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Abstract

This Note provides a comparison of the doctrines of separability and compétence de la compétence and the status of these doctrines under French, English and U.S. law. Part I defines the operation of these two doctrines, discusses their interrelationship, and reviews their status under the arbitration rules of international arbitral organizations. Part II reviews the private international law of the United States, England and France with respect to these doctrines. Part III concludes that with respect to the doctrines of separability and compétence de la compétence, French law best furthers the goals of international arbitration by utilizing both doctrines to provide the more liberal forum in which parties may arbitrate.

ARBITRATION UNDER PRIVATE INTERNATIONAL LAW: THE DOCTRINES OF SEPARABILITY AND COMPÉTENCE DE LA COMPÉTENCE*

INTRODUCTION

Arbitration is a private and voluntary dispute resolution process that invests in private individuals the authority to hear a dispute, simultaneously divesting courts of such authority.[1] The arbitration process is contractual in nature[2] and as such the autonomy of the parties' will is extensive.[3] The intent of the parties is a fundamental element of arbitration.[4] The embodiment of the parties' intentions in an arbitration clause is essential for the existence of arbitration proceedings and is a source of procedural and substantive arbitration law.[5] The expression of the parties' intent in the arbitration clause renders the arbitration process adaptable to varying circumstances.[6] Parties may, for ex-

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1. JEAN ROBERT & THOMAS E. CARBONNEAU, THE FRENCH LAW OF ARBITRATION pt. I, ch. 1 at 1 (1983) [hereinafter ROBERT & CARBONNEAU]. An agreement to arbitrate is in effect a choice-of-forum clause. *Id.* The forum for dispute resolution is mandated under the arbitration agreement, in which the parties have explicitly conferred jurisdiction on the arbitral tribunal. *See id.* pt. I, ch. 1 at 1-2 (stating that "just as one would substitute the competence of one court for that of another court, the agreement, in effect, determines which adjudicatory body has jurisdiction to entertain the dispute" (citation omitted)); *see also* Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992] 1 Lloyd's Rep. 81, 86 (Q.B.) (stating that the "foundation of an arbitrator's authority is the arbitration agreement").

2. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 2.

3. *Id.* U.S. courts have been deferential to the will of the parties as a matter of public policy where parties have selected arbitration as their dispute resolution forum. *See, e.g.*, Volt Info. Sciences v. Leland Stanford, Jr. Univ., 489 U.S. 468 (1989) (showing deference afforded to intent of parties in Court's assessment of applicability of state or federal arbitration law); Mitsubishi Motors v. Soler-Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1985) (stating that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"). Under French arbitration law, the "autonomy of the will" principle has been broadened to allow the parties to select rules of procedure. RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 126-27 (Thomas E. Carbonneau ed., 1984) [hereinafter CARBONNEAU].

4. MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW 34 (1990). The intent of the parties is the "fundamental element of arbitration, whether it is treated as being contractual (arising from an agreement between the parties) or procedural (i.e. the means through which a legal system obtains a decision)." *Id.*

5. *Id.*

6. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 2.

ample, draft a broad or narrow arbitration clause, effectively determining which issues are arbitrable.[7]

Parties may select arbitration in the hope of providing a quicker, less expensive, and less formal dispute resolution process[8] administered by persons with special technical knowledge.[9] Alternatively, parties may select arbitration for a number of other reasons: to utilize a different set of rules to resolve their disputes,[10] to ensure the continuity of good relations between the parties,[11] or to resolve a dispute that is unique and therefore not capable of adjudication by a court.[12]

The expanding global economy has increased the importance of arbitration in the international commercial context.[13]

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7. *See* Jennifer Bagwell, *Enforcement of Arbitration Agreements: The Severability Doctrine in the International Arena—Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469 (9th Cir. 1991)*, 22 GA. J. INT'L & COMP. L. 487, 500-501 (1992) (stating that "[i]f a party desires that all possible disputes be arbitrated . . . a 'broad' arbitration clause should be included . . . [i]f a party merely intends for certain disputes such as contract terms or performance to be arbitrated, a 'narrow' arbitration clause should be included in the contract instead").

8. *See* RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 10 (1985) (Trans. of ARBITRAGE DANS LE COMMERCE INTERNATIONAL) (discussing reasons parties choose arbitral forum); *see also*, Bagwell, *supra* note 7, at 491 (stating that "arbitration clauses have become an integral part of international contracts because of the speed, flexibility, economy, and neutrality associated with arbitration"). *But see* Henry P. de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982).

> The advantages attributed to domestic arbitration—speed, economy, and informality—are reversed in international disputes. Delays increase because of distance and difficulties of communication and language; expense is greater because of administration and arbitrators' fees; costs to the parties are higher because of the need for added counsel, translators, interpreters, and transportation. Uncertainties as to foreign procedural systems and interim measures add to the complexity of the procedure.

Id. at 61 (citations omitted); *see also* The Hon. Mr. Justice Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164-65 (1980) (discussing lawyers' skepticism regarding apparent advantages of the arbitral process); Francis J. Higgins et al., *Pitfalls in International Commercial Arbitration*, 35 BUS. LAW. 1035, 1036 (1980) (stating that "despite its current popularity . . . international commercial arbitration has generated a number of serious problems").

9. DAVID, *supra* note 8, at 10.

10. *Id.* Parties, for example, may wish to utilize rules relating to commercial law of an international nature. *Id.*

11. *Id.*

12. *Id.* This situation may occur, for example, where the arbitrator is called upon to vary contract terms or fill in terms in an incomplete contract. *Id.*

13. Bagwell, *supra* note 7, at 491. The use of arbitration agreements in international commercial contracts promotes international business and trade. *See id.* at 504 (stating that "[e]nforcing arbitration agreements benefits the international business

Arbitration clauses are now routinely included in international commercial contracts.[14] A party to such contract may, however, subsequently attempt to avoid arbitration.[15] The recalcitrant party may initiate court proceedings in spite of the arbitration agreement, or petition the court to declare the arbitration agreement void, or challenge the arbitrator's jurisdiction.[16] Two related doctrines have developed that maintain the integrity of the arbitration process in the face of these and other challenges:[17] the doctrines of separability[18] (or severability) of the arbitration clause, and the doctrine of compétence de la compétence.[19]

This Note provides a comparison of the doctrines of separability and compétence de la compétence and the status of these doctrines under French, English and U.S. law. Part I defines the operation of these two doctrines, discusses their interrelationship, and reviews their status under the arbitration rules of international arbitral organizations. Part II reviews the private inter-

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community by allowing swift and efficient dispute resolution in the manner chosen by the parties. Additionally, the international trade community has long favored arbitration because of its 'simplicity, informality, and expedition.'" (citation omitted)).

14. *Id.*

15. DR. JULIAN D.M. LEW [Partner in S.J. Berwin & Co., London], CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 74 (1986).

16. *Id.* at 74-76.

17. *See id.* (stating that there may be various challenges to arbitration, relating to questions of validity of main contract or arbitration agreement itself). Challenges to arbitration have raised two principal issues: the questions of "who should decide the validity of the main contract, i.e., national court or arbitrators, and whether the arbitration agreement stands [or] falls with the main contract." *Id.* at 76. The increase in the use of arbitration agreements and the development of a body of rules in the field of international commercial arbitration have caused the doctrine of separability to develop under the laws of many countries. *Id.* at 74-76; *see also* STEPHEN M. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 3-4 (1987) (discussing rationale underlying doctrine of separability). Separability has been justified on the ground that, in its absence, parties could easily avoid obligations to arbitrate. *See id.*

> [I]f one party could . . . deprive an arbitral tribunal of the competence to rule upon that allegation [the validity of the contract], upon its constitution and jurisdiction and upon the merits of the dispute, then it would always be open to a party to an agreement containing an arbitration clause to vitiate its arbitral obligation by the simple expedient of declaring the agreement void.

Id. at 4.

18. *See* SCHWEBEL, *supra* note 17, at 2-3 (defining separability as doctrine of autonomy of arbitration agreement pursuant to which arbitrator may decide disputes arising under arbitration agreement even where initial validity or subsequent validity of arbitration agreement is at issue).

19. *See id.*, at 2-3 (defining compétence de la compétence as theory that arbitrator is judge of his own jurisdiction); *see* DAVID, *supra* note 8, at 192 (discussing distinction between doctrines of separability and compétence de la compétence).

national law of the United States, England and France with respect to these doctrines. Part III concludes that with respect to the doctrines of separability and compétence de la compétence, French law best furthers the goals of international arbitration by utilizing both doctrines to provide the more liberal forum in which parties may arbitrate.

I. *THE DOCTRINES OF SEPARABILITY AND COMPÉTENCE DE LA COMPÉTENCE AND THEIR STATUS UNDER THE ARBITRATION RULES OF UNCITRAL AND THE ICC*

The doctrines of separability and compétence de la compétence are closely related, yet distinguishable.[20] Both doctrines are well established in the sphere of international arbitration law.[21] The doctrines of separability and compétence de la compétence have been explicitly mandated under the rules of two well-respected international arbitral organizations, the Court of Arbitration of the International Chamber of Commerce ("ICC")[22] and the United Nations Commission on International

20. *See* DAVID, *supra* note 8, at 192 (stating that there is often confusion between doctrines of separability and compétence de la compétence). Separability is concerned with contract interpretation and the question of whether the arbitrators may determine its existence or validity. *Id.* Compétence de la compétence is concerned with the jurisdictional power of the arbitrator, versus that of the court, to decide whether there is a valid arbitration agreement. *Id.*

21. *See* SCHWEBEL, *supra* note 17, at 10 (describing compétence de la compétence doctrine as "axiomatic in international law"); *id.* at 59 (stating that "the principle of the severability of the arbitration agreement . . . is supported by the weight of international arbitral codification and cases . . . ."); *id.* at 60 (quoting Professor Sanders' [Professor Pieter Sanders, legal scholar from The Netherlands] conclusion that "[s]eparability has become, like the competence of the arbitrator to rule upon his competence, a truly international rule of law"); *see also* LEW, *supra* note 15, at 77 (stating that "[t]he doctrine [of separability] is today also recognised in most of the international arbitration rules").

22. *See* EARNEST J. COHN ET AL., HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE 19 (1977) (discussing ICC arbitration). The International Chamber of Commerce ("ICC"), formed for the purpose of "unit[ing] businessmen," is an international arbitration institution that has been headquartered in Paris since its inception in 1919. *Id.* The International Court of Arbitration was thereafter established as the arbitral body of the ICC. *Id.* Proceedings pursuant to ICC arbitration rules take place internationally. *Id.* The ICC does not itself conduct arbitral proceedings. James E. Meason & Alison G. Smith, *Current Issues in International Commercial Arbitration: Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 J. INT'L L. BUS. 24, 34 (1991). Instead, it supervises the cases presided over by its arbitrators, who are chosen either pursuant to the parties' agreement or by ICC appointment. *Id.* The ICC Court of Arbitration [hereinafter ICC Court] controls the arbitrations held under its auspices. *Id.* In its supervisory capacity, it reviews requests for arbitration,

Trade Law ("UNCITRAL").[23] Both organizations were established for the purpose of facilitating international trade.[24]

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oversees the arbitration proceedings, and reviews the arbitral award. *Id.* The ICC is "the dominant general purpose institution . . . in the field of international commercial arbitration." *Id.* (quoting J. PAULSSON, ARBITRATION UNDER THE RULES OF THE INTERNATIONAL CHAMBER OF COMMERCE, IN RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 236 (T. Carbonneau, ed. 1984)). The ICC, in addition to supervising arbitrations under its own arbitration rules, has, on rare occasions, appointed arbitrators to employ UNCITRAL arbitration rules without supervision. *Id.* at 34.

23. *See* HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 4 (1989) (discussing UNCITRAL arbitration). The United Nations Commission on International Trade Law [hereinafter UNCITRAL] is a special commission which was created in 1966 by the United Nations General Assembly "in order to harmonize and unify international trade law." *Id.* UNCITRAL has promulgated several sets of rules in the field of commercial dispute resolution in response to its recognition of the value of arbitration in the context of international trade law. *Id.* at 5. Arbitration rules promulgated by UNCITRAL were adopted by the United Nations General Assembly on December 15, 1976. *Report on the Work of its Ninth Session*, U.N. Commission on International Trade Law, 31 U.N. GAOR, 9th Sess., Supp. No. 17, at 34-50, U.N. Doc. A/31/17 (1976) [hereinafter UNCITRAL RULES]; CARBONNEAU, *supra* note 3, at 287 n.5. The promulgation of UNCITRAL arbitration rules was followed by the formulation of UNCITRAL Conciliation Rules, *Report on the Work of its 13th Session*, U.N. Commission on International Trade Law, 35 U.N. GAOR Supp. No. 17, at 12-38, U.N. Doc. A/35/17 (1980), and the UNCITRAL Model Law, which provides a statutory scheme for arbitration. *Report on the Work of its Eighteenth Session*, U.N. Commission on International Trade Law, 40 U.N. GAOR, 18th Sess., Supp. No. 17, at 81-93, U.N. Doc. A/40/17 Ann. I (1985) [hereinafter Model Law]; *Foreword* to HOLTZMANN & NEUHAUS, *supra*. The Model Law was drafted in response to the lack of uniformity in national arbitration law covering international commercial arbitration, and was an attempt to provide for the harmonization of national arbitration law. DEPARTMENT OF TRADE AND INDUSTRY, A NEW ARBITRATION ACT? THE RESPONSE OF THE DEPARTMENTAL ADVISORY COMMITTEE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 2 (Eng. 1989) [hereinafter DEPARTMENT OF TRADE, ENGLAND].

24. *See* Meason & Smith, *supra* note 22, at 33 (stating ICC was "formed to promote international commerce"); *see also* HOLTZMANN & NEUHAUS, *supra* note 23, at 4 (stating UNCITRAL was created to "unify international trade law").

One consideration that may affect the parties' choice between UNCITRAL Rules and ICC Arbitration Rules is whether the parties and their counsel want an "ad hoc" arbitration (parties agree on a set of rules when negotiating contract) or "institutional" arbitration (arbitration administered under auspices of arbitration organization [such as ICC], pursuant to the arbitration rules of the institution). James M. Rhodes & Lisa Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANSNAT'L L. 19, 22 (1984). Drafting an agreement which provides for ad hoc arbitration rules may be a lengthy and difficult process. *Id.* This difficulty, however, has been alleviated by the promulgation of the UNCITRAL Rules which may replace individually-drafted rules in ad hoc arbitrations. *Id.* UNCITRAL Rules, in addition to their use in ad hoc arbitration, may also be employed in institutional arbitrations by the specification of such use in the parties' agreement. *Id.* at 23. Institutional arbitration under its own rules is generally advantageous. ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTER-

A. *Methods of Dispute Resolution in Commerce and Trade*

Parties to international commercial contracts may utilize one of several methods of dispute resolution. The three principal methods used to resolve disputes in the spheres of commerce and trade are litigation (judicial proceedings), conciliation (mediation), and arbitration (settlement of disputes by third party pursuant to agreement of the parties).[25] The use of arbitration to resolve disputes is several centuries old.[26] Arbitration resembles litigation in its adversarial nature and in the binding nature of arbitral awards.[27] Arbitration differs from litigation, however, in that it is voluntary, not compulsory, and requires prior agreement between the parties.[28]

Arbitration proceedings involve the parties to the arbitration agreement as well as one or more arbitrators.[29] Arbitrators may be lawyers (trained in civil or common law), professors of law, judges, diplomats, or businessmen.[30] An arbitration clause

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NATIONAL COMMERCIAL ARBITRATION 113-14 (1986). Incorporating the arbitration rules of the institution to which the arbitration will be referred may be preferable as such rules are designed to cover any contingencies arising during the institutional arbitration. *Id.* at 114. Employing UNCITRAL arbitration rules in an institutional arbitration is a satisfactory substitution for the institution's own rules, albeit one which may require the claimant to use his own efforts to a greater extend at the start of the proceedings. *Id.* It is not recommended that parties employ institutional arbitration rules in an ad hoc arbitration, however, as such rules generally function best in their institutional setting. *Id.* at 115.

25. ISAAK I. DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS, 3 (1986). Arbitration has been defined, at both common law and civil law, as a "mode of resolving disputes by one or more third persons who derive their powers from agreement of the parties and whose decision is binding upon them." de Vries, *supra* note 8, at 42.

26. DORE, *supra* note 25, at 43. Arbitration dates back to Greek, Roman and biblical times. *Id.* Arbitration was used in ancient Persia, China, Nepal, Japan and India. *Id.* Arbitration later developed in mercantile countries (e.g., England and Holland) and in other European countries such as France, Scotland and Denmark. *Id.*

27. *Id.* at 44.

28. *Id.*

29. *See id.* at 43 (stating that "[a]rbitration is the settlement of a dispute by a third party, the arbitrator or arbitrators, after the parties have agreed to submit their dispute to arbitration"). Parties to an arbitration agreement may appoint an arbitral tribunal consisting of a sole arbitrator, two or three arbitrators, or a committee of arbitrators. *See, e.g.*, HALSBURY'S LAWS OF ENGLAND ¶ 655 (4th ed. reissue 1991) (stating that under English arbitration law "[i]t is open to the parties to an arbitration agreement to agree to whatever form of tribunal, and to appoint whomever they want, to arbitrate on any dispute").

30. de Vries, *supra* note 8, at 70. Arbitrators participating in international commercial arbitration may come from various backgrounds. *See id.* (stating that

in an international contract may contain provisions delineating the arbitrable issues, the governing law, the situs of arbitration, the procedures by which arbitrators are appointed and the number of arbitrators, the language to be used in arbitral proceedings, and the applicable time limits.[31] Arbitration proceedings, though less formal than litigation[32] employ a mode of operation that is similar to court proceedings in that each party uses argument and evidence to set forth his case.[33] An arbitral tribunal, however, has greater freedom concerning the taking of testimony and evidence than does a court.[34] Parties to arbitration proceedings may choose the degree to which formal procedural rules will control their proceedings and thus define the procedural context for the resolution of their disputes.[35] There is often limited discovery of parties' relevant documents in arbitral proceedings.[36] In addition to such limited discovery, the rules of evidence are not strictly followed in the arbitral setting.[37] Fur-

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"[a]rbitrators in international proceedings necessarily reflect their own background, experience, and procedural habits").

31. *See* de Vries, *supra* note 8, at 65 n.89 (discussing items considered in negotiating arbitration clause in international licensing agreements).

32. DORE, *supra* note 25, at 44.

33. *Id.* at 43.

34. *Id.* at 44. *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 447-3, ICC RULES OF CONCILIATION AND ARBITRATION, at 23 (as amended Jan. 1, 1988) [hereinafter ICC RULES]. The ICC Rules contain a broadly-worded procedural clause, which provides that:

> The arbitrator shall proceed within as short a time as possible to establish the facts of the case by all appropriate means. After study of the written submissions of the parties and of all documents relied upon, the arbitrator shall hear the parties together in person if one of them so requests; and failing such a request he may of his own motion decide to hear them.

Id.; UNCITRAL RULES, *supra* note 23, at 43. The UNCITRAL Rules similarly contain a broadly-worded clause relating to the production of evidence, providing that "[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine . . . [e]ach party shall have the burden of proving the facts relied on to support his claim or defence." *Id.*

35. Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATHOLIC U. L. REV. 591, 593 (1988).

36. Eldon H. Crowell & Charles Pou, Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183, 232 (1990); *see* John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 965 (1988) (stating that "[a]lthough no legal rule necessitates that discovery must be restricted in arbitration proceedings, it must at least be recognized that discovery procedures are underdeveloped and informal in the arbitration context").

37. Patterson, *supra* note 35, at 593; *see* Crowell & Pou, Jr., *supra* note 36, at 232

ther, in the arbitral setting, direct testimony may be given by written submission, and the evidentiary submissions may be limited to cross-examination predicated upon such written testimony.[38] The flexibility of this system permits arbitration to progress with greater speed than court proceedings.[39] The arbitration process has given rise to two related doctrines, the doctrines of separability and compétence de la compétence, which help to maintain the integrity of the arbitration agreement in the face of a challenge by a party wishing to avoid arbitration.[40]

B. *The Doctrines of Separability and Compétence de la Compétence and Their Interrelationship*

While the separability doctrine provides for the autonomy of the arbitration clause,[41] the compétence de la compétence doctrine provides that the arbitrator has the competence to judge his own jurisdiction.[42] The separability doctrine created a need for the arbitrator to have jurisdiction to determine the validity of the main contract as well as the arbitration agreement.[43] Compétence de la compétence is a corollary to the doctrine of separability.[44]

1. Separability Doctrine

The doctrine of separability, or autonomy, of the arbitration clause provides that an arbitration clause embedded in a contract is considered separate from the main contract.[45] The arbi-

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(stating that "discovery [under arbitral proceedings] is often curtailed and the hearing itself can be simpler than a judicial hearing employing all the rules of evidence").

38. Patterson, *supra* note 35, at 593.

39. *Id.*

40. *See supra* notes 15-19 and accompanying text (discussing rationale underlying doctrines).

41. *See supra* note 18 and accompanying text (defining separability doctrine).

42. *See supra* note 19 and accompanying text (defining compétence de la compétence doctrine).

43. *See* ROBERT & CARBONNEAU, *supra* note 1, pt. II, ch. 2 at 26-27 (discussing relationship between doctrines of compétence de la compétence and separability).

44. ROBERT & CARBONNEAU, *supra* note 1, pt. II, ch. 2 at 27.

45. Bagwell, *supra* note 7, at 500. The "logical difficulty [with doctrine of separability] is summed up in the proposition Ex nihilo nil fit [from nothing nothing comes]." Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992] 1 Lloyd's Rep. 81, 85 (Q.B.). According to Stephen Schwebel [Vice-President and Judge, International Court of Justice] "[i]n logic, the . . . argument [that the arbitrator can derive no rights from an arbitration clause contained in a void or voidable contract] is plausible. But in law it has been overcome by presumptions and by practice. It has been overcome by necessity.

tration clause and the main contract comprise two separate sets of contractual relations.[46] Where a dispute arises concerning the initial validity or continued existence of the main contract, the arbitration clause, being independent, continues to be valid and binding on the parties even if the main contract is void.[47] The doctrine of separability has been justified on four theoretical grounds: that it conforms to the parties' intentions, that it furthers the integrity of the arbitral process, that there is a legal presumption of the existence of two agreements, and that courts usually review only the arbitral award, not the merits, of the dispute.[48]

And it has been overcome by the essence of the arbitral process." SCHWEBEL, *supra* note 17, at 2.

46. Black Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg AG, [1981] 2 Lloyd's Rep. 446, 455 (Q.B.). The *Black Clawson* Court clarified the relationship between the arbitration clause and the main contract:

> [T]here are not one, but two, sets of contractual relations which govern the arbitration of disputes under a substantive contract. . . . First, there is the contract to submit future disputes to arbitration. This comes into existence at the same time as the substantive agreement of which it forms part. Prima facie it will run for the full duration of the substantive agreement, and will then survive for as long as any disputes remain unresolved. Second, there are one or more individual sets of bilateral contractual obligations which are called into existence as and when one party asserts against the other a claim falling within the scope of the initial promise to arbitrate, which they have not been able to settle.

Id.

47. *See* SCHWEBEL, *supra* note 17, at 2-3 (stating that doctrine of separability gives arbitral tribunal power to decide "disputes arising out of the agreement . . . even where those disputes engage the initial or continuing validity of that agreement"). One court has described the doctrine as a method of guaranteeing the integrity of the arbitration clause in spite of the invalidity, rescission or termination or discharge of the contract. *Harbour Assurance*, [1992] 1 Lloyd's Rep. at 81.

48. SCHWEBEL, *supra* note 17, at 3-6. The four theoretical bases for the doctrine of separability provide: (1) that parties generally intend any dispute arising out of or relating to an arbitration agreement to be settled by arbitration. They generally do not intend to exclude disputes concerning the validity of the container contract, and the parties' intentions are controlling in arbitration agreements; (2) the effectiveness of arbitration would be compromised if, by merely alleging the invalidity of the underlying contract, a party could avoid its contractual obligation; (3) two agreements exist as a matter of legal presumption—there are actually two agreements contained in a contract with an arbitration clause and "the arbitral twin . . . survives any birth defect or acquired disability of the principal agreement"; and (4) courts would be forced to rule upon the merits of a dispute, contrary to the usual practice (when national law governs an arbitration) of affording judicial review of the award. *Id.*

2. Compétence de la Compétence Doctrine

The compétence de la compétence doctrine provides that the arbitral tribunal has the competence to be judge of its own jurisdiction.[49] Under the compétence de la compétence doctrine, the arbitrator or arbitrators may determine the existence of the arbitration clause,[50] the validity of the arbitration clause,[51] or the scope of the arbitration clause,[52] and parties need not invoke the jurisdiction of a national court to determine these issues.[53] The compétence de la compétence doctrine has been justified on two grounds: first, there is a rebuttable presumption that such jurisdictional power has been conferred by the will of the parties when they entered into an arbitration agreement, and second, the compétence de la compétence power is inherent in all judicial bodies and essential to their ability to function.[54]

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49. SCHWEBEL, *supra* note 17, at 2; *see* IBRAHIM F.I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS JURISDICTION 25-26 (Martinus Nijhoff 1965) (discussing compétence de la compétence doctrine with respect to International Court of Justice).

50. Alan Redfern, *The Jurisdiction of an International Commercial Arbitrator*, 3 J. INT'L ARB. 19, 30 (Mar. 1986). A party may argue that he was not in fact a party to the alleged contract, or that although he was a party to the contract, the contract did not provide for arbitration. *Id.*

51. SCHWEBEL, *supra* note 17, at 11. A jurisdictional challenge may take the form of an argument that the arbitration clause is null and void, inoperative, or cannot be performed; a party may alternatively argue that the subject matter is non-arbitrable. LEW, *supra* note 15, at 75.

52. DAVID, *supra* note 8, at 192.

53. *See* Redfern, *supra* note 50 (discussing jurisdiction in international commercial arbitration). A challenge to the jurisdiction of the arbitral panel may take several forms. *Id.* at 31-32. A party may challenge jurisdiction before a national court, seeking an order halting the arbitration proceeding. *Id.* at 32. Whether or not this remedy is available is dependent on the law of the situs of the arbitration. *Id.* Alternatively, a jurisdictional challenge may be made to the arbitral panel during the arbitral proceedings. *Id.* In most instances, the panel will then issue an interim award which may be challenged in the national courts, a procedural referred to as "concurrent control". *Id.*

54. SHIHATA, *supra* note 49, at 25-26. Under the first theory, parties are assumed to have bestowed the power to determine their own jurisdictional competence upon the arbitrators. *Id.*

> It follows that such a power could not be exercised by the tribunal if the parties stipulated to reserve it to themselves or to another organ. The whole question is then reduced, in this view, to the interpretation of the silence of the parties in accordance with a rebuttable presumption that favors attributing the *compétence de la compétence* to the tribunal.

Id. The second theory is espoused by modern writers and views compétence de la compétence as a power both "inherent in every judicial organ, and . . . independent from the will of the parties." *Id.* Under this view, the arbitrator's jurisdictional competence

3. The Interrelation of the Doctrines

Under the separability doctrine, the arbitration clause is severed so that a question of the main contract's validity or existence may be brought to arbitration.[55] The compétence de la compétence doctrine, however, is concerned with the arbitrator's power to determine his own jurisdiction over a dispute.[56] The compétence de la compétence doctrine is considered a corollary to the separability doctrine.[57] The separability doctrine, which espouses the autonomy of the arbitration agreement, creates a need for the arbitral tribunal to have the jurisdictional competence to rule not only on the main contract's validity but on the validity of the arbitration agreement.[58] Under this analysis, the competence of the arbitral tribunal to rule on jurisdictional challenges is a corollary to the doctrine of separability establishing the autonomous nature of the arbitration agreement.[59]

Both the doctrine of compétence de la compétence and separability are well established under international arbitration

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is a power "necessary for the mere functioning of the tribunal." *Id.*; *see* Redfern, *supra* note 50, at 27 (stating compétence de la compétence doctrine widely accepted).

55. *See* SCHWEBEL, *supra* note 17, at 2-3 (stating that doctrine of separability gives arbitral tribunal power to decide "disputes arising out of the agreement . . . even where those disputes engage the initial or continuing validity of that agreement").

56. *See* SCHWEBEL, *supra* note 17, at 2 (stating under compétence de la compétence doctrine "a tribunal is the judge of its own jurisdiction").

57. ROBERT & CARBONNEAU, *supra* note 1, pt. II, ch. 2 at 27. There is often confusion between the doctrines of separability and compétence de la compétence. DAVID, *supra* note 8, at 192. The two doctrines are related, yet distinct. *Id.* Separability is concerned with contract interpretation and the question of whether the arbitrators may decide its existence or validity. *Id.* Compétence de la compétence is concerned with the jurisdictional power of the arbitrator, versus that of the court, to decide whether there is a valid arbitration agreement. *Id.*

58. *See* ROBERT & CARBONNEAU, *supra* note 1, pt. II, ch. 2 at 26 (discussing relationship between doctrines of compétence de la compétence and separability).

59. *Id.* pt. II, ch. 2 at 27. The proposition has also been asserted in the reverse. Under this theory, since compétence de la compétence is an inherent power of the arbitral tribunal, it follows that the tribunal has the competence to judge the validity of the contract which initially created its authority.

> If it is inherent in the arbitral (and judicial) process that a tribunal is the judge of its own jurisdiction, that it has compétence de la compétence it is no less inherent in that process that an arbitral tribunal shall have the competence to pass upon disputes arising out of the agreement which is the immediate source of the tribunal's creation even where those disputes engage the initial or continuing validity of that agreement.

SCHWEBEL, *supra* note 17, at 2-3 (citation omitted).

law,[60] and are supported under the procedural rules of two highly respected international arbitral organizations, UNCITRAL and the ICC.[61] In international commercial contracts, the intent of the parties, as embodied in the arbitration clause, usually determines the procedural arbitration rules to be applied.[62] Parties may choose national procedural arbitration rules or those that are non-national in nature, such as ICC Rules of Conciliation and Arbitration ("ICC Rules")[63] or UNCITRAL arbitration rules ("UNCITRAL Rules").[64]

C. *The Arbitration Rules of UNCITRAL and the ICC*

It is widely accepted that the arbitral tribunal's power to investigate its own jurisdiction (compétence de la compétence) is a power inherent in the appointment of the tribunal.[65] This

60. *See supra* note 21 and accompanying text (discussing acceptance of doctrines of separability and compétence de la compétence under international arbitration law).

61. UNCITRAL RULES, *supra* note 23, at 42-43; ICC RULES, *supra* note 34, at 19; *see* ROBERT & CARBONNEAU, *supra* note 1, App. B-22 (citing UNCITRAL and ICC regulations as most widely-recognized arbitral rules).

62. *See* CARBONNEAU, *supra* note 3, at 126-27 (stating that principle of "autonomy of the will" has been extended to procedural matters). As a caveat, however, even where parties choose non-national arbitration rules, their choice may be circumscribed by the arbitration law of the place where arbitration takes place. *See* Redfern, *supra* note 50, at 29 (stating that "it may be doubted whether the parties to an arbitration agreement may validly agree on rules which are contrary to 'the law of the place of the country where the arbitration takes place'"). International commercial arbitration involves a complex legal system. REDFERN & HUNTER, *supra* note 24, at 1. Three different sets of legal rules may apply to even a simple international commercial arbitration: the law governing the proceedings (usually national law), the law governing the substantive issues involved in the case, and the law governing recognition and enforcement of the award. REDFERN & HUNTER, *supra* note 24, at 1-2. In most cases, arbitration is held before a "national" tribunal. Ole Lando, *The Law Applicable to the Merits of the Dispute in* 2(2) ARB. INT'L 104 (Apr. 1986). The proceedings are held before an arbitration institution's tribunal and governed by its rules, which are supplemented by national arbitration law and civil procedure. Lando, *supra*, at 104. In other instances, "non-national" arbitration may be selected. Lando, *supra*, at 104. Here,

> [p]arties who have neither chosen the seat of arbitration nor the arbitrator agree to entrust an international body such as the Court of Arbitration of the International Chamber of Commerce with the choice of the arbitrator or the chairman of the tribunal. The institution or the arbitrator selects the seat of the tribunal. The tribunal follows the arbitration rules of the institution and does not apply the rules of procedure of the place of arbitration.

Id. at 104-05. Parties may decide to combine elements of "national" and "non-national" arbitration in varying degrees. *Id.* at 104.

63. ICC RULES, *supra* note 34, at 12-34.

64. UNCITRAL RULES, *supra* note 23, at 34-50.

65. Redfern, *supra* note 50, at 27. "It is generally accepted that an arbitral tribunal

power is expressly provided under the procedural arbitration rules of both UNCITRAL[66] and the ICC.[67] Both UNCITRAL Rules and ICC Rules also expressly adopt the separability doctrine.[68]

UNCITRAL Rules are accepted internationally and used under the auspices of over thirty arbitral institutions.[69] A United Nations General Assembly resolution characterized the UNCITRAL Rules as acceptable in nations with varying social, legal and economic institutions.[70] The UNCITRAL Rules were prepared in consultation with international commercial arbitration centers and arbitral institutions.[71] ICC Rules are widely used[72] and, like UNCITRAL Rules, they are international and neutral in nature.[73] This appeals to parties who may be unwilling to en-

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has power to investigate its own jurisdiction." *Id.*; *see* SHIHATA, *supra* note 49, at 25-26 (discussing theoretical justifications for compétence de la compétence doctrine).

66. UNCITRAL RULES, *supra* note 23, at 42-43; *see* Redfern, *supra* note 50, at 27-28.

67. ICC RULES, *supra* note 34, at 19.

68. ICC RULES, *supra* note 34, at 19; UNCITRAL RULES, *supra* note 23, at 42-43.

69. *Foreword* to HOLTZMANN & NEUHAUS, *supra* note 23. Some institutions have adopted the UNCITRAL Rules, while others have proclaimed their willingness to administer arbitrations using the UNCITRAL Rules. DORE, *supra* note 25, at 77. Among these arbitral institutions are the Inter-American Commercial Arbitration Commission (IACAC), which has reproduced in substance the UNCITRAL Rules, *id.*, and The London Court of Arbitration, which has adopted the UNCITRAL Rules, *id.* The Arbitration Institute of the Stockholm Chamber of Commerce, the International Chamber of Commerce, and the American Arbitration Association have all indicated their willingness to act in conformity with the UNCITRAL Rules. *Id.* at 77-78.

70. G.A. Res. 31/98, U.N. GAOR, 31st Sess., Supp. No. 39, at 182, U.N. Doc. A/31/39 (1977) [hereinafter Res. 31/98]; SCHWEBEL, *supra* note 17, at 16. Res. 31/98 states that

> [the General Assembly, being] *[c]onvinced* that the establishment of rules for *ad hoc* arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations . . . *Recommends* the use of the Arbitration Rules of the United Nations Commission on International Trade Law in the settlement of disputes arising in the context of international commercial relations, particularly by reference to the Arbitration Rules in commercial contracts.

Res. 31/98, *supra* at 182.

71. SCHWEBEL, *supra* note 17, at 16.

72. *See* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 16 (1990) (discussing wide appeal of ICC arbitration). Parties from in excess of 140 countries have been involved in ICC arbitrations. *Id.* Additionally, the ICC International Court of Arbitration has an international membership. *See Foreword* to ICC RULES, *supra* note 34 (stating that as of 1988, the International Court of Arbitration consisted of 56 members representing 48 different nations).

73. *See* CRAIG, *supra* note 72, at 17 (stating that "a number of factors indicate that

trust a national court or even a national arbitration association with fairly adjudicating their claims.[74]

The UNCITRAL and ICC rules both espouse a denationalized arbitration system that is self-contained and does not depend upon national rules of law.[75] Despite, however, the denationalized nature of UNCITRAL and ICC rules, their effectiveness as a practical matter may be limited by the national law of the place of arbitration.[76] As a practice matter, parties will not often agree on rules that contradict the national law of the place where the arbitration is held.[77] Parties to an arbitration agreement are well advised to inform themselves as to the legal consequences of their choice of arbitral forum.[78]

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parties choose ICC arbitration because it represents an international and neutral system for the resolution of commercial disputes").

74. *See* CRAIG, *supra* note 72, at 16-17 (discussing reasons parties may prefer ICC Rules to national arbitration rules).

75. ROBERT & CARBONNEAU, *supra* note 1, pt. II, ch. 4 at 5. *See* CRAIG, *supra* note 72, at 15-16 (stating that "[t]he prime motivation of businessmen and sovereign states to agree to ICC arbitration is that it does not possess the potential menaces of national courts. . . .").

76. *See* Redfern, *supra* note 50, at 27-30 (discussing compétence de la compétence doctrine under UNCITRAL and ICC Rules and limitations on effectiveness of arbitration rules chosen by parties).

77. *See id.* at 29 (discussing limitations imposed on arbitral rules by national law); CRAIG, *supra* note 72, at 12.

> Whatever one's doctrinal views as to the limits of freeing an award from the authority of the courts at the arbitral situs, it is still the case that parties, the ICC Court, and arbitrators all seek to conform to local strictures as a practice matter; it would be irresponsible to ignore local law simply to demonstrate one's passionate attachment to the principle of delocalization of the international arbitral process.

Craig, *supra* note 72, at 12; *see* SCHWEBEL, *supra* note 17, at 12 (stating that parties who want de-nationalized arbitration choose as arbitral situs countries with most liberal arbitration law).

> Whether the parties . . . to an arbitration agreement contained in an international commercial contract between private parties have the freedom to agree upon an arbitration 'unbound' by any elements of national arbitration law is a contentious question . . . . [b]ut it is pertinent to note that there is some evidence of a trend towards choosing as the place of arbitration in such cases countries whose arbitration law accords the arbitrators the widest freedom to decide upon questions of procedure and governing law or rules of arbitration.

Schwebel, *supra* note 17, at 12.

78. CRAIG, *supra* note 72, at 10. Parties may want to determine, for example, whether domestic arbitration law in the chosen forum allows them to utilize procedural rules other than those provided under local law. *See id.* (discussing effect of local arbitration law on parties' choice of international arbitration rules). For example, under French arbitration law, parties may arbitrate using any agreed-upon procedural arbitration rules. *See* NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1494 (Fr.) (English trans. *in*

1. UNCITRAL Arbitration Rules

UNCITRAL Rules adopt both the doctrine of compétence de la compétence and separability.[79] In Article 21, UNCITRAL Rules incorporate the compétence de la compétence doctrine by providing that the arbitral tribunal may rule on allegations of the tribunal's lack of jurisdiction, including questions concerning the existence or validity of the arbitration agreement or arbitration clause.[80] UNCITRAL Rules also incorporate the separability doctrine by further providing in Article 21 that the arbitral tribunal may rule on questions concerning the existence or validity of the contract containing the arbitration clause, and that even where the arbitral tribunal rules that the main contract is null and void, the arbitration clause is not automatically invalidated.[81]

2. UNCITRAL Model Law

While the UNCITRAL Rules were designed to be utilized in international commercial arbitral proceedings,[82] the UNCI-

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ROBERT & CARBONNEAU, *supra* note 1, App. B-8) (stating that "[t]he arbitration agreement may, directly or by reference to institutional arbitral regulations, establish the procedure to be followed in the arbitral proceeding; it may also submit the proceeding to any procedural law it determines"); CRAIG, *supra* note 72, at 10. In other jurisdictions, however, domestic arbitration law mandates that arbitration proceedings be governed by rules which conform to domestic law. *Id.* at 11. National legislation on arbitration has been influenced by the "ICC school of thought." *Id.* at 12. For example, French, Belgian and Swiss arbitration legislation appear to have been considerably influenced by ICC rules. *Id.*

79. UNCITRAL RULES, *supra* note 23, at 42-43; SCHWEBEL, *supra* note 17, at 17.

80. UNCITRAL RULES, *supra* note 23, at 42-43. Article 21 states that "[t]he 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." *Id.*; SCHWEBEL, *supra* note 17, at 16-17. However, the arbitral ruling on this issue may be subject to judicial review. *Id.* at 17 n.28.

81. UNCITRAL RULES, *supra* note 23, at 42-43. Article 21 states that:

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

Id.; Redfern, *supra* note 50, at 28.

82. *See supra* notes 23-24 and accompanying text (discussing use of UNCITRAL Rules in international commercial arbitration).

TRAL Model Law on International Commercial Arbitration[83] ("Model Law") was developed to address the lack of harmonization between the arbitration law of different nations and was intended as a model for the promulgation of a harmonized system of national arbitration laws.[84] Article 16 of the Model Law explicitly authorizes both separability and compétence de la compétence.[85] One commentator has observed that the Model Law provides a link between the doctrines of separability and compétence de la compétence[86] by providing at Article 16(1), first, that the arbitral tribunal may render a decision on its own competence, including a decision with respect to questions of the validity or existence of the arbitration agreement (compétence de la compétence),[87] and second, that a decision by the arbitrator that the contract is null and void will not automatically invalidate the arbitration clause (separability).[88]

3. ICC Arbitration Rules

The ICC Rules explicitly authorize both the separability and compétence de la compétence doctrines.[89] ICC Rules provide for a two-step process in addressing jurisdictional questions.[90] Where a party has raised a jurisdictional challenge to arbitration, the ICC Court of Arbitration ("ICC Court") must first determine the prima facie existence of the arbitration agreement.[91] If it is

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83. Model Law, *supra* note 23, at 86.

84. *See* DEPARTMENT OF TRADE, ENGLAND, *supra* note 23, at 2 (stating that Model Law was drafted in response to lack of uniformity in national arbitration law covering international commercial arbitration, and attempted to provide for harmonization of national arbitration law).

85. Model Law, *supra* note 23, at 86; *see* SCHWEBEL, *supra* note 17, at 17-18 (discussing Model Law). The Model Law provides at Article 16 that:

> 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 the 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.

Model Law, *supra* note 23, at 86.

86. Model Law, *supra* note 23, at 86. According to Stephen Schwebel, the Model Law "rightly, links that provision [specifying severability] with the competence of the arbitral tribunal to rule on its jurisdiction." SCHWEBEL, *supra* note 17, at 18.

87. Model Law, *supra* note 23, at 86.

88. *Id.*; *see* SCHWEBEL, *supra* note 17, at 18 (discussing Article 16 of Model Law).

89. ICC RULES, *supra* note 34, at 19.

90. *Id.*; *see* Redfern, *supra* note 50, at 28 (discussing Article 8 of ICC Rules).

91. ICC RULES, *supra* note 34, at 19; *see* Redfern, *supra* note 50, at 28 (discussing

satisfied, the ICC Court may then decide that arbitration shall proceed and the arbitrator is thereby granted the competence to determine his own jurisdiction.[92] The ICC Rules further provide that the arbitrator's jurisdiction will continue even where there is an allegation that the contract is null and void or nonexistent,[93] and the arbitrator may proceed to adjudicate with respect to both the parties' rights and the merits of the dispute.[94] The ICC Rules, as well as the UNCITRAL Rules, thus espouse both the separability and compétence de la compétence doctrines.[95] A nation's private international law, however, may reflect a different position with respect to these doctrines than that es-

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Article 8 of ICC Rules). The procedure to determine the prima facie existence of the arbitration agreement is administrative in nature. CRAIG, *supra* note 72, at 187. The ICC Court limits itself to a review of the contract documents or counsel's written argument, and there is no opportunity for oral argument. *Id.* at 186-87 The parties are notified of the ICC Court's decision by the Secretariat. *Id.* at 187. The ICC Court does not, however, provide reasons for its decision. *Id.* Absence of arbitral jurisdiction is most commonly shown by:

> (i) the "pathological" arbitration clause (a contract provision which manifests an interest to arbitrate but fails to specify an institution or any operative rules); (ii) the non-existence of an arbitration clause or agreement; (iii) the lack of defendant's signature of, or other form of acquiescence to, an arbitration agreement; and (iv) the claim that a party was not bound by an agreement to arbitrate made by the beneficiary of a guarantee which in turn does not contain an arbitration clause, by an alleged but disavowed representative or agent, or by another company of the same group.

Id.

92. ICC RULES, *supra* note 34, at 19; *see* Redfern, *supra* note 50, at 28 (discussing Article 8 of ICC Rules). The ICC Rules provide, at Article 8, that:

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

ICC RULES, *supra* note 34, at 19.

93. ICC RULES, *supra* note 34, at 19. The ICC Rules provide that

> Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas.

Id.

94. *Id.*

95. ICC RULES, *supra* note 34, at 19; UNCITRAL RULES, *supra* note 23, at 42-43; SCHWEBEL, *supra* note 17, at 18.

poused by UNCITRAL and the ICC.[96]

II. *DOCTRINES OF SEPARABILITY AND COMPÉTENCE DE LA COMPÉTENCE UNDER PRIVATE INTERNATIONAL LAW OF THE UNITED STATES, ENGLAND AND FRANCE*

The provisions of substantive and procedural arbitration law of the United States, England and France are found in the statutory and case law of these countries.[97] These bodies of law reflect the public policies that have influenced the development of the doctrines of compétence de la compétence and separability in these nations. Although public policies in the United States, England and France all reflect the desire to encourage arbitration,[98] each nation has developed a different legal framework in response to this goal.[99] The development and status of arbitration law within each nation reflects the desire of courts and legis-

96. *See, e.g.*, Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992], 1 Lloyd's Rep. 81, 83 (Q.B.) (stating that only court may definitively rule on jurisdictional issues).

97. *See* Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1, 4 (1980) [hereinafter Carbonneau II] (discussing French courts' role in formulation of law). Under French law, in contrast to English and U.S. law, the doctrine of *stare decisis* is not formally recognized. *See id.* Under the doctrine of *stare decisis*, courts abide by the holdings rendered in decided cases and do not disturb settled points. *See* Windust v. Department of Labor and Indus., 323 P.2d 241, 243 (Wash. 1958) (discussing *stare decisis* doctrine). In France, the Civil Code is the primary source of law. Carbonneau II, *supra*, at 4.

98. *See, e.g.*, Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth Inc., 473 U.S. 614, 631 (1985) (stating that there is an "emphatic federal policy [in the United States] in favor of arbitral dispute resolution . . . [which] applies with special force in the field of international commerce").

99. *See, e.g.*, AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648-49 (1985) (indicating that compétence de la compétence not accepted under U.S. law); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701, 721 (C.A.) (stating that compétence de la compétence not accepted under English legal system); Judgment of Jan. 21, 1992, Cass. com., Bull. Civ. IV, No. 30, at 25 (Fr.) ("Bai Line Shipping Co. v. Société Recofi") (upholding compétence de la compétence doctrine pursuant to provisions of Nouveau Code de Procédure Civile). The United States, England and France, however, all accept the separability doctrine. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967) (holding arbitration clause separable where fraudulent inducement of contract alleged, except where parties indicate contrary intent); Heyman v. Darwins, Ltd., [1942] App. Cas. 356, 366 (H.L.) (holding arbitration clause separable in action for breach of contract by repudiation); Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 208 (Fr.) ("Société Gosset v. Société Carapelli") (holding arbitration clause separable in international arbitration, save under "exceptional" circumstances).

latures to encourage the use of arbitration agreements and to enhance that nation's status as a favorable center for arbitration.[100]

A. *Separability and Compétence de la Compétence Under the Private International Law of the United States*

Prior to the enactment of the Federal Arbitration Act[101] ("FAA") in 1925, the U.S. judiciary regarded arbitration with hostility.[102] The development of a federal public policy favoring

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100. *See, e.g., Mitsubishi Motors*, 473 U.S. at 631 (discussing U.S. public policy favoring arbitration); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992] 1 Lloyd's Rep. 81, 92 (Q.B.) (discussing English public policy favoring arbitration).

101. 9 U.S.C. §§ 1-16 (1988 & Supp. IV 1992). The Federal Arbitration Act [hereinafter FAA], which comprises Chapter 1, Title 9 of the U.S.C., provides at § 1 that Chapter 1 covers maritime transactions or transactions involving "commerce." 9 U.S.C. § 1. "Commerce" is limited to interstate or extra-territorial commerce. McDonough Const. Co. of Fla. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964). Section 2, the principal substantive provision of the FAA, provides that "[a] written [arbitration] provision in . . . a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable . . . ." 9 U.S.C. § 2. Section 3 provides that a court *shall* stay trial of an action, pending arbitration, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" under an agreement in writing to arbitrate. 9 U.S.C. § 3. Section 4 provides a mechanism to obtain a court order to arbitrate and provides that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall . . . [direct] the parties to proceed with the arbitration . . . ." 9 U.S.C. § 4.

102. *See, e.g.*, Insurance Co. v. Morse, 87 U.S. 445, 457 (1874) (stating that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void"). The U.S. Supreme Court further stated in *Morse* that

> [w]here the stipulation, though not against the policy of the law, yet is an effort to divest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce the agreement, but will leave the parties to their own good pleasure in regard to such agreements.

Id. at 452; Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942) (stating that "English attitude [of disfavor toward arbitration agreements] was largely taken over in the 19th century by most courts in this country"); U.S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1010-1011 (S.D.N.Y. 1915) (stating that "the courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute); Prince Steam-Shipping Co. v. Lehman, 39 F. 704 (S.D.N.Y. 1889) (stating that "such agreements [to arbitrate] have repeatedly been held to be against public policy and void"); Jane Byeff Korn, *Changing Our Perspective on Arbitration: A Traditional and a Feminist View*, 1991 U. ILL. L. REV. 67, 74 (1991) (stating that U.S. judiciary imported its hostility toward arbitration from England). The expansion of international trade following the end of the first world war and following the Geneva Treaty on arbitration of 1923 has resulted in the enactment of arbitration statutes in

arbitration followed the enactment of the FAA.[103] U.S. courts have repeatedly enunciated their support of the arbitration process.[104] The intent of such support, as manifested in a public policy favoring arbitration, was to guarantee the enforcement of private contracts.[105]

Western trading countries such as the United States and England. de Vries, *supra* note 8, at 50-51; *see* H.R. REP. No. 96, 68th Cong., 1st Sess., at 2 (1924) (stating that "[a]rbitration agreements are purely matters of contract, and the effect of the bill [FAA] is simply to make the contracting party live up to his agreement"). The House of Representatives further stated that

> [s]ome centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts . . . [the] bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement . . . . [the high cost of litigation] can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

Id.; *see* Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-21, n.6 (1985) (stating that FAA intended to change U.S. judiciary's hostility toward arbitration which came from English common law system); David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 114 n.45 (1990) (stating that U.S. courts' hostility toward arbitration changed to encouragement as caseloads have increased in United States).

103. *See, e.g.*, Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth Inc., 473 U.S. 614, 631 (1985) (stating that there is an "emphatic federal policy in favor of arbitral dispute resolution . . . [which] applies with special force in the field of international commerce"); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 352 (7th Cir. 1983) (stating that "there is a strong policy in favor of carrying out commercial arbitration when a contract contains an arbitration clause. Arbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies."); *see also* Bagwell, *supra* note 7, at 504 (stating that "Congressional legislation, international commitments, and Supreme Court rulings express and mandate the strong United States policy favoring arbitration"); Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-21 n.6 (1985) (stating that intent of FAA was to override judicial hostility toward arbitration).

104. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (stating that refusal by courts to enforce arbitration agreements would frustrate purpose of achieving orderliness and predictability essential to international business transactions); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (stating that "we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts"); Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991) (stating that "the clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes"); Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1410 (9th Cir. 1989) (upholding enforceability of arbitration agreement).

105. *See Mitsubishi Motors*, 473 U.S. at 625 (stating that "[t]he 'liberal federal policy favoring arbitration agreements,' manifested by . . . the Act as a whole, is at bottom a

1. The FAA and the New York Convention

The provisions of the FAA apply to U.S. interstate commerce and transnational commerce.[106] International commercial arbitration agreements, therefore, may fall under the purview of the FAA.[107] The FAA guarantees the enforcement of written arbitration agreements[108] by including mechanisms through which courts may decide issues regarding both the arbitrability[109] and validity of the arbitration clause.[110] The FAA provides that a written arbitration agreement contained in a commercial contract is a valid, irrevocable, and enforceable agreement.[111]

International commercial arbitration agreements, however, may also be subject to the provisions of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"),[112] which was codified in U.S. law in 1970.[113] The New York Convention, to which the United States is a signatory, is an international treaty that provides

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policy guaranteeing the enforcement of private contractual arrangements" (citation omitted)).

106. *See* McDonough Const. Co. of Fla. v. Hanner, 232 F. Supp. 887, 890 (M.D.N.C. 1964) (stating that "[t]he United States Arbitration Act is limited to maritime transactions and transactions involving interstate or foreign commerce").

107. *Id.*

108. 9 U.S.C. § 3-4.

109. *See* 9 U.S.C. § 3 (providing that party may obtain stay of proceedings where issue referable to arbitration).

110. *See* 9 U.S.C. § 4 (providing that court shall compel arbitration upon being satisfied that making of agreement for arbitration not in issue).

111. 9 U.S.C. § 2.

112. Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter New York Convention], June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997; *see* REDFERN & HUNTER, *supra* note 24, at 46 (stating that major trading nations of world, including Japan, United States, France and United Kingdom, are signatories to New York Convention).

113. 9 U.S.C. §§ 200-208 (1988). Section 201 provides for enforcement of the New York Convention in U.S. courts. 9 U.S.C. § 201. Section 202 provides that an arbitration agreement or award which arises out of a "commercial relationship" falls under the Convention. 9 U.S.C. § 202. A commercial relationship, however, entirely between U.S. citizens, with narrow exceptions, *does not* fall under the New York Convention. *Id.* Section 208 provides that Chapter 1 of the FAA applies to actions brought pursuant to Chapter 2 "*to the extent that chapter is not in conflict with this chapter or the Convention* . . . ." 9 U.S.C. § 208 (emphasis added).

Article II of the New York Convention provides, *inter alia*, 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 request of one of the parties, refer the parties to arbitra-

mechanisms for the enforcement and recognition of transnational arbitral awards and the enforcement of international arbitration agreements,[114] thereby facilitating international commercial transactions.[115] Thus, while U.S. domestic arbitration agreements will generally only be subject to the provisions of the FAA,[116] international commercial arbitration agreements may be subject to both the FAA and the New York Convention, as codified,[117] inasmuch as the provisions are not in conflict.[118]

In *Wilko v. Swan*,[119] the U.S. Supreme Court had held that claims relating to federal securities law violations were non-arbitrable.[120] In *Scherk v. Alberto-Culver Co.*,[121] however, the Court declined to apply its prior holding in *Wilko* and in so doing upheld the goals of the New York Convention.[122] *Scherk* involved an international commercial contract between Alberto-Culver Co. ("Alberto-Culver"), a Delaware corporation with its principal office in Illinois, and Fritz Scherk ("Scherk"), a German citizen.[123] Alberto-Culver brought suit against Scherk in the U.S. District Court for the Northern District of Illinois, alleging violations of federal securities laws.[124] Scherk attempted to stay litigation

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tion, *unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

New York Convention, June 10, 1958, art. II, 21 U.S.T. at 2519, T.I.A.S. No. 6997, at 3 (emphasis added).

114. REDFERN & HUNTER, *supra* note 24, at 46.

115. *See* David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 250 (2d Cir. 1991) (stating that purpose of New York Convention was to "promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions on the whole"); *see also* McDermott Intern. Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1209 (5th Cir. 1991) (stating that Congressional ratification of New York Convention proposed to "ensur[e] that parties to international business transactions can expect courts to enforce their specifications as to how their disputes will be resolved"). The enactment of the Convention "has led to an even wider acceptance and enforcement of arbitration agreements and awards." Bagwell, *supra* note 7, at 496; *see* REDFERN & HUNTER, *supra* note 24, at 46 (stating that "[the] success [of the New York Convention] may be regarded as one of the factors responsible for the rapid development of arbitration as a means of resolving international trade disputes in recent decades").

116. 9 U.S.C. § 1.

117. *Id.* § 202.

118. *Id.* § 208.

119. 346 U.S. 427 (1953).

120. *Id.* at 438.

121. 417 U.S. 506 (1974).

122. *Id.* at 515-16.

123. *Id.* at 508-09.

124. *Id.*; Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards*

based on an agreement to arbitrate contained in the parties' contract.[125] The U.S. District Court for the Northern District of Illinois applied the Supreme Court's holding in *Wilko* and declined to grant a stay.[126] The Court of Appeals for the Seventh Circuit subsequently affirmed the district court's decision.[127] The Supreme Court, however, reversed the district court's decision and enforced the arbitration clause,[128] upholding the goals of the New York Convention.[129] The Court reasoned that because of the international nature of the contract, significantly different considerations and policies should govern than those enunciated in the *Wilko* decision.[130] The Court in *Scherk* also reviewed the relevant provisions of the FAA[131] and held that the dispute fell under the purview of the FAA.[132] Thus, *Scherk* reflects the U.S. judiciary's support for the arbitration process, es-

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Under the New York Convention — Practice in U.S. Courts, 3 INT'L TAX & BUS. LAW. 249, 254-55 (1986).

125. *Scherk*, 417 U.S. at 509; McLaughlin & Genevro, *supra* note 124, at 255.

126. *Scherk*, 417 U.S. at 510; McLaughlin & Genevro, *supra* note 124, at 255.

127. Alberto-Culver Co. v. Fritz Scherk, 484 F.2d 611 (7th Cir. 1973).

128. *Scherk*, 417 U.S. at 519-20; McLaughlin & Genevro, *supra* note 124, at 255.

129. *Scherk*, 417 U.S. at 520 n.15. The Supreme Court stated that

> [o]ur conclusion today is confirmed by international developments and domestic legislation in the area of commercial arbitration subsequent to the *Wilko* decision . . . . [W]e think that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today.

Scherk, 417 U.S. at 520 n.15; *see* McLaughlin & Genevro, *supra* note 124, at 255 (stating that "[the Scherk] Court noted that its ruling must be consistent with the goals of the New York Convention").

130. *Scherk*, 417 U.S. at 515; McLaughlin & Genevro, *supra* note 124, at 255. In *Scherk*, the Supreme Court stated:

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts"

Scherk, 417 U.S. at 519 (citation omitted).

131. *Scherk*, 417 U.S. at 510-511.

132. *Id.* at 519-520. The Supreme Court stated that "we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act [FAA]". *Id.*

pecially in the field of international arbitration.[133]

2. Separability and Compétence de la Compétence Under U.S. Case Law

The U.S. Supreme Court established the separability doctrine under U.S. law with reference to the FAA in the seminal case of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[134] Prima Paint Corporation ("Prima Paint"), a Maryland corporation, purchased a paint manufacturing business from Flood & Conklin Manufacturing Company ("Flood & Conklin"), a New Jersey corporation.[135] The parties entered into a Consulting Agreement under which Flood & Conklin was to provide advice to Prima Paint in the areas of production, manufacturing, sales and service of paint products over a six-year period.[136] Prima Paint subsequently alleged that the execution of the Consulting Agreement, which contained an arbitration clause, was fraudulently induced by false representations regarding Flood & Conklin's financial condition.[137]

The Supreme Court determined that the Consulting Agreement involved interstate commerce and, therefore, fell under the purview of the FAA.[138] Under Section 4 of the FAA, a federal court must order arbitration in accordance with the terms of an arbitration agreement if the initial validity of the arbitration agreement itself is not at issue.[139] The Court affirmed the decision of the U.S. Court of Appeals for the Second Circuit that as a

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133. *See supra* note 115 and accompanying text (illustrating judiciary's support for goals of New York Convention and international arbitration).

134. 388 U.S. 395 (1967).

135. *Id.* at 397.

136. *Id.*

137. *Id.*

138. *Id.* at 400. The New York Convention was not applied in *Prima Paint.* The New York Convention was not codified under U.S. law until three years after the *Prima Paint* decision was rendered. *See supra* note 113 and accompanying text (discussing New York Convention). The New York Convention, moreover, would not be applicable to *Prima Paint* since *Prima Paint* did not involve international commerce. *Id.*

139. 9 U.S.C. § 4; *Prima Paint,* 388 U.S. at 403. The Court held that although § 4 of the U.S.C. does not encompass a party's request that federal action be stayed so that arbitration can proceed, "it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court." *Id.* at 404. The Court stated that a federal court, when reviewing an application for a stay, may only consider issues relating to the validity and performance of the arbitration agreement. *Id.* The Court invoked "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a con-

matter of federal law, except where parties indicate a contrary intent, the arbitration clause is 'separable' from the contract in which it is imbedded.[140]

Under *Prima Paint*, a federal court may adjudicate an issue involving the making of the arbitration agreement.[141] An allegation of fraud in the inducement of the main contract, however, renders the arbitration agreement separable so that the parties may nevertheless proceed to arbitration.[142] The separability doc-

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tract, be speedy and not subject to delay and obstruction in the courts" to justify its decision. *Id.*

140. *Prima Paint*, 388 U.S. at 402.

141. *Id.* at 403-04. As case law in the United States has shown, U.S. law does not espouse the doctrine of compétence de la compétence. *See* AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648-49 (1985) (stating that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit . . . . [T]he question of arbitrability . . . is undeniably an issue for judicial determination"); Peoples Security Life Ins. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989) (stating that "[w]hether a contract's arbitration clause allows the arbitration of a certain dispute is for a court to determine . . . . [i]n making this determination, a court must focus on 'whether or not the company was bound to arbitrate, as well as what issues it must arbitrate' . . . ." (quoting AT&T, 475 U.S. at 649) (citation omitted)); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Exide Corp., 688 F. Supp. 174, 180 (E.D. Pa. 1988); *aff'd* 857 F.2d 1464 (3d Cir. 1988) (stating that "[a] party's agreement to arbitrate is a matter of contract construction and whether a dispute is arbitrable is a question of law for the court"); Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 585 F. Supp. 770, 780 (E.D. Pa. 1984) (stating that "[w]hen presented with a written arbitration agreement, and a motion for an arbitration order under Section 4 of the Arbitration Act [FAA], a federal court must initially evaluate whether the arbitration clause covers the dispute at hand"); Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp., 455 F. Supp. 211, 217 (S.D.N.Y. 1978). In *Pollux Marine*, the United States District Court for the Southern District of New York stated that the issue of the scope of the arbitration clause was to be determined by the court, not the arbitrators:

> Given the existence of these issues as to the making of the arbitration agreement, there is a live controversy for this Court to adjudicate pursuant to 9 U.S.C. § 4 . . . [t]hat these issues are for the Court, rather than the arbitrators, to determine flows from the fact that the duty to arbitrate is contractual and a Court cannot compel a party to arbitrate a dispute it did not contractually agree to arbitrate.

Id.

142. *Pollux Marine*, 455 F. Supp. at 404. The holding in *Prima Paint* has been broadened by some courts to include suits for contract rescission where there is an allegation of frustration or mistake. *See, e.g.*, Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d 524, 529 (1st Cir. 1985) (extending *Prima Paint* holding to allegations of frustration of purpose and mutual mistake). The *Prima Paint* rule has also been invoked in suits involving duress, coercion and unconscionability. *See, e.g.*, Hall v. Prudential-Bache Sec., Inc., 662 F. Supp. 468, 470-71 n.1 (C.D. Cal. 1987) (extending *Prima Paint* rationale to allegations of duress, unconscionability and coercion).

trine as set forth in *Prima Paint* is a rule of national substantive law.[143]

Prima Paint involved a contract between domestic corporations and was decided only with reference to the FAA.[144] Arbitration agreements contained in international commercial con-

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Additionally, the *Prima Paint* holding has been broadened to include suits concerning the validity of the contract. *See, e.g.*, Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1410 (9th Cir. 1989) (stating that federal courts "requir[e] that cases be submitted to arbitration unless there is a challenge to the arbitration provision which is *separate* and *distinct* from any challenge to the underlying contract"); Bagwell, *supra* note 7, at 502-03. Other courts, however, only hold the arbitration clause separable when a voidable, but not invalid, contract is at issue. *See, e.g.*, Three Valleys Mun. Water Dis. v. E.F. Hutton & Co., 925 F.2d 1136, 1140 (1st Cir. 1991) (holding *Prima Paint* rationale does not extend to issue of contract validity); Bagwell, *supra* note 7, at 503.

The New York Court of Appeals has applied *Prima Paint* with the caveat that where fraud in the inducement of a contract pervades the contract so as to encompasses the arbitration provision, separability will not apply. Weinrott v. Carp, 298 N.E.2d 42 (1973). In the *Weinrott* decision, the New York Court of Appeals disregarded its prior statement, in dicta, that the arbitration clause was not separable where there was an allegation of fraud in the inducement of the main contract. In *Weinrott*, respondents George H. Weinrott, et al. ("Weinrott") licensed appellants Emile Carp, et al. ("Carp") to utilize a building construction method which made conventional framing methods unnecessary, under the terms of a licensing and joint venture agreement executed by the parties. 298 N.E.2d at 43. Carp alleged that the contract was fraudulently induced by Weinrott's misrepresentations concerning the viability of the construction process, government approvals and ownership of the process, and actual use of the process. *Id.* at 44. The *Weinrott* court held that under a broad arbitration clause, the merits of a claim of fraudulent inducement are to be determined at arbitration. *Id.* at 48. The court also stated, in dicta, that under a broad arbitration clause contained in a contract in which fraudulent inducement is alleged, all issues concerning the validity of the contract are to be referred to arbitration. *Id.* at 47. The court reasoned that there is an assertion in cases in which the arbitration clause is held separable that, to avoid arbitration, the fraud must affect the arbitration provision itself. *Id.* at 46. The *Weinrott* court emphasized, however, that where fraud accompanies a grand scheme affecting the contract in its entirety, both the main contract and the arbitration provision should fall, stating that "if the alleged fraud was part of a grand scheme that permeated the entire contract, including the arbitration provision, the arbitration provision should fall with the rest of the contract." *Id.*

143. *Prima Paint*, 388 U.S. at 400. Under U.S. law, the scope of the arbitration agreement in a contract involving interstate commerce will, pursuant to the FAA, be determined by the Court. *See, e.g.*, Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991) (stating that role of court is "strictly limited to determining arbitrability and enforcing agreements to arbitrate"); *see also*, Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 845 (2d Cir. 1987) (stating that in enacting FAA Congress created national substantive law governing questions concerning validity and enforceability of arbitration agreements); Filanto S.p.A. v. Chilewich Intern. Corp., 789 F. Supp. 1229, 1234 (S.D.N.Y. 1992) (holding that issue of arbitrability of dispute is governed by federal law).

144. 9 U.S.C. §§ 1-16; *see supra* znote 101 and accompanying text (discussing FAA).

tracts also fall under the purview of the New York Convention.[145] Title 9, Section 208 of the U.S. Code provides that the FAA applies to actions brought under Chapter 2 of Title 9 only to the extent the two provisions do not conflict.[146] Article II, Paragraph 3 of the New York Convention provides that a court shall refer parties to arbitration unless the arbitration agreement is null and void, or inoperative, or incapable of being performed.[147] Section 4 of the FAA, however, states that arbitration must be ordered if the validity of the arbitration agreement is not at issue.[148] Thus far, the Supreme Court has not interpreted the separability doctrine with respect to an international arbitration agreement falling under the purview of the New York Convention.

The U.S. Court of Appeals for the Seventh Circuit has considered the separability doctrine in an international context, extending separability to the issue of contract validity in *Sauer-Getriebe KG v. White Hydraulics, Inc.*[149] In *Sauer-Getriebe*, White Hydraulics, Inc. ("White"), an Indiana manufacturer of engines, entered into a contract with Sauer-Getriebe KG ("Sauer"), a West German limited partnership.[150] The contract contained a broad arbitration clause under which the parties agreed to submit to arbitration all disputes arising under the contract.[151] Under the contract, White gave Sauer the right to sell its engines and agreed to furnish Sauer with technical information and certain intellectual property rights necessary for the manufacture of the engines.[152] In exchange, Sauer agreed to pay royalties on each sale.[153] Sauer alleged that White was negotiating to sell Sauer's contracted-for rights to a third party and that White had thus repudiated its contract with Sauer.[154] White argued that before submitting the dispute to arbitration, a court must rule

145. New York Convention, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997. *See supra* note 113 and accompanying text (discussing provisions of New York Convention and its implementing legislation under U.S. law).

146. 9 U.S.C. § 208.

147. New York Convention, June 10, 1958, 21 U.S.T. at 2519, T.I.A.S. No. 6997, at 3.

148. 9 U.S.C. § 4.

149. 715 F.2d 348, 350 (7th Cir. 1983).

150. *Id.* at 349.

151. *Id.* at 350.

152. *Id.* at 349.

153. *Id.*

154. *Id.*

on the validity and enforceability of the contract.[155] White alleged that its contract with Sauer was invalid due to lack of consideration and vagueness, an argument subsequently upheld by the U.S. District Court for the Northern District of Indiana.[156] White further alleged that the arbitration clause itself was invalid because the existence of an agreement to arbitrate requires the existence of a valid contract.[157] The court rejected this argument, stating that this conclusion was a *non-sequitur*.[158] The Seventh Circuit held that the arbitration agreement and main contract were separate, each furnishing sufficient consideration for the other, thus applying the doctrine of separability.[159] The Seventh Circuit further held that since the arbitration provision in the contract required the parties to arbitrate all disputes arising under the contract, the issue of the validity of the contract should have been decided by the arbitrators, not the court.[160]

In *Republic of Nicaragua v. Standard Fruit Co.*,[161] the U.S. Court of Appeals for the Ninth Circuit applied the analysis set forth by the Seventh Circuit in *Sauer-Getriebe*.[162] *Standard Fruit* involved a dispute over the validity of a Memorandum of Intent executed by the Republic of Nicaragua and the Standard Fruit

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155. *Id.* at 350.

156. *Id.* at 349.

157. *Id.* at 350.

158. *Id.*

159. *Id.* The Seventh Circuit stated that

> White claims that before this dispute may be submitted to arbitration, a court must decide that the contract containing the arbitration clause is valid and enforceable. White argues that if there is no contract to buy and sell motors there is no agreement to arbitrate. The conclusion does not follow its premise. The agreement to arbitrate and the agreement to buy and sell motors are separate. Sauer's promise to arbitrate was given in exchange for White's promise to arbitrate and each promise was sufficient consideration for the other.

Id.

160. *See id.* (stating that arbitration provision covered White's claim that contract was invalid). The Seventh Circuit went on to state that the findings of the District Court regarding the validity and enforceability of the contract "are not binding and should be disregarded by the arbitrators in any subsequent arbitration proceeding." *Id.* at 351.

161. 937 F.2d 469 (9th Cir. 1991).

162. *Id.* at 477. The Court of Appeals for the Ninth Circuit endorsed the court's analysis in *Sauer-Getriebe*, stating that "the agreement to arbitrate and the agreement to buy and sell [ ] are separate," and concluded that there may still be a valid agreement to arbitrate even where there is an invalid contract. *Id.* (quoting *Sauer-Getriebe*, 715 F.2d at 350).

Co.[163] The Ninth Circuit held that the arbitration provision embedded in the Memorandum of Intent was separable[164] and that the district court should have determined the arbitrability of the contract solely by reference to the arbitration provision.[165] The Ninth Circuit reasoned that under *Prima Paint*, courts are prohibited from considering challenges to the validity or enforceability of the main contract as a defense to arbitration.[166] Under the separability doctrine, in *Standard Fruit*, an arbitration clause may be enforced even though the arbitrator may subsequently hold the rest of the contract invalid.[167]

The U.S. Supreme Court's decision in *Prima Paint* thus gives force to U.S. public policy favoring arbitration agreements subject to the FAA.[168] Subsequent decisions, such as *Sauer-Getriebe* and *Standard Fruit*, have expanded the *Prima Paint* separability rule.[169] As U.S. courts have expressed, however, the power to decide jurisdictional issues, such as the validity of the arbitration clause and the scope of arbitrability, is reserved to the judiciary, and as such, U.S. law does not espouse the doctrine of compétence de la compétence.[170]

B. *Separability and Compétence de la Compétence Under the Private International Law of England*

Courts in England have traditionally viewed arbitration agreements with animosity, regarding such agreements as a usur-

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163. *Id.* at 472.

164. *Id.* at 477.

165. *Id.* at 479-80. The Ninth Circuit stated that:

> [T]he language of the clause at issue here, read in light of the *Prima Paint* severability rule and the strong presumption of arbitrability in international disputes, requires that the arbitration clause be enforced. *Our role is strictly limited to determining arbitrability and enforcing agreements to arbitrate.*

Id. (emphasis added).

166. *Id.* at 476.

167. *Id.*

168. *See supra* notes 134-43 and accompanying text (discussing *Prima Paint* case).

169. *See, e.g.*, Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1410 (9th Cir. 1989) (holding validity of contract arbitrable unless validity of arbitration clause is at issue); Unionmutual Stock Life Ins. Co. v. Beneficial Life Ins. Co., 774 F.2d 524, 529 (1st Cir. 1985) (extending *Prima Paint* holding to allegations of frustration of purpose and mutual mistake); Hall v. Prudential-Bache Sec., Inc., 662 F. Supp. 468, 470-71 n.1 (C.D. Cal. 1987) (extending *Prima Paint* rationale to allegations of duress, unconscionability and coercion).

170. *See supra* note 141 and accompanying text (indicating that compétence de la compétence doctrine not espoused under U.S. case law and pursuant to § 4 of FAA).

pation of the courts' jurisdictional powers.[171] Up until the 1920's, English courts held such agreements void as against public policy and denied them recognition.[172] This view, however, was extinguished with the expansion of world trade following World War I.[173] English courts have traditionally and continue to scrutinize the text of arbitration agreements in order to determine whether a dispute falls within the arbitration clause.[174] Thus, in England, the manner in which arbitration clauses are worded is important.[175] Professional terms utilized by the parties, as well as the parties' past business dealings, are all considered significant with respect to the wording of arbitration agree-

171. *See, e.g.*, Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942) (discussing hostility of English courts toward arbitration); Scott v. Avery, [1856] 4 H.L. Cas. 811, 853 (stating that English courts' hostility originated "in the contests of the different Courts in ancient times for extent of jurisdiction, all of them being opposed to any thing that would altogether deprive every one of them of jurisdiction"); Bagwell, *supra* note 7, at 492 (stating that "English courts . . . traditionally refused to enforce agreements to arbitrate on the grounds that such agreements 'ousted' their jurisdiction"); Korn, *supra* note 102, at 73 (stating that "[U.S.] courts' mistrust of arbitration dates back to at least seventeenth century England"); *see also supra* note 102 and accompanying text (discussing hostility of U.S. courts toward arbitration).

172. *See* Bagwell, *supra* note 7, at 492 (stating that English courts traditionally refused to enforce arbitration agreements, holding them "void as contrary to public policy").

173. *See* Bagwell, *supra* note 7, at 492 (stating that "World War I was followed by an expansion in world trade, during which the trading countries of the West enacted various arbitration statutes"); de Vries, *supra* note 8, at 50-51 (discussing enactment of arbitration statutes in United States and England following expansion of trade after World War I and enactment of Geneva Treaty on arbitration in 1923).

174. *See, e.g.*, Heyman v. Darwins, Ltd., [1942] App. Cas. 356, 370 (H.L.) (stating that "many of the reported cases are concerned with the interpretation of the scope of the terms of reference, for an arbitrator has jurisdiction only to determine such matters as, on a sound interpretation of the terms of reference, the parties have agreed to refer to him"); Ashville Investments Ltd. v. Elmer Contractors Ltd., [1989] Q.B. 488, 495 (stating that "in any event it must be necessary to compare the surrounding circumstances in each case to ensure that those in the latter case did not require one to construe albeit the same words [in an arbitration clause] differently when used in a different context"); Overseas Union Insurance Ltd. v. AA Mutual International Insurance Co., [1988] 2 Lloyd's Rep. 63, 66 (Q.B.) (stating that "the question is always one of construction, giving the words of the arbitration clause their natural and proper meaning in the circumstances of the case"); HALSBURY'S LAWS OF ENGLAND, *supra* note 29, ¶ 613 (stating that "[w]hether a particular dispute falls within the scope of an arbitration agreement is a question of construction of the form of words of the arbitration clause").

175. *See* DAVID, *supra* note 8, at 193 (discussing importance of wording of arbitration agreements in England). In determining whether a dispute falls within an arbitration clause, English courts scrutinize the text in order to distinguish between a contract allegedly induced by fraud or invalid due to mistake or frustration or fundamental breach. *Id.*

ments.[176]

Today, the doctrine of separability appears to be favored in England.[177] Under English law, however, while an arbitrator

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176. DAVID, *supra* note 8, at 193. Courts consider usages (*e.g.* terms used in particular trades) significant where parties ordinarily have, or are assumed to have, knowledge of the meaning of such terms. *Id.*

177. *See, e.g.*, Heyman v. Darwins, Ltd., [1942] App. Cas. 356, 366 (H.L.) (holding arbitration clause separable in action for breach of contract by repudiation); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701 (C.A.) (extending separability doctrine to initial illegality of contract); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992] 1 Lloyd's Rep. 81, 84 (Q.B.) (holding that separability applies to issue of initial validity of contract); Paul Smith Ltd. v. H.& S. Int'l Holding Inc., [1991] 2 Lloyd's Rep. 127, 131 (Q.B.) (holding arbitration clause separable in dispute regarding legality of notice of termination); SCHWEBEL, *supra* note 17, at 58. The English Arbitration Act, 1979, ch. 42 (Eng.) [hereinafter 1979 Act] abolished the "special case" (or "case stated") procedure which had restricted commercial arbitration for nearly one hundred years, under which the High Court had the authority to compel the arbitrator to submit legal issues to the Court for decision. English Arbitration Act of 1979 [Arbitration Act, 1979, ch. 42 § 1(1) (Eng.)]; *see* CARBONNEAU, *supra* note 3, at 91 (discussing special case procedure). The 1979 Act provides that

> In the Arbitration Act 1950 . . . section 21 (statement of case for a decision of the High Court) shall cease to have effect and, without prejudice to the right of appeal conferred by subsection (2) below, the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

Arbitration Act, 1979, ch.42 § 1(1) (Eng.); *see* CARBONNEAU, *supra* note 3, at 81, 91 (discussing abolition of special case procedure). The special case procedure was criticized as a means by which a party could delay an arbitration proceeding. *Id.* at 94. "Legal scholars, legislators, and judges criticized the case stated procedure, alleging that it provided a delaying tactic for undeserving parties who feared they were about to lose an arbitration on the merits and wanted to put off the day of reckoning." *Id.* The 1979 Act was promulgated to make London a "more attractive" center for the arbitration of international disputes by increasing the autonomy of English arbitral procedure. *Id.* at 81; *see* Pioneer Shipping v. B.T.P. Tioxide, [1981] 3 W.L.R. 292, 300 (H.L.) (stating that "there are . . . several indications in the Act [English Arbitration Act of 1979] itself of a parliamentary intention to give effect to the turn of the tide in favour of finality in arbitral awards"). Under the 1979 Act, a question of law which arises during arbitral proceedings can be referred to the court for interlocutory clarification in a fashion similar to the special case procedure. CARBONNEAU, *supra* note 3, at 101. This can only be done, however, if the arbitrator or all of the parties agree and if the court determines that a substantial savings in cost would result. *Id.* The provision which most significantly alters international commercial arbitration under the 1979 Act is one permitting "exclusion agreements" which deprive the High Court of jurisdictional power to intervene, absent which, under the 1979 Act, "[a] question of law arising during the proceedings can be referred to the court for interlocutory clarification." *Id.* at 101-02 (discussing exclusion agreements under English Arbitration Act). The 1979 Act provides that "[o]n an application to the High Court made by any of the parties to a reference . . . the High Court shall have jurisdiction to determine any question of law arising in the course of the reference." Arbitration Act, 1979, ch. 42 § 2(1) (Eng.). The 1979 Act further provides that "no application may be made under section 2(1)(a) above

may express an opinion on his jurisdictional authority to hear a dispute, he may not issue a final ruling.[178] English courts thus have retained the power to dispositively rule on jurisdictional matters.[179]

1. Doctrine of Separability Under English Case Law

The holding in *Heyman v. Darwins, Ltd.*[180] first established the doctrine of separability in England. Darwins, Ltd. ("Darwins"), an English steel manufacturer, appointed Heyman, whose business was based in New York, as its sole selling agent pursuant to a contract executed in 1938.[181] The contract contained a broadly-worded arbitration clause providing that any conflicts that arose with respect to the contract would be settled in arbitration.[182] Heyman brought a court action against Darwins alleging breach of contract by repudiation.[183] Darwins then moved for a stay of court proceedings, claiming that the dispute was arbitrable.[184] The House of Lords[185] held that the

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[interlocutory clarification] with respect to a question of law, if the parties to the reference in question have entered into an agreement in writing . . . ." *Id.* § 3(1).

178. *See* Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701, 721 (C.A.) (stating that "[i]t is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction"); Promvimi Hellas A.E. v. Warinco A.G., [1978] 1 Lloyd's Rep. 373, 377 (C.A.); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992] 1 Lloyd's Rep. 81, 83 (Q.B.) (stating that "[o]nly the Court can definitively rule on issues relating to the jurisdiction of arbitrators"). In *Promvimi*, the Court of Appeal stated that

> [i]t is clear law that it is perfectly proper for an arbitral tribunal, when its jurisdiction is challenged, to proceed to hear evidence that may be relevant on that matter and to arrive at a decision on its own jurisdiction if it thinks right to do so, although it is clear also that that decision in itself does not preclude a Court thereafter from holding that there is no jurisdiction

Promvimi, [1978] 1 Lloyd's Rep. at 377; Christopher Brown, Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer, [1954] 1 Q.B. 8, 13 (stating that arbitrators may inquire into matter of their jurisdiction but not make final determination binding upon the parties); *see* SCHWEBEL, *supra* note 17, at 2 n.2 (discussing English approach to compétence de la compétence doctrine). Where a party refuses to participate once the arbitral tribunal is constituted on grounds of the arbitration agreement's invalidity, it is normal to go to court for a decision. DAVID, *supra* note 8, at 286.

179. *See supra* note 178 and accompanying text (discussing compétence de la compétence doctrine under English law).

180. [1942] App. Cas. 356 (H.L.).

181. *Id.* at 357.

182. *Id.* at 357-58.

183. *Id.* at 358.

184. *Id.* at 359.

185. *See* G.R. RUDD, THE ENGLISH LEGAL SYSTEM 37 (1962) (discussing modern

arbitration clause was separable from the contract,[186] and concluded that the arbitrator, not the court, was to decide whether future performance by the non-breaching party was excused.[187] The breach of contract by one party and the excuse of future performance by the other fell within a broad arbitration clause providing for disputes arising under or in respect of or with regard to the contract.[188] Viscount Simon, Lord Chancellor, indicated in dicta, however, that an issue relating to the existence of the contract and an allegation of initial illegality were not within the scope of the arbitration agreement.[189] The doctrine of separability has evolved substantially since the *Heyman* decision.[190]

The separability doctrine was recently upheld in a case concerning the validity of a notice of termination of a contract. In

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English court system). The highest court of appeals in the United Kingdom is the House of Lords. *Id.* at 38. The House of Lords hears appeals from the Court of Appeal of England, the Supreme Court of Northern Ireland and the Court of Session in Scotland. *Id.* Three high-ranking court officials (such as the Lord Chancellor [president]) must be present for an appeal to be heard and decided. *Id.* The English Supreme Court of Judicature is composed of the High Court of Justice and the Court of Appeal. *Id.* at 37. The Judges of the Court of Appeal are termed Lord Justices of Appeal. *Id.* at 39. The High Court of Justice is comprised of three divisions, including the Queens Bench Division. *Id.* at 37. The High Court is a court of first instance with almost unlimited jurisdiction as well as a court of limited appellate jurisdiction. O. HOOD PHILLIPS, A FIRST BOOK OF ENGLISH LAW 47 (1960). The Queens Bench Division keeps a list of cases of a commercial nature which are heard by a "Commercial Court" consisting of a Queens Bench Division judge experienced in commercial matters. *Id.* at 49; *see also* Gregory T. Walters, *Bachchan v. India Abroad Publications Inc.: The Clash Between Protections of Free Speech in the United States and Great Britain*, 16 FORDHAM INT'L L. J. 895, 897 n.12 (describing English court structure).

186. *Heyman*, [1942] App. Cas. at 366.

187. *Id.* at 366-69. Lord Porter stated *in dicta* that the same separability principles applied to frustration. *Id.* at 400; *see* Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp., [1981] App. Cas. 909, 980 (H.L.) (stating that arbitration clause constitutes separate contract ancillary to main contract); Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG, [1981] 2 Lloyd's Rep. 446, 453 (Q.B.) (stating that arbitration agreement represents severable contract which itself may be prematurely terminated by repudiation or frustration). The Queens Bench Division stated in *Harbour Assurance* that "[i]t has been clearly established in the case law that the initial invalidity *of the arbitration clause*, or its subsequent termination by repudiation or frustration does not affect that validity of the contract. That is so because an arbitration clause is a separate and severable agreement." Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992] 1 Lloyd's Rep. 81, 88 (Q.B.).

188. *Heyman*, [1942] App. Cas. at 366-67; *see supra* notes 174-76 and accompanying text (discussing importance of manner in which arbitration clauses are worded).

189. *Heyman*, [1942] App. Cas. at 366.

190. *See* Paul Smith Ltd. v. H.& S. Int'l Holding Inc., [1991] 2 Lloyd's Rep. 127, 130-31 (Q.B.) (discussing evolution of separability doctrine following *Heyman* decision).

Paul Smith Ltd. v. H.& S. International Holding Inc.,[191] plaintiff Paul Smith Ltd. ("Smith"), a sportswear manufacturer, contracted to grant H.& S. International ("H.& S.") a license to sell, distribute, manufacture and promote its sportswear.[192] Under the contract, H.& S. was required to pay royalties to Smith.[193] H.& S. failed to do so, Smith terminated the contract, and H.& S. initiated arbitral proceedings under an arbitration agreement contained in the contract.[194] Smith challenged the legitimacy of the arbitration proceeding on the ground that the arbitration agreement, while valid, covered disputes that occurred only before termination of the contract.[195] The *Paul Smith* court rejected this argument, holding instead that the arbitration clause, which was separable from the main contract, was wide enough in scope to cover the dispute regarding the legality of the notice of termination.[196] The court did, however, hold open the question of whether an arbitration clause may cover a dispute regarding the validity of a contract at its inception.[197]

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191. *Id.* at 127.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Paul Smith*, [1991] 2 Lloyd's Rep. at 131. "Initial illegality" refers to contract formation which is criminal, tortious or against public policy. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS, 887-88 (3d ed. 1987). Public policy grounds include "immorality, unconscionability, economic policy, unprofessional conduct, paternalism, and diverse other criteria." *Id.* at 888.

197. *Paul Smith*, [1991] 2 Lloyd's Rep. at 130. The *Paul Smith* court stated that

> [i]t is important to bear in mind the evolution of the doctrine of the separability and independence of an arbitration agreement which forms part of a written contract. While the arbitration agreement was regarded as simply one of the terms of the contract, it was plausible to say that the arbitration clause is terminated with the contract of which it forms part. . . . Fortunately, our arbitration law is today in a more advanced state. Rescission, termination on the ground of fundamental breach, breach of condition, frustration and subsequent invalidity of the contract, have all been held to fall within arbitration clauses. Even what was once perceived to be the "rule" that a rectification issue always falls outside the scope of an arbitration clause has given way to the realism of the separability doctrine. . . . Admittedly, no English Court has yet been asked to take the final step of ruling that an arbitration clause, which forms part of a written contract, may be wide enough to cover a dispute as to whether the contract was valid ab initio. . . . Given the development of English arbitration law, this step may be a logical and sensible one which an English Court may be prepared to take when it arises. In the meantime it is possible to say with confidence that the evolution of the separability doctrine in English law is virtually complete.

Id. at 130-31 (citation omitted).

In a 1992 decision, *Harbour Assurance Co. v. Kansa General International Insurance Co.*[198] ("*Harbour I*"), the Queens Bench Division Commercial Court[199] chose to extend the separability doctrine by addressing the question left undecided in *Paul Smith*, and decided the issue of whether the initial invalidity of an international commercial contract between U.K. and Finnish insurance and reinsurance companies rendered the contract nonarbitrable.[200] Harbour Assurance Co. (U.K.) ("Harbour"), the English insurer, entered into a retrocession agreement with Kansa General International Insurance Co. ("Kansa") under which Kansa hoped to extend its reinsurance portfolio into the English market.[201] The retrocession agreement pursuant to which Harbour agreed to reinsure Kansa contained an arbitration clause.[202]

Harbour alleged that the underlying insurance and reinsurance contracts, and thus the retrocession agreement, were illegal due to Kansa's failure to obtain an authorization to do business from the English Department of Trade and Industry.[203] The *Harbour I* court held that the initial invalidity of a contract was arbitrable under the broad arbitration clause.[204] To support its decision, the court cited the trend in arbitration law toward full recognition of the separability principle.[205] The court also cited public policy reasons supporting the arbitral process[206] and favoring application of the separability doctrine to issues ad-

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198. [1992] 1 Lloyd's Rep. 81 (Q.B.) [hereinafter Harbour I].

199. *See supra* note 185 and accompanying text (discussing English court system).

200. *Harbour I*, [1992] 1 Lloyd's Rep. at 84. *Harbour I* "raise[d] in acute form the question where precisely the line should be drawn" concerning the scope of the separability doctrine. *Id.* at 83.

201. *Id.* at 84.

202. *Id.* at 81.

203. *Id.* at 84.

204. *Id.* In the *Paul Smith* decision, in contrast to the *Harbour I* decision, the issue was not the legality of the contract at its inception but rather the legality of the notice *terminating* the contract in response to a breach of contract by the other party. *Paul Smith*, [1991] 2 Lloyd's Rep. at 127.

205. *Harbour I*, [1992] 1 Lloyd's Rep. at 92. Judge Steyn stated that "[t]hese considerations are of concern in England since England is a major trading nation and London is a major centre of international arbitrations." *Id.* at 93.

206. *Id.* The *Harbour I* court stated that "[i]t is also in the public interest that the arbitral process, which is founded on party autonomy, should be effective. There are strong policy reasons in favour of holding that an arbitration clause is capable of surviving the initial invalidity of the contract." *Id.*

dressing the initial validity of the contract.[207]

Such public policy reasons included a desire to give effect to the intent of the parties, to prevent the evasion of obligations to arbitrate, to recognize the value of the neutrality of arbitration process and to facilitate international trade.[208] The court, however, followed common law precedent and held that the separability principle did not extend to a claim of the initial illegality of the contract.[209] Thus, while *Harbour I* went far in extending the separability principle by deciding that it would cover the initial invalidity of the contract, the *Harbour I* court retained the power to both rule on initial contract illegality and influence public policy with regard to contractual issues.[210]

The *Harbour I* decision was subsequently appealed and a decision rendered in January, 1993. In *Harbour Assurance Co. v. Kansa General International Insurance Co.*[211] ("*Harbour II*"), the English Court of Appeal reversed the Queens Bench Division in *Harbour I* and held that the initial illegality of the contract was subject to the separability principle.[212] The Court of Appeal justified its decision by finding that, contrary to Judge Steyn's decision in *Harbour I*, common law precedent did not prohibit extending the separability principle to the initial illegality of the contract.[213] The *Harbour II* court also cited public policy considerations to justify their decision, which included giving effect to the parties' wishes and the practical advantages of supporting the convenience of one-stop adjudication.[214] The decision in

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207. *Id.*

208. *Id.* at 92-93.

209. *Id.* at 95.

210. *See* HALSBURY'S LAWS OF ENGLAND, *supra* note 29, ¶ 645 (stating that under English law, "the parties to an arbitration agreement cannot oust the court's jurisdiction, and any agreement which purports to do so is illegal and void as being contrary to public policy").

211. [1993] Q.B. 701 (C.A.) [hereinafter Harbour II].

212. *Id.*

213. *Id.* at 719. Lord Justice Leggatt stated that "[i]n my judgment this court is not obliged by authority to prevent the arbitrator from determining the issue of initial illegality." *Id.* Lord Justice Hoffmann concurred, stating that "none of these [statements that initial illegality and invalidity of contract can never be subject of binding arbitration] are binding authority . . . [i]n my view the case [cited by Judge Steyn in Harbour I] did not address this question at all." *Id.* at 725.

214. *Id.* at 724. Lord Justice Hoffmann stated that:

> In deciding whether or not the rule of illegality also strikes down the arbitration clause, it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the

Harbour II supports the trend in English law toward the full recognition of the separability principle, and indicates the judiciary's support for the arbitration process.[215]

2. Compétence de la Compétence Doctrine Under English Law

In *Harbour I*, the Queens Bench Division also reviewed the English approach to the compétence de la compétence doctrine.[216] The court stated that although the arbitrators may consider and rule on jurisdictional matters, only the court may issue a final determination.[217] The *Harbour I* court emphasized that the rule that an arbitrator may not issue a final determination as

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policy of the illegality rule. These are, first, the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and secondly, the practical advantages of one-stop adjudication, or in other words, the inconvenience of having one issue resolved by the court and then, contingently on the outcome of that decision, further issues decided by the arbitrator.

Id. Lord Justice Leggatt stated that:

> In my judgment this court is not obliged by authority to prevent the arbitrator from determining the issue of initial illegality. The tide is flowing in favour of permitting the arbitrator to do so, and it is no more necessary on grounds of public policy for the courts to retain exclusive control over the determination of the initial legality of agreements than over their subsequent legality. In particular, it would ill become the courts of this country, by setting their face against this jurisdiction, to deprive those engaged in international commerce of the opportunity of entrusting such disputes to English commercial arbitrators without the need for arbitration clauses containing elaborate self-fulfilling formulae.

Id. at 719. Lord Justice Gibson concurred, stating that "[t]he policy consideration which is of greatest weight, in my judgment, is what the judge [Judge Steyn] called the imperative of giving effect to the wishes of the parties unless there are compelling reasons of principle why it is not possible to do so." *Id.* at 710.

215. *See supra* note 214 and accompanying text (discussing public policies cited by *Harbour II* court in support of extending separability principle to initial illegality).

216. *Harbour I*, [1992] 1 Lloyd's Rep. at 83.

217. *Id.* The court emphasized at the outset that the case involved application for a stay pursuant to Section 1 of the English Arbitration Act of 1975 and concerned "important questions regarding the jurisdiction of arbitrators" but this had "nothing to do with the question whether arbitrators are competent to decide on questions relating to their own jurisdiction." *Id.* With respect to the issue of the arbitrators' competence to judge their own jurisdiction, the *Harbour I* court stated:

> The approach in English law is simple, straightforward and practical. As a matter of convenience arbitrators may consider, and decide, whether they have jurisdiction or not: they may decide to assume or decline jurisdiction .... But it is well settled in English law that the result of such a preliminary decision has no effect whatsoever on the legal rights of the parties. *Only the Court can definitively rule on issues relating to the jurisdiction of arbitrators. And it is*

to his jurisdictional competence is one that is well settled in English law.[218] In *Harbour II*, the Court of Appeal affirmed the *Harbour I* court's explanation of the status of compétence de la compétence under English law.[219]

English courts thus favor the separability principle.[220] The Court in *Heyman*[221] established the doctrine of separability in England and the doctrine has subsequently been extended to cover cases concerning the initial validity of the main contract and most recently its initial illegality.[222] English courts, however, do not accept the compétence de la compétence doctrine and appear emphatically opposed to its expansion.[223]

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possible to obtain a speedy declaratory judgment from the Commercial Court as to the validity of an arbitration agreement before or during the arbitration proceedings.

Id. (emphasis added); *see* Christopher Brown, Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer, [1954] 1 Q.B. 8, 13. The Queens Bench Division stated in *Brown* that the arbitrators may inquire, but not make a final determination, as to their jurisdiction over a dispute:

> They [the arbitrators] are entitled to inquire into the merits of the issue as to whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties—because that they cannot do—but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not.

Id. at 12-13.

218. *Harbour I*, [1992] 1 Lloyd's Rep. at 83.

219. *Harbour II*, [1993] Q.B. at 721. Lord Justice Hoffmann stated that "[i]t is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction, and therefore the validity of the arbitration clause is not an arbitrable issue." *Id.*

220. *See* Heyman v. Darwins, Ltd., [1942] App. Cas. 356 (H.L.) (holding arbitration clause separable in action for breach of contract by repudiation); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701 (C.A.) (extending separability doctrine to initial illegality of contract); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992] 1 Lloyd's Rep. 81, 84 (Q.B.) (holding that separability applies to issue of initial validity of contract); Paul Smith Ltd. v. H.& S. Int'l Holding Inc., [1991] 2 Lloyd's Rep. 127 (Q.B.) (holding arbitration clause separable in dispute regarding legality of notice of termination).

221. *Heyman*, [1942] App. Cas. at 356.

222. *See Harbour I*, [1992] 1 Lloyd's Rep. at 95 (holding that initial validity of contract was arbitrable); *Harbour II*, [1993] Q.B. 701 (holding that initial illegality of contract was arbitrable).

223. *See Harbour II*, [1993] Q.B. at 721 (stating that "[i]t is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction"); Promvimi Hellas A.E. v. Warinco A.G., [1978] 1 Lloyd's Rep. 373, 377 (C.A.) (stating that "[i]t is clear law that it is perfectly proper for an arbitral tribunal, when its jurisdiction is challenged, to proceed to hear evidence that may be relevant on that matter and to arrive at a decision on its own jurisdiction if it thinks right to do so, although it is clear also that that decision in itself does not preclude a Court thereafter from holding that there is no jurisdiction"); *Harbour I*, [1992] 1 Lloyd's Rep. at 83 (stating that "[o]nly

C. *Separability and Compétence de la Compétence Under the Private International Law of France*

Arbitration is favored in France[224] and is the most dynamic area of French contract law.[225] International arbitration is afforded great deference under French law,[226] and France occu-

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the Court can definitively rule on issues relating to the jurisdiction of arbitrators"); Christopher Brown, Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer, [1954] 1 Q.B. 8, 13 (stating that arbitrators may inquire into matter of their jurisdiction but not make final determination binding upon the parties).

224. *See, e.g.*, Judgment of May 18, 1971, Cass. civ. 1re, 1971 Bull. Civ. I, No. 161, at 134 (Fr.) ("Société Impex v. Société P.A.Z.") (holding arbitrator competent to judge all conflicts relating to contract, including those related to existence and validity of arbitration clause); Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 208 (Fr.) ("Société Gosset v. Société Carapelli") (holding that save under exceptional circumstances arbitration clause always separable in international contract); Judgment of Nov. 26, 1981, Cour d'appel de Paris, 1re Chambre suppl., [1982] Rev. Arb. 439 ("Société internationale du siège v. Société Bocuir") (upholding arbitral award even in face of arbitration agreement later found null where parties clearly intend to arbitrate); Judgment of Apr. 10, 1957, Cour d'appel 1re, Paris, 85 J. DU DROIT INT'L 1002 (1958) ("Société Myrtoon Steamship") (holding rule that French state may not be party to arbitration did not apply in international arbitration context); Gerald Pointon & David Brown, *France: Resolving Disputes*, REUTER TEXTLINE, EUROMONEY SUPP., Sept. 2, 1991, *available in* LEXIS, Nexis Library, ALLWLD File (stating that international arbitration is afforded favorable environment in France); Carbonneau II, *supra* note 97, at 5 (stating that France can "claim . . . the status of being a jurisdiction which favors international arbitration"); SCHWEBEL, *supra* note 17, at 11 (stating that France "occupies a prominent position in international arbitration, to which French law accords great latitude"). The favorable environment afforded arbitration in France which existed as early as the time of the French Revolution changed to subsequent disfavor during the mid-1800's, and then back to its present favored status. de Vries, *supra* note 8, at 50 n.40.

> At the time of the French Revolution there was a great deal of enthusiasm for arbitration. It was considered a panacea. . . . When a system of professional judges was later reinstituted . . . these judges reacted against what were considered to have [been] misuses and excesses of the revolutionary period. As a result, arbitration was viewed as being in competition with professional courts and was no longer looked upon with sympathy. This led to more and more hostile court rulings, finally culminating in a leading decision by the Supreme Court on July 10, 1843 that . . . stated that the principle that agreements to arbitrate were not legally binding. Little by little, under the pressure of commercial and international necessity, the severe judicial limitations on arbitration lessened.

Id. See generally M. Pierre Bellet, *The Evolution of French Judicial Views on International Commercial Arbitration*, 34 ARB. J. 28, 29 (1979) (discussing evolution of attitude of French judges toward arbitration). The present attitude toward arbitration in France reflects the desire of the French judiciary and parliament to encourage parties to hold their arbitration proceedings in France. Carbonneau II, *supra* note 97, at 5-6.

225. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 2.

226. *See, e.g.*, Judgment of June 21, 1965, Cass. com., [1966] Rev. Crit. Dr. Int'l Pr. 477 (Fr.) ("Société Supra-Penn v. Société Swan Finch Oil Corporation") (holding that arbitration clause in international commercial contract implied renunciation of juris-

pies a prominent position in international arbitration.[227] The highly favorable status of arbitration law in France reflects a choice by French judges to limit their control over international arbitration, and reflects the intention of the French Parliament to encourage settlement of disputes in international trade.[228]

1. The Separability Doctrine and Compétence de la Compétence Doctrine Under French Private International Case Law

France, unlike England and the United States, accepts the compétence de la compétence doctrine.[229] The arbitral tribunal's jurisdictional authority is comprehensive and allows the arbitral tribunal to answer various jurisdictional challenges.[230] The separability doctrine is also well-established under French pri-

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dictional rights pursuant to French Civil Code); Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 208 (Fr.) ("Société Gosset v. Société Carapelli") (holding that save under exceptional circumstances arbitration clause always separable in international contract); Judgment of July 4, 1972, Cass. civ. 1re, 1974 Bull. Civ. I, No. 348, at 154 (Fr.) ("Hecht v. Société N.V.R. Buisman's") (holding that in international arbitration, arbitration agreement is self-governing). SCHWEBEL, *supra* note 17, at 11. The favorable status of arbitration in France may be motivated by economic considerations and the desire to attract parties to the forum. Carbonneau II, *supra* note 97, at 5-6. French courts, however, are also motivated by a desire to adjudicate in a fashion which furthers the economic interests of the world community. *Id.*

> The unequivocal liberalism of the international commercial arbitration doctrine perhaps reflects the French judiciary's astute reading of what is in the best economic and commercial interests of France. The articulation of this doctrine, however, also seems to respond to higher-order considerations. . . . [t]he courts have emphasized—at least impliedly—their view that France should respond positively to the modifications in the international economic order and, thereby, make its contribution to a stable and viable world community.

Id.

227. SCHWEBEL, *supra* note 17, at 11.

228. 60 YEARS OF ICC ARBITRATION: A LOOK AT THE FUTURE 23 (ICC 1984); *see* Carbonneau II, *supra* note 97, at 5 (stating that "French courts have consistently supported the continued development of international commercial arbitration as a method of dispute resolution and have systematically eliminated many of the potential legal obstacles to the process").

229. NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8); *see* ROBERT & CARBONNEAU, *supra* note 1, pt. II, ch. 2 at 26 (stating that "Article 1466 of the new legislation [Nouveau Code de Procédure Civile] expressly incorporates the *kompetenz-kompetenz* [compétence de la compétence] doctrine into the applicable French law"). The compétence de la compétence doctrine is now well-settled under French case law concerning international commercial arbitration. *Id.*

230. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 3 at 2.

vate international case law.[231]

The Cour de Cassation[232] first established the doctrine of separability in France in its decision in *Société Gosset v. Société Carapelli*.[233] *Gosset* involved a contract for the sale of grain between a French company and an Italian company.[234] Les Établissements Raymond Gosset ("Gosset"), the buyer, had obtained an import license, but had not obtained the special authorization required to allow the grain to clear customs.[235] La Maison Frères Carapelli ("Carapelli"), the seller, brought an arbitration proceeding in Italy for damages resulting from impossibility.[236] After receiving a judgment in its favor, Carapelli was granted an exequatur[237] by the Tribunal Civil[238] de Marseille.[239] In its subsequent appeal to the Cour de Cassation, Gosset argued that the

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231. SCHWEBEL, *supra* note 17, at 43.

232. *See* M.A. Cunningham, *Guide to Louisiana and Selected French Legal Materials and Citation*, 67 TUL. L. REV. 1305 (1993) (discussing French court system). French courts may have judicial (ordinary), administrative, or constitutional jurisdiction. *Id.* at 1327. Courts having judicial jurisdiction are subdivided further into criminal and civil courts. *Id.* Civil cases are first heard by a court of first instance (tribunal d'instance or tribunal de grande instance). *Id.* Appeal may then be taken to regional appeals courts (Cour d'appel). *Id.* An appeal may subsequently be taken by means of a "pourvoi" (request to be heard) to the highest court in the French legal system, the Cour de Cassation. *Id.*; *see also* RAYMOND GUILLIEN & JEAN VINCENT, LEXIQUE DE TERMES JURIDIQUES 149 (8th ed. 1990). The Cour de Cassation is composed of five civil chambers and one criminal chamber. *Id.* The fourth civil chamber of the Cour de Cassation (Chambre commerciale et financière) hears cases of a commercial nature. *Id.* at 86.

233. Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 208 (Fr.).

234. *Id.*

235. *Id.*

236. *Id.* Under U.S. law, employment of the doctrine of impossibility requires satisfaction of a three-prong test: (1) there must be an occurrence of an unexpected event; (2) the risk of the unexpected event must not have been allocated to either party; and (3) the occurrence of the unexpected event must have made performance of the contract commercially impracticable. Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966); *see* CALAMARI & PERILLO, *supra* note 196, at 537 (discussing impossibility of performance of contract).

237. *See* EUGENE F. SCOLES, CONFLICT OF LAWS 1005 (2d ed. 1992) (stating that "[c]ivil law countries provide a procedure to give executory force (exequatur) to [a] foreign judgment as distinguished from the Anglo-American common law (but not statutory) practice of requiring an action on the judgment") (emphasis omitted).

238. *See* DOMINIQUE FRÉMY & MICHÈLE FRÉMY, QUID 1991 754 (Éditions Robert Laffont 1990) [hereinafter QUID 1991] (discussing French civil court system). The French civil court system is comprised of common law tribunals and "special" tribunals (such as the Tribunal de Commerce). *Id.* A civil tribunal may be a "tribunal d'instance" presided over by a single judge, or a "tribunal de grande instance," which is composed of three magistrates and which hears actions concerning amounts in excess of FF20,000 or actions which cannot be heard by another jurisdiction. *Id.*

239. Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 209 (Fr.).

grant of an exequatur was improper.[240] Gosset reasoned that the main contract, and therefore the arbitration clause, had been invalidated by impossibility.[241] The Cour de Cassation held that where international arbitration is involved, an arbitration agreement, whether in a separate document or part of the main contract, is always, except under exceptional circumstances,[242] completely autonomous.[243] Thus, under the doctrine of separability as articulated by the Cour de Cassation in *Gosset*, the autonomy of the arbitration agreement in an international contract is not affected even where the main contract may be invalid.[244]

In *Société Minoteries Lochoises v. Société Langelands Korn Foderstof*,[245] the Cour de Cassation upheld the separability doctrine, rejecting an allegation that impossibility of performance consti-

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240. Judgment of May 7, 1963, Cass. civ. 1re, *Moyen de Cassation available in* LEXIS, Intlaw Library, Frprcs File, at 2.

241. *Id.*

242. *See* CARBONNEAU, *supra* note 3, at 158 (discussing *Gosset* decision). The "exact character of the exceptional circumstances" has not been addressed in subsequent cases. *Id.*

243. Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 209. The Cour de Cassation stated that

> [Q]u'en matière d'arbitrage international, l'accord compromissoire, qu'il soit conclu séparément ou inclus dans l'acte juridique auquel il a trait, présente toujours sauf circonstances exceptionnelles qui ne sont pas alléguées en la cause, une complète autonomie juridique, excluant qu'il puisse être affecté par une éventuelle invalidité de cet acte. (In matters of international arbitration, the arbitration agreement, whether a separate agreement or included in the juridical act to which it refers, always presents, save in exceptional circumstances which are not alleged in the instant case, a complete juridical autonomy excluding the possibility of its being affected by the eventual invalidity of this act) (trans. *in* ROBERT & CARBONNEAU, *supra* note 1, pt II, ch 2 at 20).

Id.

244. *Id.*; *see* Judgment of Nov. 26, 1981, Cour d'appel de Paris, 1re Chambre suppl., 1982 Rev. Arb. 439 ("Société internationale du siège v. Société Bocuir"); ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 3 at 7. In *Société Bocuir*, the court ruled that even where an arbitration agreement is later found null, the arbitral award will stand where the parties' intent to arbitrate is clear. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 3 at 7.

> Here, the court not only held that the arbitral tribunal could rule upon the principle of its jurisdictional authority when one of the parties to the arbitration raised such a challenge, but also the fact that the tribunal ruled upon the basis of an arbitration agreement which was null did not invalidate the award when the common intent of the parties to submit all disputes to arbitration was clear.

Id.

245. Judgment of Nov. 12, 1968, Cass. com., 1968 Bull. Civ. V, No. 316, at 285 (Fr.).

tuted the exceptional circumstances (as articulated in *Gosset*) under which separability was not applicable. In *Minoteries Lochoises*, a French company, Société Minoteries Lochoises ("Minoteries"), brought suit protesting the decision of the Cour d'appel[246] d'Orléans in favor of a Danish company, Langelands Korn Foderstof ("LKF").[247] Minoteries had sold 300 tons of milk powder to LKF pursuant to a contract dated May 24, 1962.[248] A government regulation promulgated by the Fonds d'orientation et de régularisation des marchés agricoles ("FORMA")[249] subsequently suspended the exportation of milk powder.[250] Pursuant to the arbitration clause in the contract, LKF thereafter obtained an arbitration award in London.[251] The Cour d'appel d'Orléans granted an exequatur allowing the enforcement of the arbitration award.[252] In its appeal to the Cour de Cassation, Minoteries alleged that the contract was invalid.[253] According to Minoteries, legal precedent required that the invalidity of a contract result in the invalidity of the arbitration clause.[254] Minoteries alleged that it was not possible for a valid arbitration clause to be included in an invalid contract.[255] Minoteries also argued that the impossibility of performance of the contract due to force majeure[256] constituted an exceptional circumstance

246. *See* QUID 1991, *supra* note 238, at 754 (discussing French Cour d'appel). The Cour d'appel is the French court of appeal and has jurisdiction over both civil and criminal matters. *Id.* The Cour d'appel may take appeals on decisions rendered by a tribunal d'instance or a tribunal de grande instance. *Id.*

247. Judgment of Nov. 12, 1968, Cass. com., 1968 Bull. Civ. V, No. 316, at 285 (Fr.).

248. *Id.*

249. *See* YVES BERNARD & JEAN-CLAUDE COLLI, DICTIONNAIRE ÉCONOMIQUE ET FINANCIER 691-92 (1975) (discussing the Fonds d'orientation et de régularisation des marchés agricoles [hereinafter FORMA]). FORMA is an "[é]tablissement public chargé de préparer et d'exécuter les interventions financières de l'État sur les marchés des produits agricoles" [a public organization whose function is to prepare and implement economic measures promulgated by the State (France) concerning the agricultural market]. FORMA was dissolved on January 29, 1986 by French Decree No. 86,136. QUID 1991, *supra* note 238, at 1556.

250. Judgment of Nov. 12, 1968, Cass. com., 1968 Bull. Civ. V, No. 316, at 285 (Fr.).

251. *Id.*

252. *Id.* at 286.

253. Judgment of Nov. 12, 1968, Cass. com., *Moyens de Cassation available in* LEXIS, Intlaw Library, Frprcs File, at 2.

254. *Id.*

255. *Id.*

256. *See* 36A C.J.S. *Force* 953 (1961). "Force majeure" is a French term which corre-

under which the arbitration clause was nonseparable.[257] The Cour de Cassation rejected these arguments, holding that the cancellation of the contract for nonperformance of the seller's obligations did not invalidate the arbitration clause.[258]

The compétence de la compétence doctrine and separability doctrines were upheld by the Cour de Cassation in *Société Impex v. Société P.A.Z.*[259] *Impex* involved a contract for the sale of barley between Société Impex ("Impex"), a French company, and Société P.A.Z. Produzione Lavorazione Orzo ("PAZ"), an Italian company.[260] Impex had cancelled its contracts with PAZ and three other Italian companies because of impossibility after the Office national interprofessionel des céréales[261] ("ONIC") refused to furnish the required export certificates.[262] PAZ instituted an arbitration action pursuant to the arbitration clause.[263]

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sponds to an "Act of God" under the common law system and which is defined under civil law systems as "an accident produced by physical cause which is irresistible; a fact or accident which human prudence can neither foresee nor prevent; a fortuitous event; inevitable accident or casualty; irresistible force, overpowering force, or unforeseen event." *Id.* (citations omitted).

257. Judgment of Nov. 12, 1968, Cass. com., *Moyens de Cassation available in* LEXIS, Intlaw Library, Frprcs File, at 2.

258. Judgment of Nov. 12, 1968, Cass. com., 1968 Bull. Civ. V, No. 316, at 286 (Fr.). The Cour de Cassation stated that "[L]a Cour d'appel a décidé à bon droit que la résolution dudit contrat pour inéxécution des obligations du vendeur n'était pas de nature, même en presence du caractère d'ordre public de cette mesure réglementaire, à faire obstacle à l'application de la clause compromissoire . . . ." (The Court of Appeal has correctly decided that the contract provision concerning the non-performance of the seller's legal obligations is not enough, even amidst the public policy character of this statutory measure, to compromise the application of the arbitration clause) (translation by Carol Remy; Pauline Mével). *Id.*

259. Judgment of May 18, 1971, Cass. civ. 1re, 1971 Bull. Civ. I, No. 161, at 134 (Fr.).

260. *Id.*

261. *See* BERNARD & COLLI, *supra* note 249, at 962-63 (discussing the Office national interprofessionel des céréales [hereinafter ONIC]). ONIC is an "[é]tablissement public administratif chargé de la préparation et de l'exécution des mesures relatives à l'organisation du marché des céréales" [a municipal administrative organization whose task is to initiate and implement measures relating to the regulation of the grain market]. *Id.* at 962. The predecessor organization to ONIC, ONIB (Office national interprofessionel du blé) [national organization relating to wheat industry matters] was created in 1936. *Id.* ONIB was transformed into ONIC in 1940 in conjunction with an extension of the organization's role to encompass grains other than wheat. *Id.* ONIC is responsible for ensuring that price guarantees for grains are respected. *Id.*; *see also* QUID 1991, *supra* note 238, at 1557 (discussing ONIC).

262. Judgment of May 18, 1971, Cass. civ. 1re, 1971 Bull. Civ. I, No. 161, at 134 (Fr.).

263. *Id.*

Impex then instituted a court action to annul the contracts, arguing that its performance would constitute a violation of French public policy.[264] The Tribunal Civil de Strasbourg declared itself incompetent to judge the dispute.[265] The Tribunal Civil de Strasbourg referred the matter to arbitration, declaring that the arbitrator may judge his own competence to rule on the validity of the contract.[266] Even where a contract is void, the Tribunal Civil de Strasbourg stated, the arbitration clause has total legal autonomy and therefore is still valid.[267] The Cour de Cassation affirmed the Cour d'appel de Colmar's ruling, which had upheld the autonomy of the arbitration clause, and allowed the arbitrator to judge all conflicts that arose,[268] even those conflicts related to the existence and validity of the arbitration clause.[269]

2. The Compétence de la Compétence Doctrine Under the Arbitration Provisions of the Nouveau Code de Procédure Civile

In 1983 the French Parliament promulgated the Nouveau Code de Procédure Civile[270] in response to two executive enact-

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264. *Id.*

265. Judgment of May 18, 1971, Cass. civ. 1re, *Moyen de Cassation available in* LEXIS, Intlaw Library, Frprcs File, at 2.

266. *Id.*

267. *Id.*

268. Judgment of May 18, 1971, Cass. civ. 1re, 1971 Bull. Civ. I, No. 161, at 134 (Fr.). The Cour de Cassation stated that "[E]lle [the Cour d'appel de Colmar] a non moins justement decidé qu'en vertu dudit accord compromissoire, juridiquement autonome en droit international privé français, les chambres arbitrales ont exclusivement qualité pour statuer sur les litiges entrant dans le cadre de la mission . . . ." (The Court of Appeal of Colmar has also correctly decided that because of the above-mentioned arbitration clause, which is legally autonomous in French private international law, the arbitral tribunal has the exclusive authority to make decisions which are within the scope of its jurisdiction) (translation by Carol Remy; Pauline Mével). *Id.*

269. *Id* . The Cour de Cassation stated that "[L]a Cour d'appel [de Colmar] constate que l'accord compromissoire litigieux soumet à la juridiction des chambres arbitrales désignées 'toute contestation survenant à l'occasion de la présente affaire, même celle concernant son existence et sa validité.'" (The Court of Appeal of Colmar has taken notice that the contentious arbitration clause empowers the arbitral tribunal to consider any question in this case, even a question as to the existence or validity of the clause) (translation by Carol Remy; Pauline Mével). *Id.*

270. NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1442-1507 (Fr.) (English trans.). Titles I, II, III, and IV of the NOUVEAU CODE DE PROCÉDURE CIVILE, which are comprised of Articles 1442-1491, cover domestic arbitration. *Id.* Title V, comprised of Articles 1492-1497, covers international arbitration and incorporates Titles I, II and III when an international arbitration is subject to French substantive law, unless the parties have agreed otherwise. *Id.* Title V of the NOUVEAU CODE DE PROCÉDURE CIVILE was drafted

ments, Decree No. 80-354 of May 14, 1980 and Decree No. 81-500 of May 12, 1981.[271] Article 1466 of the Code explicitly authorizes the compétence de la compétence doctrine by assigning full authority to the arbitral body to be the judge of its own jurisdiction.[272] Article 1466 provides the arbitrator with powers that nearly approximate those afforded to a judge.[273] Under Article 1466 of the Nouveau Code de Procédure Civile, the arbitral tribunal has the power to rule upon issues of both the principle of its authority, such as whether or not the arbitration agreement itself is valid, and the scope of its authority, such as a case where a party alleges that the present dispute is not covered under the arbitration agreement.[274] Under Article 1458 of the Nouveau Code de Procédure Civile, where a dispute that has been brought before an arbitral tribunal by virtue of an agreement to arbitrate is subsequently brought before a civil or commercial

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in accordance with customary practices in the area of international trade and was influenced by the rules of the two most respected arbitral organizations, UNCITRAL and the ICC. ROBERT & CARBONNEAU, *supra* note 1, App. B-22 (Report to the Prime Minister Accompanying the draft Decree of May 12, 1981, Instituting the Provisions of Books III and IV of the New Code of Civil Procedure) [hereinafter the Report]. The new international arbitration rules do not alter the Cour de Cassation's decisional law concerning international arbitration and specifically the doctrine of separability. *Id.* Title VI, comprised of Articles 1498-1507, provides rules for appeals in international arbitration. NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1498-1507 (Fr.) (English trans.). Under Articles 1504 and 1502 of Title VI, for example, an award rendered in France may be challenged where, *inter alia*, there was no arbitration agreement or where the arbitration agreement was null and void. *Id.*

271. Decree No. 80-354 of May 14, 1980, (1980) Journal Officiel de la République Française ("J.O.") 1238, (1980) D.S.L. 207 (Fr.); Decree No. 81-500 of May 12, 1981, (1981) J.O. 1380, (1981) D.S.L. 222 (Fr.); CARBONNEAU, *supra* note 3, at 117. The 1980 Decree initiated the extensive revision of domestic arbitration law while the 1981 Decree was followed by a change in international arbitration rules. *Id.*; *see* W. Laurence Craig et al., *French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981*, 7 Y.B. COM. ARB. 407 (Kluwar 1982) [hereinafter Craig II]. The liberalism of the new French rules on international arbitration is universally recognised. 60 YEARS OF ICC ARBITRATION, *supra* note 228, at 23. The justification for the new set of rules is to favor dispute settlement in international trade. *Id.*

272. NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8). ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 3 at 2.

273. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 3 at 2.

274. NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8). Article 1466 provides that "[i]f one of the parties contests, before the arbitral tribunal, the principle or scope of the tribunal's jurisdictional authority, the tribunal has the power to rule upon the validity or the limits of its investiture." *Id.*; *see* ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 3 at 2 - pt. I, ch. 3 at 3 (discussing Article 1466 of the Nouveau Code de Procédure Civile).

court by one of the parties, the court must rule that it lacks jurisdiction to hear the dispute.[275] Additionally, the court must reach the same result even where the dispute has not yet been referred to the arbitral tribunal.[276] This principle holds true unless the arbitration agreement is manifestly null.[277]

In a recent decision, *Bai Line Shipping Co. v. Société Recofi*,[278] the Cour de Cassation upheld the compétence de la compétence doctrine mandated under the Nouveau Code de Procédure Civile.[279] Société Bai Line Shipping Compagnie ("Bai Line"), a Panamanian company, was the owner of the vessel *Sabarika*.[280] Bai Line chartered the vessel to Société Recofi ("Recofi") pursuant to a charter party contract containing an arbitration clause.[281] The arbitration clause limited the time in which a party could commence an arbitration action to six months after the merchandise was unloaded or the unexecuted contract was terminated.[282] Bai Line, however, brought an action for nonpayment against Recofi more than six months after the merchandise was unloaded from the chartered vessel, in contravention of the terms of the contract.[283] In its appeal to the Cour de Cassation, Bai Line argued that the arbitration clause

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275. NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1458 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8). Article 1458 provides that

> When a dispute which has been referred to an arbitral tribunal by virtue of an arbitration agreement is brought before a court, the latter must rule that it lacks jurisdiction to hear the dispute. If the dispute has not as yet been referred to the arbitral tribunal, the court again must rule that it lacks jurisdiction, unless the arbitration agreement is manifestly null. In both cases, the court cannot raise its lack of jurisdiction on its own motion.

Id.

276. *Id.*

277. *Id.* Manifest nullity, or prima facie nullity, encompasses traditional means of invalidating arbitration clauses, such as legal capacity, failure to reduce the clause to writing, or lack of arbitrable subject matter. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 2 at 9. Thus, the courts are afforded only *limited* powers as compared to the more far-reaching authority awarded the arbitral body to judge its own competence. *Id.* The legislators who drafted the Nouveau Code de Procédure Civile saw the courts in a "complimentary" role. *Id.* The French Parliament intended to afford "absolute" authority to the parties' wishes where they manifested their intent to arbitrate. *Id.*

278. Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25 (Fr.).

279. *Id.* at 25-26.

280. Judgment of Jan. 21, 1992, Cass. com., *available in* LEXIS, Intlaw Library, Frprcs File, at 2.

281. Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25 (Fr.).

282. *Id.*

283. Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25 (Fr.).

violated a June 18, 1966 law concerning charter parties and freightage that required a one-year limitation period for the commencement of arbitration actions.[284] The Tribunal de Commerce[285] de Paris and subsequently the Cour d'appel de Paris both declared their jurisdictional incompetence to render a decision.[286] The Cour de Cassation upheld their ruling.[287] The Cour de Cassation stated that under Article 1458 of the Nouveau Code de Procédure Civile, a court must, absent manifest nullity of the arbitration clause, declare itself incompetent to render a decision on the merits.[288] The Cour de Cassation further stated that under Article 1466 of the Nouveau Code de Procédure Civile it was for the arbitrator, not the court, to rule both on the limits of his jurisdictional power and on the merits of the matter of the prescription.[289] Thus, under Article 1466 of the

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284. Judgment of Jan. 21, 1992, Cass. com., *Moyen de Cassation available in* LEXIS, Intlaw Library, Frprcs File, at 2.

285. *See* QUID 1991, *supra* note 238, at 754 (defining Tribunal de Commerce). Under the French court system, a tribunal de commerce has jurisdiction to rule upon conflicts relating to commerce and the exercise of commerce. *Id.*

286. Judgment of Jan. 21, 1992, Cass. com., *Moyen de cassation available in* LEXIS, Intlaw Library, Frprcs File, at 2-3.

287. Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25-26 (Fr.).

288. *Id.* at 26; *see supra* note 277 (defining "manifest nullity"). The Cour de Cassation stated that

> [C]onformément a l'article 1458 du nouveau Code de procédure civile, si le tribunal arbitral n'est pas encore saisi, la juridiction d'État doit se déclarer incompétente, à moins que la convention d'arbitrage soit manifestement nulle, la cour d'appel a decidé à bon droit, par ce seul motif, qu'il appartenait à la juridiction arbitrale de statuer sur la question de la prescription. (Conforming to Article 1458 of the nouveau Code de procédure civile, if the matter has not yet been referred to the arbitral tribunal, the national court has to declare itself incompetent, unless the arbitration clause is obviously null (non-existent). Thus, the Court of Appeal has correctly decided that it is the task of the arbitral tribunal decide the question of the prescription) (translation by Carol Remy; Pauline Mével).

Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25 (Fr.); *see supra* note 275 and accompanying text (discussing Article 1458 of Nouveau Code de Procédure Civile).

289. Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25 (Fr). The Cour de Cassation stated that

> [q]ue si le motif par lequel l'arrêt retient qu'en vertu de l'article 1466 du nouveau Code de procédure civile, il appartient à l'arbitre de statuer sur les validités ou les limites de son investiture, et, partant, sur l'extinction de son pourvoir juridictionnel et sur les prescriptions . . . que la cour d'appel ne pouvait, sans tirer les consequences de ses propres constatations relatives a l'o[b]jet du litige, et violer l'article 1466 du nouveau Code de procedure civile, considerer qu'il appartenait a la juridiction arbitrale de statuer sur la question de la prescription. (If the Court of Appeal observes that under Article 1466 of

Nouveau Code de Procédure Civile, the arbitral body may rule upon an allegation of invalidity of the main contract, and consequently the attendant arbitration provision, by reason of mistake or lack of consent.[290] If the tribunal determines that the main contract is in fact null, the tribunal is then rendered jurisdictionally incompetent to rule upon the merits of a dispute.[291]

3. Limitations on Arbitrability of Disputes Under French Law

Although international arbitration is highly favored under French law,[292] there may be limitations to the arbitrability of a dispute under the French legal system.[293] Where parties to an international commercial contract have chosen to arbitrate under French law, they will be subject in many instances to the substantive provisions of French domestic law.[294] Under French substantive law, the subject matter of a contract may be nonarbitrable in a number of areas where court intervention is regarded as indispensable.[295] Nonarbitrable subject matter under French substantive law includes public policy matters[296] such as the status and capacity of individuals in relation to naturalization, im-

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the nouveau Code de procédure civile it is the task of the arbitral tribunal to rule on the validity and limits of its jurisdictional power, on the extinction of its jurisdictional power and on the matter of the prescription, then the Court of Appeal would violate the provisions of Article 1466 if it did not find that it is the arbitration tribunal's task to rule on the question of the prescription) (translation by Pauline Mével).

Id.

290. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 3 at 4.

291. *Id.*

292. *See* Carbonneau II, *supra* note 97, at 5 (stating that France can "claim . . . the status of being a jurisdiction which favors international commercial arbitration"); SCHWEBEL, *supra* note 17, at 11 (stating that France "occupies a prominent position in international arbitration, to which French law accords great latitude"); Gerald Pointon & David Brown, *France: Resolving Disputes*, REUTER TEXTLINE, EUROMONEY SUPP., Sept. 2, 1991, *available in* LEXIS, Nexis Library, ALLWLD File (stating that international arbitration is afforded favorable environment in France).

293. Telephone Interview with Me. Abdelhay Sefrioui, Partner, Abdelhay et Anne Sefrioui (Avocats à la Cour d'Appel de Paris) (May 9, 1993). *See generally* Carbonneau II, *supra* note 97 (discussing application of French domestic arbitration law to international commercial arbitration).

294. Telephone Interview with Me. Abdelhay Sefrioui, Partner, Abdelhay et Anne Sefrioui (Avocats à la Cour d'Appel de Paris) (May 9, 1993). *See generally* Carbonneau II, *supra* note 97 (discussing application of French domestic arbitration law to international commercial arbitration).

295. Carbonneau II, *supra* note 97, at 9.

296. *Id.* at 37. French courts define "public policy" less broadly in the area of international commercial arbitration. *See id.* (stating that "public policy concerns have

migration, tax and administrative matters.[297] Nonarbitrable subject matter constituting public policy also incorporates political legislation, including the constitution, and laws concerning the economic organization of society, including price controls and freedom of commerce.[298]

Even where a contract relates to a public policy matter, such as exchange controls, contractual disputes may nonetheless be arbitrable where they do not result in a direct ruling on an issue of public policy.[299] Nonarbitrability will only result where a public policy mandate is directly violated.[300] Under French international arbitration law, in contrast to French domestic arbitration law, arbitrability has been upheld in contracts in which the State and State entities were parties.[301]

Actions concerning trademarks and issues of unfair competition under French substantive law are nonarbitrable, except where the dispute involves misappropriation.[302] Disputes concerning patents are generally arbitrable, except where they relate to public policy matters as mandated under applicable legislation.[303] The arbitral tribunal may not render an award that

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been interpreted and applied quite restrictively by the French courts in matters of international commercial arbitration . . . .").

297. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 13.

298. *Id.* pt. I, ch. 1 at 13.

299. *Id.* pt. I, ch. 1 at 14.

300. *Id.* pt. I, ch. 1 at 15.

301. *Id.* pt. I, ch. 1 at 17; *see* Judgment of May 2, 1966, Cass. civ. 1re, 1966 D.S. Jur. 575 (Fr.) ("Trésor public v. Galakis"); *supra* notes 121-133 and accompanying text (discussing *Scherk* case in which U.S. Supreme Court upheld arbitrability of securities laws violations in international context).

302. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 17. The exclusive jurisdiction of the civil courts in France over trademark issues does not extend to the misappropriation of trademarks because the "[misappropriation issue] does not raise a public policy issue since it only has a relative effect as between the parties involved." *Id.* pt. I, ch. 1 at 17-18 (citation omitted).

303. *Id.* pt. I, ch. 1 at 19. If a question as to the invalidity of a patent is brought up during the course of arbitration, under Article 1466 of the Nouveau Code de Procédure Civile the arbitral tribunal may rule on the issue

> not to the merits, but to the question of the tribunal's jurisdiction. The tribunal either would decide that the patent is valid (arguably, a relative decision which affects only the rights of the parties engaged in arbitration) and then could proceed to rule on the merits. It also might rule that the patent is invalid—this holding would have the exclusive effect of divesting the arbitral tribunal of jurisdiction and not have any impact upon the absolute validity or invalidity of the patent.

Id.

invalidates a patent.[304] Ownership of patents, however, is arbitrable,[305] as are disputes involving misappropriation[306] and patent licensing agreements.[307] Collective bargaining agreements are arbitrable,[308] but arbitration of individual labor disputes is discouraged under French law.[309]

The separability doctrine is thus well established under French case law involving international arbitration.[310] As set out in the seminal case of *Société Gosset v. Société Carapelli*,[311] the separability principle applies save where "exceptional circumstances" are present.[312] The compétence de la compétence doctrine has been established as well, mandated by the new arbitration rules of the Nouveau Code de Procédure Civile in the absence of a manifestly null arbitration clause.[313] Both doctrines, however, are subject to the limitations to arbitrability under French substantive law.[314]

III. *FRENCH ARBITRATION LAW MOST EFFECTIVELY PROMOTES INTERNATIONAL ARBITRATION*

Although a clear desire to promote international arbitration

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304. *Id.*

305. *Id.*

306. ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 19.

307. *Id.* pt. I, ch. 1 at 20. This is so because patent licensing agreements are private contractual arrangements and thus arbitration is the preferred method of dispute resolution. *Id.*

308. *Id.* pt. I, ch. 1 at 22.

309. *Id.* pt. I, ch. 1 at 20-21.

310. *See supra* notes 232-69 and accompanying text (discussing French decisions upholding separability doctrine). Under the Nouveau Code de Procédure Civile, "international" arbitration relates to international contracts which implicate "international commercial interests." CARBONNEAU, *supra* note 3, at 104, 122. "International commercial interests" are generally held by commentators to refer to economic criterion, a more comprehensive test than using legal criterion (under which a contract is international if "linked to more than one State, *i.e.*, through the nationality or residence of the parties"). *Id.* at 122. French courts have held a transaction "international" and "commercial" in nature when it has a "reciprocal economic impact upon different countries, *i.e.*, when it has a bearing upon private transnational commercial dealings between nationals of different countries . . . . [t]he economic nature and subject matter of the transaction giving rise to the arbitration are the critical factors." ROBERT & CARBONNEAU, *supra* note 1, pt. II, ch. 1 at 14.

311. Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 208 (Fr.).

312. *See supra* notes 232-44 and accompanying text (discussing *Gosset* decision).

313. *See supra* notes 270-77 and accompanying text (discussing provisions of Nouveau Code de Procédure Civile).

314. *See supra* notes 292-309 and accompanying text (discussing nonarbitrable subject matter under French law).

has been articulated by the courts and legislative bodies of France, the United States and England,[315] France has developed a legal structure that most effectively furthers this public policy goal.[316] French law, in contrast to English and U.S. law, accepts the compétence de la compétence doctrine in addition to the separability doctrine.[317] French law, in espousing the compétence de la compétence doctrine in conformity with UNCITRAL Rules, ICC Rules, and the Model Law, provides a greater degree of neutrality in its arbitration rules than is provided under U.S. or English law.[318] Acceptance of the compétence de la compétence doctrine under French law promotes international arbitration by giving effect to the parties' intentions,[319] by preserving the interrelationship between compétence de la compétence

315. *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974) (stating that refusal by courts to enforce arbitration agreements would frustrate purpose of achieving orderliness and predictability essential to international business transactions); Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991) (stating that "the clear weight of authority holds that the most minimal indication of the parties' intent to arbitrate must be given full effect, especially in international disputes"); CARBONNEAU, *supra* note 3, at 81 (stating that English Arbitration Act was promulgated to make London "more attractive" center for arbitration of international disputes); Carbonneau II, *supra* note 97, at 5 (stating international arbitration in favor in France); *supra* note 214 and accompanying text (discussing public policy favoring arbitration under English law).

316. *See, e.g.*, *supra* notes 270-77 (describing Nouveau Code de Procédure Civile); *see also* 60 YEARS OF ICC ARBITRATION, *supra* note 228, at 23 (stating that liberalism of new French rules on international arbitration [Nouveau Code de Procédure Civile] is universally recognised); Carbonneau II, *supra* note 97, at 5 (stating that "French courts have consistently supported the continued development of international commercial arbitration as a method of dispute resolution and have systematically eliminated many of the potential legal obstacles to the process").

317. *See, e.g.*, Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 208 (Fr.) ("Société Gosset v. Société Carapelli") and Heyman v. Darwins, Ltd., [1942] App. Cas. 356 (H.L.) (establishing separability principle in the United States, France and England, respectively); *see also* NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8) (providing statutory mandate for compétence de la compétence doctrine under French law).

318. *See* ICC RULES, *supra* note 34, at 19 (providing for acceptance of compétence de la compétence under ICC Rules); UNCITRAL RULES, *supra* note 23, at 42-43 (providing for acceptance of compétence de la compétence doctrine under UNCITRAL Rules); Model Law, *supra* note 23, at 86 (providing for acceptance of compétence de la compétence doctrine under Model Law); NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1458, 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8) (providing for acceptance of compétence de la compétence doctrine under Nouveau Code de Procédure Civile).

319. *See* MAURO RUBINO-SAMMARTANO, *supra* note 4, at 34 (stating that intention of parties is the "fundamental element of arbitration, whether it is treated as being con-

and separability,[320] and by recognizing the inherent competence power of the arbitral tribunal.[321] U.S. and English arbitration law, in contrast, permit a greater degree of judicial control over arbitration.[322] The retention of judicial control under U.S. and English law inhibits the effectiveness of international arbitration in several ways: it affords parties a means by which they may avoid their obligation to arbitrate,[323] it negates certain advantages attributed to the arbitral procedure, such as providing a reduced judicial workload and a less expensive dispute resolution mechanism,[324] and it detracts from the credibility of the arbitral process as an alternative dispute resolution mechanism.[325]

A. *The French Legal System Promotes International Arbitration by Accepting Both Compétence de la Compétence and Separability*

The separability doctrine is well established under French case law.[326] The doctrine of compétence de la compétence has been accepted under French law as well, pursuant to the French

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tractual (arising from an agreement between the parties) or procedural (i.e. the means through which a legal system obtains a decision)").

320. *See supra* notes 55-59 and accompanying text (discussing interrelationship between separability and compétence de la compétence doctrines).

321. *See* SHIHATA, *supra* note 49, at 25-26 (stating that compétence de la compétence power is "inherent in every judicial organ").

322. *See, e.g., supra* note 141 and accompanying text (indicating compétence de la compétence not accepted under U.S. case law); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701, 721 (C.A.) (stating that compétence de la compétence not accepted under English legal system); *supra* notes 174-77 (describing English courts' scrutiny of wording of arbitration clause and process of interlocutory clarification).

323. *See, e.g., supra* notes 15-17 (discussing means by which parties may attempt to avoid arbitration by initiating court proceedings); DAVID, *supra* note 8, at 285, stating that "in many cases the objection raised by a party to the jurisdiction of the arbitral tribunal is not made in total good faith; the purpose of the opponent is only to gain time").

324. *See* Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 352 (7th Cir. 1983) (stating that "[a]rbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies"); H.R. REP. NO. 96, 68th Cong., 1st Sess., at 2 (1924) (stating that "[the high cost of litigation] can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable").

325. *Cf.* ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 9 (stating that drafters of Nouveau Code de Procédure Civile imagined national court in complimentary role with respect to arbitral tribunal); *id.* pt. I, ch. 3 at 2 (stating that Article 1466 of Nouveau Code de Procédure Civile "in effect . . . gives the arbitrator powers nearly equivalent to those of the [national court] judge").

326. *See supra* notes 232-69 and accompanying text (discussing French decisions upholding separability doctrines).

Parliament's promulgation of the Nouveau Code de Procédure Civile.[327] The acceptance of both compétence de la compétence and separability under French law renders it the most effective of the three legal systems in encouraging the use of, and enforcing the provisions of, international commercial arbitration agreements.[328] In addition, accepting both separability and compétence de la compétence places French law in conformity with the provisions of UNCITRAL and ICC Rules.[329] By conforming to these provisions, French law espouses the concept of internationalization and neutrality in arbitral proceedings[330] and furthers the arbitral process by keeping arbitrable disputes out of the national courts.[331]

1. Separability and Compétence de la Compétence Under French Law

The French Cour de Cassation established the separability principle in the *Société Gosset v. Société Carapelli* decision.[332] Under *Gosset*, the arbitration clause is always separable in international contracts save under exceptional circumstances, even where the main contract may later be found to be invalid.[333] Although French courts do not formally accept the doctrine of *stare decisis*,[334] they are generally consistent in deciding subse-

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327. *See supra* notes 270-77 and accompanying text (discussing provisions of Nouveau Code de Procédure Civile).

328. *See* 60 YEARS OF ICC ARBITRATION, *supra* note 228, at 23 (stating that liberalism of new French rules on international arbitration [Nouveau Code de Procédure Civile] is universally recognised); Carbonneau II, *supra* note 97, at 5 (stating that "French courts have consistently supported the continued development of international commercial arbitration as a method of dispute resolution and have systematically eliminated many of the potential legal obstacles to the process").

329. *See* ICC RULES, *supra* note 34, at 19 (providing for acceptance of separability and compétence de la compétence under ICC Rules); UNCITRAL RULES, *supra* note 23, at 42-43 (providing for acceptance of separability and compétence de la compétence doctrine under UNCITRAL Rules).

330. *See supra* notes 69-74 (discussing neutral and international nature of UNCITRAL and ICC Rules).

331. *Id.*

332. Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 208 (Fr.); *see supra* notes 232-244 (discussing *Gosset* decision).

333. Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 209 (Fr.).

334. *See* Kent A. Lambert, *The Suffocation of a Legal Heritage: A Comparative Analysis of Civil Procedure in Louisiana and France—the Corruption of Louisiana's Civilian Tradition*, 67 TUL. L. REV. 231, 236 (1992) (stating that "[t]he common-law doctrines of precedent and stare decisis generally have no place in the civilian [civil law] court"). Although civil law courts are not bound to follow prior decisions, subsequent decisions should be

quent cases,[335] and international case law in France following the *Gosset* decision indicates that the separability doctrine is now well established.[336] The French Parliament has promoted the doctrine of compétence de la compétence by explicitly authorizing its use under Article 1458 and 1466 of the Nouveau Code de Procédure Civile.[337] The Nouveau Code de Procédure Civile reflects the special status of international arbitration in France.[338]

2. French Law Most Effectively Promotes International Commercial Arbitration

French arbitration law furthers the public policy goal of promoting international arbitration in France.[339] The French approach favors less court intervention and review,[340] creating a favorable forum in France for international arbitration.[341] The

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consistent. *See id.* (stating that under civil law systems, successive courts frequently reach same conclusion in cases which are similar, as result of employment of similar interpretative methods and application of same written codal provisions). Further, under the French court doctrine of *jurisprudence constante*

> once a matter has been decided the same way numerous times and thereby establishes an official interpretation of the written law, the court will follow this interpretation. In effect, a series of consistent judicial decisions is granted the status of an interpretation of the written law provided by custom.

Id.; *see* Alvin B. Rubin, *Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad*, 48 LA. L. REV. 1369, 1372 (1988) (stating that [under civil law system] "[i]nstead of *stare decisis*, the rule is one of deference to a series of decisions, *jurisprudence constante*"). *Compare* Lambert, *supra*, *with* Windust v. Department of Labor and Indus., 323 P.2d 241, 243 (Wash. 1958) (discussing *stare decisis* doctrine under U.S. law).

335. *See supra* note 334 (discussing deference to prior decisions under civil law systems).

336. *See supra* notes 232-69 and accompanying text (discussing French cases upholding separability doctrine).

337. NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1458, 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8); *see* Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25 (Fr.) ("Bai Line Shipping Co. v. Société Recofi") (upholding compétence de la compétence doctrine as mandated under Nouveau Code de Procédure Civile).

338. *See* 60 YEARS OF ICC ARBITRATION, *supra* note 228, at 23 (stating that liberalism of new French rules on international arbitration [Nouveau Code de Procédure Civile] is universally recognised).

339. *See* Carbonneau II, *supra* note 97, at 5 (stating that "French courts have consistently supported the continued development of international commercial arbitration as a method of dispute resolution and have systematically eliminated many of the potential legal obstacles to the process").

340. NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1458, 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8).

341. *See supra* note 339 (discussing French courts' support of international commercial arbitration).

essence of the arbitral process is its contractual nature, which gives effect to the parties' intentions.[342] Parties who execute an arbitration agreement intend both to invest the arbitrator with the power to hear their disputes and to simultaneously divest the courts of such authority.[343] Court intervention in arbitration proceedings, then, runs contrary to the parties' intentions in formulating an arbitration agreement.[344] Further, by creating a milieu in which there is minimal court intervention in arbitral proceedings and in which courts are seen in a complementary role, France promotes the credibility of arbitration as a dispute resolution mechanism.[345] By accepting both compétence de la compétence and separability, French arbitration law gives effect to the parties' intentions,[346] sustains the inherent competence power of arbitral bodies,[347] and maintains the link between the two concepts, thus preventing the evasion of arbitration agreements.[348]

a. French Law Gives Effect to Parties' Intentions and Sustains the Inherent Competence Power of the Arbitral Tribunal

Acceptance of the compétence de la compétence doctrine under French law promotes international arbitration by giving force to the parties' intentions and recognizing the inherent competence power of the arbitral tribunal.[349] By accepting the compétence de la compétence doctrine, French law conforms to the fundamental nature of international arbitration, which is to

342. *See supra* notes 3-5 and accompanying text (discussing autonomy of will of parties in arbitration process).

343. *See supra* note 1 and accompanying text (discussing arbitration agreement as choice-of-forum clause).

344. *Id.*

345. *See* ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 9 (stating that drafters of Nouveau Code de Procédure Civile imagined national court in complimentary role with respect to arbitral tribunal); *id.* pt. I, ch. 3 at 2 (stating that Article 1466 of the Nouveau Code de Procédure Civile "in effect . . . gives the arbitrator powers nearly equivalent to those of the [national court] judge").

346. *See* SHIHATA, *supra* note 49, at 25-26 (discussing theoretical bases for doctrine of compétence de la compétence).

347. *Id.*

348. *See supra* notes 55-59 and accompanying text (discussing relationship between compétence de la compétence doctrine and separability doctrine).

349. *See supra* notes 342-47 and accompanying text (discussing principle of autonomy of will of parties to arbitration agreement and inherent competence power of arbitral tribunal.).

give effect to the intent of the parties.[350] The arbitral tribunal derives its authority from the arbitration agreement.[351] Where parties agree to arbitrate, they generally intend that all their disputes will be resolved by the arbitrators, not the courts.[352] The compétence de la compétence doctrine has been justified on the theory that, absent evidence of a contrary intent, there is a rebuttable presumption that parties to an arbitration agreement intend to delegate the power to determine its own jurisdictional competence to the arbitral body.[353] To later invest the courts, rather than the arbitrators, with the power to decide jurisdictional issues is contrary to the parties' intentions and thus to the fundamental nature of the arbitration process.[354] In the alternative, compétence de la compétence is widely considered to be a power inherent in all arbitral tribunals.[355] The arbitrator's jurisdictional competence is essential to ensure the tribunal's ability to function.[356]

b. French Law Maintains the Link Between Compétence de la Compétence and Separability

French law maintains the integrity of international arbitration agreements by preserving the interrelationship between the doctrines of compétence de la compétence and separability.[357] The compétence de la compétence doctrine and the separability doctrine are related, yet distinct.[358] The doctrine of separability provides for the autonomy of the arbitration clause in the face of challenges to the main contract, while the compétence de la compétence doctrine provides that the arbitrator may be the judge of his own jurisdiction and may address challenges to the

350. *See* MAURO RUBINO-SAMMARTANO, *supra* note 4, at 34 (stating that intention of parties is the "fundamental element of arbitration").

351. *See supra* note 1 and accompanying text (designating arbitration agreement as choice-of-forum clause).

352. *Id.*

353. *See* SHIHATA, *supra* note 49, at 25-26 (discussing theoretical justifications for compétence de la compétence doctrine).

354. *See* RUBINO-SAMMARTANO, *supra* note 4, at 34 (stating intention of parties is the "fundamental element" of arbitration).

355. *See* SHIHATA, *supra* note 49, at 25-26 (discussing theoretical bases for doctrine of compétence de la compétence).

356. *Id.*

357. *See supra* notes 55-59 and accompanying text (discussing interrelationship between separability and compétence de la compétence).

358. *Id.*

arbitration clause.[359] Both doctrines ensure that arbitrable disputes will not be forced into national courts.[360]

Accepting both standards prevents parties from opting out of arbitration contracts.[361] For example, acceptance of the doctrine of separability prevents parties from forcing an arbitrable dispute into a national court merely by alleging that the main contract is invalid.[362] Acceptance of the compétence de la compétence doctrine prevents parties from forcing a dispute into the national courts merely by alleging that the arbitration agreement is invalid or that the dispute is outside the scope of the arbitration agreement.[363] Under the Nouveau Code de Procédure Civile, such allegations are properly heard by the arbitrators, not the court, absent the manifest nullity of the arbitration agreement.[364]

c. French Law Provides an Internationalized and Neutral Forum for Arbitration

French law promotes the use of international arbitration agreements by providing greater neutrality under its arbitration rules.[365] Legal scholars have commented that bringing an arbitrable dispute before national courts, especially in the context of international law, is contrary to the spirit of arbitration.[366] One commentator has argued that the internationalization of arbitra-

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359. *See supra* notes 49-53 and accompanying text (discussing challenges to arbitration).

360. *See, e.g., supra* note 17 and accompanying text (discussing doctrine of separability with respect to challenges to arbitration).

361. *Id.*

362. *See supra* note 17 and accompanying text (discussing challenges to arbitration).

363. *See supra* notes 50-51 and accompanying text (discussing challenges to arbitration clause).

364. *See* NOUVEAU CODE DE PROCÉDURE CIVILE, art. 1458, 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8); Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25 (Fr.) ("Bai Line Shipping Co. v. Société Recofi") (upholding compétence de la compétence doctrine).

365. *See* DAVID, *supra* note 8, at 285 (stating that "[r]ecourse to a national court always runs against the spirit of arbitration and is especially objectionable in the case of international arbitration").

366. *Id.*; *see* SCHWEBEL, *supra* note 17, at 4 (stating that "even in the sphere of international commercial contracts, which are legion, the procedure of requiring a party to have recourse to a national court to enforce the arbitral remedy against the other party would in many cases be, at best, prejudicial to the purposes of the arbitral process").

tion is recognized as a necessary element that must occur if arbitration is to be fully accepted in international commerce.[367] This internationalization necessitates removal of the restrictions of national laws.[368]

ICC and UNCITRAL arbitration rules are both neutral and internationalized in nature and are preferred by parties who wish to avoid the bias inherent in national courts proceedings.[369] French arbitration law parallels the UNCITRAL Rules, the ICC Rules and the Model Law by accepting both the doctrine of separability and compétence de la compétence.[370] Inasmuch as these doctrines operate to prevent parties from opting out of arbitration agreements,[371] French law promotes international arbitration by providing for greater neutrality in the dispute resolution process.[372]

B. *U.S and English Law Inhibit the Effectiveness of International Arbitration*

Although both England and the United States recognize the doctrine of separability,[373] the case law of both nations indicates

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367. LEW, *supra* note 15, at 1 (commenting that "the internationalisation or denationalisation of international arbitration is recognised as one of the most vital and necessary elements for the development and acceptance of arbitration").

368. *Id.*

369. *See supra* notes 69-74 and accompanying text (discussing neutral nature of ICC and UNCITRAL Rules).

370. *See* NOUVEAU CODE DE PROCÉDURE CIVILE, arts. 1458, 1466 (Fr.) (English trans. *in* ROBERT & CARBONNEAU, *supra* note 1, App. B-8) (mandating compétence de la compétence under French civil code); Judgment of Jan. 21, 1992, Cass. com., Bull Civ. IV, No. 30, at 25 (Fr.) ("Bai Line Shipping Co. v. Société Recofi") (upholding compétence de la compétence doctrine); Judgment of May 7, 1963, Cass. civ. 1re, 1963 Bull. Civ. I, No. 246, at 208 (Fr.) ("Société Gosset v. Société Carapelli") (establishing separability doctrine under French case law); ICC RULES, *supra* note 34, at 19 (providing for acceptance of separability and compétence de la compétence under ICC Rules); UNCITRAL RULES, *supra* note 23, at 42-43 (providing for acceptance of separability and compétence de la compétence doctrine under UNCITRAL Rules); Model Law, *supra* note 23, at 86 (providing for acceptance of separability and compétence de la compétence under Model Law).

371. *See* Redfern, *supra* note 50, at 32 (stating that "[a]t the beginning of the arbitral process, an unwilling respondent might wish to challenge the jurisdiction of the arbitral tribunal and seek to do so by recourse to the competent court (which would usually be the court of the place of arbitration)").

372. *See* LEW, *supra* note 15, at 1 (stating that internationalization of arbitration law is necessary for full acceptance of arbitration in international commerce).

373. *See* Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (establishing separability principle in United States); Heyman v. Darwins, Ltd., [1942] App. Cas. 356 (H.L.) (establishing separability principle in England).

that the compétence de la compétence doctrine is not accepted.[374] Moreover, English arbitration law provides for a greater degree of judicial control over arbitral proceedings than does U.S. law.[375] In addition to non-acceptance of the compétence de la compétence doctrine,[376] English arbitration law permits the judiciary to control arbitration proceedings through the use of several devices.[377] Allowing the judiciary to maintain control over international arbitration proceedings inhibits the effectiveness of such proceedings by affording parties a means by which to force arbitrable disputes into national courts,[378] negating the use of arbitration to reduce overcrowded court calendars and the parties' costs,[379] and impairing the credibility of arbitration as a dispute resolution process.[380]

1. The Doctrine of Separability Is Accepted Under Both English and U.S. Law

The U.S. Supreme Court recognized the separability doctrine in the *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* decision.[381] Lower courts in the United States have subsequently expanded the holding in *Prima Paint*, which involved a charge of fraudulent inducement, to encompass allegations of frustration, mistake, duress, coercion, unconscionability, and in-

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374. *See, e.g., supra* note 141 and accompanying text (indicating compétence de la compétence not accepted under U.S. case law); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701, 721 (C.A.) (stating that compétence de la compétence not accepted under English legal system).

375. *See supra* notes 174-77 (describing English courts' scrutiny of wording of arbitration clause and process of interlocutory clarification).

376. *See Harbour II*, [1993] Q.B. at 721 (stating that compétence de la compétence not accepted under English legal system).

377. *See supra* notes 174-77 (describing English courts' scrutiny of wording of arbitration clause and process of interlocutory clarification).

378. *See supra* notes 15-17 (discussing means by which parties may attempt to avoid arbitration by initiating court proceedings).

379. *See* Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 352 (7th 1983) (stating that "[a]rbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies"); H.R. REP. No. 96, 68th Cong., 1st Sess., at 2 (1924) (stating that "[the high cost of litigation] can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable").

380. *Cf.* ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 2 at 9 (stating that drafters of Nouveau Code de Procédure Civile imagined national court in complimentary role with respect to arbitral tribunal); *id.* pt. I, ch. 3 at 2 (stating that Article 1466 of the Nouveau Code de Procédure Civile "in effect . . . gives the arbitrator powers nearly equivalent to those of the [national court] judge").

381. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

validity of the contract.[382] By expanding the doctrine of separability, U.S. courts have acted consonant with a public policy favoring arbitration,[383] which was established by the promulgation of the FAA[384] and the U.S. ratification of the New York Convention and its implementing legislation.[385]

In England, the separability principle was established in *Heyman v. Darwins*,[386] a case involving a breach of contract by repudiation. The doctrine underwent an evolution following the *Heyman* decision and may now be invoked in cases of contract rescission, fundamental breach, breach of condition, frustration, and initial invalidity.[387] Most recently, the English Court of Appeal, in its decision in *Harbour II*, extended the separability doctrine to cover the initial illegality of the contract.[388] The *Harbour II* court recognized the importance of the English judiciary's role in creating a favorable environment in England for arbitration in order to promote international commercial arbitration.[389]

In contrast to the United States and England, where the separability doctrine expanded over time as courts applied the doctrine in decisions subsequent to *Prima Paint*[390] and *Heyman*,[391] the Cour de Cassation's decision in *Gosset* was initially broader in

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382. *See supra* note 142 (discussing extension of *Prima Paint* separability principle by lower courts in United States).

383. *See, e.g.*, Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth Inc., 473 U.S. 614, 631 (1985) (stating that there is an "emphatic federal policy in favor of arbitral dispute resolution . . . [which] applies with special force in the field of international commerce"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (upholding goals of New York Convention); Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 352 (7th Cir. 1983) (stating that "there is a strong policy in favor of carrying out commercial arbitration when a contract contains an arbitration clause. Arbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies.").

384. 9 U.S.C. §§ 1-16.

385. 9 U.S.C. §§ 200-208.

386. Heyman v. Darwins, Ltd., [1942] App. Cas. 356 (H.L.).

387. *See supra* note 197 and accompanying text (discussing extension of separability principle following *Heyman* decision).

388. Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701 (C.A.).

389. *See id.* at 724 (stating that "it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses . . . first, the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and secondly, the practical advantages of one-stop adjudication").

390. *See supra* notes 142, 149-169 and accompanying text (discussing application of separability doctrine in U.S. cases subsequent to *Prima Paint* decision).

391. *See supra* note 197 and accompanying text (discussing evolution of separability doctrine in England following *Heyman* decision).

scope and upheld separability in international contracts under all save exceptional circumstances.[392] The French approach is the more desirable one, ensuring that separability will virtually always be upheld in international contracts.[393]

2. Neither U.S. nor English Courts Accept the Compétence de la Compétence Doctrine

Although both the United States and England accept the separability doctrine,[394] the compétence de la compétence doctrine is not accepted under the case law of either the United States or England.[395] As U.S. courts have expressed, conflicts that arise concerning both the scope of arbitrability and the validity of the arbitration clause are delegated to the courts.[396] English courts unequivocally retain the power to render a binding decision on the jurisdictional competence of the arbitrator.[397] Under English law, while the arbitrator may rule on the matter of his jurisdiction, only a court may definitively decide jurisdiction matters.[398] The Queens Bench Division stated in *Harbour I* that this matter is well settled under English law,[399] a

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392. *See supra* notes 232-44 and accompanying text (discussing *Gosset* decision).

393. *Id.*

394. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Heyman v. Darwins, Ltd., [1942] App. Cas. 356 (H.L.).

395. *See, e.g., supra* note 141 and accompanying text (indicating compétence de la compétence not accepted under U.S. case law); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701, 721 (C.A.) (stating that compétence de la compétence not accepted under English legal system).

396. *See supra* note 141 and accompanying text (indicating compétence de la compétence not accepted under U.S. case law).

397. *See supra* notes 178-79 (discussing English courts' retention of power to decide jurisdictional matters).

398. *See Harbour II*, [1993] Q.B. at 721 (stating that "[i]t is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction"); Promvimi Hellas A.E. v. Warinco A.G., [1978] 1 Lloyd's Rep. 373, 377 (C.A.) (stating that "[i]t is clear law that it is perfectly proper for an arbitral tribunal, when its jurisdiction is challenged, to proceed to hear evidence that may be relevant on that matter and to arrive at a decision on its own jurisdiction if it thinks right to do so, although it is clear also that that decision in itself does not preclude a court thereafter from holding that there is no jurisdiction"); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1992] 1 Lloyd's Rep. 81, 83 (Q.B.) (stating that "[o]nly the Court can definitively rule on issues relating to the jurisdiction of arbitrators"); Christopher Brown, Ltd. v. Genossenschaft Oesterreichischer Waldbesitzer, [1954] 1 Q.B. 8, 13 (stating that arbitrators may inquire into matter of their jurisdiction but not make final determination binding upon parties).

399. *See Harbour I*, [1992] 1 Lloyd's Rep. at 83 (stating that "[a]s a matter of convenience arbitrators may consider, and decide, whether they have jurisdiction or not: they

view reiterated by the Court of Appeal in *Harbour II*.[400] English courts, moreover, appear to be emphatically opposed to any expansion of the competence de la competence doctrine.[401]

The failure to accept compétence de la compétence under U.S. and English law, in contrast to French law, reduces the credibility of the arbitral process as an alternative to litigation.[402] Non-acceptance of compétence de la compétence allows parties to evade or delay arbitration by alleging that the arbitrator lacks jurisdiction.[403] In addition, non-acceptance of compétence de la compétence compromises the public policy goal of encouraging arbitration in order to reduce overcrowded court calendars and reduce the parties' costs by keeping arbitration out of the national courts.[404]

3. Courts in England Are Reluctant to Relinquish Control Over Arbitration

English courts retain control over the arbitration process to

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may decide to assume or decline jurisdiction. But it is well settled in English law that the result of such a preliminary decision has no effect whatsoever on the legal rights of the parties. Only the Court can definitively rule on issues relating to the jurisdiction of arbitrators").

400. *See Harbour II*, [1993] Q.B. at 721 (stating that "[i]t is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction, and therefore the validity of the arbitration clause is not an arbitrable issue").

401. *See supra* note 223 (indicating compétence de la compétence doctrine not accepted under English law).

402. *Cf.* ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 1 at 9 (stating that drafters of Nouveau Code de Procédure Civile imagined national court in complimentary role with respect to arbitral tribunal); *id.* pt. I, ch. 3 at 2 (stating that Article 1466 of the Nouveau Code de Procédure Civile "in effect . . . gives the arbitrator powers nearly equivalent to those of the [national court] judge").

403. *See, e.g.*, *supra* notes 15-17 (discussing means by which parties may attempt to avoid arbitration by initiating court proceedings); DAVID, *supra* note 8, at 285, stating that "in many cases the objection raised by a party to the jurisdiction of the arbitral tribunal is not made in total good faith; the purpose of the opponent is only to gain time").

404. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (stating that "[there is an] unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts"); *see also* Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 352 (7th Cir. 1983) (stating that "[a]rbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies"); H.R. REP. No. 96, 68th Cong., 1st Sess., at 2 (1924) (stating that "[the high cost of litigation] can be largely eliminated by agreements for arbitration").

a greater degree than courts in the United States and France.[405] English courts have historically regarded arbitration with animosity[406] on the ground that it ousted the courts of their jurisdictional power.[407] For nearly 100 years prior to 1979, commercial arbitration in England was subjected to the special case procedure under which the High Court of Justice had the authority to compel arbitrators to submit legal issues to the court for a decision.[408] The promulgation of the 1979 Act was motivated by a desire to de-emphasize in English arbitration law the concept that the law should produce results that were legally correct, and to create instead an arbitral process that rendered London a more attractive center for the resolution of international commercial disputes.[409]

Although the special case procedure was abolished under the 1979 Act as a result of widespread call for reform,[410] English courts nevertheless continue to maintain control over arbitration by employing several devices.[411] The interlocutory clarification procedure permits questions regarding points of law which arise during the arbitral proceedings to be referred to the court for a decision.[412] Under the process of interlocutory clarification, the court has retained the power to intervene in arbitration proceedings absent the execution of an exclusion agreement by the parties.[413]

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405. *See supra* notes 174-77 (describing English courts' scrutiny of wording of arbitration clauses and process of interlocutory clarification).

406. *See supra* note 171 and accompanying text (discussing traditional hostility of English courts toward arbitration).

407. *Id.*

408. *See* CARBONNEAU, *supra* note 3, at 91 (discussing special case procedure).

409. *See* CARBONNEAU, *supra* note 3, at 81 (stating that "[t]he design of the Act [1979 Act] was to move English arbitration law away from its emphasis on ensuring legally correct results, thereby increasing the autonomy of the arbitral process in England").

410. *Id.* at 91, 95.

411. *See supra* notes 174-77 (describing English courts' scrutiny of wording of arbitration clauses and process of interlocutory clarification).

412. *See supra* note 177 and accompanying text (discussing procedure of interlocutory clarification under 1979 Act). Interlocutory clarification is permitted only if all parties or the arbitrator agrees, and if the court finds that a substantial savings in cost will result. CARBONNEAU, *supra* note 3, at 101.

413. *See supra* note 177 and accompanying text (discussing exclusion agreements under 1979 Act). *But see* CARBONNEAU, *supra* note 3, at 115 (stating that "[t]he present state of English arbitration law seems to leave the High Court with powers wide enough to justify almost any intervention in the arbitral process, despite an exclusion agreement").

In addition to interlocutory clarification, English courts retain jurisdictional control through their strict scrutiny of the wording of arbitration clauses.[414] Parties who fail to pay careful attention to such language when drafting arbitration clauses risk a court's refusal to relinquish judicial control should a conflict arise.[415] By affording the English judiciary power to intervene in arbitral proceedings, however circumscribed, English law is at odds with the goal of promoting arbitration in international commerce by removing the bias attributed to national court proceedings.[416]

In contrast, although U.S. courts have expressed that the examination of the validity and scope of the arbitration clause is reserved to the courts,[417] U.S. courts do not scrutinize the text of the arbitration clause to the same degree as is traditional in England.[418] French courts retain less control over arbitration than do the United States or England.[419] By declining to limit the application of the doctrine of separability, French law provides greater neutrality to arbitral proceedings than either the United States or England,[420] as well as greater credibility to the arbitral process.[421]

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414. *See supra* notes 174-76 and accompanying text (discussing importance of wording of arbitration clause under English arbitration law).

415. *Id.*

416. *See* DAVID, *supra* note 8, at 285 (stating that "[r]ecourse to a national court always runs against the spirit of arbitration and is especially objectionable in the case of international arbitration"); *see also* SCHWEBEL, *supra* note 17, at 4 (stating that "even in the sphere of international commercial contracts, which are legion, the procedure of requiring a party to have recourse to a national court to enforce the arbitral remedy against the other party would in many cases be, at best, prejudicial to the purposes of the arbitral process").

417. *See supra* note 101 (discussing FAA); *supra* note 141 (discussing power to decide jurisdictional issues under U.S. case law).

418. *See supra* notes 134-69 and accompanying text (discussing U.S. cases upholding separability doctrine).

419. *See, e.g.*, Carbonneau II, *supra* note 97, at 5-6 (stating that "[t]he unequivocal liberalism of the international commercial arbitration doctrine [in France] perhaps reflects the French judiciary's astute reading of what is in the best economic and commercial interests of France"); *see also id.* at 5 (stating that "French courts have consistently supported the continued development of international commercial arbitration as a method of dispute resolution and have systematically eliminated many of the potential legal obstacles to the process"). In *Gosset* the Cour de Cassation decided that, save under exceptional circumstances, the arbitration clause is always separable in international arbitration. *See supra* notes 232-44 and accompanying text (discussing *Gosset* decision).

420. *See supra* notes 365-72 (discussing neutrality of French arbitration law).

421. *Cf.* ROBERT & CARBONNEAU, *supra* note 1, pt. I, ch. 3 at 2 (stating that Article

4. *The Retention of Judicial Control Over Arbitration in the U.S. and England Inhibits the Effectiveness of International Arbitration*

U.S. and English case law thus indicates that the United States and England do not accept the doctrine of compétence de la compétence, allowing U.S. and English courts to retain a greater degree of judicial control over arbitration.[422] English courts, moreover, retain control over arbitration by their strict scrutiny of the wording of an arbitration clause, and by the device of interlocutory clarification.[423] By retaining the power to intervene in arbitral proceedings, U.S. and English courts reduce the neutrality of the arbitration procedure.[424] Parties may attempt to opt out of their obligation to arbitrate by initiating court proceedings in spite of the arbitration agreement, or petition the court to declare the arbitration agreement void, or challenge the arbitrator's jurisdiction.[425] Similarly, the traditional close reading of the text of arbitration agreements by English courts inhibits the effectiveness of the arbitration process, allowing parties to delay arbitral proceedings, by claiming that the dispute falls outside the scope of the arbitration clause.[426] In addition, the public policy goal of encouraging arbitration in order to lessen overcrowded court calendars and reduce the parties' costs is negated where arbitrable disputes are heard by the courts rather than arbitral tribunals.[427]

The acceptance of the compétence de la compétence doc-

1466 of the Nouveau Code de Procédure Civile "gives the arbitrator powers nearly equivalent to those of the judge").

422. *See, e.g.*, *supra* note 141 and accompanying text (indicating compétence de la compétence not accepted under U.S. case law); Harbour Assurance Co. v. Kansa Gen. Int'l Ins. Co., [1993] Q.B. 701, 721 (C.A.) (stating that compétence de la compétence not accepted under English legal system).

423. *See supra* notes 174-77 (describing English courts' scrutiny of wording of arbitration clauses and process of interlocutory clarification).

424. *See* DAVID, *supra* note 8, at 285 (stating that "[r]ecourse to a national court always runs against the spirit of arbitration and is especially objectionable in the case of international arbitration").

425. *See supra* notes 15-17 and accompanying text (discussing challenges to arbitration); DAVID, *supra* note 8, at 285 (stating that "in many cases the objection raised by a party to the jurisdiction of the arbitral tribunal is not made in total good faith; the purpose of the opponent is only to gain time").

426. *See supra* note 50 and accompanying text (discussing challenges to arbitration).

427. *See* Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F.2d 348, 352 (7th Cir. 1983) (stating that "[a]rbitration lightens courts' workloads, and it usually results in a speedier resolution of controversies"); H.R. REP. No. 96, 68th Cong., 1st Sess., at 2

trine as espoused under French arbitration law (and under the UNCITRAL Rules,[428] the ICC Rules,[429] and the Model Law[430]) would remove a barrier to the effective enforcement of international arbitration agreements in the United States and England.[431] The acceptance of compétence de la compétence in the United States and England would thus result in greater neutrality, greater credibility, and increased effectiveness of arbitration as a means of reducing judicial overload.[432] In addition, by accepting the compétence de la compétence doctrine as well as separability, the United States and England would promote the harmonization of their arbitration law as provided under the UNCITRAL Model Law.[433]

CONCLUSION

France, which accords international arbitration the most highly favorable status of the three nations, has developed the legal framework that best promotes the public policy goal of encouraging the use of arbitration agreements in international commerce. U.S. and English arbitration law, in contrast, permit a greater degree of judicial control over arbitral proceedings, thus inhibiting the effectiveness of international arbitration. French law, which, in contrast to English and U.S. law, delegates the authority to decide jurisdictional matters to the arbitrator, preserves the interrelationship between the doctrines of compétence de la compétence and separability, thus preventing parties from opting out of arbitration contracts. French law reduces the burden on the courts by keeping arbitral disputes out of the courts. French law also promotes arbitration by preserving the neutrality of arbitration in conformity with UNCITRAL and ICC Rules. Finally, French law conforms to the essential nature of arbitration by giving effect to the wishes of the parties and recog-

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(1924) (stating that "[the high cost of litigation] can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable").

428. UNCITRAL RULES, *supra* note 23, at 34-50.

429. ICC RULES, *supra* note 34, at 19.

430. Model Law, *supra* note 23, at 81-93.

431. *See supra* notes 323-25 and accompanying text (discussing effect of judicial control over arbitration in England and United States).

432. *See supra* notes 339-72 and accompanying text (discussing acceptance of compétence de la compétence under French law).

433. *See* Model Law, *supra* note 23, at 86 (providing for acceptance of compétence de la compétence doctrine under Model Law).

nizing the inherent power of the arbitral tribunal to rule on its own jurisdiction.

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