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The Inconvenience of Principle: Separability and Kompetenz-Kompetenz

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The principles of separability and Kompetenz-Kompetenz were developed to favour the effectiveness of arbitration as a means of dispute settlement. This article seeks to demonstrate that in the modern day the beneficial effects of these principles have been ordained in statute in most arbitration law systems, but frequently such statutes also maintain reference to their being principles. It is contended in the article that the persistence of such principles is the source of multiple inconvenience. The article recommends that reference to the two principles as principles be excised from statute, and those of these principles' effects which are beneficial to arbitration be prescribed without more.

1 INTRODUCTION

This article concerns the principle of separability and the principle of Kompetenz-Kompetenz in international arbitration in their capacity as principles.

The concept of a 'principle' in law discloses an element of complexity. Invariably, the term 'principle' as used in any legal context designates a rule claiming a relation to reason. At the least, a principle is to be followed according to its internal logic. But a principle often aspires also to derive its force from reason beyond the coherence of the principle itself, beyond the mere positive authority of the principle, such as where it is encased in a statute.

Among the most prominent of principles in the area of international arbitration law are the principle of separability and the principle of Kompetenz-Kompetenz. Separability entails that an arbitration clause is not invalid by virtue alone that the contract in which it is set is invalid. Kompetenz-Kompetenz, although it presents a number of variations, exhibits this invariable feature: it affirms that the arbitral tribunal has power to assess its own jurisdiction.

^{*} The author is grateful to Me Pierre-Yves Tschanz of Tavernier Tschanz, Geneva, for sharing some of his deep knowledge of and insights into the philosophical foundations and traditions of international arbitration law, which led the author to reflect on the issues which are the subject of this article. Any errors are the author's own.

The aspiration of both is to aid in the efficacy of arbitration clauses. Unsurprisingly, this is due to the context in which these principles originated, namely, state indifference and even hostility to arbitration.

Even where states are indifferent to arbitration, arbitration struggles to take root. There is no asperity in observing that it is the general disposition of respondents to delay and otherwise obstruct dispute resolution proceedings. They have particular opportunities to do so in relation to arbitration, in that it is a jurisdiction of exception, whereas court jurisdiction benefits from being the default jurisdiction. Some complaisance from the state is generally needed to even out the playing field between arbitration and court litigation as dispute resolution options.

Since in their origin, therefore, these principles were not clothed with state authority, in the final analysis they were compelled to seek their justification in deeper reason. As will be noted below, this enterprise was ultimately a meretricious one in regard to separability. It was more successful in relation to Kompetenz-Kompetenz. Yet for both there was a propelling reason in the perceived desirability of saving international arbitration jurisdiction. The success of this reason is doubtless to be attributed to the fact that, at least in the first instance, the operative perception was that of arbitrators who, for reasons at least partly altruistic, were committed to the pursuit of arbitral jurisdiction.

The principles of separability and Kompetenz-Kompetenz are therefore widely celebrated in arbitral lore as among the foremost of achievements for their rendering arbitration efficacious and independent of the state. In this article, it will be shown that the original conception of these principles continues to operate. It will then be argued that these principles *qua* principles may be seen to hamper the achievement of a truly satisfactory solution to the very problems they were developed to address. Separability, moreover, strains credulity and spawns a multitude of unwelcome effects.¹ The reasons for retaining these principles in the form of identifiable principles are largely inconsequential. These concepts should be prescribed in arbitration legislation. As regards separability, that legislation should confine itself to enacting its few useful features.

¹ This view draws inspiration from P. Mayer, *The Limits of Severability of the Arbitration Clause*, in *ICCA Congress series no. 9*, 261 (Kluwer L. Intl. 1999), where it is argued that separability often works contrary to the parties' intentions, and is made to yield illogical effects.

2 PRINCIPLES OF SEPARABILITY AND KOMPETENZ-KOMPETENZ

2.1 SEPARABILITY

The principle of separability of arbitration clauses is also designated the principle of severability,² or, especially in its most ambitious avatar, the principle of autonomy of arbitration clauses.³ It operates by creating a presumption conferring a sort of *status* on the arbitration clause vis-à-vis the surrounding contract. According to this presumption, the parties intended the arbitration clause to be separate from the contract in respect of which it applies. As is usual with the legal recognition of status, this particular status is pregnant with legal effect ensuing from it as if irresistibly. The consequences of separability are felt in at least four contexts: arbitral Kompetenz-Kompetenz, arbitral jurisdiction, the transfer of arbitral clauses and the enforcement of arbitral awards.

2.2 KOMPETENZ-KOMPETENZ

The principle of Kompetenz-Kompetenz⁴ conveys in its core the power to determine jurisdiction.⁵

In the arbitral context, it must be acknowledged that the arbitral tribunal's decision on jurisdiction is generally subject to court control at the seat, whether immediately upon the arbitral tribunal's jurisdictional determination, or subsequently, once the award on the merits has been made.

But this court control does not deprive arbitral tribunals of Kompetenz-Kompetenz. If there is no challenge to the arbitral tribunal's Kompetenz-Kompetenz decision, it takes effect within the state of the seat and the award which follows is credited under the New York Convention in the same way as an award from an

² This was, for example, the term employed for the principle in the leading case on separability in the United States, *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204, 1208–1209 (2006).

³ Under French law, subject to party agreement to the contrary, the arbitration clause is treated as autonomous not only vis-à-vis the contract, but also vis-à-vis any applicable law. See s. 3.2 below.

⁴ This German name for the principle has established itself in English usage. In its original German usage, it designated not the general notion of the arbitral tribunal's powers to come to a determination on its own jurisdiction but a more specific notion, i.e., a variant of the general notion. See W.W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz has crossed the Atlantic?* Arb. Intl. 137, 149 (1996). Used here, the term denotes the general notion.

⁵ Here one is conscious of Prof. Pierre Mayer's view that arbitrators cannot have actual power to make determinations on their own jurisdiction, since only an adjudicator whose powers are independent of the particular instance of jurisdiction may do so. For Prof. Mayer, arbitrators can only make a *declaration* of their jurisdiction. See P. Mayer, *L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence*, in *RCADI 1989 V*, in *Collected Courses of the Hague Academy of International Law Vol 217 Part V* (1989) 327–454, esp. 339–342. This view seems defeasible; however, where the arbitral tribunal makes its 'declaration' and this is not challenged by the other party. In such circumstances, this declaration doubtless takes legal effect as a final determination on jurisdiction, as that of a court at the seat would.

arbitral tribunal whose Kompetenz-Kompetenz was challenged before the courts of the seat but upheld.

The purpose of arbitral Kompetenz-Kompetenz is to avoid a situation where the arbitral tribunal can only proceed with its work once a court has declared it to have jurisdiction to do so. Thus, Kompetenz-Kompetenz is an indispensable contributor to the efficiency of arbitral proceedings. It removes from them a very significant disadvantage vis-à-vis the alternative of having courts deal with the merits of a dispute, since the sufficient Kompetenz-Kompetenz of courts is never doubted.

It should be observed here that Kompetenz-Kompetenz must be broad *ratione materiae* – at least as broad as any potential jurisdiction which the arbitral tribunal may take. Any constriction removing Kompetenz-Kompetenz over some question over which jurisdiction could potentially be taken will cheerfully be exploited by respondents to delay and bedevil proceedings.

Originally, it was commonly supposed that Kompetenz-Kompetenz rests upon the will of the parties. Today, Kompetenz-Kompetenz is generally conceived of as necessarily resting upon state will, i.e., a statute in the ordinary case:

[Most French scholars accept that] the competence-competence principle is founded not on the agreement of the parties but on leave commonly given by the national legal systems which might be called to enforce the award.⁶

This modern view is not just motivated by empirical observation that an arbitral tribunal's view of Kompetenz-Kompetenz can only receive practical effect insofar as an enforcing court recognizes such view, and enforces it. It is equally motivated by the inadequacy of party will as the purported basis of Kompetenz-Kompetenz. As seen above, arbitral Kompetenz-Kompetenz must be broad if it is to be of any use, and basing it on the will of the parties makes it logically insufficient to encompass Kompetenz-Kompetenz determinations on the operability of such will and to give desirable effect to arbitral decisions denying jurisdiction due to the inoperability of party will.

3 EFFECTS OF SEPARABILITY

3.1 KOMPETENZ-KOMPETENZ

Separability furnishes a basis to defend arbitral Kompetenz-Kompetenz against the objection that an allegedly invalid, non-existent or ineffective agreement in which the arbitral clause is inserted (the '*inoperability of the main agreement*') infects and debilitates the very basis upon which arbitrators were conventionally thought to

⁶ A. Demolista, *Separability and Kompetenz-Kompetenz*, ICCA Congress Series, no. 9, 217, at 232.

exercise their Kompetenz-Kompetenz powers, that is, valid agreement of the parties. Separability aids Kompetenz-Kompetenz in that without separability Kompetenz-Kompetenz follows the fate of the contract surrounding the arbitration clause.

The Kompetenz-Kompetenz effect of separability is not often differentiated from its jurisdictional effects, notably its expansion of arbitral jurisdiction as will be examined below. Indeed, the Kompetenz-Kompetenz effect of separability is at times entirely overshadowed by⁷ or sublimated into⁸ its jurisdictional effects.

Thus, it is widely supposed that an incident of Kompetenz-Kompetenz is the power to proceed in accordance with what has been decided. But as far as Kompetenz-Kompetenz itself is concerned, the fact that an arbitral tribunal may put into effect what it has decided under its Kompetenz-Kompetenz power can be no more than a manifestation that this latter power is in fact a genuine power. This putting into effect is not an exercise of Kompetenz-Kompetenz but is rather an exercise of *jurisdiction*. One must therefore distinguish the power of Kompetenz-Kompetenz from how it is exercised, that is, the rules which determine jurisdiction and the extent of jurisdiction.

3.2 SEPARABILITY AND JURISDICTION

The jurisdictional effect of separability both saves arbitral jurisdiction and expands the scope of arbitral jurisdiction. By its operation, the arbitral tribunal takes jurisdiction despite the potential inoperability of the main agreement and even the declared inoperability of the main agreement, that is, as having been so declared by the arbitral tribunal.

The expansion of the scope of arbitral jurisdiction operates not only in respect to the matter of whether the main agreement is inoperative but also regarding claims arising upon or potentially surviving the inoperability of the main agreement, chiefly claims in restitution and tort.

⁷ Demolista, *supra* n. 6, at 217: 'Although the power of arbitrators to rule on the validity of the main contract, with the possibility of declaring it to be ineffective, null and void or non-existent presupposes acceptance of the autonomy of the arbitration agreement in relation to the main contract, such autonomy alone is not a sufficient basis for allowing arbitrators to rule on the validity of the arbitration agreement itself when the latter is challenged. It is precisely competence-competence which allows this.'

⁸ S.M. Schwebel, *International Arbitration: Three Salient Problems*, Hersch Lauterpacht Memorial Lectures 2 (Grotius Publications Ltd. 1987): '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.'

Separability detaches the arbitral clause from the main contract not only as a matter of contract law but potentially also as a matter of applicable law. As regards the latter, the arbitral clause may be subject to a specific applicable law different to that applying to the main agreement or perhaps even to *sui generis* pro-arbitration legal principles.⁹ While under the law generally applicable to the main contract the arbitration clause might be void (even where not *ipso facto* because of the inoperability of the main contract), under the law specifically applicable to the arbitration clause, that clause might not be void.

3.3 SEPARABILITY AND THE TRANSFERABILITY OF THE ARBITRATION CLAUSE

The principle of separability also operates to resist the passing of an arbitration clause to a transferee of a contract. Where, for example, a contract is assigned, if its arbitration clause is treated as separate, it might be contended that the assignee is not bound by the arbitration clause.

3.4 SEPARABILITY AND THE ENFORCEMENT OF THE ARBITRATION AWARD

Separability can save the enforceability of an award against an objection that the arbitration tribunal lacked jurisdiction, even where a court of the seat has denied arbitration jurisdiction. This occurs in France, for example, where jurisdiction is treated as being governed by French principles specifically fashioned for the international arbitration context, and vehemently pro-arbitration. More broadly, even if the enforcement court accepts that a certain applicable law governs the arbitration clause, it may affirm arbitration jurisdiction upon the basis that separability as a fundamental principle of international arbitration overrides that applicable law. Lastly, it may simply apply its own law containing the principle of separability (i.e., by Article VII(1) of the New York Convention), or it might apply some other law, to sustain the arbitrators' acceptance of their own jurisdiction. In this latter regard, it is Article V(1)(a) of the New York Convention which relates to the invalidity of the arbitration clause as a ground to refuse enforcement of the award, and this provision contains a choice of law. Nonetheless, enforcement courts have wide discretion in determining whether the parties had subjected the arbitration clause to a certain law, and if so, which law. The enforcement court uses its own rules to determine what the applicable law is. It might rely on separability as composing one of those rules, and/or it may otherwise conclude that the applicable law is one containing the principle of separability. Separability so

⁹ This is the position in France. See notably the decision of 3 Mar. 1992 of the French Cour de cassation, 1e civ., in *Sonotex v. Charphil*, 1993 Rev. Arb. 273.

applied may result in the enforcement court rejecting a challenge to the arbitrators' jurisdiction as a basis to deny enforcement.

The enforcement effects of separability are therefore derivative upon the jurisdictional effects of separability in that the enforcement question posed is one of jurisdiction of the arbitral tribunal.

In effect, the result of separability is to ensure effective arbitral jurisdiction in respect of the material operation of the principle insofar as either the court of the seat or the enforcement court accepts the applicability of separability. Accordingly, for the most part, the enforceability effects of separability are not discussed hereafter, and should simply be understood as amplifying the jurisdictional effects discussed below.

4 ASSESSMENT OF THE EFFECTS OF SEPARABILITY

4.1 GENERAL

4.1.1 *Kompetenz-Kompetenz*

As acknowledged in 2.2 above, wherever potential jurisdiction exceeds *Kompetenz-Kompetenz ratione materiae*, immense disturbance can be occasioned to proceedings. If one persists in the view that party will underlie *Kompetenz-Kompetenz*, it might be accepted that separability goes a long way in broadening *Kompetenz-Kompetenz* to alleviate such a problem. Even so, it does not go far enough. It does not assure *Kompetenz-Kompetenz* where the arbitration clause itself is impugned, for example, as having been tainted by fraud. Where, however, one accepts that only state will can be adequately operative behind *Kompetenz-Kompetenz*, separability is an incongruous, complicating and disruptive factor. It is incongruous since it purports to base itself in a presumption as to party will. It complicates matters since otherwise the state can simply legislate *Kompetenz-Kompetenz* of *result-oriented breadth*. It is disruptive since it tends to narrow *Kompetenz-Kompetenz ratione materiae* by importing party will as a relevant factor.

4.1.2 *Jurisdiction*

Separability ensures, in most cases, one-stop adjudicative shopping with the arbitral tribunal, and that is most valuable in ensuring the efficacy of arbitration.

4.1.3 *Law Applicable to the Arbitration Clause*

The principle's effect on the matter of the law applicable to the arbitration clause results in inconvenience on the whole, but in some accidental convenience. If the arbitration clause is deemed separate from the rest of the contract, the inference becomes available that the clause is not necessarily governed by the same law applicable to the rest of the contract.

At the very least, separability as applied to the question of applicable law complicates matters. It creates a third candidate for the law applicable to the arbitration clause next to the *lex contractus* and the *lex arbitrii*. Not only the former, but also the latter, aspires to apply upon the straightforward basis of party choice. Separability tends to insulate the arbitration clause as regards applicable law from any basis in party will. It finds fictional party will (i.e., the legal fiction behind separability) evicting genuine party will (i.e., the express choice of either the *lex contractus* or the *lex arbitrii* which would naturally extend to the arbitration clause), and thereby confounds party expectations. It also entails the consequence that a connecting factor must be determined between the arbitration clause and an applicable law, and there is no easy answer to the question of which one that should be.

One potential favourable consequence of the principle of separability as relates to the law applicable to the arbitration clause may, however, be acknowledged. Because separability operates generally to defeat any claim that the parties actually chose an applicable law for their arbitration clause, for the purposes of enforcement under the New York Convention, specifically Article V(1)(a), it becomes more likely that the law applicable to the validity of the arbitration clause is the law of the seat. The parties typically chose the seat and with it the *lex arbitrii* specifically for its arbitration-friendly character, and therefore the application of the *lex arbitrii* to determine whether the arbitration clause is valid is likely to maximize the chances of its being treated as valid and of the award being enforced.

4.1.4 *Transferability of the Arbitration Clause*

As regards the transferability of arbitration clauses, the result of separability is unalloyed inconvenience. Most systems of contract law treat dispute resolution clauses, including arbitration clauses, indifferently to all others in a contract for the purposes of assignment. The principle usually found is that unless a contractual clause is intimately related to the person of the assignor, it passes to the assignee. It is, of course, pro-arbitration for arbitration clauses to pass in this way, such that a contractual party will not be deprived of his bargained for right to arbitration by the other party's assigning the contract. But the principle of separability, hoisted

here by its own petard, works against this ordinary operation. Such inconvenience occasioned by the principle has led it largely to be ignored by legal systems in the context of assignment,¹⁰ although the assignee will very often invoke it with a view to opposing arbitration.

4.2 IMPLAUSIBILITY OF SEPARABILITY

In the ordinary case, the arbitration clause is simply one clause within one contract. Gillis Wetter accurately observed of parties entering into a contract with an arbitration clause: 'In my experience such a conception [i.e., separability] is almost always very far from their minds as well as from those of their legal advisors.'¹¹ As Professor Mayer points out,¹² the reality is that arbitral clauses are auxiliary to the main agreement, and therefore only the clearest express intentions of the parties can ever support their separation from the main contract.

Separability is therefore an implausible basis to support even those of its effects which are salutary.

5 LEGISLATION OF THE PRINCIPLES OF KOMPETENZ-KOMPETENZ AND SEPARABILITY

5.1 GENERAL

In 1985, Gillis Wetter observed that the principle of separability was of little practical use in the central context of its application, that is, objections that the arbitration clause and arbitral jurisdiction must fall because the surrounding contract is invalid:

to imply that the doctrine [of separability] is of vast significance in cases where the issue is whether a contract which embodies an arbitration clause has been validly entered into is an exaggeration. Where this issue is raised squarely, the legal fiction of regarding the

¹⁰ D. Girsberger & Ch. Hausmaninger, *Assignment of Rights and Agreement to Arbitrate*, 8 Arb. Intl. 121, 136 (1992): 'Despite a recent tendency to view the arbitration agreement as a fully autonomous agreement, however, most jurisdictions still treat the arbitration clause as an integral part of the contract when it comes to the issue of transfer. Treating the arbitration agreement at the same time as autonomous and as an integral part of the main contract is somewhat inconsistent and calls for justification. Courts and commentators fail, however, to justify this disparate treatment of the arbitration agreement.'

¹¹ J. Gillis Wetter, *Salient Features of Swedish Arbitration Clauses*, Y.B. Arb. Inst. Stockholm Chamber Commerce 33, 35 (1983). See also S. Jarvin, *The sources and limits of the arbitrator's powers*, 2 Arb. Intl. 140, 151 (1986): 'Although this theory [i.e. separability] probably is far from the minds of business-men when they sign a contract, it has become widely accepted since the arbitral process would otherwise be ineffective.'

¹² Mayer, *supra* n. 1, at 262–263.

arbitration agreement as an entirely separate undertaking will have no material significance. The New York Convention clearly so provides, and so do most national arbitration laws.¹³

Gillis Wetter's principal point in the foregoing citation is that positive law has now secured the effect for which the principle of separability was developed under self-generating authority.¹⁴ While one might disagree with him that '[t]he New York Convention clearly so provides,' it is indisputable that this is the position under national arbitration laws. Separability is indeed today enshrined in the arbitration laws of most major arbitration venues.¹⁵ It is also undeniably true that Kompetenz-Kompetenz is found ubiquitously in the positive law of international arbitration law systems.

5.2 SURVIVAL OF SEPARABILITY AND KOMPETENZ-KOMPETENZ AS PRINCIPLES IN STATUTE

5.2.1 *General*

Subject to political will and power, the content of legislation may be freely determined, quite unlike the content of principle. So one might expect to find legislation simply prescribing the desired effects of the principle of separability. One might expect that Kompetenz-Kompetenz of useful material scope can jauntily be posited under statute. One might equally expect that in relation to arbitral jurisdiction, a statute would simply prescribe the desired breadth upon the authority of the legislature, without reference to implausible imputations of party will. But arbitration legislation seems in a number of ways reluctant to relinquish separability as a principle.

5.2.2 *UNCITRAL Model Law*

Article 16 of the UNCITRAL Model Law is placed under Title IV of the Model Law, 'Jurisdiction of Arbitral Tribunal' and under the rubric 'Competence of

¹³ J.G. Wetter, *The Conduct of the Arbitration*, 2 J. Intl. Arb. 27, n. 45 (1985).

¹⁴ The developments in English law are emblematic of this phenomenon generally. For English law, see P. Gross, *Separability Comes of Age in England: Harbour v. Kansa and Clause 3 of The Bill*, 11 Arb. Intl. 85 (1995): 'As and when clause 3 of the draft Arbitration Bill becomes law, in the context of the "separability" or "autonomy" of the arbitration clause, statute will anchor in English law the achievement of the Courts in *Harbour v. Kansa*.' The achievement is more properly that of counsel in arbitrations and arbitrators themselves, as well as academic commentators, who appealed to and applied the principle which came to be accepted by English judges and so to enter positive English law, still in the form of principle.

¹⁵ The United States remains an exception, where the principle is derived from the authority of case law, in particular *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (USSC, 1967).

arbitral tribunal to rule on its jurisdiction'. Although Kompetenz-Kompetenz is a special sort of jurisdiction, there is in this incongruousness between title and rubric a foreboding of possible conceptual difficulty to follow.

Article 16 first provides, generally and without qualification, that '[t]he arbitral tribunal may rule on its own jurisdiction' and then designates as being particularly covered: 'any objections with respect to the existence or validity of the arbitration agreement'. This particular designation covers the Kompetenz-Kompetenz effect of the separability principle, and goes further. Where, as here under the first sentence of the Model Law, even the potential inoperability of the arbitration clause does not deprive the arbitrators of Kompetenz-Kompetenz, *a fortiori* the potential inoperability of the main contract does not either.

All of this is a fully satisfactory, purpose-oriented prescription of Kompetenz-Kompetenz, as broad as one could expect and hope for. It is somewhat astonishing then, that Article 16 proceeds to gild the lily, by supplying the rationale: 'For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.'

The reference '[f]or that purpose' is strictly to Kompetenz-Kompetenz, since it is the sole subject of the preceding sentence, and not, for example, also to jurisdiction itself. So arbitral Kompetenz-Kompetenz is the only matter this rationale can claim to be directed to. This rationale is obviously a *separability* rationale and its inclusion in the Model Law seems thus far to be entirely gratuitous. It adds nothing to arbitrators' Kompetenz-Kompetenz which in the preceding part of Article 16 has already been unambiguously and sufficiently established.

Article 16 of the Model Law then provides: 'A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.'

This sentence begs the question of whether the arbitral tribunal actually has jurisdiction to determine that the contract is null and void, since to do so the arbitration clause must be operative. As seen above, where that question arises there is a doubt as to the parties' will founding arbitral jurisdiction. Two explanations may be advanced for what is operating here. First, there may simply be an elision of Kompetenz-Kompetenz and jurisdiction: the uncritical acceptance that with Kompetenz-Kompetenz over a matter there must also be potential jurisdiction over it. Second, the *principle* of separability may be at work. The Model Law seems to assume that, since for the purposes of Kompetenz-Kompetenz an arbitration clause is treated as an agreement independent of the other terms of the contract, then *logically* this should obtain for jurisdiction too.

Despite the rubric ‘Competence of arbitral tribunal to rule on its own jurisdiction’, and despite the *Kompetenz-Kompetenz* object of the rest of the paragraph, this last sentence may only be given some effect if it is understood to intend consequences other than in respect of *Kompetenz-Kompetenz*, such as jurisdiction.

It equally admits of the further inference, albeit unexpressed in the Model Law, that the arbitration clause is valid as resulting from a law governing the arbitration clause which can be different from the law governing the rest of the contract. It cannot, however, contemplate the matter of the transfer of arbitration clauses, since the transfer presumes the validity of the main contract (being transferred), and so the condition of this statutory stipulation’s application is not fulfilled.

If all this is so, the separability principle as relates to *Kompetenz-Kompetenz* and jurisdiction, has largely survived in the Model Law, shorn only of its egregiously noisome transferability effects. Indeed, the Explanatory Note¹⁶ by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, states at paragraph 24: ‘Article 16(1) adopts the two important . . . principles of *Kompetenz-Kompetenz* and of separability or autonomy of the arbitration clause.’

5.2.3 *English Arbitration Act 1996*

The survival of the principle of separability in statute appears vividly in the English Arbitration Act 1996 and in its application. Section 30 of the Arbitration Act 1996 on its face provides for *Kompetenz-Kompetenz* expansively, and without qualification:

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
 - (a) whether there is a valid arbitration agreement.

Separability is present in the Act too, but far away, in section 7, under a different rubric, ‘The arbitration agreement’. So, *prima facie*, this distancing of separability from *Kompetenz-Kompetenz* seems calculated unabashedly to ensure the former’s continued existence and largely untrammelled operation as an independent principle.

¹⁶ ‘Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006’ in UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (United Nations Publication Sales No. E.08.V.4 ISBN 978-92-1-133773-0), 23 at 30.

Section 7 provides:

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

The first point to be made is that, again, one sees articulated in the Arbitration Act 1996, the rationale behind the principle of separability (treated as a distinct agreement) thus leaving it largely unaffected, except that a coating of legislative authority has been laid over it.¹⁷

Second, the reference to ‘for that purpose’ the arbitration clause is to be ‘treated as a distinct agreement’ must be understood, on its face, to contemplate both Kompetenz-Kompetenz and any jurisdiction-saving purpose, including the applicability of a law different from that governing the main contract, but not the transferability of arbitration clauses. This is because the statutory reference ‘for that purpose’ relates back to the main contract being ‘invalid, non-existent, or ineffective’. As just seen in connection with the Model Law, separability from an invalid main contract potentially has both Kompetenz-Kompetenz and jurisdictional effects. By contrast, the potential separability effects relating to transferability of the arbitration clause would appear to have been excluded by the Arbitration Act, as by the Model Law, by parity of reasoning.

Third, the mechanism upon which the principle works is presumed to be party agreement (was intended to form part of another agreement), as far-fetched as it may seem.

5.2.4 *A Possible Substantive Difference Between the Model Law and the Arbitration Act 1996*

As regards Kompetenz-Kompetenz and separability, although different in form, the Model Law and the Arbitration Act appear to produce the same substantive result. This appearance is, however, deceptive in one regard.

In the English case of *Fiona Trust & Holding Corp. & Ors v. Yuri Privalov*,¹⁸ the following determination was made as to arbitral jurisdiction:

If arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been procured by bribery . . . It is not

¹⁷ See also, Art. 1040(1) of the German ZPO, the last line of which reads in translation: ‘For that purpose [i.e. Kompetenz-Kompetenz], an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.’

¹⁸ *Fiona Trust & Holding Corp. & Ors v. Yuri Privalov*, [2007] EWCA Civ 20, decision of 24 Jan. 2007.

enough to say that the bribery impeaches the whole contract *unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular*.¹⁹ (emphasis added)

The risk is that this limit on arbitral jurisdiction may apply as regards Kompetenz-Kompetenz as well.²⁰ Despite the broad wording of section 30, the argument might be made that Kompetenz-Kompetenz is subject to the workings of separability in section 7, which only saves the arbitration clause from the inoperability of the main agreement, and, according to *Fiona Trust* and the nature of the principle, not against the invalidity, non-existence or ineffectiveness *of the arbitration clause itself*. That Kompetenz-Kompetenz is co-terminous with the scope of potential jurisdiction under the Arbitration Act is also suggested in that the Kompetenz-Kompetenz section in the Act, section 30, is under the rubric 'Jurisdiction of the arbitral tribunal'. Moreover, the inference lies that the Arbitration Act has consciously departed from its inspiration, the Model Law, in omitting expressly to state that Kompetenz-Kompetenz extends to questions of the validity, existence and effectiveness *of the arbitration clause itself*. It also does not help that section 30 can be contracted out of, unlike Article 16 of the Model Law. The practical difficulty with such a view is that a respondent in an arbitration merely has credibly to challenge the validity of the arbitration clause to prevent the arbitral tribunal from determining whether it has jurisdiction to decide on the validity of the arbitral clause. If, however, Kompetenz-Kompetenz is a pure creature of state will, and this will is posited in workable and workmanlike fashion, it does not matter that the parties' will in adopting the arbitration clause itself is vitiated.

6 ASSESSMENT OF SEPARABILITY AND KOMPETENZ-KOMPETENZ UNDER LEGISLATION

6.1 ADVENT OF SEPARABILITY AND KOMPETENZ-KOMPETENZ

Neither Kompetenz-Kompetenz nor separability sprung to life as legislative fiat, fully formed, helmeted and ready to do battle. They both coalesced in response to necessity which states were initially disinclined actively to alleviate. So parties, adjudicators and legal commentators employed their own resources to found these principles, and extended them by increments, as one extends principles.

¹⁹ *Fiona Trust & Holding Corp. & Ors v Yuri Privalov*, *ibid.* para. 29, per Longmore JA.

²⁰ See B. Harris, *Report on the Arbitration Act 1996*, 23 *Arb. Intl.* 437, 443 (2007) for apparent support for this view: 'It is also worth observing that in many cases the question of jurisdiction depends on whether a valid contract was entered into at all. Then only a tribunal whose jurisdiction does not depend on consent can authoritatively decide the question.'

For the principle of separability, the original impetus was drawn from supposed party will:

The parties normally consider all of the problems likely to arise between them in connection with the agreement so that they can be referred to arbitration, and the claim that the agreement is invalid represents one of those problems.²¹

Judge Schwebel has famously identified two principal and two auxiliary sources of initial justification for separability: the principal sources are party intention to have all their disputes settled in one forum, and the requirements of effective arbitration. The auxiliary sources are that in reality, or at least in the legal construction of reality, the parties' arbitral clause and their main agreement are two different contracts, and separability avoids a situation where courts would need to delve into the merits. The second principal source, and the two auxiliary ones ultimately lead back to putative party will.²²

Schwebel attributes the original basis for arbitral Kompetenz-Kompetenz to the notion, established in public international law, that every tribunal is the judge of its own jurisdiction.²³ Poudret and Besson agree that Kompetenz-Kompetenz 'is derived from an extensive or analogous application of the principle pursuant to which all tribunals have the competence to rule on their own jurisdiction' but suggest the possibility of an alternative provenance: 'the presumption that the parties intended to also submit this preliminary question to the arbitral tribunal'.²⁴

All of these original sources of inspiration for Kompetenz-Kompetenz and separability are notably independent of or at least resistant to state will. All of these inspirations have a sort of self-generating aspect to them, and cannot be defeated by the fiat of any particular state.

6.2 ADVANTAGE OF MAINTAINING KOMPETENZ-KOMPETENZ AND SEPARABILITY UNDER STATUTE

It was seen above that Kompetenz-Kompetenz and separability were ordained to contribute to the efficacy of arbitral proceedings. Two sources of such threats to arbitration may, however, be distinguished. First, there is obviously the threat from

²¹ Mayer *supra* n. 1, at 263.

²² Schwebel, *supra* n. 8, at 2, 3–6.

²³ Schwebel, *supra* n. 8, at 2, 3–6. Schwebel identifies four sources of inspiration of the principle, one of the main ones being the presumed party intentions indicated above.

²⁴ J.-F. Poudret & S. Besson, *Comparative Law of International Arbitration* 385–386, 134 (2d ed., Sweet & Maxwell 2007), speaking of both Kompetenz-Kompetenz and separability: Both are based on the 'presumed will of the parties to submit all disputes to the arbitrator, starting [with ...] the issue of jurisdiction, and thus to have a single procedure'.

respondents engaging in dilatory behaviour.²⁵ But there is also the threat of state interference in arbitration.

The aspiration behind much of the pro-arbitration exertions of parties, arbitrators, courts and learned authors is to free international arbitration from unreasonable restrictions imposed by states, most particularly that of the arbitral seat. Both Professor Pierre Mayer and Professor Julian Lew identify Kompetenz-Kompetenz as a classic instance of the competition between autonomy and state authority in arbitration.²⁶ Separability in the service of Kompetenz-Kompetenz is equally subject to this competition. In fact, its recruitment into the service of Kompetenz-Kompetenz was doubtless originally motivated in good part because it reinforced the self-generating credentials of Kompetenz-Kompetenz.

The advantage of rooting Kompetenz-Kompetenz and separability in a self-generating principle, such as party will, even where statute provision for them is ubiquitous, is that it preserves their salutary, pro-arbitration effects independently of state will to interfere in arbitration. As was noted above, for the jurisdictional benefits of separability to be enjoyed, it suffices for either the courts of the seat or the enforcement courts to subscribe to separability. One might even go further. If it can be established that separability is a 'general principle of arbitration law', then this will even induce arbitrators to apply this general principle.²⁷ In such case, the benefits of separability will be enjoyed unless either a court of the seat or an enforcement court feels strongly enough against separability to interfere. In international arbitration today, this must be distinctly rare.

Even under statute, there may be an interest in maintaining the independence of separability. Since the content of statute is much more freely altered than the content of principle, over time, general arbitration principles risk being lost. Leaving separability as a recognizable unity within statute assists the argument that separability is a general principle of arbitration. Its cross-statute commonality is thus preserved, and its remains on the surface of statute, visible to legal commentators formulating *opinio juris*.

²⁵ C. Svernlöv, *What Isn't, Ain't: The Current Status of the Doctrine of Separability*, 8 Arb. Intl. 37 (1991): 'The doctrines of competence-competence . . . and separability . . . of the arbitration agreement have arisen to rationalize a legitimate desire by arbitrators, courts and scholars to prevent the consequences of such abuses [i.e., attempts to avoid arbitral jurisdiction] and intolerable behaviour.'

²⁶ Mayer, *supra* n. 5, at 345; J. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 Arb. Intl. 179, 180 (2006).

²⁷ E. Gaillard & J. Savage, Fouchard, Gaillard, *Goldman on International Commercial Arbitration* 197-240, pt. 2, Ch. 1 (Kluwer L. Intl. 1999) is given over to establishing 'the autonomy of the arbitration agreement' as a general principle of arbitration. Prof. René-Jean Dupuy in *Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Republic* (1975) 53 I.L.R. 393 considered separability 'an essential principle of the law of arbitration'. See also, A. Rogers & R. Launders, *Separability: The Indestructible Arbitration Clause*, 1 Arb. Intl. 77, 79 (1994).

Furthermore, if principle merges into statute to too great a degree, then principle will not survive any repeal of the statute. Where Kompetenz-Kompetenz and separability are left intact under statute, this is a measure of guarantee that this hard fought for arbitral *acquis* will not simply follow the whim of the legislator.

It was perhaps in view of these considerations that separability is preserved as principle (for the most part) in the Model Law and in the English Arbitration Act 1996, and in the latter at least is made to operate upon presumed party will.

6.3 LIMITED NATURE OF THIS ADVANTAGE OF MAINTAINING SEPARABILITY

6.3.1 *Separability as Bare Principle is Rarely Efficacious*

In the rare instances where statute cannot be found instituting separability, one generally finds state disinclination to accept the content of this principle. If such a state accepted separability, this would by now have resulted in the promulgation of statute.

It was seen above that the benefit of separability is largely confined to jurisdiction. Arbitral jurisdiction is usually a matter to which the courts of the seat are not indifferent. This is, first, because by reviewing arbitral jurisdiction, the seat ensures its attractiveness as a seat for international arbitrations. In part this is why courts of the seat may even intervene when arbitrators wrongly refuse jurisdiction.²⁸ Second, arbitration is considered by states to be a sacrifice of ordinary state jurisdiction (even if not that of the seat in the particular instance), and therefore courts do have something to say about how arbitrators deal with jurisdiction.²⁹ Third, the award will be a product of the seat's supervision, and the seat must ensure that its awards meet certain minimum standards³⁰ and are going to be enforceable.

Added to this interest in reviewing arbitral jurisdiction, the seat very often has powers to prevent the arbitration from proceeding. The fact alone of the juridical

²⁸ See, example., ATF 118 II 193, consid. 5, where the Swiss Supreme Court set aside an arbitral award on the basis that the arbitral tribunal wrongly declined its jurisdiction, contrary to Art. 190(2)(b) of the Swiss PIL Act, to decide on questions of EU competition law; and the decision of the Paris Court of Appeal of 26 Oct. 1995 in *Société Nationale des Chemins de Fer Tunisiens v. J.M. Voith AG*. Both of these decisions are cited by Demolista, *supra* n. 6, at 233.

²⁹ Wetter, *supra* n. 13, at 27: 'So long as arbitration is viewed as an agreed derogation from an otherwise obligatory judicial exclusivity of jurisdiction, no convincing legal argument can be made against allowing courts to decide whether or not there does exist a valid arbitration agreement giving the arbitrators their power to rule.' See also Demolista, *supra* n. 6, at 229: '[T]he competence-competence principle has always been seen as a concession on the part of national legal systems.'

³⁰ G. Kaufmann-Kohler, *L'ordre public d'envoi ou la notion d'ordre public en matière d'annulation des sentences arbitrales*, in SZIER 3/93 esp. at 281 (1993); Ph. Landolt, *Limits on Court Review of International Arbitration Awards Assessed in light of States' Interests and in particular in light of EU Law Requirements*, 23 Arb. Intl. 63 (2007).

connection that is the seat, between an arbitration and a state, will often provide jurisdiction for a court there to enjoin the arbitrators or the parties from proceeding.

These interests, and these powers of the state of the seat, therefore lessen the few opportunities for arbitrators' determinations contrary to the view of the state of the seat to survive.

6.3.2 *Modern Legal Realism Unfertile Ground for Separability as a Bare Principle*

The realization today is that separability is simply implausible as an account of party intentions. This implausibility was adverted to above. Doubtless it was in large part because of this realization that statute was adopted to prop up separability. The recognition of this implausibility makes it very unlikely that separability will ever re-emerge from repealed statute as an effective principle observed by arbitrators and courts.

In addition, since Kompetenz-Kompetenz is today generally conceived of as necessarily resting upon state will, i.e., statute in the ordinary case, there is no longer any role for self-generating separability to support self-generating Kompetenz-Kompetenz.

7 CONCLUSIONS

Separability should be jettisoned not just as a principle operating upon self-generating authority but as a principle operating in modern arbitration legislation. Even supported upon the will of the legislature it remains implausible, and continues to exert a number of unwanted effects.

With separability thus cast out, what should be done with Kompetenz-Kompetenz and jurisdiction?

The desired result in relation to arbitral Kompetenz-Kompetenz is to invest arbitrators with jurisdiction to determine *all* matters of jurisdiction in relation to a contract in which an arbitration clause is inserted, within the natural meaning of the wording of the arbitration clause, which is usually purposefully capacious. The principal realization which must undergird any truly satisfactory approach to Kompetenz-Kompetenz is that party will, that supposed only begetter in arbitration, cannot be sufficiently operative here. Effective Kompetenz-Kompetenz must be at least as broad as potential jurisdiction, and there is a logical problem in finding in party intention arbitral Kompetenz-Kompetenz over the validity of an arbitration clause, that is, the source of that party intention. It is therefore unalloyed state will which underlies arbitral Kompetenz-Kompetenz.

But what, therefore, might determine the grant of such important authority, if not party will? It cannot be that states are prepared to respect just any person or 'tribunal's' proceeding to make a determination of its jurisdiction. If that were the case, procedural abuses of a different sort would arise. Parties would believably threaten to embroil other parties in arbitration proceedings to extract all manner of advantages and concessions. Where a state accords negative Kompetenz-Kompetenz a party could also be deprived of its access to the courts totally without cause. The state does not exercise such forbearance in any and all circumstances where arbitral jurisdiction is claimed.

The short answer is that the state will properly accord arbitral Kompetenz-Kompetenz to the parties' use of the word 'arbitration' usually subject to certain (further) formal requirements, such as the existence of a writing.

It is true that there is party will generally operating behind the use of the word, but it is this formal element (the mention of 'arbitration', or the equivalent in another language, generally in writing) which engenders the Kompetenz-Kompetenz of an arbitral tribunal constituted under it, and not the party will. It is only in the *exercise* of the Kompetenz-Kompetenz, i.e., the determination of jurisdiction, by the arbitral tribunal that genuine party will becomes relevant, and of course, in the arbitration of the merits which ensues, if jurisdiction is thereby affirmed.

Therefore party will is not absent in the arising of arbitral Kompetenz-Kompetenz. It is simply not yet operative. The function of the general coincidence of party will with the scope of Kompetenz-Kompetenz is to ensure that the grant of arbitral Kompetenz-Kompetenz, as an exception to the rule of exclusivity of judicial Kompetenz-Kompetenz, is bestowed in a manner rationally connected to the basis of the arbitrators' immediate authority subsequently, that is, party will.

The writing requirement for the validity of arbitration clauses and the parallel jurisdiction of state courts to decide on arbitral jurisdiction, especially the non-acceptance of negative Kompetenz-Kompetenz, have been forcefully deprecated by certain legal commentators. But where full, result-oriented arbitral Kompetenz-Kompetenz applies, they are seen to be instrumental safeguards. The writing requirement is instrumental in ensuring this accidental (i.e., non-essential) correspondence between Kompetenz-Kompetenz and party will, and, moreover, a tangible basis upon which arbitrators and courts can examine arbitral jurisdiction.

The desired result in relation to arbitral jurisdiction is that jurisdiction follows the parties' true intentions not only as to who is to decide matters connected to the inoperability of the main contract, but also that, where violence is not done to clear party intentions otherwise, arbitral jurisdiction should provide one-stop

adjudicative shopping.³¹ On many occasions, unaided, arbitrators will find that the parties intended that the arbitrators have jurisdiction to determine whether or not the main agreement is inoperable, and to determine the consequences of any finding of inoperability. The great majority of arbitration systems will not interfere with this finding, and will enforce it. For the most part, however, stipulations to this effect in arbitration rules, which *are* believably the will of the parties, will put the matter beyond doubt.³² It remains that arbitration legislation may usefully ensure efficient dispute resolution by plainly providing for arbitral jurisdiction over the matter of the inoperability of the main agreement, save where there is clear party intent to the contrary.

³¹ This issue is analysed by Mayer, *supra* n. 1, at 263–266. Mayer argues that one can generally presume that the parties intended that all problems arising between them in connection with their agreement be referred to arbitration, but this does not obtain where the parties’ consent to the arbitration clause is lacking, they lacked authority, and in certain further situations.

³² The ICC Rules are a model to be followed in this regard. Art. 6(5) *in fine* simply lays down broad, unconstrained arbitral Kompetenz-Kompetenz. Art. 6(9) then provides for arbitral jurisdiction in face of the potential and actual inoperability of the main agreement, and it does so without resort to the artifice of separability. A model to be abjured is that found in Art. 21.1 of the UNCITRAL Rules, Art. 23.1 of the LCIA Rules, Art. 15(2) of the AAA International Arbitration Rules, and Art. 21(2) of the Swiss Rules, all of which are built upon the sand of separability.

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