The Application of the Doctrines of Severability and Competence-Competence in the UAE

تطبيق مبدأي استقلالية شرط التحكيم والاختصاص بالاختصاص في دولة الإمارات العربية المتحدة

by

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ABSTRACT

Arbitration is considered one of the best options available to parties for resolving their disputes. Nowadays, courts strongly encourage arbitration, and thus, has been largely adopted locally and internationally.

With that, this dissertation aims to determine whether, or not, the UAE arbitration practice in respect of the arbitral jurisdiction aligns with the international practice. In addition, this dissertation will also examine the importance and implications of Competence-Competence and severability doctrines under the UAE law.

In-depth research has been done to answer these issues. This includes, without limitation, going through a series of reviews and gathering information from different sources such as journals, books, court judgments, awards, and articles.

We discovered that there is an urgent need to introduce new global concepts within the effective legislation, including the competence-competence and severability concepts, to tackle the issue of who decides the jurisdiction of the tribunal and make sure that the arbitration agreement is not ineffective. This finding suggests that, in the UAE, these principles need to be applied in all cases except when there is a solid challenge to the basis of the arbitration such as when there are valid allegations that the party did not agree on the arbitration agreement.

Therefore, we recommend forming an independent body, which can be in the form of a judicial committee (be it an independent circuit in local courts or linked with the technical office of the Minister of Justice or the Chairman of the court (the "Committee")) to deal with the issues that negatively affect the continuation of the arbitral proceedings on summary basis.

The role of this Committee shall be to facilitate the determination of cases and to support the parties' autonomy. If the Committee finds a major reason that prevents the arbitral proceedings, as if the arbitration agreement was never formed or the dispute is not arbitrable, the case shall forthwith be referred to the competent court for determination, otherwise the matter shall be referred to the tribunal to continue the arbitral proceedings.

ABSTRACT IN ARABIC

يُعد التحكيم من أفضل الوسائل المتاحة للأطراف لحل نزاعاتهم. وتدعم المحاكم التحكيم بشدة في الوقت الحاضر، وبالتالي يتم اللجوء إلى التحكيم إلى حد كبير محلياً ودولياً.

وتهدف رسالة الماجستير هذه إلى بيان مدى توافق ممارسة التحكيم في دولة الإمارات العربية المتحدة فيما يتعلق بولاية التحكيم مع الممارسات الدولية من عدمه. علاوة على ذلك، ترمي هذه الرسالة إلى بحث أهمية وآثار مبدأي الاختصاص بالاختصاص واستقلالية شرط التحكيم حسب قانون دولة الإمارات العربية المتحدة.

تم إجراء بحث متعمق للإجابة على هذه المسائل، وقد شمل ذلك – دون حصر – الاطلاع على مجموعة واسعة من المراجع وجمع المعلومات من مصادر مختلفة مثل المجلات والكتب وأحكام المحاكم وأحكام التحكيم والمقالات.

وقد اكتشفنا وجود حاجة ملحة لإدخال مفاهيم عالمية جديدة في التشريعات السارية، بما في ذلك مفهومي الاختصاص بالاختصاص واستقلال شرط التحكيم، وذلك لتحديد الجهة التي تفصل في اختصاص هيئة التحكيم والتأكد من سريان وفعالية اتفاق التحكيم. وتوحي النتيجة التي توصلنا إليها بأنه يجب تطبيق تلك المبادئ - في دولة الإمارات العربية المتحدة - في كافة القضايا مع استثناء حالة وجود طعن قوي يتعلق بأساس اتفاق التحكيم ذاته، مثل حالة توافر ادعاءات سديدة بعدم قبول أحد الأطراف لاتفاق التحكيم.

لذلك نوصي بتشكيل هيئة مستقلة يمكن أن تكون على شكل لجنة قضائية (كدائرة مستقلة في المحاكم المحلية أو تتبع المكتب الفني لوزير العدل أو رئيس المحكمة (ويشار إليها فيما بعد بـ"**اللجنة**")) للنظر في المسائل التي تؤثر سلباً على مضي واستمرار إجراءات التحكيم على وجه الاستعجال.

ويتمثل دور تلك **اللجنة** في تسهيل الفصل في القضايا ودعم إرادة الأطراف. فإذا وجدت اللجنة سببًا جوهرياً يحول دون إجراءات التحكيم، كحالة عدم انعقاد اتفاق التحكيم أو كون النزاع غير قابل للتحكيم، تُحال القضية على الفور إلى المحكمة المختصة للفصل فيها، وإلا فيتم إحالة الأمر إلى هيئة التحكيم لمواصلة الإجراءات التحكيمية.

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The author expresses his gratitude and appreciation towards his mum for her unconditional love and prayers. The author seizes this opportunity to thank his wife, Sally, for all her support and patience during the last three years. Further, an apology is hereby given by the author to his kids, Khaled and Aseel, for not being able to spend much time with them during the last year.

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CHAPTER 1

1. THE ARBITRAL JURISDICTION

1.1 *Background*

Far before laws were enacted or courts were constituted, or judges had established legal principles and general rules, people had recourse to arbitration for resolving or settling their disputes[1]. Arbitration is arguably one of the oldest and most popular forms of alternative dispute resolution to the extent that it was found in very old wills[2].

The process of arbitration has becoming largely adopted[3] and can be classified as an alternative to litigation[4]. Nowadays, courts strongly encourage arbitration[5] and decide in favor of the existence, enforceability and validity of arbitration agreements[6].

Although it is not the only possibility, normally parties agree on arbitration well in advance before any dispute arises, i.e. at the time of executing the contract, but when the dispute comes to light either party may raise jurisdictional challenges in relation to the existence of the arbitration agreement, the invalidity of the main contract, which contains the arbitration clause (the "Container Contract"), and/ or that the dispute is not covered by the arbitration agreement (if any).

So a party, most probably the respondent, may try taking the case to the court in order to either avoid arbitration or, at least, abuse its rights to recourse to the judiciary to delay the arbitration process aiming at causing difficulties to the other party. This raises several questions relating to the arbitration agreement including the possibility of the parties to recourse to court although a valid arbitration agreement has been signed before by the parties? Although the answer would be in the affirmative, if both parties agree to disregard arbitration and refer their dispute to the court.

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[1] F Kellor, *American Arbitration: Its History, Functions and Achievements (*Beard Books, Washington, 2000) 3.
[2] B Roth and others, *The Alternative Dispute resolution Practice Guide (*West group, USA, 1999) 1-4.
[3] Ibid.
[4] A Asouzu, *International Commercial Arbitration and African States: Practice, participation and Institutional development* (Cambridge University Press, UK, 2001) 13.
[5] B Roth and others, above n 2.
[6] Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (Student edn, New York: Oxford University Press, 2003) 160.

However, if one of the parties wishes to avoid arbitration unilaterally, the answer may differ depending on the circumstances.

When the case goes to court, the matter will be usually referred to arbitration if the other party timely objects the courts' jurisdiction. However, there should be some situations where the court needs to adjudge on the case either before, i.e. in a preliminary stage, or as an alternative of arbitration. This can be seen in cases where the respondent raises valid points on the permissibility or existence of the arbitration agreement including denial of the arbitration agreement, formation of the Container Contract or arbitrability of the dispute subject matter.

It is likely that a claimant initiates arbitration proceedings against another party (the "respondent"), when the respondent has not actually signed the alleged arbitration agreement. In such an event, the respondent is required to make a very difficult decision either to:

a) attend the hearing and raise all legal points before the tribunal so that the case can be dismissed for non-existing of an arbitration agreement? But, there might be some risks here including that the tribunal does not understand the jurisdictional challenges raised and, further attendance itself may be interpreted, by the tribunal and/ or the court thereafter, as acknowledgement of jurisdiction, waiver of jurisdictional challenges before the courts and/ or acceptance of arbitration; or
b) disregard the arbitral proceeding – because no contract was entered into with the claimant in the first place - and wait to attack the award at a later stage, namely before the court during the enforcement process (if any)? This is again subject to risk. As in civil legal systems, such as the UAE, nothing is guaranteed and the court, by its sole discretion, may not honour the respondent's position or assume the respondent was in default for not attending the arbitration hearings although was dully summoned. Further, the award may be enforced in a foreign country with different laws, which again involves additional efforts, costs and could be a difficult task for the respondent to defend.

Therefore, it is not always easy for the respondent to decide on these matters, as in some situations there is no clear cut answer. Arbitration, like any other dispute resolution process including litigation, is a process deemed, by the disputing parties, as a battle field where all weapons in their arsenals are permitted till victory is achieved. This means that disputing parties will submit as many

challenges and points as they can to avoid losing their case.

An average person may argue that, unless the courts rule otherwise, a party should not be dragged to arbitration if:

a) Such party never signed the Container Contract nor agreed to the arbitration clause (or is claiming so); and
b) If the signed Container Contract failed or has become null and void for any reason whatsoever.

Although the above argument sounds logic, but, it may result in keeping the door open for anyone to attack the arbitration proceedings and permitting more unnecessary judicial intervention in the arbitration proceedings. That is why the international practice in arbitration had to find different approaches to tackle these issues.

1.2 *Research Problem*

In order to touch base on the arbitral jurisdiction, the following shall be noted:

a) Although there are arbitrations imposed by law or statute known as compulsory arbitration[7], which shall be excluded from the concept of the normal arbitration, however arbitration normally comes as a result of a contract. Therefore, without a valid arbitration agreement between the parties, there is no valid arbitration and hence an enforceable award[8]. The parties may not be compelled to arbitrate unless they have agreed to do so[9]; and
b) Unlike litigation, arbitration is a private dispute resolution mechanism wherein arbitrators receive their jurisdiction powers from the parties' agreement.

If the arbitrators' authority is derived from the parties' agreement, it can be affected if the said agreement is rescinded, cancelled or was never constituted. In other words, authority can be used only if and after it is given. Therefore, in case of a dispute between the parties on the formation of the Container Contract or the validity of the arbitration agreement it would be challenging for the

[7] This includes, by way of example, the Collective Labour Disputes which need to be referred to arbitration, not courts, as directed by articles 158 & 160 of the UAE Labour Law No. 8 of 1980 as amended (the "Labour Law").
[8] A Asouzu, above n 4.
[9] B Roth and others, above n 2.

tribunal to decide on its own jurisdiction.

It is not unusual for the jurisdictional challenges to be raised in arbitration proceedings. However, the tribunal's responses will be different according to the nature and time of the challenge raised and also under which law the proceedings are being held.

It may be argued that because the parties intended to arbitrate all disputes relating to the contract, any jurisdictional challenge is to be decided by the tribunal itself. However, on the other hand, others may view that the arbitrator(s) should be unbiased and determining on the jurisdictional challenges may affect the arbitrators' independence. Therefore, the tribunal shall not rule on its own jurisdiction to maintain that independence. Further, giving the fact that the arbitrators' fees are subject to proceeding with arbitration and ruling on the arbitrated dispute, there might be a conflict of interest when the tribunal decides on its own jurisdiction. Accordingly, the jurisdictional challenges are to be referred to, and adjudged only by, the competent courts.

The need to facilitate the arbitrators' role and to draw a clear borderline for the arbitral jurisdiction has inspired the introduction of new concepts in the arbitration field. This includes the doctrine of severability[10], and the principle of Competence-Competence[11]. These two principles are two most fundamental principles in arbitration[12] and are widely recognized at international level.

One of the reasons for adopting the severability principle is to prevent disputing parties from nullifying their arbitration agreement due to defects in the Container Contract. Accordingly there is no surprise to see the following judgments:

a) In the English case of *Heyman v. Darwins*[13], the court held that the arbitration clause shall survive although the Container Contract fails;
b) In the *Gosset* case[14] the French Cour de Cassation held that the concept of severability remains unaffected if the Container Contract is invalid; and

[10] Which means the autonomy of the arbitration agreement and sometimes is referred to as 'separability'.
[11] Which permits the arbitrators to rule on their own jurisdiction to avoid the parties recourse to courts which will negatively affect the arbitration proceedings.
[12] F Cossio, 'The Competence-Competence Principle' (2007) 24(3) JIA, 231.
[13] *Heyman v Darwins* [1942] AC 356, 378.
[14] *Gosset*, Case Civ. 1, 7 May 1963, (1963) JCP, Ed. G, Part II, No. 13405 as cited by P Pinsollee, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in Putrabali' [2008] 24 (2) Arbitration International, 277 available at

c) In the *SNE v. Joc Oil*[15] case, the Bermuda Court of Appeal held that even though the Container Contract was void, because of inadequate signature, the arbitration agreement shall survive and it was not improper for the arbitral tribunal to assume jurisdiction.

It is obvious, from the above examples, that foreign courts encourage arbitration and do not invalidate the arbitration agreement, even when embedded in a Container Contract that fails, becomes invalid or null and void. On the other hand, the principle of Competence-Competence effectively means that the arbitrators shall have the necessary power to rule on their jurisdiction. Therefore, the tribunal can decide on all issues relating to the existence, formation and/ or validity of the arbitration agreement itself.

To achieve the benefits highlighted above, different theories and various standards have been adopted in different jurisdictions. Under the German school of thought, the theory is that the arbitral tribunal is the only judge of its jurisdiction however, in practice, the law permits the parties to recourse to the court to determine if the arbitration may proceed or not[16]. Further development is noticed under the French school of thought, where the arbitrator decides first on the jurisdiction issue before a final judgment is to be issued by the competent court. This theory is currently being followed by other countries such as the United States and Mexico[17].

Further, most foreign laws, including the Model Law[18], provide that any issue with regards to the tribunal's jurisdiction shall be referred to, and determined by, the arbitrators unless the arbitration agreement is invalid, inoperative or ineffective. Furthermore, the UNCITRL and the ICC Rules vest the arbitrator(s) with the right to rule on their own competence and the same is normally recognized by courts[19]. Therefore, the principle of Competence-Competence is internationally recognized for the sake of preventing early judicial interventions that may have a negative effect on arbitration.

At local level, the arbitration institutions in the UAE highly recognize the principles of

http://www.kluwerlawonline.com/abstract.php?id=ARBI2008017&PHPSESSID=d3mc7ou40t35mu8ul2aso7hkb7 accessed 10 June 2014.

[15] *Sojuznefteexport (SNE) v. Joc Oil Ltd* (1990) XV Y.B.CA 384 (Court of Appeal of Bermuda, 7 July 1989).

[16] F Cossio, 'The Competence-Competence Principle' (2007) 24(3) JIA, 231.

[17] F Cossio, above n 16.

[18] Refer to Articles 5 and 6 of the Model Law (The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with the amendments adopted in 2006).

[19] Article 21 of the UNCITRAL Rules (The United Nations Commission on International Trade Law Rules) and Article 6(4) of the ICC Rules (International Chamber of Commerce Arbitration Rules).

Competence-Competence and Severability[20]. Further, the domestic courts generally support reinforcing party autonomy by requiring the parties to refer disputes to arbitration where they have a valid standing arbitration agreement and one of the parties insists, in a timely manner, on arbitration[21].

However, the courts' approach, in respect of the severability and Competence-Competence principles, is not very clear. Different judgments were passed and seem to be contradicting although this might not be the actual case. Some judgments provided that an arbitration clause will be void if the Container Contract is invalid and the validity of the Container Contract falls outside the scope of the tribunal's jurisdiction[22]. However, other judgments decided that an arbitration clause shall be severed from, and not affected by the cancellation of, the Container Contract[23]. These judgments have opened endless arguments between commentators on the application of these international doctrines in the UAE.

Many signs were seen showing that the UAE is willing to take further steps towards empowering the arbitrator(s) the authority to judge matters beyond their jurisdiction[24]. However, it seems that there are still some differences between the practices followed locally in the UAE and the international practice in respect of the arbitral jurisdiction.

This study aims at examining the meaning and need of applying the principles of Competence-Competence and Severability in the UAE. It, further, argues that, although it contradicts with proper logic, in some cases an arbitration provision can be effective although was contained in a contract that never legally materialized in line with the international practice.

1.3 *Research Question*

This study shall answer the following research questions:

[20] Refer to Article 23 of Dubai International Financial Center Rules and Article 6 of Dubai International Arbitration Center Rules.
[21] Please refer to para 5 of Article 203 of the UAE Civil Procedures Code issued by the Federal Law No. 11 of 1992, as amended (the "CPC").
[22] Such as the judgment issued on 30/10/2007 by the Court of Cassation in the Cassation Case No. 58 of 2007.
[23] Abu Dhabi Court of Cassation, Commercial Cassation No. 795 of 2010, judicial year 4 issued on 9/12/2010.
[24] Refer to Article 23 (1) of the UAE drat arbitration law ("Draft Law").

(i) What is the tribunal's jurisdiction?

(ii) Do we really need the principle of Competence-Competence and the doctrine of severability in arbitration?

(iii) What is the international practice with regard to the principles of Competence-Competence and severability?

(iv) The current legal framework in the UAE and the local courts' position in applying the doctrines of Competence-Competence and severability?

(v) Any recommendations for the UAE to follow the international practice on the arbitral jurisdiction?

1.4 *Aim and Objectives*

The aim of this research is to determine whether, or not, the UAE arbitration practice in respect of the arbitral jurisdiction aligns with the international practice. The objectives of this research are to:

(i) define the two doctrines of Competence-Competence and severability and their importance;

(ii) examine the arbitral tribunal's authority to rule on its own jurisdiction under the current UAE law;

(iii) examine the application of the doctrines of Competence-Competence and severability in law and practice; and

(iv) report findings including a proposal of the needed of legislative amendments (if any).

1.5 *Research Methodology*

The objectives can be attained by literature review through obtaining the required information from different sources such as journals, books, court judgments, awards and articles.

1.6 *Significance of Research*

Although the issue of jurisdiction is usually raised in most, if not all, arbitration cases the author did not find reasonable amount of research or detailed papers covering the doctrines of Competence-Competence and severability under the UAE law.

As far as arbitration effectiveness is concerned, the tribunal shall be provided with all necessary tools needed to effectively decide on their own jurisdiction. The jurisdiction issue, if not managed correctly, may lead to severe negative impacts on the parties as well as the arbitration image itself including collapse of the proceedings due to nullification of the awards[25].

This dissertation will examine the importance and implications of Competence-Competence and severability doctrines under the UAE law and whether the current arbitration practice is in line with the international practice. This intends to:

(i) support the arbitration stakeholders, such as the disputing parties as well as the arbitrators, in finding a clearer answer to the queries with regard to arbitral jurisdiction;

(ii) assist the legislators to take into account the international practice and enact a modern arbitration law clearly draw the border line of the court intervention during arbitration. This may hopefully influence other countries, especially in the Arab world, to follow or adopt; and, in consequence thereof,

(iii) assist allowing the UAE to place itself as a dispute resolution hub and an arbitration friendly resort bearing in mind the crucial importance of this part of the world where many businesses are carried out and, therefore, a huge amount of disputes need to be resolved effectively.

1.7 *Structure of the Dissertation*

The dissertation consists of six (6) chapters as summarized below:

[25] Refer to Article 203(3) of the CPC.

(i) The first chapter provides an overview of the study by providing a general background on arbitration and the arbitral jurisdiction. This chapter identifies the research problem and the significance of the research.

(ii) The second chapter covers the severability doctrine. This shall present the need and advantages of introducing such doctrine in the field of arbitration.

(iii) The third chapter provides an overview of the competence-competence principle. This shall include the need and effects of the Competence-Competence principle.

(iv) The fourth chapter shall address how the cornerstones of the research, namely the principles of severability and the Competence-Competence, are being adopted internationally. This will examine the recognition of the said two principles in different international rules, laws and conventions.

(v) The fifth chapter identifies the current legal framework in the UAE and the local courts approach with regards to the severability and the Competence-Competence.

(vi) The sixth chapter draws all the research results to present the overall findings and the proposed recommendations (if any).

CHAPTER 2

2. OVERVIEW OF ARBITRATION AND ITS KEY PRINCIPLES

2.1 *Introduction*

Arbitration is considered as an important mechanism in the field of alternative dispute resolution[26]. The essence of arbitration is to appoint an individual termed as the arbitrator to produce a binding resolution for the disputing parties.[27] Arbitration may thus be perceived as an exceptional way of settling disputes, in terms of its deviation from recourse to courts, being the ordinary way of resolving disputes via litigation.

In principle, the parties are entrusted with selecting an arbitrator to handle the resolution of the dispute from inception until conclusion which is not always the case with litigation. By agreeing on referring their dispute to arbitration, the parties, in essence, mutually waive their rights to refer their disputes to courts in the first instance. The arbitrator will quickly become familiar with the parties and the subject matter of the dispute and sometimes allows the parties to resolve the dispute by reaching an amicable settlement[28]. This is perhaps why arbitration is becoming a preferred option as an alternative method of resolving disputes across the globe[29].

In the Middle East Countries, laws such as in the United Arab Emirates (the "UAE") recognize arbitration and enforce arbitral awards due to numerous factors including:

(i) Shari'a, being one of the sources of law and public policy in the Middle East, has always supported the parties to agree on arbitration;

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[26] M Movsesian, 'International Commercial Arbitration and International Courts' (2008) 18 Duke Journal of Comparative and International Law 423.
[27] C Bűhring-Uhle and others, *Arbitration and Mediation in International Business* (Kluwer Law, 2006) 64.
[28] A Redfern and others, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 1991) 23.
[29] C Leong & Q. Zhiqian, 'The Rise of Arbitration in Asia' [2010], available at www.globalarbitrationreview.com/reviews/23/sections/84/chapters/853/the-rise-arbitration-asia/ accessed on 10 February 2014.

(ii) Existing long term business relations between the Islamic world companies, particularly those in the Middle East[30], and other companies in other parts of the world; and

(iii) Expansion and development of Islamic finance, which is becoming an essential tool for financing projects under Shari'a in the Middle East.

2.2 *The Rise and Development of Arbitration*

The roots of arbitration can be referred back to old times. Historical records show that disputes involving Greek cities were being resolved by a binding determination of a neutral third party (something akin to arbitrator). In Egypt, arbitration was used during the ancient ages. For instance, in the time of pharaohs, priests were acting as arbitrators and used to resolve disputes between the disputing parties as an alternative way of recourse from the judiciary. Several documents were found which refer to the Pharaohs' fourth kin in the period starting from as early as 2780 B.C. to 2270 B.C., containing, inter alia, details of the number of arbitrators, the subject matter of the dispute and the procedures to be followed[31]. Even before Islam, the Arabs used to arbitrate voluntarily, however the award was not legally binding and was subject to the arbitrator's moral authority. Throughout the rise of Islam, arbitration was acknowledged and supported by various evidences under Shari'a[32].

Arbitration has since developed significantly and now we may find different forms of arbitration according to the way it is administered including:

(i) ad-hoc and institutional arbitration;

(ii) national and international arbitration; and

(iii) Judicial arbitration and arbitration by conciliation[33].

For the parties in dispute, arbitration is usually perceived as an alternative tool available to finally settle their disputes. The parties' freedom to choose the governing law and rules is derived from

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[30] F Kutty, 'The Shari'a Law Factor in International Commercial Arbitration' [2006] 565, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=898704, accessed on 1 March 2014.

[31] A Al-Teshi, *the Doctrine of Competence-Competence in the Field of Arbitration (Mabdaa Al-Ikhtisas Bel-Ikhtisas fi Majal Al-Tahkim*) (first edn, Dar Al Nahda Al Arabiya, Cairo, 2009) 16.

[32] For instance, refer to Aya no. 35 of Surat Al Nesaa, in the holy Quran.

[33] A Al-Teshi, *the Doctrine of Competence-Competence in the Field of Arbitration* (*Mabdaa Al-Ikhtisas Bel-Ikhtisas fi Majal Al-Tahkim*) (first edn, Dar Al Nahda Al Arabiya, Cairo, 2009) 22 - 23.

the principle of party autonomy. This does not however mean that such concept of party autonomy is unrestricted. By way of example, the Rome Convention[34] does not allow the parties to select a foreign law that overrides the application of a concerned country's mandatory laws.

In the UAE some matters, by their nature, are not arbitrable such as follows:

(i) Public policy matters; under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention"), which was acceded by the UAE in 2006[35], the courts may refuse enforcing an arbitral award if it was contrary to the public policy. Examples of some public policy matters may include, but not limited to, the following:

   a. Employment contracts except in collective labour claims (as clarified below);
   b. Agency agreements[36]; and
   c. Disputes of criminal nature.

(ii) Unreconciled matters[37].

Additionally, in some situations arbitration may be permitted only if some conditions are met such as:

(i) insurance contracts; an arbitration clause will be invalid if stated under the general conditions of an insurance policy[38];

(ii) Governmental Department's contracts in Dubai[39] which shall be governed by the laws of Dubai and any arbitration shall be seated in Dubai, unless otherwise permitted; and

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[34] See Article 3 of the Rome Convention 1980.
[35] Refer to the UAE Federal Decree No. 43 of 2006 issued on 13 June 2006.
[36] Article 6 of the UAE Federal Law No. 18 of 1981, as amended, provides that: "*The Commercial Agency agreement shall be deemed to be for the joint interest of the contracting parties and the State's Courts shall rule in any disputes which may arise between the Principal and the Agent due to its implementation. Any agreement to the contrary shall be void.*"
[37] Para 4 of Article 203 of the CPC provides that: "*It shall not be permissible to arbitrate matters is which conciliation is not permissible. An agreement to arbitrate shall not be valid unless made by persons having the legal capacity to make a disposition over the right the subject matter of the dispute.*"
[38] Article 1028 of the UAE Civil Transactions Code issued by the Federal Law No. 5 of 1985 as amended ("CTC").
[39] Article 36 of Law No. 6 of 1997 concerning Contracts of Government Departments in Dubai provides that: **"***No stipulation shall be made in any contract in which the Government of Dubai or any of its Department is a party to conduct the arbitration outside Dubai or to subjugate any dispute regarding arbitration or the procedures thereof to any laws or principles rather than those applicable in the Emirate of Dubai. Any stipulation in violation thereof shall be deemed null and void. Save as the foregoing and wherever the public interest may require, the Government or any of its department's, institutions, bodies or authorities may - under a written consent from The Ruler - be exempted from abiding by this provision.*"

(iii) Collective labor disputes shall be resolved through conciliation or a special arbitration board[40].

2.3 *Defining Arbitration*

Most of the arbitration legislation, including the UK Arbitration Act 1996, do not define arbitration[41]. Even the New York Convention is silent on this issue. In the Arab world, it was discovered that the Yemeni Arbitration Law, in Article 2 thereof, defines arbitration as "the parties' consensual selection of one third party or more to decide, excluding the competent court, on any dispute or difference that may arise between them." In the UAE, however, there is no equivalent provision. Arbitration is mainly governed by the UAE Federal Civil Procedures Law No. 11 of 1992 (the "CPC") but there is no clear definition given under any effective law in the UAE.

Jean-François Poudret and Sébastien Besson in their book "Comparative Law of International Arbitration" define arbitration as:

> *"Arbitration is a contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in the place of state courts by rendering a decision having effects analogous to those of a judgment[42]"*

In light of the above definition, one may conclude the following:

(i) Although this is not the only case, arbitration is normally a contractual arrangement between the parties as it comes as a result of a contract. Without a valid arbitration agreement, there is no valid arbitration and eventually an enforceable award[43]. The parties cannot be compelled to arbitrate unless they have agreed to do so[44]. Only those bound by an arbitration agreement may be made part to arbitration by virtue of the said agreement[45]. However, there are situations where arbitration is imposed by law or statute, known as

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[40] Collective Labour Claims shall be referred to arbitration, not courts, as directed by articles 158 & 160 of the UAE Federal Labour Law No. 8 of 1980 on regulation of Labour Relations as amended.
[41] J Poudret and S Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, London, 2007).
[42] J Poudret and S Besson, above n 41.
[43] A Asouzu, *International Commercial Arbitration and African States: Practice, participation and Institutional development* (Cambridge University Press, UK, 2001).
[44] B Roth and others, *The Alternative Dispute resolution Practice Guide* (West Group, USA, 1999).
[45] Ibid.

compulsory arbitration, which is not covered here as it falls outside the scope of this dissertation. Such kind of arbitration shall be ruled out from the concept of the normal arbitration as the parties are forced, by law, to arbitrate[46].

(ii) Arbitration is a private dispute resolution mechanism as arbitrators who, although in doing their job they can be seen as judges, do not hold a public office and receive their jurisdiction powers from the parties' agreement.

2.4 *The Arbitration Agreement*

There is no express definition of the arbitration agreement under the laws of the UAE. Therefore, reference has to be made to laws in other countries which provide such a definition. The Egyptian legislation defines an arbitration contract in its Article 10, para 1, of law no. 27 of 1994 as follows: "*the parties' agreement to recourse to arbitration for resolving all or part of their disputes arising out of a certain relationship be it contractual or non-contractual*[47]". This effectively means that arbitration is normally based on, and should come as a result of, a valid contract to arbitrate.

Accordingly, it might be argued that if the arbitration agreement is neither effective nor operative then the arbitral tribunal may not decide on the dispute. This can be sought when the contract between the parties is invalid and, in consequence of this, the tribunal lacks the proper jurisdiction to resolve the dispute. But if this is the case no tribunal will be able to play its role and decide on the dispute.

It is now a matter of common defence tactic that the defendant will try to attack the whole proceedings including questioning the tribunal's jurisdiction which might affect one of the advantages of arbitration in terms of quick determination. Typically, a respondent in an arbitral proceeding who seeks to avoid being sued in arbitration may try to challenge the jurisdiction of the tribunal by raising challenges to its jurisdiction which may include the following arguments*:*

[46] H Radhi, *Judiciary and Arbitration in Bahrain: A Historical and Analytical Study (*Kluwer Law International, The Netherlands, 2003).
[47] A Al-Teshi, above n 33.

(i) the arbitration agreement is not binding for some reason including that the arbitration clause was never contained therein;

(ii) the legal entity/ person signing the agreement was a different and independent legal entity/ person, or that the arbitration agreement was not formed in writing;

(iii) the dispute in question does not fall within the scope of the arbitration agreement or the jurisdiction of the tribunal (if any); and/or

(iv) the subject matter of the current proceedings may not be subject to arbitration as per the applicable law[48].

The above arguments might be the reasons for the requirement of arbitration agreements to be evidenced only in writing. The New York Convention requires the arbitration agreements to be signed in writing[49]. The UAE legislators, on the other hand, do not recognize any arbitration agreement if not in writing[50]. Further, both the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration 1985 as amended (the "Model Law") require, inter alia, that:

(i) the arbitration agreement shall be in writing and executed by the parties[51]; and

(ii) the member states' courts shall not decide on the disputes and refer the disputant parties to arbitration if a valid and enforceable arbitration agreement was assumed[52].

If there is a case before the court and a party challenges, in a timely manner, that there is an arbitration agreement, the court will have to (i) determine whether, or not, the arbitration agreement is valid, and (ii) whether to enforce it or proceed to adjudge the case on its own jurisdiction. In deciding whether the arbitration clause is valid or not, local courts look at the substance and not the form to enforce the parties' intentions.

The Model Law further provides that a court before which an action is brought in a dispute covered by an arbitration agreement shall, upon the request of either party, refer the parties to arbitration unless the arbitration agreement is not valid, operative nor capable of being performed[53]. In general,

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[48] A Redfern and others, above n 28.
[49] Article 2 of the New York Convention 1958.
[50] Para 2 of Article 203 of the CPC provides that: "*2 - An arbitration agreement may be proved only by writing*".
[51] Refer to Article 7 of the UNICITRAL Model Law and Article 2 of the New York Convention 1958.
[52] Para 3 of Article 2 of the New York Convention.
[53] Articles 5 and 8 of the Model Law.

courts have developed a progressive approach in interpreting the validity of arbitration agreements. For instance, in the case of *Arab African Energy Corp. Ltd v. Olieprodukten Nederland BV*[54], the English court regarded correspondence between two entities providing that "English law-arbitration, if any, London according to ICC Rules" is more than enough to confirm the existence of a binding valid arbitration agreement between the parties.[55]

Courts also do not normally refuse to enforce arbitration agreements in a way to reinforce the autonomy of the parties, save for some exceptions including the above referred to public policy matters. This is done when the courts refer the disputing parties to arbitration when they have a valid and effective arbitration agreement.

The timing of executing the arbitration agreement may affect its type. There are two classical forms of arbitration agreements[56] as follows:

(i) A clause that refers any future dispute between the parties to arbitration, which is normally an arbitration clause embedded in the Container Contract governing the relationship between the parties; and

(ii) the submission agreement that is normally entered into by the disputant parties, after a dispute has arisen, whereby those disputant parties agree to arbitrate.

The arbitrators' authority and competence are derived from the parties, namely the signed agreement between the parties. Such authority should mainly be affected if the contract is terminated, cancelled or was never constituted in the first place. This is what logic suggests, as any layman should agree that authority can only be used when first conferred with and, for sure, no authority may be used if it was never given before or even given in an ineffective way.

This means that not only the default position is to refer disputes to courts but also, whenever there is an express intention to refer disputes to arbitration, such arbitration referral and the arbitral tribunal shall be limited to the extent agreed upon by the parties. Therefore, in case of doubt, the

[54] 485 U.S 271 (1988).
[55] A Redfern and others, above n 28.
[56] These are not the only forms. There is another non-conventional form which is called 'Standing Offer' that is normally found in Bilateral Investment Treaties (BIT's) between states. By which investors may start arbitral proceedings against the states, which are parties to the BIT, by invoking the aforesaid Standing Offer. However, this paper does not intend to cover such non-conventional form of arbitration.

ordinary way – which is referral to courts - shall be followed if no further agreement was reached by the parties.

The question of who decides a challenge on jurisdiction is of importance and, if not answered clearly, will affect the arbitration proceedings negatively. Therefore, there should be a solution to such avoidable situations if the international community really cares about arbitration to be a valid alternative to litigation.

2.5 *Competence (or Jurisdiction)*

Unless otherwise provided for in the applicable law, the powers of an arbitral tribunal usually come from the parties. A tribunal may not resolve any disputes that were not agreed upon by the parties. If the arbitration agreement does not define the pending issue to be covered by the tribunal's jurisdiction, the tribunal may not assume any power to resolve it[57]. Accordingly, the parties' agreement is the main source of the tribunal's competence or authority. In other words, the parties confer the authority to the tribunal, by way of contractual arrangement, in order for the tribunal to resolve the parties' disputes. The tribunal shall keep itself within the limits of the parties' agreement, i.e. the tribunal shall not exceed its jurisdiction, failing which the award may be nullified for that specific reason.

It is globally acknowledged that arbitrators shall have the power and authority to determine their own jurisdiction otherwise the parties will have to file a litigation case to confirm whether or not the selected tribunal has jurisdiction to adjudge the case or even has the authority to rule on its jurisdiction. The tribunal's right to rule on its jurisdiction does not suggest that its decision is final or not subject to review by courts. It should be noted, however, that the jurisdiction decision may be overruled in a later stage by a competent national court.

The scale of judicial intervention in arbitration is one of the most critical issues. Although a wide view that courts should not interfere in arbitration however, for the sake of effectiveness, judicial

[57] Para 3 of Article 203 of the CPC provides that: "*The subject matter of the dispute must be defined in the arbitration instrument or during the trial of the action even if the arbitrators are empowered to effect a conciliation, failing which the arbitration shall be void.*"

support from national courts is needed. The extent and amount of judicial involvement may be different from one country to another.

The New York Convention sets out the following principles:

(i) national courts shall refer disputes to arbitration when parties have an existing valid arbitration agreement to settle that dispute[58]; and

(ii) courts shall enforce the arbitral awards, which meets the requirements of Article 4 of the New York Convention, with no review except in exceptional circumstances.

Further, there are only seven cases stated under Article 5 of the New York Convention in which an award may be unenforceable including (i) the invalidity of the arbitration agreement, (ii) if the dispute falls outside the scope of the submission to arbitration, (iii) if the composition of the arbitral authority was not in conformity with the parties' agreement, (iv) the non-arbitrability of the subject matter of the dispute under the law, or (v) if the award is contrary to the public policy of that country.

Of the above cases, the jurisdiction of the arbitral tribunal is very important as it may not only affect the proceeding itself but also, in the wider picture, have adverse impacts on the outcome of the proceedings, i.e. non enforcement or nullification of the arbitral awards. This was one of the drivers for the international communities to try to find some new exceptional concepts to make sure that arbitration does not lose its effectiveness.

2.6 *The Concept of Arbitrability*

This concept deals with disputes that cannot be resolved by arbitration. This may include such issues which form a part of the concerned country's public policy. The New York Convention applies only to disputes which may be settled by arbitration.[59] It is the courts' role to decide

[58] Para 3 of Article 2 of the New York Convention provides that: *"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*

[59] Para 1 of Article 2 of the New York Convention.

whether, or not, a specific issue is arbitrable. However, the courts' attitude has been influenced by the need to promote international trade as well as attaining some uniformity in arbitration[60].

2.7 *The Concept of Severability*

This concept means the arbitration agreement contained in a contract survives the Container Contract. Domestic courts, in different countries, have given recognition to this concept which is the source of arbitral tribunal's authority. For example, the US Supreme Court held in the case of *Prima PaintCorp. v. Flood & Conklin Manufacturing Co*[61] that the arbitration clause shall be separable from the main contract in which it is contained.

Not only the doctrine separates between the Container Contract and the arbitration clause, but also provides that the parties formed an independent arbitration agreement which is in the form of the arbitration clause. In the English case of *Heyman v. Darwins Ltd*[62] the court held that the arbitration clause will be unaffected even if the Container Contract fails. The survival of the arbitration clause is very essential to decide the mode of the dispute resolution.

Further, the French Court of Cassation held, in the *Gosset case*[63], that the concept of severability will not be affected by invalid contracts[64]. Similarly, the Bermuda Court of Appeal held, in the *SNE v. Joc Oil* case[65], that even if the Container Contract was not valid, due to inadequate signature, this will not impact the arbitration agreement and it will survive to allow the arbitral tribunal to assume jurisdiction. Therefore, the concept of severability is highly recognized by many developed countries which have tried to find a solution to the issue of the arbitrators' jurisdiction in an attempt to keep arbitration an attractive option for dispute resolution. This concept will be covered in more detail in Chapter 3 of this dissertation.

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[60] A Redfern and others, above n 28.
[61] 388 U.S. 395 (1967).
[62] 356 AC (1942).
[63] Available at http://www.international-arbitration-attorney.com/portfolio-type/french-law-arbitration-clauses-distinguishing-scopefrom-validity-comment-icc-case-65/ accessed on 14 January 2014.
[64] A Redfern and others, above n 28.
[65] (1990) XV Year Book. Commercial Arbitration 31.

2.8 *The Concept of Competence-Competence*

The essence of the competence-competence principle is that the tribunal has the basic tools to determine its own competence so that the tribunal is able to work properly. This means that arbitral tribunals are entitled to determine their own competence and authority. This right is also acknowledged under both the International Chamber of Commerce Rules of Arbitration ("ICC Rules")[66] and the UNCITRL Arbitration Rules [67]and normally enforced by domestic courts. In one of the cases, the English Court of Appeal ruled down that the ICC Rules empower arbitrators the necessary powers to decide on their own jurisdiction in the case of *Dalmia Dairy Industries Ltd v. National Bank of Pakistan*[68].

It should be noted, however, that the tribunal's decision is not final and may be subject to variation or cancellation by the court. The parties' agreement to resolve their dispute by arbitration will be negatively affected either in the form of delay or cancelation if the door is open for the court to decide on those matters during the arbitral proceedings. Such situations would adversely undermine arbitration being an effective dispute resolution method[69].

The main point here is that any objection against a tribunal's jurisdiction should be initially determined by the tribunal itself, even if, for the sake of achieving justice and fairness, there might be another final determination by the courts at a later stage.

2.9 *Conclusion*

Arbitration is one of the best options available to parties for resolving their disputes. It is a private dispute resolution mechanism whereby appointed arbitrators, by the parties, will determine the dispute. The tribunal's authority is founded on the parties' arbitration agreement. In order to avoid having ineffective arbitration, there was a need to find new concepts to make the arbitral proceedings more productive. In light of the above, the competence-competence and severability

[66] Article 6 of the ICC Rules.
[67] Article 23 of UNCITRAL Rules.
[68] (1978)2 Lloyds' Rep.223
[69] William W. Park, 'The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz–Kompetenz- Has Crossed the Atlantic?' (1996) 12 Arbitration Intl 137- 149.

concepts were introduced to tackle the issue of who decides the jurisdiction of the tribunal. By recognizing the powers of the arbitral tribunal to determine and decide on their own jurisdiction, domestic courts reduce their levels of interference in the arbitral proceedings which will, for sure, positively promote the future of arbitration.

CHAPTER 3

3. THE DOCTRINE OF SEVERABILITY

3.1 *Introduction*

As we believe no one, except god, is perfect. It can be argued that nothing created by human is totally perfect and error free. This applies to many things including, for instance, legal documents such as contracts and laws.

This does not mean that all laws and regulations are defective. But it suggests that in some cases a specific provision in a law or certain clause in a contract may be unenforceable or ineffective. In a kind scenario, there might be calls to invalidate the said law or contract in full, which will result in many legislations and agreements are simply nullified. To avoid that risk people, especially judges, had to come with a solution to such cases.

In this chapter we will examine the doctrine of Severability. For that purpose, we will start by discussing if we do really need the severability doctrine. Then we will describe the doctrine, its meaning and essence. Then we will talk about the rise and existence of severability. Thereafter, we will look at the merits and demerits of the doctrine before we reach a conclusion.

3.2 *The Need for Severability*

Arbitration is a matter of agreement. The parties' agreement, be a clause in the Container Contract or an independent arbitration agreement, forms the constitution[70] based on which the arbitration proceedings and arbitral tribunal's authority will be founded. The concept of severability was developed in order to avoid certain unfavourable situations providing a base for the arbitrators to be able to rule in case of vices in the Container Contract. For instance, suppose that after referring

[70] Ahmad Al-Shuqeiri, Arbitration Course, held at Sheraton Creek Hotel, Dubai, on 11 June 2014.

a dispute to arbitration, the tribunal finds that the Container Contract was invalid. Then the tribunal will have just one of the following two options:-

(i) to issue an award to accept or reject the case; or

(ii) omit from issuing any award because it lacks jurisdiction.

Under the first option, to save its interests the party against whom the award was issued may try to argue that upon invalidation of the Container Contract the arbitration clause becomes null and void and, therefore, the tribunal should not have issued any award due to lack of jurisdiction. In the alternative, under the second option, it is still possible for both parties to argue that the invalidity of the Container Contract shall not affect the proceedings, as the parties have agreed on arbitration and the arbitral tribunal should have the necessary jurisdiction to adjudge the pending dispute. Although, in the same time, such argument may be refuted by the other party that arbitration may not proceed without a valid arbitration agreement in place.

Since the arbitration agreement signed by the parties is the basis of the tribunal's jurisdiction[71] nothing would prevent the litigants from challenging the arbitral tribunal's jurisdiction, in different occasions including the above example, in order to nullify the award. This represents uncertainty and highlights some grey areas which are detrimental to arbitration and may result in parties avoiding recourse to arbitration. This prompted the need to set a new principal to mitigate such avoidable risks[72].

3.3 *The Doctrine of Severability*

3.3.1 The Meaning

That term "severability" may be misleading and confusing. Other terms are being used in other legal systems instead such as 'the autonomy of the arbitration clause' or, in French, '*l'autonomie de la clause compromissoire*'[73]. Although the term "Separable" may be suitable and better to be

[71] J Jenkins and S Stebbings, 'International Construction Arbitration Law' (2006) Kluwer Law International 163.
[72] Al-Shehawy Al-Sharqawy, Arbitration Course, held at Sheratoon Creek Hotel, Dubai, on 12 June 2014.
[73] A Redfern and others, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, Oxford 2004) 117.

used here however, the term ‘severability’ is used in this dissertation because it is commonly used by the majority of judges and commentators.

The concept of severability means that the arbitration clause is considered separable and distinct from the contract which it forms part of and, therefore, such clause survives any termination of the said contract[74]. It provides that the validity of an arbitration clause is independent and is not contingent upon the validity of the Container Contract. That’s why some commentators prefer to call it the "independence of the arbitration agreement"[75].

3.3.2 The Essence

Severability can be seen as a solution to keep parts of the contract valid although some clauses were held to be void to a certain extent. It was introduced to maximize the arbitration effectiveness as a mean to resolve commercial disputes and to limit the temptation and effect of delaying tactics[76].

For example, in case of allegations of fraudulent inducement with regards to the Container Contract, the issue arises as to whether litigation or arbitration shall decide the question of fraud? Different views may come to fore, however if the arbitration clause is separable from the Container Contract, the case will be determined by the arbitrator simply, but if the arbitration clause is non-separable the arbitrator may not decide if the Container Contract is void, because after the invalidity of the Container Contract there will be no authority nor jurisdiction for the arbitrator, which may affect the arbitration provision to fall[77].

Therefore, the essence of severability is that certain defects in the Container Contract may not affect the arbitration agreement, unless otherwise those defects nullify the arbitration agreement itself. This concept empowers the tribunal to issue an award without affecting its jurisdiction. Based

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[74] Ibid.
[75] A Al-Sharqawi, ‘*Commenting on the judgment No. 166 of 2008 Commercial Cassation*’, a special publication for commentary on the Supreme Union Court’s judgments, (special edn, Abu Dhabi (2013) 55-69.
[76] S Kroll and others, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution Chapter 8 – Competence-Competence and Separability-American Style (*Kluwer Law International, Netherlands 2011) 2.
[77] S John, ‘Separability of the Arbitration Provision-Time to Reconcile New York and Federal Approaches’ (1973) 3 SJLR 550.

on this doctrine arbitration agreements are rescued from failing due to being contained in contracts whose validity is under question.

3.4 *The Rise and Existence of Severability*

In judiciary, from a legislative point of view, the issue of severability is about whether a court's decision that a section in a statute is invalid causes the remainder of the said statute to be invalidated[78]. The same logic applies to contracts, i.e. if the court finds that a part of a contract is not valid does this lead to the invalidation of the contract, as a whole, or just some clauses may be separated and the contract will remain in full force and effect? The concept of severability is becoming highly recognized by many countries which have tried to find a solution to the issue of the arbitrators' jurisdiction for the sake of keeping arbitration an attractive option for dispute resolution.

The French Court of Cassation held, in the *Gosset* case[79], that the concept of severability will not be affected by invalid contracts[80]. Five years later[81], the issue of severability first came to fore[82] in *Prima Paint* v. *Flood & Conklin Manufacturing Company*[83], in which one party claimed fraud in the inducement of a sales contract that contained an arbitration clause[84]. The US Supreme Court held, while deciding on that case, that the arbitration clause shall be separable from the Container Contract[85].

Further, in the case of *Heyman v. Darwins Ltd*[86] the English court decided that there are no effects on the arbitration clause if the main contract fails. Similarly, the Bermuda Court of Appeal held, in

[78]N Nagle and John C., 'Severability' (1993) Scholarly workspaper 153 1 available at http://scholarship.law.nd.edu/law_faculty_scholarship/153, accessed on June 4, 2014.
[79] *Gosset* Case, Cour de Cassation,Ire Chamber, May 7, Dalloz,1963,p.545.
[80] A Redfern and Hunter, above n 6.
[81] Ibid 118.
[82] P John and others, 'A Presumptively Better Approach to Arbitrability' [2013] Law & Economics Working Papers 88, available at http://repository.law.umich.edu/law_econ_current/88, accessed on June 3, 2014.
[83]388 U.S. 395 (1967)
[84] P John and others, above n 82.
[85] That principle was reaffirmed through by the US Supreme Court in other court cases such as *Buckeye Check Cashing, Inc.* v. *Cardegna* (in 2006) when it held that an arbitration provision is severable from the remainder of the Container Contract and unless the arbitration clause is challenged, the contract's validity is to be decided by the arbitrator in the first instance.
[86] 356 AC (1942)

the *SNE v. Joc Oil* case[87], that even if the Container Contract was not valid, due to inadequate signature, this will not impact the arbitration agreement which shall survive to allow the arbitral tribunal to assume jurisdiction.

Therefore, domestic courts in different countries have given recognition to the severability concept which is the source of arbitral tribunal's authority. The arbitration clause is seen as an independent contract from the Container Contract. It deems to be a legal fiction that the parties form, in addition to the Container Contract, a second contract in the form of the arbitration clause. Courts enforce the fictional arbitration agreement, created by virtue of the severability doctrine, when they refer to arbitration disputes on whether the Container Contract was induced by fraud or not[88].

Although some commentators have defended severability which provides a good baseline rule ensuring arbitration clauses are enforceable even if the Container Contract is defective[89], there is, however, some criticism to the severability doctrine.

3.5 *Opinions and Arguments of the Doctrine of Severability*

Over the past decade commentators have criticized the concept of severability. Unlike most of the arbitration rules, some of the commentators are of the view that the severability doctrine does not (i) comply with contract law, and (ii) seem logically sound. Therefore, in their view, the doctrine should be reconsidered to regard (i) the parties' general right to litigate; and (ii) the protection under the contract law including any defenses to contact enforcement.

Some commentators, although accepting the need of the severability concept, they, however, suggest a limited severability doctrine. They distinguish between contract defenses to invalidate all the contract's terms, to be ruled by courts in this case, and contract defenses to invalidate some part of the terms, to be ruled by arbitrators in such kind a situation. The practical advantages of the severability doctrine shall not stop the right to litigate and the parties should be entitled to have the protection of contract law's defenses to enforcement.

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[87] (1990) XV Year Book. Commercial Arbitration 31
[88] Available at http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1136&context=nlj accessed 7 June 2014.
[89] P John and others, above n 82.

The opponents believe that the severability doctrine should be repealed. It is a prerequisite requirement for referring a dispute to arbitration, to have an enforceable contract requiring arbitration of that dispute. It excludes arbitration agreements from normal general rules of law. The severability doctrine provides that a party waives its right to litigate when executing a contract, which contains an arbitration clause, even if that Container Contract is unenforceable. That should not be accepted and courts shall hear the arguments on the enforceability of the Container Contract before sending any case to arbitration. To cement their view[90] that the severability may not be necessary, some of the commentators argued that the arbitrator's power comes, in addition to the Container Contract, from post-dispute agreements to arbitrate and, further, when the parties argue the merits to the arbitrator, without questioning the arbitrator's jurisdiction, they agree that jurisdiction on the arbitrator. But this conclusion may put people off from participating in arbitration.

On the other hand, the proponents of severability reject the need for the court to resolve disputes over whether the parties have formed an enforceable Container Contract. This suggestion would add a further procedural step which is expected to negatively affect the proceedings in terms of time and money. Further, the court would resolve issues that will often go to the arbitrator if the Container Contract is valid. Furthermore, in international arbitration there is no international court with compulsory jurisdiction to rule on the validity of the arbitration agreement. Moreover, there are still several justifications for the doctrine of severability including:

(i) In general when parties enter into an arbitration agreement, they usually intend, impliedly if not expressly stated, to arbitrate all disputes, including disputes over the validity of the Container Contract;

(ii) If by denying the validity of the Container Contract a party can deprive the arbitrator of competence, disputant parties can easily repudiate their obligation to arbitrate. This defeats one of the arbitration main advantages in terms of speed and simplicity;

(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; and

[90] To reply on the point that the severability doctrine allows arbitrators to invalidate the Container Contract without risking that their decision will nullify the arbitration clause from which they derive their own powers.

(iv) Courts usually review only arbitral awards and not the merits of disputes which are meant to be arbitrated. However, without the severability doctrine, courts would be forced to do this every time[91].

Despite the fact that, nowadays the doctrine of severability serves, in practice, international arbitration however, the effect of severability doctrine is still arguable. Not all scholars have adopted one view on its effect. Some commentators believe it is just to strengthen and support the jurisdiction of the arbitral tribunal[92]. The severability principle is a pragmatic and convenient fiction[93] and without the valid arbitration agreement the tribunal will have no power[94]. Others believe it empowers arbitrators with the necessary tools to effectively do their job. The severability doctrine is the precursor needed for assuming jurisdiction by the arbitrator to be able to determine their own jurisdiction[95]. These different opinions based on two main views. The first view supports the autonomy doctrine and the second view combat autonomy. [96]

Nevertheless many international and national legislations as well as arbitral institutions rules have considered the doctrine of severability to advance arbitration internationally. This attempt was to avoid courts from delaying the arbitration processes. However, it may be argued that logic, business needs and the legal theory of contract formation require the involvement of courts in certain cases including where questions are raised in relation to the Container Contract's formation[97].

In most jurisdictions, the severability doctrine does not operate in such case. i.e. when the existence of the Container Contract is in question[98]. The severability doctrine cannot protect the doctrine of Competence-Competence if the Container Contract formation is currently in dispute. Where there is no Container Contract there is no relationship and all the terms and conditions of the alleged Container Contract vanish as nothing can come from nothing[99].

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[91] J Lew, 'Separability, Competence-Competence and the Arbitrator's Jurisdiction in Singapore' [1995] (7) SALJ, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=648402 accessed 14 June 2014.
[92] J Lew and others, *Comparative International Arbitration (*1st edn, Kluwer Law International, 2003) 334.
[93] A Redfern and others, above n 73.
[94] Ibid.
[95] S Chaturvedi and C Agrawal, 'Jurisdiction to determine jurisdiction' (2011) 77(2) Arbitration 201-210.
[96] T Biswas, 'The doctrine of competence-competence from Indian perspectives' (2010) 13(2) Int. A.L.R. 42-49.
[97] K Haining and B Zeller, 'Can separability save Kompetenz-Kompetenz when there is a challenge to the existence of a contract?' (2010) 76(3) Arbitration 2010 493-502.
[98] Ibid.
[99] K Haining and B Zeller, above n 97.

In the Arab world, some of the commentators[100] believe that severability can find its root in the theory of separation of contract terms (in Arabic: *Nazareyet Intiquas Al-Aqd*). This doctrine (Nazareyet *intiqāṣ Al-Aqd*) is known to Islamic jurisprudence[101]. This theory assumes that the entire contract is not wholly void if some of its parts are void. The invalid part shall be removed and the remaining parts of the contract shall remain valid. Therefore, the arbitration clause may remain valid if the contract is invalid and vice versa. However, both the Container Contract and the arbitration agreement shall be void in case of no capacity, i.e. where the signatory party lacks the proper capacity to act on behalf of the contracting party. This is in line with other opinions which support that there are two independent contracts, i.e. the Container Contract and the arbitration agreement, and each of these contracts has a totally different object and cause[102]. The arbitration agreement shall be valid in all cases including when the Container Contract is void due to public policy issues such as if the cause of the Container Contract was illegitimate[103] or was invalidated by the courts[104].

But others believe that in line with the general rules, the theory of separation of contract terms cannot be the alleged source of severability. That theory suggests that the contract is valid although some of its terms are void. The doctrine of severability provides that one term will be valid even if all the other terms of the contract are void which contradicts with the general principles of law and the legal logic[105].

Some opinions[106] differentiate between the two meanings of the doctrine of severability, namely (i) the independence and separation of the arbitration agreement from the Container Contract. Thus the invalidation of the Container Contract shall not invalidate the arbitration agreement; and (ii) independence of the arbitration agreement from the local laws as far as the parties do not violate

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[100] F Sami, *International Commercial Arbitration* (*Al Tahkim Al Tejary Al Dawly*), (6th edn, Dar Al Thaqafa Publishing, Cairo 2012) 206-207.
[101] Refer to the UAE Civil Code and Ministry of Justice Commentary on Chapter I ("Sources of Obligation or Personal Rights"), Part 1 Contracts, Section 2 on the elements, validity and effect of the contract and options - Article 211 of the CPC.
[102] F Wali, *Arbitration Law in Theory and Practice* (Q*anon Al Tahkim Fi Al Nazaria Wa Al Tatbiq) (*1st edn, Knowledge institution, Cairo, 2007) 95.
[103] S Rashed, *Arbitration in Private International relations*, *(Al Tahkim In Al Elakat Al Dawleyah Al Khasah) (*1st edn, Dar Al Nahda Al Arabiya, Cairo, 1998) 95.
[104] F Wali, above n 102.
[105] A Al-Sharqawi, above n 75.
[106] Ibid.

the international public policy. Thus the parties may agree on different laws to govern the Container Contract and the arbitration agreement. However, other parts of commentators[107] believe that the arbitration agreement shall be nullified if the Container Contract is invalid. However, in line with the theory of separation of contract terms, the invalidation of the arbitration agreement shall not, in itself, have negative effects on the Container Contract which shall remain valid.

Therefore, the doctrine of severability remains, and will be, widely acceptable at international level. Courts in developed countries continue to recognise the severability doctrine, although they may apply different standards depending on the circumstances[108]. However, there might be a need to provide for some limits to the severability doctrine and to provide a clear situation when the severability doctrine may be disregarded by courts. This will help boosting the practice of arbitration and prevent unfavourable results.

3.6 *Conclusion*

Although some commentators have raised valid points against the application of the doctrine of severability, it remains one of the most important concepts in the field of arbitration. In order to give effect to the awards issued by arbitrators and to keep arbitration attractive, it is very crucial to maintain the arbitrator's jurisdiction otherwise the whole process of arbitration may be at risk. That is why the concept of severability is highly recognized by many countries, by courts and legislation.

Arbitration is just an informal process in which the rules of substantive and procedural law are not necessarily applied. Protecting the arbitrators' jurisdiction from parties' formal challenges would be advantageous not only to the proceedings but also the enforcement of the process outcome, i.e. the arbitral awards.

Because the arbitrator's awards are final, in some circumstances, there might be a need not to give full autonomy to an arbitration clause. There might be some situations where un-favorable results may arise when the arbitration clause is granted full autonomy including when the doctrine of

[107] M Al-Sharqawi, *International Commercial Arbitration (Al Tahkim Al Tijari Al Dawly)* (Dar Al Nahda Al-Arabia, Cairo 2011) 109.
[108] A Redfern and others, above n 73.

severability is applied without any limitation in cases where the Container Contract is void for illegality of the cause, its object is invalid, or was signed by a party with no proper capacity. However, specific legal standards should be set to draw a clear distinctive line between the court's role and involvement in arbitration.

Accordingly, as a general rule, for arbitration to be effective, there is an immediate need to apply the doctrine of severability to give the arbitrators the proper tool to decide on any jurisdictional issue. However, there might be some exceptions and, further, this doctrine should not be applied without limits otherwise there might be some negative impacts such as recognition of void contracts or allowing parties to arbitrate some illegal matters.

CHAPTER 4

4. THE DOCTRINE OF COMPETENCE-COMPETENCE

4.1 *Introduction*

Both competence-competence and severability are two most important concepts in the field of international commercial arbitration. Although these concepts are somewhat linked, they are definitely different concepts and they share a common objective, which is to avoid early judicial intervention that might hinder the process of arbitration[109].

Although they are connected the doctrine of severability should not be combined with Competence-Competence. Whilst the former provides that the validity of an arbitration clause shall survive and does not depend on the validity of the Container Contract, the latter entrusts the arbitral tribunal the power to rule on its own jurisdiction[110]. Not only the doctrine of Competence-Competence is accepted by Shari'a[111], but it is also widely recognized by different laws at international level.

In this chapter we will examine, in some detail, the doctrine of Competence-Competence. We will start by shedding some light on its meaning, merits and rationale. Thereafter, we will address when courts are needed to apply such a doctrine. Then we highlight the main views and arguments on the doctrine and the arguably relationship it has with the principle of severability before reaching a conclusion.

4.2 *The Competence-Competence Doctrine*

4.2.1 The Meaning

Different terms are being used interchangeably to define the disputes to be decided by arbitrators

[109] T Biswas, 'The doctrine of competence-competence from Indian perspectives' (2010) 13(2) Int. A.L.R. 42-49.
[110] Ibid.
[111] For more information, please refer to: A Al-Teshi, *the Doctrine of Competence-Competence in the Field of Arbitration (Mabdaa Al-Ikhtisas Bel-Ikhtisas fi Majal Al-Tahkim)* (first edn, Dar Al Nahda Al Arabiya, Cairo, 2009) 65 and 293.

rather than courts. These terms include "jurisdiction", "power", "mission", "authority", and "arbitrability"[112]. The English term of "Competence-Competence" means literally "jurisdiction on jurisdiction" which is called, in German, '*Kompetenz-Kompetenz',* and known, in French, as '*compétence-compétence'*[113]. This terms is commonly translated into Arabic as **"اختصاص الاختصاص"**[114] or, more legally accurate[115], ".[117]"[116]**الاختصاص بالاختصاص**

Although there is no specific definition of the doctrine of Competence-Competence in the law however, as usual, other definitions may be found in jurisprudence. Competence-Competence was defined by one of the authors as follows:

> *"The arbitrator's right to decide on his/ her jurisdiction by issuing an award subject to revision by courts at a later stage.*[118]*"*

The doctrine of Competence-Competence suggests that arbitral tribunals are entitled to determine their own competence and authority and there is no necessity to stop the arbitration. This means, in summary, that this doctrine allows arbitrators to rule on their own authority without the need to suspend the arbitration proceedings in the event of jurisdictional questions[119].

4.2.2 The Merits

The merit of the Competence-Competence doctrine is to provide arbitrators with the power to rule on their own jurisdiction. This doctrine gives additional force to the arbitration agreement and the arbitration's effectiveness as a whole by way of empowering the arbitrators the power to be self-determent, i.e. to determine the powers of their powers[120].

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[112] W Park, 'Arbitral jurisdiction in the United States: who decides what?' [2008] Int. A.L.R. available at http://williamwpark.com/documents/Arbitral%20Jurisdiction%20%20IALR.pdf accessed 1 July 2014.
[113] W Park, 'Arbitral jurisdiction in the United States: who decides what?' [2008] Int. A.L.R. available at http://williamwpark.com/documents/Arbitral%20Jurisdiction%20%20IALR.pdf accessed 1 July 2014.
[114] Transliterated from Arabic as "Ikhtisas Al-Ikhtisas".
[115] A Al-Teshi, *the Doctrine of Competence-Competence in the Field of Arbitration (Mabdaa Al-Ikhtisas Bel-Ikhtisas fi Majal Al-Tahkim*) (first edn, Dar Al Nahda Al Arabiya, Cairo, 2009) 291.
[116] Transliterated from Arabic as "Al-Ikhtisas Bil-Ikhtisas".
[117] For more information, refer to: A Al-Teshi, *the Doctrine of Competence-Competence in the Field of Arbitration (Mabdaa Al-Ikhtisas Bel-Ikhtisas fi Majal Al-Tahkim)* (first edn, Dar Al Nahda Al Arabiya, Cairo, 2009) 36.
[118] Ibid.
[119] W Park, above n 112.
[120] J Lew, 'Achieving the potential of effective arbitration' (1999) 65(4) Arbitration 283-290.

The core of Competence-Competence is to avoid arbitration being derailed before it starts. The arbitrators are not required to halt the proceedings just because there is a question on their authority[121]. Thus, the doctrine in question avoids any barriers or disruptions, by the disputant parties, to proceed with arbitration.

The arbitral tribunal's authority to determine questions regarding its jurisdiction has attracted considerable interest due to several reasons including:

(i) the parties' difficulty in accepting a normal person to act as a judge in their own case bearing in mind the financial interest of the arbitral tribunal; and

(ii) the way of conferring jurisdiction on the tribunal[122].

The need of Competence-Competence doctrine is based on its perceived advantages. Under that doctrine the tribunal is empowered to do whatever is necessary to control and manage the arbitral process[123]. If we accept that 'justice delayed is justice denied' then the doctrine of Competence-Competence may be argued to achieve justice and, further, it can be seen to have the following advantages:

(i) the arbitration procedure is governed by specific rules based on the principle of party autonomy and the arbitral tribunal will not take much time, as the court may take, in order to decide its own jurisdiction; and

(i) The doctrine is very crucial in the international context, where parties intend to avoid litigation in other jurisdictions[124].

In summary, Competence-Competence provides that in the event of an alleged nullity, cessation, cancellation, termination or lapse of the Container Contract, the arbitration agreement survives until the arbitral tribunal rules on its own jurisdiction unless otherwise the said agreement is not tainted with an invalidity cause per se[125].

[121] W Park, above n 112.
[122] S Chaturvedi and C Agrawal, 'Jurisdiction to determine jurisdiction' (2011) 77(2) Arbitration 201-210.
[123] J Lew, above n 120.
[124] T Biswas, above n 109.
[125] C Cazenave and M Fernet, 'The uniform law on international commercial arbitration' (2013) Int'l Bus LJ 19.

4.2.3 The Rationale

The essence of Competence-Competence is to avoid any negative effects on the arbitration process including any stoppage to the procedure by referring unnecessary challenges to the courts. The rationale behind this doctrine is that by agreeing to refer relevant disputes to the jurisdiction of the arbitrators, by implication the parties have already agreed that a dispute on the arbitrator's jurisdiction shall also be resolved by those arbitrators[126]. Thus, allowing the tribunal to be entrusted with the necessary tools needed to determine its own competence.

Although there might be strong views against the application of the Competence-Competence doctrine, either contractual, legal or technical[127], it does currently exist and is widely accepted. This is because of the benefits attributable to the use of the Competence-Competence doctrine which may be seen in the following three levels[128]:

(i) it permits arbitrators to proceed with the arbitration and consider challenges to their jurisdiction[129];

(ii) under which arbitrators may be granted exclusive authority to initially decide jurisdictional challenges subject, of course, to judicial review under the applicable standards at a later stage; and/or

(iii) under which arbitrators may be granted exclusive authority to initially rule on jurisdictional challenges, subject to subsequent limited judicial review on specified grounds[130].

The motive of the parties to recourse to arbitration is to have their own dispute settled by a resolution method alternative to the national courts. The national courts should not be highly involved in the arbitral process. Any such involvement shall be reduced to provide a supportive role, i.e. to support the parties' agreement to sort out their dispute, as agreed, without judicial interference[131]. Therefore, a procedural challenge would not automatically stop the arbitrators from assuming jurisdiction. The arbitrators should be permitted to proceed with the arbitration and

[126] W Chang and L Cao, 'Towards a higher degree of party autonomy and transparency: the CIETAC introduces its 2005 new rules' (2005) 8 (4) Int ALR 2.
[127] A Al-Teshi, above n 115.
[128] S Chaturvedi and C Agrawal, above n 122.
[129] Smit, 'Separability and Competence-Competence in International Arbitration' (2002) 13 Am. Rev. Int'l Arb. 19.
[130] Ibid.
[131] J Lew, above n 120.

decide on the merits of the case including the jurisdictional challenge[132]. However, in practice, sometimes this is not the case. Although the concept that the arbitral tribunal has jurisdiction to determine its own jurisdiction is one of the most modern arbitration rules now embraces in certain forms or shape[133]. However, the question is not simply "who decides" but rather "who decides who decides?"[134]

4.3 *Judicial Review of the Doctrine*

Arbitrators shall act within the boundaries of authorities conferred thereto by the parties. The arbitrators should not exceed their powers. Neither courts nor litigants would accept an award falling beyond the tribunal's arbitral authority[135]. In deciding challenges to arbitral authority, the parties' intent must be served. But again, some questions may be raised and need answering.

The doctrine of Competence-Competence raises issues on the boundaries of authority and responsibility between arbitral tribunals and courts. These issues include the following two questions:

(i) whether the court will be allowed to determine the tribunal's jurisdiction?; and (if this is the case),

(ii) at what time and by which mean the court will determine the tribunal's jurisdiction?

This may be answered in line with the international convergence that the power to determine arbitral jurisdiction is not exclusive or to be seen as an ultimate right to the arbitral tribunal in all circumstances[136]. Further, commentators have suggested a new concept called the "negative effect of Competence-Competence"[137]. Under that concept, which is recognized by many courts in different countries[138], the court intervention shall always be very limited. The arbitrators should be

[132] G Hutchinson, 'The existence of the arbitration agreement and the Kompetenz-Kompetenz principle in Irish law' (2014) 80 (1) The International Journal of Arbitration, Mediation and Dispute Management 73-81.
[133] Ibid.
[134] W Park, above n 112.
[135] W Park, above n 112.
[136] G Hutchinson, above n 132.
[137] This concept was first introduced by Professor Emmanuel Gaillard in 1994.
[138] Including the courts in France, Switzerland, India, Canada and Hong Kong.

allowed to exercise their rights and to determine their own jurisdiction[139]. But that concept does not apply to all disputes, as there might be some cases where the arbitration agreement itself is at large[140]. For instance, a valid legal defense may be raised, during arbitral proceedings, when a respondent party alleges that it never agreed to arbitrate[141]. This procedural defense finds its basis on the said negative effect[142].

Legal systems vary with regards to the possibility and time in which arbitrators may decide on their authority. In some countries[143] it is generally acceptable that the parties' agreement allows the arbitrators to decide on their arbitral authority[144]. However, different standards are applied by courts when addressing the arbitral jurisdiction. This suggests that there is no model answer to the question of whether judges should make a full inquiry into the intention of the parties, i.e. in deep examination, or apply a prima facie standard by just summary examination[145].

It seems that some courts support the concept of judicial deference to arbitration. These courts held that, for the case to be referred to arbitration, it is sufficient that prima facie[146] or arguably[147] an arbitration agreement existed between the parties[148]. However, it was sufficient for other courts, while deciding if a dispute fell within the limits and scope of the arbitration agreement, that the dispute was arguably[149] or prima facie[150] the subject of an arbitration agreement[151].

But, on the other hand, different conclusions are reached by other courts. For instance, in Canada

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[139] G Hutchinson, above 132.
[140] Ibid.
[141] W Park, above n 112.
[142] C Cazenave and M Fernet, above n 125.
[143] such as the United States courts.
[144] W Park, above n 112.
[145] Ibid.
[146] High Court, Hong Kong, December 11, 1996, *Nanhai West Shipping Co v Hong Kong United Dockyards Ltd* and the Court of First Instance, Hong Kong, February 28, 2001, *Paladin Agricultural Ltd v Excelsior Hotel (Hong Kong) Ltd.* available at *www.lexis.com accessed* 1 June 2014.
[147] British Columbia Court of Appeal, Canada, March 10, 2002, *Gulf Canada Resources Ltd v Arochem International Ltd,* 66 B.C.L.R. (2d) 113, CLOUT case 31, British Columbia Court of Appeal, Canada, July 4, 1995, *The City of Prince George v A. L. Sims & Sons Ltd* [1995] 9W.W.R. 503, CLOUT case 179 and the British Columbia Court of Appeal, January 15, 2004, *Instrumenttitehdas Kytola Oy v Esko Industries Ltd.*
[148] N Horn, 'The arbitration agreement in light of case law of the UNCITRAL Model Law' (2005) 8(5) Int. A.L.R. 146-152.
[149] *Gulf Canada Resources Ltd v Arochem International Ltd,* above n 147; British Columbia Supreme Court, Canada, November 18, 1994, *Globe Union Industrial Corp v G.A.P. Marketing Corp* [1995] 2 W.W.R. 696, CLOUT case 114, *The City of Prince George v. A. L. Sims & Sons Ltd,* above n. 147, High Court, Hong Kong, January 29, 2002, *Liu Man Wai v Chevalier (Hong Kong) Ltd* and British Columbia Supreme Court, April 9, 2001, *Cecrop Co v Kinetic Sciences Inc,* available on the internet at *www.lexis.com* accessed 10 June 2014.
[150] *Nanhai West Shipping Co v Hong Kong United Dockyards Ltd, above n 148*.
[151] N Horn, above n 148.

it is understood that the arbitral tribunal makes the first decision on the existence of an arbitration agreement and the scope of such arbitration agreement[152]. However, some courts would not refer cases to arbitration if it is obvious that the dispute lies outside the terms of the arbitration agreement[153]. Further, in other jurisdictions, other courts[154] exercise a full review of the case, before reference to arbitration, to be satisfied with the existence of a valid arbitration agreement[155] and/or to make sure that the dispute is within the scope of that arbitration agreement[156]. Furthermore, one court stressed out that parties shall not be forced into arbitration unless it is clear beyond doubt that they have agreed to it[157]. The above different conclusions demonstrate that there is judicial deference to arbitration[158].

Nevertheless, the main effects of a valid arbitration agreement are (i) to confer jurisdiction to the arbitral tribunal; and (ii) to exclude jurisdiction of the court unless otherwise agreed[159]. That is why, on the other hand, some courts view that under the arbitration agreement there is an obligation on the parties to be participative in arbitration[160].

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[152] Ontario Court of Justice, Canada, March 1, 1991, *Rio Algom Ltd v Sammi Steel Co,* CLOUT case 18; Ontario Court, General Division, Canada, April 30, 1992, *Mind Star Toys Inc v Samsung Co Ltd,* 3 Ontario Reports (3d), 374, CLOUT case 32; Court of Appeal, Hong Kong, November 24, 1996, *Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam BV;* High Court of Hong Kong, April 19, 1996, *Nassetti Ettore SpA v Lawton Development Ltd*; Federal Court of Appeal, Canada, March 22, 2000, *Thyssen Canada Ltd v Mariana Maritime SA*; Ontario Superior Court of Justice, Canada, June 27, 2000, *Dalimpex Ltd v Janicki,* available at www.lexis.com accessed 10 June 2014.

[153] *The City of Prince George v A. L. Sims & Sons Ltd, above* n 147; British Columbia Supreme Court, Canada, November 17, 1995, *Continental Commercial Systems Corp v Davies Telecheck International, Inc* [1995] B.C.J. 2440, CLOUT case 357; Ontario Superior Court of Justice, Canada, July 29, 1999, *NetSys Technology Group AB v Open Text Corp* [1999] O.J. 3134, 1 B.L.R. (3d) 307, CLOUT case 367 available at www.lexis.com accessed 10 June 2014.

[154] Such as the German court and the Bavarian Highest Regional Court. For more information, refer to N Horn, 'The arbitration agreement in light of case law of the UNCITRAL Model Law' (2005) 8(5) Int. A.L.R. 146-152.

[155] British Columbia Supreme Court, Canada, January 31, 1996, *Siderurgica Mendes Junior SA v "Icepearl",* CLOUT case 178; Bayerisches Oberstes Landesgericht, Germany, 4 Z SchH 03/99, September 9, 1999, available at www.dis-arb.de accessed 10 June 2014.

[156] British Columbia Supreme Court, Canada, November 28, 1988, *ODC Exhibit Systems Ltd v Lee, Expand International,* 41 Business Law Reports, 286, CLOUT case 65; High Court of Hong Kong, December 16, 1994, *York Airconditioning & Refrigeration Inc v Lam Kwai Hung t/a North Sea A/C Elect Eng Co,* CLOUT case 89; Ontario Court of Justice, Canada, November 10, 1994, *T1T2 Ltd Partnership v Canada,* CLOUT case 113; Federal Court of Canada, January 9, 1998, *Methanex New Zealand Ltd v Fontaine Navigation SA, Tokyo Marine Co Ltd, The Owners and all Others Interested in the Ship Kinugawa* [1998] 2 F.C. 583, 142 F.T.R. 81 (Fed. T.D.), CLOUT case 382; Ontario Court of Justice, Canada,March 31, 1988, *Temiskaming Hospital v Integrated Medical Networks, Inc.* [1998] 59 O.T.C. 48, 46 B.L.R. (2d) 101, O.J. 1309,CLOUT case 388; Ontario Court of Appeal, Canada, April 25, 1994, *Automatic Systems Inc v E. S. Fox Ltd and Chrysler Canada Ltd,* CLOUT case 74; Alberta Court of Appeal, Canada, January 16, 1992, *Kaverit Steel & Crane Ltd v Kone Corp*; High Court,Hong Kong, September 28, 1999, *Chung v Primequine Corp,* available at *www.lexis.com* accessed 10 June 2014.

[157] High Court, Hong Kong, February 17, 1993, *William Company v Chu Kong Agency Ltd*.

[158] N Horn, 'The arbitration agreement in light of case law of the UNCITRAL Model Law' (2005) 8(5) Int. A.L.R. 146-152.

[159] Ibid.

[160] N Horn, 'The arbitration agreement in light of case law of the UNCITRAL Model Law' (2005) 8(5) Int. A.L.R. 146-152.

In line with the foregoing, the tribunal's decision is not final and may be subject to variation or cancellation by the court. The parties' agreement to resolve their dispute by arbitration will be negatively affected either in the form of delay or cancelation if the door is open for the court to early decide on those matters during the arbitral proceedings. Such situations would adversely undermine arbitration being an effective dispute resolution method[161]. Therefore, any objection against a tribunal's jurisdiction should be initially determined by the tribunal itself, even if, for the sake of achieving justice and fairness, there might be another final determination by the courts at a later stage.

Although delaying court intervention until the end of the arbitration may be beneficial to save the judicial resources[162] however it may negatively affect the development of a strong arbitration culture because it leaves judges less exposed to arbitral techniques of resolving jurisdictional issues[163]. But it remains useful to avoid any unnecessary delay to the resolution process and not to deprive the parties from their right to go to courts. Nevertheless, this may be argued that (i) a party shall be allowed to go to court, for contesting arbitral power, at any time, even during the arbitral proceedings; and/or (ii) this restricts court challenges of arbitral authority until an award is issued[164], which may be seen as time consuming. Therefore, it might be better, for saving time[165] and money[166], if parties, who are improperly involved in the arbitral proceedings, go to court at the beginning of the proceedings. As, under the current application of the Competence-Competence doctrine, these parties will have to wait for the award and then file a case before the court to nullify the award on jurisdictional issues, which is considered by some commentators as a total waste of time[167]. However, to define those improperly involved parties allowed to challenge the arbitral jurisdiction, before courts, during the arbitral proceedings would be another issue.

It is becoming evident that the Competence-Competence may not fully divest national courts of all

[161] W Park, 'The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz–Kompetenz- Has Crossed the Atlantic?' (1996) 12 (2) Arbitration Intl 137-159.
[162] W Park, above n 112.
[163] Stewart Shackleton, 'The high cost of London as an arbitration venue - the Court of appeal rejects competence-competence and separability in Midgulf International Ltd v Groupe' [2010] (1) http://www.srshackleton.com/assets/pdfs/Midgulf.pdf accessed 4 July 2014.
[164] W Park, above n 112.
[165] It is understood that delaying the review would reduce the parties' tactics to sabotage arbitration.
[166] As the parties will be unnecessary involved in a separate litigation case before different panel, i.e. the court.
[167] A Al-Teshi, above n 115.

authorities to decide challenges to arbitral jurisdiction simply because those courts are entrusted with the authority to enforce awards and arbitration agreements. For this purpose, the courts will need to find a jurisdictional basis before any enforcement to be ruled[168]. Therefore, the remedial role of courts, in terms of correcting any errors or mistakes during the arbitral process, is undeniable.

4.4 *Different Opinions and Arguments on the Competence-Competence*

Although they are linked together and have been internationally recognized, still there are different opinions on how the two doctrines of severability and Competence-Competence function for the arbitral tribunal to assume jurisdiction[169].

From a judicial perspective, opinions range from providing that the severability doctrine and the doctrine of Competence-Competence are corollaries of each other, to other views that the two doctrines are separate and totally independent. The latter hold that the tribunal's power to determine its jurisdiction is not related to the doctrine of severability but is a power to the tribunal[170].

From a scholarly perspective, there are widely different opinions. One opinion holds that when the arbitral tribunal determines its jurisdiction it has an immanent power[171] and the doctrine of severability is just to strengthen and support the jurisdiction of the arbitral tribunal[172]. Therefore, the power of arbitrators to decide upon their own jurisdiction is an "inherent" one[173]. The severability principle is a pragmatic and convenient fiction[174]. But this opinion is not fully convincing to some commentators[175], who believe it lacks some logic.

However, other commentators think that there is no need for the tribunal to apply the doctrine of severability. No law provides for applying such doctrine by the concerned authorities, be them

[168] T Biswas, above n 109.
[169] S Chaturvedi and C Agrawal, above n 122.
[170] Ibid.
[171] J Lew and others, above n 92.
[172] Ibid.
[173] A Redfern and others, above n 73.
[174] A Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (Student edn, Sweet & Maxwell, 2003) 252.
[175] S Chaturvedi and C Agrawal, above n 122.

courts or tribunals. The Model Law[176] provides for a provision to just separate the contracts without any need to apply the said doctrine. Therefore, when a jurisdictional challenge arises, the power to determine jurisdiction comes from the contract, i.e. the arbitration clause, and is not automatically inherent in the tribunal. That is why most jurisdictions are not fully comfortable to refer cases to arbitration when the dispute focuses on the arbitration clause itself[177]. Similarly, another opinion holds that arbitration agreement provides the foundation of the power and authority of the arbitrator's powers[178] hence there should be a valid arbitration clause at some point for excluding the court's jurisdiction. Without the valid arbitration agreement the tribunal will have no power[179]. Further, other justification[180] provided that there is a rebuttable presumption that the tribunal was entrusted with the jurisdictional power by both parties' will when the parties agreed on the arbitration agreement[181].

Certain jurists are of the opinion that Competence-Competence empowers the arbitral tribunal to view the underlying contract and check the existence of a valid arbitration clause. They believe the Competence-Competence doctrine is needed to empower the tribunal to check the existence of a valid arbitration clause before it can apply the concept of severability[182]. But another interesting view[183] suggests that the doctrines of severability and Competence-Competence meet together when arbitrators look to the arbitration clause alone, not to the entirety of the contract, while deciding on their own jurisdiction.

Nevertheless, one of the views holds that arbitrators are entrusted with the power to determine their own jurisdiction as a result of the doctrine of severability[184] in line with the wording of the UNCITRAL Arbitration Rules. The Competence-Competence is seen as a consequence and direct

[176] Please refer to Article 16 of the Model Law.
[177] S Chaturvedi and C Agrawal, above n 122.
[178] P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions (*2nd edn, Sweet & Maxwell Publishing, London 2005) 144.
[179] Redfern and Hunter, above n 174.
[180] I Shihata, *The Power of the International Court to Determine its Own Jurisdiction* (M Nijhoff, 1965) 25-26, as cited in Rosen 'Arbitration under Private International Law' (1997) 17 Fordham Int'l L.J. 599.
[181] Ibid.
[182] S Chaturvedi and C Agrawal, above n 122.
[183] W Park, 'Determining Arbitral Jurisdiction' (1997) 8 Am. Rev. Int'l Arb. 133.
[184] A Al-Sharqawi, '*Commenting on the judgment No. 166 of 2008 Commercial Cassation*', a special publication for commentary on the Supreme Union Court's judgments, (special edn, Abu Dhabi, 2013) 55-69. See also, R Sammartano, *International Arbitration Law and Practice,* (2nd edn, 2007) 584.

result of the severability doctrine[185], although this suggestion was not accepted by other commentators[186].

Having raised some of those interesting arguments to the doctrine of Competence-Competence, which are expected to increase endlessly, the most logical conclusion remains that the severability doctrine provides the basis for the arbitral tribunal's jurisdiction to determine questions relating to its jurisdiction. It is an essential needed to complement the doctrine of Competence-Competence. Without severability the Competence-Competence doctrine will be incomplete[187]. In this respect, the UNCITRAL Model Law does not suggest that the doctrine of Competence-Competence to be considered as an independent power of the tribunal, it stated, however, that the severability doctrine 'complements' the said doctrine[188]. A proper interpretation of the relevant terms, based on valid legal basis[189], would result in that the Competence-Competence doctrine will not be complete without the doctrine of severability. Therefore, it can be argued that the doctrine of Competence-Competence is contingent upon the severability principle and not an inherent power of the tribunal[190].

4.5 *Conclusion*

The doctrine of Competence-Competence constitutes the basis of modern arbitration. In order to understand that concept, the unique nature of arbitration has to be considered carefully. Courts' jurisdiction is totally different than the arbitral tribunal's jurisdiction in the sense of its origin or source. While courts have jurisdiction to determine their jurisdiction by the force of law and statutes, the jurisdiction of the arbitral tribunal, on the other hand, originates from the parties' agreement as, in the end, the arbitration agreement is just a contract.

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[185] A Al-Sharqawi, '*Commenting on the judgment No. 166 of 2008 Commercial Cassation*', a special publication for commentary on the Supreme Union Court's judgments, (special edn, Abu Dhabi, 2013) 55-69.
[186] M Briri, *International Commercial Arbitration (Al Tahkim Al Tejri Al Dawly), (3rd edn,* Dar Al Nahda Al Arabiya, Cairo 2004) 70.
[187] S Chaturvedi and C Agrawal, above n 122.
[188] Ibid.
[189] Bearing in mind the Vienna Convention on the Law of Treaties (Done at Vienna on May 23, 1969) (UN Doc. A/Conf. 39/27 1155 UNTS 331) (entered into force on January 27, 1980) which provides that for the purpose of interpretation, ordinary meaning is to be attributed to terms.
[190] S Chaturvedi and C Agrawal, above n 122.

The Competence-Competence doctrine was invented on the basis of necessity to avoid any unnecessary stoppage or suspension to the arbitral proceedings as there was some concern of abuse by litigants. This doctrine intends to allow proceeding with arbitration in certain situations including when the arbitration agreement itself is being questioned or challenged. Although, as stated before, under such doctrine the arbitral tribunal has jurisdiction to determine its own jurisdiction, however the tribunal's decision is not final and may be subject to revision by the courts. Nevertheless, the court involvement in the arbitral proceedings is still a controversial point in some circumstances.

CHAPTER 5

5. INTERNATIONAL RECOGNITION OF THE DOCTRINES OF SEVERABILITY AND COMPETENCE-COMPETENCE

5.1 *Introduction*

As stated in the preceding Chapter, the doctrine of Competence-Competence is one of the most modern arbitration rules that are adopted by many countries[191]. The development of arbitration has driven the need of the new concepts including, the two doctrines outlined in Chapters 2 and 3 before. These two doctrines, namely the doctrines of severability and Competence-Competence, are argued to be recognized under different international legislations and institutional arbitration rules including, the Model Law[192] however, the extent and form of this recognition need to be examined.

In this chapter we will examine the international recognition of these two doctrines. For that purpose, we may locate the different articles on the two doctrines in different conventions and some of the main arbitration institutions' rules. Thereafter, we will conclude whether, or not, the doctrines are internationally recognized and widely accepted.

5.2 *International Recognition of the Severability and Competence-Competence*

5.2.1 The Conventions

We will start with the main conventions addressing one or both of the doctrines. The conventions are listed below in accordance with the date they were adopted.

[191] Including Belgium, France, The Netherlands, Egypt, Sri Lanka, Switzerland, Bahrain, Bermuda, Bulgaria, Hungary, Kenya, Lithuania, Singapore, Ukraine, Mexico, Peru, Zimbabwe, Croatia, Tunisia, Algeria, Brazil, Yemen, Spain, India, Greece, China and Sweden.
[192] Refer to Article 16 of the Model Law.

(i) The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"[193])

Although the New York Convention deals with the enforcement of awards however it intends to protect the jurisdiction of arbitral tribunals. Article 2 of the said convention[194] requests the courts to refer the parties to arbitration unless otherwise the arbitration agreement is not valid, operative nor enforceable.

By ordering the courts to refer the case to arbitration upon the request of the defendant, the New York Convention gives full regard to the parties' arbitration agreement. This includes, inter alia, recognizing the essence of the doctrine of Competence-Competence which is to refer the case to the arbitral tribunal which is assumed to have jurisdiction to rule on the arbitrated dispute. Although, there is no express provision on the doctrine of severability, however it can be argued that the New York Convention refer to the severability doctrine by implication. Para 3 of Article 2 of the New York Convention suggests that the tribunal shall have jurisdiction unless the arbitration agreement is (i) invalid, (ii) inoperative, or (iii) unenforceable.

(ii) European Convention on International Commercial Arbitration[195] (the "EU Convention")

Para 3 of Article 5[196] of the EU Convention authorizes the arbitral tribunal to rule on its own jurisdiction including determination on the formation or the validity of Container Contract and the arbitration agreement included therein. Therefore, the EU Convention recognizes the doctrine of Competence-Competence as the arbitrator should, in the first instance, rule on jurisdictional

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[193] Available at http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf accessed on 10 July 2014.

[194] Para 3 of Article 2 of the New York Convention provides that: *"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*(emphasis added).

[195] This was done at Geneva on 21 April 1962.

[196] Article 5 of the EU Convention stipulates that: "*Pleas to arbitral jurisdiction*

1. [-----].

2. [-----].

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 upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part." (emphasis added).

challenges. Further, it can be argued that the severability doctrine is adopted by the EU Convention which, under the said article, Article 5, differentiates between the validity of the Container Contract and the arbitration clause included therein.

However, Article 6[197] of the EU Convention interestingly draws a distinction between two scenarios; The first one, when the case is filed with the court before initiating any arbitration proceedings, in this case the court shall examine whether, or not, the arbitration agreement is valid and the dispute is arbitrable in accordance with the applicable law. The second scenario is when the case is filed during the arbitral proceedings, wherein courts are given the option to stay any ruling on the jurisdictional issue until the award is issued unless otherwise there were valid substantial reasons not to do so.

(iii) Convention on the Settlement of Investment Disputed between States and Nationals of other States – International Centre for Settlement of Investment Disputes (the "ICSID Convention")[198]

Under Article 41[199] of the ICSID Convention, the arbitral tribunal is considered as the judge of its own jurisdiction. The said convention recognizes the essence of the doctrine of Competence-

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[197] Article 6 of the EU Convention provides that: *"Jurisdiction of Courts of Law*
1. [----].
2. In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions.
(a) under the law to which the parties have subjected their arbitration agreement;
(b) failing any indication thereon, under the law of the country in which the award is to be made;
(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.
The courts may also refuse recognition of the arbitration agreement if under the law of their country the dispute is not capable of settlement by arbitration.
3. Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.
4. [----]." (emphasis added).

[198] Known as Washington Convention 1965.

[199] Article 41 of the ICSID Convention provides that**: "***Section 3: Powers and Functions of the tribunal*
"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 Centre, 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 question or to join it to the merits of the dispute." (emphasis added).

Competence and the philosophy that the tribunal rules on its own jurisdiction is reflected in the ICSID Convention[200]. Therefore, the concept of Competence-Competence is acknowledged by the ICSID Convention and although there is no express provision on the severability doctrine. However, the ICSID Rules expressly provides for the doctrine of severability.[201]

(iv) The Arab Convention on Commercial Arbitration[202] (the "Amman Convention")

Under Article 24 of the Amman Convention[203], the tribunal is empowered with the needed tools to rule on any jurisdictional challenge. The arbitral tribunal assumes jurisdiction to determine its own jurisdiction. The tribunal's determination in such kind of challenges shall be final and, therefore, not subject to any sort of appeal or reconsideration.

Therefore, the Amman Convention recognizes the doctrine of Competence-Competence. However, there is no express provision or reference to the doctrine of severability.

(v) The Convention[204] on the Settlement of Investment Disputes in the Arab countries (the "Cairo Convention")

[200] J Eamon and G Holub, 'International Arbitration Law Review, 2009, See you in court! Respondents' failure to pay the advance on arbitration costs', (2009) Int. A.L.R. 12(6) 168-178.
[201] Refer to Article 46 of the ICSID Rules.
[202] Known as the Amman Convention dated 14 April 1987. Available at http://www.arbitrations.ru/userfiles/file/Law/Treaty/Arab%20convention%20on%20commercial%20arbitration%20eng_rus.pdf accessed 1 July 2014.
[203] Article 24 of the Amman Convention provides that: *"A plea for a lack of jurisdiction as well as other pleas must be raised before the first hearing. The arbitral tribunal must settle these points before going into the substance of the dispute and its decision in this respect is final."* (emphasis added).
[204] As Adopted by the Arab Economic Union Resolution No. 1138D/72 on 6 December 2000.

Under Article 11[205] of the Cairo Convention[206], the tribunal has the authority to rule on any jurisdictional challenge or objection to its jurisdiction. This includes challenges that it lacks jurisdiction, other additional challenges or direct defences in connection with the arbitrated dispute as well as other procedural issues. Therefore, the Cairo Convention recognizes the doctrine of Competence-Competence. However, there is no express provision or reference to the doctrine of severability.

5.2.2 The Arbitral Institutions Rules

In this part, we will investigate some of the most well-known arbitration rules by examining the rules of three arbitration institutions, namely London Court of International Arbitration ("LCIA"), International Chamber of Commerce ("ICC") and the American Arbitration Association ("AAA") before we check the UNCITRAL Rules and the Model Law as well.

(i) LCIA Rules[207]

Article 23[208] of the LCIA Rules empowers the arbitrators with the needed authority to rule on their own jurisdiction. Further, if the arbitration agreement is in the form of a clause embedded in a

[205] *Article (11) of the Cairo Convention provides that:"*

A) The Tribunal shall decide on any objection or arbitral challenge that it lacks jurisdiction provided by any of the litigant parties before checking the merits or initiating any stage of the proceedings.

B) The Tribunal must decide on any counter casual or additional challenge or any direct defenses related to the subject of the dispute, if so requested by one of the parties, provided that such requests are within the scope of the parties' arbitration agreement and within the jurisdiction of the Tribunal and never agreed to be excluded.

C) The Tribunal shall decide on any matter relates to the procedures that are not covered by the provisions of this chapter or the rules of arbitration or any other rules agreed upon by the parties.

D) [----]" (emphasis added).

[206] Uncertified translation from the Arabic text which is available at http://www.aidmo.org/aiic/docs/announcement_conflict.pdf, accessed 26 June 2014.

[207] The London Court of Arbitration Rules effective since 1 January 1998.

[208] Article 23 of the LCIA Rules provides that: "*Jurisdiction of the Arbitral Tribunal*

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. For that purpose, an 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. 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.

23.2 [-----]

23.3 [----]

Container Contract, it shall be treated as an independent contract. That is why the arbitration agreement will not be nullified because of the mere invalidation or nullification of the Container Contract. Therefore, the LCIA Rules recognize both doctrines in question, namely, the doctrine of severability and the Competence-Competence doctrine.

Interestingly, the fourth paragraph of Article 23 goes further in providing a waiver of, or a negative obligation on, the parties. Under that provision the disputant parties are not allowed to recourse to any judicial body, including courts, to rule on the arbitral jurisdiction during the proceedings unless otherwise agreed.

(ii) ICC[209] Rules of Arbitration

Article 6 of the ICC Rules provides that:

"*Effect of the Arbitration Agreement*[210]*:*

1)[----]

2)[----]

3)If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).

4)In all cases referred to the Court under Article 6(3), the Court[211] *shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the*

23.4 By agreeing to arbitration under these Rules, the parties shall be treated as having agreed not to apply to any state court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorization of the Arbitral Tribunal or following the latter's award ruling on the objection to its jurisdiction or authority." (emphasis added).

[209] International Chamber of Commerce Arbitration Rules effective from 1 January 2012.

[210] http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ accessed 3 July 2014.

[211] This term is defined in the ICC Rules as, and refers to, the International Court of Arbitration.

Court is prima facie satisfied that an arbitration agreement under the Rules may exist. [-----].

5)In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself." (emphasis added)

Under Paras 3 and 5 of Article 6 of the ICC Rules, the tribunal is entitled to rule on its jurisdiction. Further, under para 9 of Article 6 of the ICC Rules, the tribunal will assume that jurisdiction even if there are allegations to the validity or formation of the contract or even if the tribunal finds that the contract is invalid or non-existent. Therefore, the ICC Rules address the doctrine of Competence-Competence while there is no express provision on the doctrine of severability.

Having said that, it can be argued that the last sentence of Para 9[212] of Article 6 of the ICC Rules, clearly raises the logical result of the severability doctrine. That Para entitles the arbitrator to rule on the disputed matter even if the main contract was not properly formed or void. This suggests that the invalidation or recession of the Container Contract will not render the arbitration agreement void. Therefore, severability is considered under the said rules.

(iii) AAA Rules[213]

The Article 7 of the AAA Rules provides that:

R-7. Jurisdiction[214]

"(a) The arbitrator shall have 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 or to the arbitrability of any claim or counterclaim.

[212] Para 9 of Article 6 of the ICC Rules provides that: "*9)Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void."* (emphasis added).

[213] American Arbitration Association Rules amended and effective since October 1, 2013.

[214] https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased accessed 1 July 2014.

(b) The arbitrator 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 arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) [----]."

Under Article 7 of the AAA Rules, the arbitral tribunal is entrusted with the authority to rule on its own jurisdiction. Further, the tribunal is empowered to decide on the formation or validity of the Container Contract. The Arbitration clause is considered an independent contract separated from the Container Contract. The mere invalidation of the Container Contract will not negatively affect the arbitration clause which will remain in full force and effect.

Therefore, the AAA Rules recognize the two doctrines of severability and Competence-Competence doctrine and the same were addressed in one article, i.e. Article 7.

5.2.3 The International Laws and Rules

(i) The UNCITRAL Arbitration Rules[215]

Article 21 of the UNCITRAL Arbitration Rules[216] provides that:

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 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*

[215] The United Nations Commission on International Trade Law Rules issued by the General Assembly Resolution 31/98 adopted on 15 December 1976.
[216] http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf accessed 28 June 2014.

decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. …"

In 2010 the UNCITRAL Rules were revised[217]. Article 23 of the revised UNCITRAL Rules provides that:

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. 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…".*

It is obvious that Paras 1 and 2 of Article 21 of the old UNCITRAL Arbitration Rules and Article 23 of the revised UNCITRAL Arbitration Rules confirm that:

1) the arbitrators are empowered with the power to rule on jurisdictional challenges including those concerning validity and existence of the Container Contract;
2) The arbitration agreement, if was in the form of a clause embedded in a Container Contract, shall deem to be separated and independent therefrom. This is in order to allow the arbitrators to assume their jurisdiction while deciding on the existence and validity of the Container Contract; and
3) Any nullification or invalidation of the Container Contract shall not in itself automatically invalidate the arbitration agreement.

Therefore, the UNCITRAL Arbitration Rules clearly adopt the doctrine of severability and the Competence-Competence doctrine.

(ii) The United Nations Commission on International Trade Law (UNCITRAL)[218] Model Law (the "Model Law"):

[217] http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf accessed 3 July 2014.
[218] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with the amendments adopted in 2006.

It is clear that Article 16[219] of the Model Law, and in particular para (1), confirms the two fundamental doctrines of international commercial arbitration, namely the doctrine of severability and the Competence-Competence[220]. Therefore, by virtue of that Article the following conclusions apply:

1) the arbitrators are empowered to rule on their own jurisdiction in case of any jurisdictional challenge;
2) The arbitration agreement, if was in the form of a clause embedded in a Container Contract, shall be deem separated and independent from the Container Contract in order to allow the arbitrators to assume their jurisdiction; and
3) Any nullification or annulment of the Container Contract will not automatically invalidate the arbitration agreement because of that reason.

Further, it was clear under the *Travaux Preparatoires*, i.e. the preparatory papers, of the Model Law that there was a general consensus among the nation states to incorporate the doctrines Competence-Competence and severability as part of the body of prevalent arbitral laws[221]. Therefore, both doctrines, of severability and the competence-competence, are recognized by the Model Law[222] under Article 16.

5.3 ***Conclusion***

Close examination of the above stated conventions, legislation and rules reveals that there is no specific definition for any of the two doctrines, i.e. severability and Competence-Competence[223],

[219] Article 16 of the Model Law provides that *"Competence of arbitral tribunal to rule on its jurisdiction*
(1) 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." (emphasis added).
[220] C Cazenave and M Fernet, 'The uniform law on international commercial arbitration' (2013) Int'l Bus LJ 20.
[221] J Eamon and G Holub, 'International Arbitration Law Review, 2009, See you in court! Respondents' failure to pay the advance on arbitration costs', (2009) Int. A.L.R. 12(6) 168-178.
[222] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 with the amendments adopted in 2006.
[223] For more information, refer to: A Al-Teshi, *the Doctrine of Competence-Competence in the Field of Arbitration* (*Mabdaa Al-Ikhtisas Bel-Ikhtisas fi Majal Al-Tahkim*) (first edn, Dar Al Nahda Al Arabiya, Cairo, 2009) 286.

although they are widely known. The doctrine of severability is needed to avoid any invalidity of the arbitration agreement when the underlying Container Contract is void. Therefore, the arbitration clause, being the foundation of the arbitration process, may survive termination or expiry of the Container Contract[224]. Although it is widely criticized by scholars, with arguments on its compliance with contract law and its logical soundness, however it remains to be a good baseline rule to ensure the arbitration clauses to be enforceable if the Container Contract is defective[225].

The severability principle is becoming very popular to the extent that some legislators provide that all statutes assumed to be severable except when the said statutes provide for a non-severability clause to the contrary[226]. It is now being recognized in modern laws on arbitration[227] and conventions and, further, an increasing number of countries are incorporating the severability doctrine into their domestic laws[228]. On the other hand, the Competence-Competence is highly considered under most of the main arbitration rules such as the ICC Rules[229] and UNCITRL Arbitration Rules[230]. Under that doctrine the arbitrators are seen as the 'masters of their own procedure'[231].

The two doctrines of severability and Competence-Competence have received widespread international recognition and acknowledgement[232]. Although they are distinct, the Competence-Competence is intertwined with the principle of severability as both share something in common. It is no surprise to know that most foreign arbitration statutes and international arbitration rules address the two doctrines together in the same or adjacent articles[233]. For instance, they are addressed under the Model Law, UNCITRAL Arbitration Rules, AAA Rules and LCIA Rules in

[224] For more information, refer to: S Chaturvedi and C Agrawal, 'Jurisdiction to Determine Jurisdiction' (2011) 77(2) Arbitration 201-210.
[225] For more information, refer to: P John and others, 'A Presumptively Better Approach to Arbitrability' [2013] 7-8 Law & Economics Working Papers, Paper 88, available at http://repository.law.umich.edu/law_econ_current/88 accessed 3 June 2014.
[226] N John, 'Severability' [1993] 55, *Scholarly Works,* Paper 153 available at http://scholarship.law.nd.edu/law_faculty_scholarship/153, accessed 3 June 2014.
[227] Refer to Article 16 of the Model Law, Article 7 of the English Arbitration Act of 1996, Article 178 of the Swiss Federal Statute on Private International Law and Section 1040 of the German Code of Civil Procedure.
[228] J Eamon and G Holub, 'International Arbitration Law Review, 2009, See you in court! Respondents' failure to pay the advance on arbitration costs' (2009) Int. A.L.R. 12(6) 168-178.
[229]Refer to Article 6 of the ICC Rules.
[230] Refer to Article 23 of UNCITRAL Rules.
[231] J Lew, 'Achieving the potential of effective arbitration' (1999) 65(4) Arbitration 1999, 283-290.
[232] S Chaturvedi and C Agrawal, 'Jurisdiction to Determine Jurisdiction' (2011) 77(2) Arbitration 201-210.
[233] Ibid.

the same article.

Nevertheless, some rules, such as the ICC Rules, limit the tribunal power to determine the parties' rights only when there is a valid contract between the parties. Therefore, the tribunal cannot, for instance, issue an award to compensate one of the parties for the damages suffered due to nullification of the contract[234]. However, we believe the two doctrines are very essential for the development of arbitration as an alternative dispute resolution method. They are widely regarded by most of the modern countries and should be accepted by the international community.

[234] A Al-Teshi, *the Doctrine of Competence-Competence in the Field of Arbitration (Mabdaa Al-Ikhtisas Bel-Ikhtisas fi Majal Al-Tahkim)* (first edn, Dar Al Nahda Al Arabiya, Cairo, 2009) 287.

CHAPTER 6

6. RECOGNITION OF THE DOCTRINES OF SEVERABILITY AND COMPETENCE-COMPETENCE IN THE UAE

6.1 *Introduction*

Unlike other Middle East countries, the UAE does not have an arbitration law[235]. Arbitration proceedings are governed by some limited articles[236] in the Civil Procedures Code issued by the Federal Law No. 11 of 1992, as amended ("CPC"). The CPC is the main piece of legislation to govern arbitration in the UAE. Although it was defined in Al Majala[237] there is no express provision in the UAE law that defines arbitration.

Notwithstanding this, it is incorrect to infer that the UAE is not an arbitration friendly state. The UAE Federal Law No. 26 of 1999 on Conciliation and Settlement Committees at the Federal Court prohibits certain courts[238] from hearing commercial or civil disputes before being considered by the relevant Conciliation and Arbitration Committee. The UAE has signed several bilateral treaties with other countries for enforcement of foreign awards, including India[239] and France[240]. Further, the UAE joined the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2006.

Given the limited resources available on these two doctrines in the UAE, this chapter will examine the recognition of the severability and Competence-Competence doctrines in the UAE from different angles including, where possible, the legal, judicial and jurisprudence points of view. For this reason some landmark judgments will be examined to establish how both doctrines are currently being interpreted by the UAE courts. Then, the recognition of the two doctrines by some

[235] Although there is a draft arbitration law based on the UNCITRAL Model Law which is not yet issued.
[236] Namely, Articles 203 to and, including, 218 of the CPC.
[237] Under Article 1790 of *Magalet Al-Ahkam Al-Adleya,* arbitration is defined as: "the parties' volunteer selection of someone to determine their conflict or case."
[238] Federal Civil and Shari'a Courts.
[239] The UAE Federal Decree No. 33 of 2000 promulgating the Agreement between the UAE and the Republic of India on Juridical and Judicial Co-operation in Civil and Commercial Matters for the Service of Summons, Judicial Documents, Judicial Commissions, Execution of Judgments and Arbitral Awards.
[240] The Federal Decree No. 31 of 1992 with regard to the Judicial Co-operation Treaty between France and the UAE which came into effect on 27 April 1992.

of the arbitration centres located in the UAE as well as the draft arbitration law will be scrutinised before the conclusion is reached.

6.2 *Recognition of the Severability Doctrine in the UAE*

While checking the UAE courts' judgments, it was found that although most of the judgments treated the arbitration clause as a separate agreement which shall not be negatively affected by a defective Container Contract. However, some judgments have provided that a void contract shall render the arbitration agreement invalid. We will start with the legal evaluation and then the courts' interpretation of the doctrine.

6.2.1 The Legal Recognition of Severability

As discussed in Chapter 3, the doctrine of separation of the contract terms [in Arabic: *intiqāṣ Al-Aqd*] is known to Islamic jurisprudence[241] and, therefore, is recognized under the UAE law[242]. Article 206 of the CPC suggests that, in general terms, an invalid clause shall be separated from the contract which shall remain valid unless the invalid clause was the main motive for the parties to enter into that contract. On this Article, the Explanatory Note on the CPC provides that jurists have worked to mitigate the effects of defectiveness by an ingenious creation of jurisprudence by, inter alia, permitting the defective contract to produce important effects for the protection of both the contracting parties and the third parties as well and for the rectification of the contract itself by separating the vitiating factor[243]. But, as usual, there are some restrictions that apply to this application.

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[241] Refer to the UAE Civil Code and Ministry of Justice Commentary on Chapter I ("Sources of Obligation or Personal Rights"), Part 1 Contracts, Section 2 on the elements, validity and effect of the contract and options - Article 211 of the CPC.

[242] Article 206 of the CPC provides that: "*The contract may be accompanied by a condition confirming its purport or consistent with it or in accordance with custom and practice or containing an advantage to one of the contracting parties or a third party, provided that in the case of all of the foregoing it is not prohibited by law or contrary to public order or morals, otherwise the condition shall be void and the contract shall be valid, unless the condition is the inducement to make the contract, in which case the contract also shall be void." (emphasis added)*

[243] Please see Article 211 of the CPC which stipulates that: *"(1) If part of a contract is void the entire contract shall be void unless the subject matter of each part is separately specified in which case it shall be void as to the void part, and*

Due to the fact that the arbitration agreement is just a contract, it shall be construed in accordance with the main principles of law applicable generally on all types of contracts including Articles 56 and 64 of the UAE Civil Transaction Code (the "CTC")[244]. Therefore, the theory of separation of contract terms is usually recognized under the UAE laws. However, when it comes to arbitration and the specific meaning of severability doctrine, as fully described in Chapter 3 before, the application seems to be convoluted. This is evidenced by some court judgments, highlighted below, that were issued by the local courts in the UAE.

6.2.2 The Judicial Recognition of Severability

Although many UAE Courts have decided that an arbitration clause will not be affected by the invalidity or cancellation of the Container Contract. However, other courts have decided that a void Container Contract shall render the arbitration agreement invalid. This is possibly because there is no express provision in the UAE which expressly defines or outlines the severability of the arbitration agreement, unlike those found in international rules and laws[245].

Under Para 1 of Article 203[246] of the CPC, the UAE legislator accepts the arbitration agreement in the two forms globally accepted, i.e. a separate submission agreement or an arbitration clause

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the remainder shall be valid.
(2) If part of a contract is dependent upon the grant of a consent, then if the consent is given the whole contract will be effective and if the consent is not given only that part will be void together with the relevant portion of the consideration, and the remainder of the contract with its portion of the consideration will be effective."

[244] Article 56 of the CTC provides that: *"A subordinate matter (right or obligation) shall be annulled if the principal matter (right or obligation) is annulled".* However, Article 64 of the CTC provides that: *"A subsidiary matter may be proved without the principal matter being proved."*

[245] Such as the international arbitration rules and model law and conventions stated in Chapter 5.

[246] Article 203 of the Civil Procedures Code[246] (the "CPC") provides that:

a. *"It shall be permissible for contracting parties generally to stipulate in the original contract, or in a subsequent agreement, to refer any dispute between them concerning the implementation of a specified contract to one or more arbitrators. It shall likewise be permissible to agree by special conditions to arbitration in a particular dispute.*
b. *No agreement for arbitration shall be valid unless evidenced in writing.*
c. *The subject of the dispute shall be specified in the Terms of Reference, or during the hearing of the case, even if the arbitrators were authorized to act as amiable compositors, otherwise the arbitration shall be void.*
d. *Arbitration is not allowed in matters which are incapable of being reconciled. An arbitration agreement can only be made by the parties who are legally entitled to dispose of the disputed right.*
e. *If the parties to a dispute agree to refer the dispute to arbitration, no court case may be filed before the courts. However, if one of the parties files a case, irrespective of the arbitration provision, and the other party does not object to such filing at the first hearing, the case may be considered, and in such instance the arbitration provision shall be deemed cancelled."*

embedded in the Container Contract. These two types of arbitration agreements were recognized by the UAE courts in many courts judgments[247]. Further, under para 2 of Article 203 of the CPC only written agreements[248] may establish the existence of arbitration agreements.

The UAE courts approach to the severability doctrine seems to be unique. The UAE Courts have consistently decided that an arbitration agreement shall deem to be separate from the Container Contract, and the termination, invalidity or cancellation of the Container Contract will not, in itself, invalidate the arbitration agreement[249]. It was found that some judgments did not recognize the severability doctrine at all[250] however, a recent judgment has supported the doctrine of severability[251]. In order to understand the local application of the severability doctrine, as applicable on arbitration agreements, it would be useful to examine some of the interesting judgments which did not fully support the severability doctrine, to the extent permitted hereunder.

However, to digest the courts' position it is worth noting that arbitration is regarded by the UAE courts as an exceptional mean of resolving disputes[252] and the arbitration agreements are interpreted on very narrow scale[253].Therefore, unlike some other legal systems, such as the US system, UAE law adopts a restrictive approach in interpreting arbitration agreements. For ease of reference, the below five judgments are arranged in sequence according to the date on which they were issued.

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[247] Such as Case No. 118/Judicial Year 23 (ruling of the Federal Supreme Court of 21 January 2004), Case No. 438/Judicial Year 23 (ruling of the Federal Supreme Court of 12 July 2004), Case No. 873/Judicial Year 3 (ruling of the Federal Court of Cassation of 22 October 2009), Case No. 170/Judicial Year 4 (ruling of the Abu Dhabi Court of Cassation of 28 April 2010), Case No. 795/Judicial Year 4 (ruling of the Abu Dhabi Court of Cassation of 9 December 2010), Case No. 72/2007 (ruling of the Dubai Court of Cassation of 10 June 2007), Case No. 92/2007 (ruling of the Dubai Court of Cassation of 17 June 2007), Case No. 162/2008 (ruling of the Dubai Court of Cassation of 28 September 2008), Case No. 67/2009 (ruling of the Dubai Court of Cassation of 24 May 2009), Case No. 156/2009 (ruling of the Dubai Court of Cassation of 27 October 2009), and Case No. 169/2009 (ruling of the Dubai Court of Cassation of 13 September 2009).

[248] Case No. 14/2008, ruling of the Dubai Court of Cassation of 23 September 2008 and Case No. 561/2011, ruling of the Abu Dhabi Court of Cassation of 16 June 2011.

[249] Case No. 108/Judicial Year 3 (ruling of the Federal Court of Cassation of 12 March 2009), Case No. 795/Judicial Year 4 (ruling of the Abu Dhabi Court of Cassation of 9 December 2010), and Case No. 164/2008 (ruling of the Dubai Court of Cassation of 10 October 2008).

[250] Case No. 58/Judicial Year 1 (ruling of the Abu Dhabi Court of Cassation of 30 October 2007, and Case No. 89/Judicial Year 2 (ruling of the Abu Dhabi Court of Cassation of 29 May 2008).

[251] Case No. 353/2011, ruling of the Abu Dhabi Court of Cassation of 24 August 2011.

[252] Case No. 22/Judicial Year 22 (ruling of the Abu Dhabi Court of Cassation of 3 March 2002).

[253] Case No. 449/Judicial Year 21 (ruling of the Abu Dhabi Court of Cassation of 11 April 2001), Case No. 92/Judicial Year 25 (ruling of the Federal Supreme Court of 8 June 2003), Case No. 220/2004 (ruling of the Dubai Court of Cassation of 17 January 2005), Case No. 192/2007 (ruling of the Dubai Court of Cassation of 27 November 2007), and Case No. 148/2008 (ruling of the Dubai Court of Cassation of 16 September 2008).

(i) Case No 209/Judicial Year 15, judgment issued by Abu Dhabi Court of Cassation on 22 January 1995[254]:

In that case the court provided that (i) the invalidity of the Container Contract will, accordingly, render the arbitration clause invalid and the court retains jurisdiction to decide on the dispute; and (ii) in order for the contract to be valid, it shall have a valid and legitimate purpose and not conditional on defective condition. If the contract's object, elements or purpose of the contract are defective, then the contract shall (i) be null and void, (ii) not have any legal effects, (iii) not be ratified and, therefore, the judge shall invalidate it without the parties' request.

(ii) Case No 58/Judicial Year 1, Judgment issued by Abu Dhabi Court of Cassation on 30 October 2007[255]:

Here the Court decided that it is settled law that if the Container Contract is void, then the arbitration clause itself will consequently be void. Therefore, the jurisdiction will vest in the judiciary having the general authority to determine the dispute. Further, Para 2 of Article 209 of the CPC provides that if during the process of arbitration a preliminary issue arises that is outside the tribunal's authority, the tribunal must stay the proceedings until a final ruling on that point is made by the courts.

(iii) Case No 89/Judicial Year 2, Judgment issued by Abu Dhabi Court of Cassation on 29 May 2008[256]:

[254] The case was about some banking transactions in which the contracts were regarded as of gambling nature. The contracts did not comply with the principles of Sharia as they contained some uncertainty (*Gharar* in Arabic) in violation to Article 1021 of the CTC and Articles 3 and 4 of the UAE Penal Code.
[255] This case was filed by the claimant to request invalidation of the lease contract which was not registered with the relevant Land Register in Abu Dhabi Municipality in violation to the law.
[256]This is the same case highlighted under footnote 255 but issued in a later stage by the court of cassation. It was filed for the invalidation of the Container Contract as it allegedly violated the law and did not satisfy the formal legal requirement of registering the lease contract with the Notary Public.

It was decided that whereas the court of first instance decided not to accept the case because of the arbitration clause and the Court of Cassation ruled that as the Container Contract was void, the arbitration clause itself was in consequence void, by way of general authority in respect of matters relating to contract invalidity, the court had jurisdiction to determine the dispute. The court of appeal should have referred the current case to the court of first instance to determine the merits of the case, pursuant to the principle of litigation at two levels.

(iv) Judgment issued in the case No. 164/2008 by the Dubai Court of Cassation, 164/2008, on 10 October 2008[257]:

The Court provided that it is a well settled principle that if the Container Contract is void, cancelled or terminated, that does not prevent the arbitrationclause remaining in existence and full effect, unless the invalidity extends to the arbitration clause itself, in which case it will have no effect. Further, a challenge was raised that the Agreement was ratified by the defendant company by virtue of performing the Agreement, for more than two years. However, it was not accepted by the Court of Cassation for some reasons including that para 4 of Article 203 of the CPC provides that the arbitration agreement will not be valid unless it is signed by a person having the competence to make a disposition over the right the subject matter of the dispute, which was not existent in the current case.

(v) Case No 166/2008, Judgment issued by the Union Supreme Court on 1 February 2010:

The Union Supreme Court stated that Para 1 and 2 of Article 203 show that the legislature's intention to treat the arbitration clause as an independent agreement of the Container Contract. The said Article differentiates between two contracts. Further, it accepts the arbitration agreement to be subsequent to the contract. However, signing of the arbitration agreement at the same time the Container Contract is signed or be included as a clause in it, does not negate the independence of the arbitration agreement. The arbitration agreement is treated differently in the law, as it cannot

[257] The merits of this case were that there was a sub-contracting agreement (the "Agreement") which included an arbitration clause. The Agreement was signed by a director of the mother company and not the manager of the defendant company, a limited liability company, which was the contracting party to the Agreement.

be proven except in writing, and has its own subject matter, i.e. to exclude some dispute(s) from the courts and conferring authority to determine them on the arbitration tribunal.

These two agreements deal with two different subject matters, one relating to the right and the other relates to identifying the body to resolve the dispute(s), on the grounds that arbitration is an exceptional mean of dispute resolution involving the exclusion of the normal modes of litigation. Therefore, the arbitration agreement is effective unless the arbitration agreement is, in itself, null and void. The recession, nullity or termination of the Container Contract will not prevent the existence of the arbitration agreement with regard to the arbitrated dispute, in connection with the rights and obligations of the contracting parties, arising out of the rescission, nullity or termination of the Container Contract.

6.2.3 Evaluation of the Court Judgments

The above highlighted judgments, which, by the way, do not represent all the judgments[258], are not in support of the severability doctrine. These judgments seemingly contradict with the other judgments, referred to above. This may be because of the civil legal system adopted in the UAE and the fact that courts sometimes are reluctant to regard arbitration agreements if they are not formed in accordance with the law.

As per the law there are certain relationships and contracts that are not subject to arbitration and therefore any agreement to arbitrate those contracts will not be regarded. For instance, before the amendment of the effective lease law[259] there was an exclusive competence of the Dubai Rent Committee to hear tenancy disputes in Dubai[260]. Further, under the law[261] certain types of tenancy disputes in Abu Dhabi are subject to the exclusive jurisdiction of the Abu Dhabi Rental

[258] As some judgments already adopted the doctrine of severability in full as stated before.
[259] Dubai Law No. 26 of 2007 as amended.
[260] Case No. 47/2007, ruling of the Dubai Court of Cassation of 29 April 2007 and Case No. 133/2007, ruling of the Dubai Court of Cassation of 23 September 2007.
[261] Abu Dhabi Law No. 20 of 2006 concerning the leasing of premises and the regulation of tenancy relationships between landlord and tenant, as amended.

Committee[262]. Similarly, the law[263] provides that certain tenancy contracts in Sharjah are subject to the exclusive jurisdiction of the Sharjah Committee for Arbitration and Complaints[264]. Furthermore, as stated before there are some matters which are not arbitrable, largely because of public policy reasons, such as criminal matters, agency matters[265], labour disputes[266] and other disputes[267].

Additionally, Para 4 of Article 203 of the CPC stipulates only those who have the legal capacity to dispose of the rights may enter into an agreement to arbitrate[268]. Under Para 2 of Article 58 of the CPC, the party agreeing on arbitration shall be having a special authorization or proxy[269]. Nevertheless, the proxy may be implied[270].

That is why UAE courts do not automatically refer all cases to arbitration where an arbitration clause is alleged to be existent. As there are some scenarios where the UAE courts will rely on some mandatory provisions in the law to invalidate or disregard the arbitration agreement for different reasons such as those relating to violation to public policy, incapacity of the signatories or contradiction with Shari'a.

6.2.4 Jurisprudence View on the Severability Principle

As outlines in Chapter 3, some commentators[271] believe that the theory of separation of contract terms (in Arabic: *Nazareyet Intiquas Al-Aqd*) can be the foundation of the severability principle. In their view, the arbitration clause may remain valid if the contract is invalid and vice versa.

[262] Case No. 136/Judicial Year 3, ruling of the Abu Dhabi Court of Cassation of 31 March 2009 and Case No. 873/Judicial Year 3, ruling of the Federal Court of Cassation of 22 October 2009.
[263] Law No. 92 of 1977 as amended by Law No. 7 of 1986 and Law No. 4 of 1988.
[264] Case No. 546/Judicial Year 24, ruling of the Federal Supreme Court of 7 March 2005.
[265] See Article 6 of the Commercial Agency Law No. 18 of 1981 as amended.
[266] Refer to the UAE Labour Law No. 8 of 1980 as amended.
[267] Refer to Article 3 of the Draft law.
[268] Case No. 321/Judicial Year 19, ruling of the Abu Dhabi Court of Cassation of 25 April 1999 and Case No. 273/2006, ruling of the Dubai Court of Cassation of 4 February 2007.
[269] Case No. 191/2009, ruling of the Dubai Court of Cassation of 13 September 2009 and Case No. 191/2009, ruling of the Dubai Court of Cassation of 13 September 2009.
[270] Case No. 178/1996, ruling of the Dubai Court of Cassation of 25 January 1997 and Case No. 305/2007, ruling of the Dubai Court of Cassation of 25 February 2008.
[271] F Sami, *International Commercial Arbitration* (*Al Tahkim Al Tejary Al Dawly*) (6th edn, Dar Al Thaqafa Publishing, Cairo 2012) 206-207.

Further, both the arbitration clause and the Container Contract shall be void in case of no capacity[272]. This is in line with some other opinions providing that there are two independent contracts and each of them has totally different object and cause[273]. Therefore, the arbitration agreement shall be valid in all cases including when the Container Contract is void such as when the contract cause is illegitimate[274] or invalidated by the courts[275]. Taking into account that it is a well-established principle that the parties may agree on different laws to govern the Container Contract and the arbitration agreement.

However, it could be argued that in accordance with the general rules and Articles 206 and 211 of the CTC, the theory of separation of contract terms cannot be the source of the severability doctrine. Contrary to the theory of separation of contract terms, the severability doctrine provides that one term shall be valid even if all other terms of the contract are void which does not make proper legal sense. However, there should be some other root for principle of severability whenever needed[276].

Other commentators[277]view that the arbitration agreement shall be nulled if the Container Contract is invalid, but, in line with the theory of separation of contract terms, the invalidation of the arbitration agreement shall not have a negative effect on the Container Contract which shall remain valid.

Nevertheless, some other opinions[278]accept the application of the severability doctrine but with some limitations. The severability shall not be automatically applied in all cases otherwise some unfavorable results will arise. They differentiate between the two meanings of the doctrine of severability, namely (i) the independence and separation of the arbitration agreement from the Container Contract; and (ii) independence of the arbitration agreement from the local laws as far as the parties do not violate the international public policy[279].

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[272] Including when the signatory party lacks the proper capacity to act on behalf of the contracting party.
[273] F Wali, *The Arbitration Act in Theory and Practice (Qanon Al Tahkim Fi Al NazariaWa Al Tatbiq)* (1st edn, Knowledge Institution, Cairo, 2007).
[274] S Rashed, above n 103.
[275] For more information, please refer to F Wali, *Arbitration Law in Theory and Practice* (Q*anon Al Tahkim Fi Al Nazaria Wa Al Tatbiq) (*1st edn, Knowledge institution, Cairo 2007) 95.
[276] A Al-Sharqawi, above 185.
[277] M Al-Sharqawy, above n 107.
[278] A Al-Sharqawi, above n 185.
[279] Ibid.

6.3 *The Legal and Judicial Recognition of the Competence-Competence Doctrine in the UAE*

There is no express provision in the UAE law which clearly defines the Competence-Competence principle. The author could not find many judgments expressly provide for the doctrine of Competence-Competence although some references were provided. This may be because the nature and subject of the cases filed before courts. The cases are normally centred on the existence, formation or invalidity of the arbitration agreement or the Container Contract. Thus the courts would usually decide either that (i) there is no valid arbitration agreement, therefore the case shall be decided by the courts; or (ii) there is a valid arbitration agreement, the court lacks jurisdiction and the dispute will be resolved by arbitration. However, the court judgments, including some of those referred to above, impliedly recognize the doctrine of Competence-Competence. Upon giving effect to the arbitration agreement, and referring the disputes to arbitration, the UAE courts affirm the Competence-Competence principle bearing in mind that the Competence-Competence is seen, by some commentators, as a direct result of the severability doctrine.

Further, para 5 of Article 203 of the CPC provides that: "5) *If the parties to a dispute agree to refer the dispute to arbitration, no case may be filed before the courts. However, if one of the parties files a case, irrespective of the arbitration provision, and the other party does not object to such filing at the first hearing, the case may be considered, and in such instance the arbitration provision shall be deemed cancelled."*

Under the law, if the case was filed before the court and the defendant does not object the same at the first hearing[280], the arbitration clause shall be disregarded and the court will deem to have the proper jurisdiction to determine the case. This has been well settled by many court judgments[281].

[280] Case No. 38/2009 (ruling of the Dubai Court of Cassation of 4 April 2010) and Case No. 1283/2010, (ruling of the Abu Dhabi Court of Cassation of 11 October 2011).

[281] Case No. 285/Judicial Year 21, ruling of the Federal Court of Cassation of 29 May 2001; Case No. 141/Judicial Year 1, ruling of the Abu Dhabi Court of Cassation of 22 November 2007; Case No. 72/Judicial Year 1, ruling of the Abu Dhabi Court of Cassation of 11 December 2007; Case No. 458/Judicial Year 3, ruling of the Federal Court of Cassation of 26 July 2006; Case No. 1283/2010, ruling of the Abu Dhabi Court of Cassation of 11 October 2011; Case No. 17/1995, ruling of the Dubai Court of Cassation of 28 October 1995; Case No. 140/1996, ruling of the Dubai Court of Cassation of 15 December 1996; Case No. 167/2002, ruling of the Dubai Court of Cassation of 2 June 2002; Case No. 228/2007, ruling of the Dubai Court of Cassation of 24 February 2008; and Case No. 38/2009, ruling of the Dubai Court of Cassation of 4 April 2010, Case No. 491/Judicial Year 24, ruling of the Federal Supreme Court of 28 November 2004;

Nevertheless, the party requesting referral to arbitration shall expressly raise the defence that the current dispute is subject to arbitration[282], in a timely manner, unless otherwise waived by the parties, by express waiver or by way of implication[283].

This means that the UAE law recognizes the negative effect of an arbitration agreement under which the parties may not bring an action before the courts in respect of a dispute, which they have previously agreed to arbitrate. For that purpose, the UAE Courts have previously decided that (i) an arbitration agreement shall deem to be separate from, and not affected by any invalidity or cancellation of, the Container Contract[284]; and (ii) the arbitral tribunal will retain its own jurisdiction to resolve any issue in relation to its own jurisdiction[285]. However, this does not apply to all cases before the courts and suggest that the jurisdictional of the arbitral tribunal is limited to a certain extent.

Interestingly, the Federal Court of Cassation decided that Para 1 and 5 of Article 203 of the CPC show the negative effect of the arbitration agreement which basically precludes the competent court from having any jurisdiction over the dispute. The positive effect of an arbitration agreement is to transfer the jurisdiction from the courts to the arbitral tribunal. Therefore, the arbitral tribunal will have the power to determine the dispute. The UAE courts are precluded from interfering in the jurisdiction of the tribunal before the tribunal issues its award, subject to the court's supervision when the award comes for ratification or annulment[286]. This judgment clearly supports the application of the Competence-Competence doctrine.

However, in another case[287]the Abu Dhabi Court of Cassation stated that the law, and in particular Para 2 of Article 209 of the CPC, orders the arbitral tribunal to stay the arbitration proceedings if there is a preliminary issue arises that is outside the tribunal's authority and only courts may

Case No. 167/2002, ruling of the Dubai Court of Cassation of 2 June 2002; and Case No. 38/2009, ruling of the Dubai Court of Cassation of 4 April 2010).

[282] Case No. 17/1995, ruling of the Dubai Court of Cassation of 28 October 1995; Case No. 320/1995, ruling of the Dubai Court of Cassation of 14 July 1996; Case No. 140/1996, ruling of the Dubai Court of Cassation of 15 December 1996; Case No. 575/2003, ruling of the Dubai Court of Cassation of 20 June 2004; and Case No. 688/2012, ruling of the Dubai Court of Cassation of 12 March 2013.

[283] Case No. 185/2008, ruling of the Dubai Court of Cassation of 24 November 2008.

[284] Case No. 795/Judicial Year 4 (ruling of the Abu Dhabi Court of Cassation of 9 December 2010), and Case No. 164/2008 (ruling of the Dubai Court of Cassation of 10 October 2008).

[285] Case No. 108/Judicial Year 3 (ruling of the Federal Court of Cassation of 12 March 2009).

[286] Case No. 458/Judicial Year 3, ruling of the Federal Court of Cassation of 26 July 2006

[287] Case No 58/Judicial Year 1, judgment issued by Abu Dhabi Court of Cassation on 30 October 2007 (highlighted above).

determine a dispute on the invalidation of the Container Contract. This allows the courts to have exclusive jurisdiction on some matters which fall outside the authority of the tribunal.

Accordingly, the general rule seems to be that the Competence-Competence doctrine is recognized by the local courts in the UAE but subject to some conditions. However, under the law courts are required to refer the disputes to arbitration if so timely objected by the defendant. But, this does not preclude some exceptions were the court will find it proper to determine the dispute without referral to arbitration or when the dispute falls outside the jurisdiction of the arbitrators. These exceptions can be seen, to a certain extent, as grey areas which may allow courts to interfere in the arbitration proceedings. Therefore, further clarification may be needed by the legislator or, preferably by, the jurisprudence to draw the line between the jurisdiction of the tribunals and the local courts.

6.4 *The Draft Arbitration Law*

In an attempt to cope with the international standards and the need for arbitration development, the UAE has drafted a draft arbitration law (the "Draft") influenced by the UNCITRAL Model Law. Although it was communicated to different segments of people few years back, the Draft is not officially passed and, therefore, not yet in force. The Draft clearly recognizes, inter alia, the doctrines of severability[288] and Competence-Competence[289].

Further, to draw the line of judicial interference in the arbitration proceedings Para 1 of Article 9 of the Draft provides that: "The court shall disallow the case, which is the subject of an arbitration agreement, if the defendant objects before raising any substantive defence or request, unless the court finds that the agreement is void, invalid or not possibly operative."

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[288] Para 1 of Article 7 of the Draft provides that: "*1) The arbitration clause shall be separate from the other terms of the contract. The contract's nullity, recession, termination shall not affect the arbitration clause contained therein, if that clause is valid."*

[289] Para 2 of Article 7 of the Draft provides that: "*2) The arbitration proceedings shall not be suspended upon a challenge on the invalidation, recession or termination of the main contract and the arbitral tribunal shall be authorized to determine the validity or nullity of the main contract."* Further, Para 1 of Article 20 of the Draft states that: *"Before it finally decides on the merits, the Arbitral tribunal shall have the authority to rule on challenges that the tribunal lacks jurisdiction including those challenges that there is no arbitration agreement, the arbitrations agreement was elapsed, void, does not cover the subject matter of the dispute."*

This clearly shows that the UAE is on the right track in terms of modernizing its legislation to be in line with the international laws and widely recognized arbitration principles including the doctrines of severability and the Competence-Competence. However, if the law if passed the matter will be subject to the sole discretion of the judge in certain cases and the courts will be required to examine the cases which might be time consuming.

6.5 *The Recognition of the Severability and Competence-Competence Doctrines by Arbitration Institutions in the UAE*

The following UAE-based arbitration institutions rules have been examined in respect of their recognition of the severability and competence-competence doctrines:

(i) Dubai International Arbitration Center ("DIAC");
(ii) Dubai International Financial Center-London Court of International Arbitration ("DIFC-LCIA");
(iii) Sharjah International Commercial Arbitration Center ("CICAC"); and
(iv) Abu Dhabi Commercial Conciliation and Arbitration Center ("ADCCAC").

Upon examination of the arbitration rules of these institutions, it was found that:

(i) Under Article 6 of its arbitration rules, DIAC supports the two doctrines in question;
(ii) Under Articles 23 of its rules, DIFC-LCIA supports the two doctrines in question;
(iii) The rules of the CICAC do not expressly provide for the two doctrines in question; and
(iv) Under Articles 7 and 22 of its rules, ADCCAC supports both doctrines in question.

Therefore, outside courts, the doctrines of severability and Competence-Competence are recognized by most of the arbitration centres operating in the UAE[290].

[290] http://www.afridi-angell.com/items/limg/WAR_UAE-K.-S.-Ali-A.-Massey.pdf, accessed on 13 July 2014.

6.6 *Conclusion*

Both doctrines of severability and Competence-Competence are recognized in the UAE to a certain extent. This is evidenced by court judgments, jurisprudence and rules of the main arbitration institutions in the UAE. The application of the UAE courts of the doctrines of severability and Competence-Competence is unique. The courts kept recognizing the two principles however, in some cases the principles were disregarded giving top priority to the local law and public policy principles. The UAE approach is understood bearing in mind that it is a civil legal system. It is arguable that allowing the said principles to apply without any limitation may create some technical issues or even result in a safe harbour to parties who wish to circumvent the effective laws or agree on something that violates the UAE public policy.

That is why we have seen some jurists call for a revisit of the doctrine of severability in cases of illegality of the contract cause, the invalidity of the object, or incapacity of the contracting parties. This is without compromising the need and significant benefits of the doctrines of severability and Competence-Competence. Further, it remains challenging to any country not to harmonize its local laws with the international principles of arbitration. It was a positive step, when the UAE's legislator drafted the draft modern arbitration law based on the UNCITRAL Model Law. This significant step shall result in the UAE becoming more attractive in international trade and arbitration, however there might be some other improvements needed. Eventually, we are all waiting for the issuance of the UAE arbitration law however, in all events the practical application will be the major challenge and is yet to be tested.

CHAPTER 7

7. CONCLUSION AND RECOMMENDATIONS

7.1 *Conclusions*

For effective purposes, there was a need to introduce new global concepts, including the competence-competence and severability concepts, to tackle the issue of who decides the jurisdiction of the tribunal and make sure that the arbitration agreement is not ineffective.

Further, in order to keep arbitration attractive, it was important to rely on the doctrine of severability to maintain the arbitrator's jurisdiction and to void several risks to the process of arbitration. However, it was found that in some circumstances unfavorable results may arise when the severability doctrine is applied without limits. Accordingly, to guarantee arbitration effective there is a need to apply the doctrine of severability to give the arbitrators the proper tool to decide any jurisdictional challenge but that doctrine should be applied with some limits. Under the concept of severability certain defects in the Container Contract do not negatively affect the arbitration agreement. It allows the tribunal to rule without affecting its jurisdiction.

The doctrine of Competence-Competence constitutes the basis of modern arbitration which was created on the grounds of necessity to avoid any unnecessary stoppage or suspension to the arbitral proceedings. Under such doctrine the arbitrators are allowed to proceed with arbitration when the arbitration agreement itself is being questioned or challenged by the disputant parties. However, the tribunal's decision remains subject to revision by the courts.

Further, the domestic courts generally support reinforcing party autonomy. However, close examination of the certain conventions, legislations and international arbitration rules shows that there is no specific definition for the doctrines of severability or Competence-Competence, although they have been widely recognized and acknowledged.

Further, upon examination of certain cases and local institutional arbitration rules, both doctrines of severability and Competence-Competence are generally recognized in the UAE. However, the application of the two doctrines by the UAE courts is unique. The UAE courts may disregard the

doctrines in case of genuine challenge that the arbitration agreement violates the mandatory rules of the local law or contradicts with the UAE public policy. It is arguable that allowing the said principles to apply without limits may create some technical issues or even will result in a safe harbour to parties who wish to circumvent the effective laws or agree on something that violates the UAE public policy.

It is challenging to any country not to harmonize its local laws according to the international principles of arbitration as the significant benefits of the doctrines of severability and Competence-Competence are undeniable. However, there are always some other factors to be considered including public policy matters. Any challenge against the tribunal's jurisdiction shall be determined initially by the tribunal itself provided that the tribunal's determination is not final and is subject to variation or cancellation by the court.

The benefit of empowering the arbitral tribunal, under the Competence-Competence doctrine, with all necessary tools to determine all challenges in relation to the arbitrate dispute is very essential. Nevertheless, it is not logically accepted for a party to be forced to participate in the arbitral proceedings without having agreed in advance on arbitration. On the other hand, the court support is always needed but shall not be regarded as an open door for unnecessary judicial intervention in the process of arbitration.

7.2 *Recommendations*

We believe there is no short answer to the question of how the doctrines in question should be applied in a specific country. Each country has to consider several issues including its legal framework, the local laws and public policy matters. In the UAE, we think, the principles need to be applied in all cases except when there is a solid challenge to the basis of the arbitration such as when there are valid allegations that the party did not agree on the arbitration agreement.

Therefore, we recommend forming an independent body, which can be in the form of a judicial committee as an independent circuit in courts or linked with the technical office of the Minister of Justice or the Chairman of the court, (the Committee"). The role of this Committee shall be to facilitate the determination of cases relating to arbitration including deciding on matters which fall

outside the scope of the arbitral tribunal or challenges that may render the arbitration agreement invalid. That Committee shall be entrusted with the needed powers to rule on challenges that cannot be resolved by the doctrines of severability and competence-competence, such as a claim that the contract was not signed by the defendant. However, the scope of the Committee shall be very clear to support the parties' autonomy and that the Committee shall not exceed its limits or the essence of its formation.

In its ruling the Committee shall review the documents provided on very top level basis and not to decide on the merits of the case. If the Committee finds there is some reason that prevents the arbitration proceedings, as if the arbitration agreement was never formed or the case is not arbitrable, the case shall forthwith be referred to the competent court for determination. However, in case of doubt or if nothing materializes in relation to the arbitrability of the case, the parties shall be referred to arbitration. The decision of the Committee shall be final and issued within a very limited period of time such as two months. The Committee's determinations shall be treated by the local courts as a judicial final judgment.

For saving the parties rights we, further, recommend that filing the case with the Committee shall (i) affect the time bar to suspend; and (ii) not prevent the parties form recoursing to arbitration or to continuing any pending arbitral proceedings (if any). Moreover, any active participation or attendance before the Committee shall not be regarded by courts as waiver of right to proceed with arbitration.

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10. Dubai Law No. 26 of 2007 as amended.
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