The High Cost of London as an Arbitration Venue—the Court of Appeal Rejects Compétence-Compétence and Separability in Midgulf v Groupe Chimique Tunisien

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THE HIGH COST OF LONDON AS AN ARBITRATION VENUE—THE COURT OF APPEAL REJECTS COMPÉTENCE-COMPÉTENCE AND SEPARABILITY IN MIDGULF V GROUPE CHIMIQUE TUNISIEN

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Anti-suit injunctions; Arbitration clauses; Contract terms; Foreign proceedings; Formation of contracts; Incorporation; International commercial arbitration; Jurisdiction; Kompetenz-Kompetenz; Offer and acceptance; Tunisia

Contrasting approaches by courts in Tunisia and England to an identical issue of arbitral jurisdiction arising out of the same contractual dispute raise important questions concerning England's claim to be an arbitration-friendly venue.

Midgulf and Groupe Chimique Tunisien had concluded two contracts for a sale of sulphur from Saudi Arabia. When disputes arose, GCT brought an application in Tunisia for a declaration that the parties were not bound by an arbitration agreement. In England, Midgulf applied for the appointment of an arbitrator.

In Tunisia, the courts declined jurisdiction, referring the matter to arbitration. The only relevant question for Ms Reem Al Nifati, deputy judge of the Tunis Court of First Instance, was the existence of an arbitration agreement in writing under the New York Convention (whether or not it was binding and regardless of the parties' contentions concerning the conclusion of the main contract in which it was contained—all matters for the arbitral tribunal).[2] For the Tunisian judge, an arbitration agreement could be enforced pursuant to art.II(3) of the New York Convention solely on the basis of internationally accepted principles of *compétence-compétence* and separability.

In England, on the other hand, the courts disregarded those same principles and the Court of Appeal declared separability to be ''irrelevant'' to the enforcement of an arbitration agreement.[3] For English judges both at first instance and the Court of Appeal, the court's task was to hear and weigh witness evidence in order to determine a variety of rival factual claims not related to the arbitration agreement, but to the formation of the main contract, including the time at which it was concluded, the terms agreed and the parties' dispute concerning the depth of water in the Tunisian ports of Sfax and Gabès.

Moreover, the courts in England granted an anti-suit injunction against the continuation of proceedings in Tunisia where the Tunisian Court of Appeal would undoubtedly have upheld the first instance decision which presented nothing novel and was rendered in accordance with established judicial practice in Tunisia and other New York Convention jurisdictions. This injunction remained in force while the English courts proceeded to determine substantive issues concerning the main contract in three hearings at first instance before Burton and Teare JJ. and an appeal before Mummery, Toulson and Patten L.JJ.

The Court of Appeal's confirmation, in *Midgulf,* of pre-1996 views of arbitration agreements as intrinsically bound up with the fate of the main contract—despite clear entrenchment of strong principles of *compétence-compétence* and separability in the Arbitration Act 1996—has significant consequences, not the least of which is that parties seeking to enforce arbitration agreements in England face the risk of costly litigation before local courts. This has often involved, as it did in *Midgulf*, several hearings at first instance on the merits and recourse to the Court of Appeal.[4]

Beyond this, arbitration agreements are not being enforced where one party can establish, in court proceedings, that the main contract did not come into existence even in circumstances where the parties commenced performance. Further, issues of fact dealt with by the

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2. See the English translation of the Tunisian first instance Decision No.23/23796 of March 28, 2009, annexed to this article.
3. *Midgulf International Ltd v Groupe Chimiche Tunisien* [2010] EWCA Civ 66 at [36].
4. See, for example, the cases of *Birse Construction Ltd v St David Ltd*; *Ahmad Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc*; *Welex AG v Rosa Maritime Ltd*; and *Fiona Trust & Holding Corp v Privalov* to name only a few.

courts are subject to rules of evidence and procedure which do not apply in international arbitration, notably the ''inadmissibility'' of pre—and post—contractual evidence which international arbitrators would have regard to without difficulty. Finally, the question arises as to whether the approach of the English courts is consistent with the United Kingdom's international obligations to enforce arbitration agreements under the 1958 New York Convention and practice in other Convention States.

The facts in Midgulf

The facts presented to the Tunisian and English courts were identical.

Midgulf concluded a contract with one of the largest Tunisian state-owned entities, Groupe Chimique Tunisien, in June 2008 for a sale by Midgulf to GCT of sulphur from Saudi Arabia. The June contract was governed by English law. The parties referred disputes to arbitration in England, both in Midgulf's initial offer which was accepted by GCT and in a subsequent formal contract (S/S/Sulphur/2008/06/27) dated June 27 signed by Midgulf and provided to GCT. Although GCT did not sign or return the formal contract, the parties nonetheless performed under it.

Midgulf's offer had stipulated a maximum draft at the ports of Gabès and Sfax of 31ft. A provision of the long-form June contract provided the, ''vessel will be safely accommodated and discharged at discharge port if vessel arrive at a maximum draft of 31 feet''.

The parties also immediately entered into negotiations for a second and larger sale of sulphur, in July 2008, on the basis of the June Contract. On July 2, Midgulf proposed that for the July contract:

> ''All other terms and conditions pertaining:
>
> — shipment & shipping terms
> — payment
> — delivery
> — inspection
> — force majeure
> — jurisdiction
> — arbitration
> — taxation
> — insurance
>
> will be as per our contract no S/S/Sulphur/2008/06/27 dated June 27th, 2008.''

This offer, together with the long form of the June contract, were passed to Tunisian Government authorities for approval. On the basis of the July 2 offer and the long-form June contract, the parties held a telephone discussion on July 4 during the course of which Teare J. found that GCT, ''inform[ed] [Midgulf] that the purchase was confirmed''.[5]

5. *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 1684 (Comm) at [11].

In any event, immediately following the July 4 conversation, the parties performed obligations under the July contract fixing vessels for the first shipment on July 4 and 5. Midgulf requested that GCT confirm the parties' ''oral agreement'' and, in a fax dated July 7 (forwarded on July 8), GCT stated:

> ''Further to your offer by fax dtd 02/07/08 and further to your fax ref mg/j/2851 dtd 02/07/08, we are pleased to confirm the purchase of 150,000 mt of Saudi crushed lump sulphur at the following conditions:
>
> Product: bright yellow crushed sulphur
> Quantity: 150,000 mt +/- 10% (seller's option)
> Draft at Gabes and Sfax ports: 31 feet maximum at high tide
> Quality specifications: as per your offer by fax dtd July 2nd 2008
> Origin: Saudi Arabia
> Packing: Bulk
> Shipment: July, August, September 2008
> Price: USD 895 pmt cfr (free out) Gabes or Sfax (buyer option) to be declared before crossing Suez Canal.
>
> Consequently, you are kindly requested to submit to us the loading schedule at the rate of probably two vessels per month as well as the name of the performing vessels in July 2008.
>
> We congratulate ourselves for this conclusion and look forward to its smooth execution.''

Midgulf responded on July 9:

> ''Thank you for your confirmation of acceptance of our offer dated 02/07/2008 per your fax... dated 07/07/2008. Accordingly we are in contract.''

On July 14, however, GCT proposed to ''amend'' arts 14 and 15 of the long-form contract dated June 27 (which would also have affected the July contract as it was based on the June contract) to provide for Tunisian—in place of English—law as the governing law of the contract and to replace the provision for ad-hoc arbitration in London with either the Tunisian courts or ICC-administered arbitration.

Tunisian proceedings

When disputes arose concerning the quality of the sulphur, GCT commenced proceedings in Tunisia seeking a declaration that the July contract did not contain an arbitration provision and parallel proceedings for damages under each of the contracts. GCT also, confusingly—and on the same date—undertook to arbitrate disputes under the July contract on condition the arbitrators issue a preliminary award on jurisdiction and applicable law.

In the declaration proceedings, GCT contended there was no arbitration agreement formed by an ''exchange'' of correspondence, as required under the New York Convention, since it had not signed or returned the long

form June contract. GCT also argued that its reply dated July 8 constituted a ''counter offer'' which did not contain an arbitration agreement and that the parties' had not concluded negotiations for the July contract. Finally, GCT argued that it could not accept the contract and arbitration agreement without prior approval from the Tunisian government.[6] Midgulf sought to have the application dismissed on the basis that the Tunisian court lacked jurisdiction (the functional equivalent in common law of the court's obligation to grant a ''stay'' of proceedings where there is an arbitration agreement) and that pursuant to separability and *compétence-compétence*, the questions raised by GCT had to be decided by the arbitrators. GCT also argued that whatever disputes had arisen between the parties as to the terms of the July contract, GCT had at no time during negotiations or performance raised any objection to the arbitration agreement which governed both the June and July contracts.

By judgment dated March 28, 2009, the Tunisian court dismissed GCT's application directing that the issue of the validity the arbitration agreement be referred to arbitrators in accordance with art.II(3) of the New York Convention and art.61(1) of the Tunisian Arbitration Code:

> ''The arbitration tribunal rules on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement. For that purpose, the arbitration agreement included in a contract shall be treated as an agreement independent of the other terms. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration agreement.''[7]

Tunisia is a Member State of the 1958 New York Convention and the Tunisian Arbitration Code, brought into force by Law 93-42 on April 26, 1993, is, with few amendments, an adoption of the UNCITRAL Model Law on International Arbitration.[8]

Article II(3) of the New York Convention provides:

> ''The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an [arbitration agreement], shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.''

The Tunisian court found that whether or not the parties were bound by the written arbitration agreement in dispute, it was in writing and it was not, ''null and void, inoperative or incapable of being performed''.

The Tunisian decision was entirely unsurprising and consistent with the established approach of courts in numerous jurisdictions, including common law jurisdictions such as Hong Kong and Canada. Pursuant to international obligations to enforce arbitration agreements under the New York Convention and the principle of *compétence-compétence*, questions concerning the existence, scope and validity of an arbitration agreement are not decided by the courts in the first instance, but referred to arbitration.

English proceedings

Midgulf applied, ex parte on notice in England, for the appointment of an arbitrator. In response, GCT challenged the jurisdiction of the Commercial Court to make the appointment contending inter alia that Midgulf had ''submitted'' to the jurisdiction of the Tunisian courts by contesting the declaration proceedings. Midgulf also applied for an anti-suit injunction to restrain GCT from taking any further steps in Tunisia, notably to appeal the first instance decision and continue parallel damages claims under the July contract, GCT having subsequently accepted arbitration of disputes in respect of the June contract.

On February 19, 2009, Burton J. granted the anti-suit injunction concluding that Midgulf had not submitted to jurisdiction in Tunisia given:

> ''[T]he very nature of what [Midgulf] was doing, namely challenging the jurisdiction by resisting the application for a declaration that there was jurisdiction.''[9]

In doing so, Burton J. also relied on the New York Convention:

> ''I am perfectly satisfied that by taking part in all three sets of Tunisian proceedings, [Midgulf] has, at any rate, for the purposes of this injunction today, not submitted to the jurisdiction, and was acting in accordance with both the New York Convention, Article II(3), and, so far as this court is concerned, in accordance with the provisions of Section 33 of the Civil Jurisdiction and Judgments Act 1982, as amended.''[10]

With respect to the test for a ''high degree of probability'' or ''sufficiency'' of Midgulf's case in favour of an arbitration agreement, required for the grant of an anti-suit injunction, Burton J. found it was:

> ''[S]trongly arguable that the second contract, and indeed the first contract, both incorporated the arbitration and jurisdiction and English law clauses... not only is there provision in the standard

6. A State Entity cannot, of course, rely on its own domestic laws and regulations to avoid an obligation to arbitrate. Similar arguments were rejected by the Italian courts in another case involving GCT, *Société Arabe des Engrais Phosphates et Azotes and Société Industrielle d'Acide Phosphorique et d'Engrais v Gemanco srl,* Corte di Cassazione, May 9, 1996, (1997) Yearbook Commercial Arbitration XXII 737.

7. See Case 23796 March 28, 2009 First Instance Court of Tunis at annexe A to this article.

8. See the English translation of the Tunisian *Code de l'arbitrage* published in Mr Habib Malouche, *ICCA Handbook on International Commercial Arbitration*, under ''Tunisia''.

9. *Midgulf v Groupe Chimique Tunisien* Unreported February 19, 2009 Comm Ct, per Burton J. at [10].

10. See *Midgulf v Groupe Chimique Tunisien* Unreported February 19, 2009 Comm Ct, per Burton J. at [11].

> terms incorporated in both contracts on that basis, 'Arbitration, English law to govern, venue in London,' but there is also a jurisdiction clause, saying, 'This contract is to be construed and governed in all respects in accordance with English law.' ''[11]

Judge Burton acknowledged the parties' dispute concerning the terms of the underlying main contract, notably the fact that GCT's acceptance was not identical to Midgulf's offer, but considered this did not affect the separable arbitration agreement. For Burton J., GCT's confirmation ''at the following conditions'':

> ''[C]ontain[ed] nothing which ousts or is inconsistent with the provisions for arbitration and jurisdiction referred to in the fax to which [GCT] was responding.''[12]

GCT applied to set aside the anti-suit injunction. Unlike Burton J., in considering whether Midgulf's case for an arbitration agreement, Teare J. reviewed the evidence for the conclusion of the main contract, notably whether there had been an offer and acceptance or an offer met by a ''counter offer''. Because this evidence included an oral conversation the content of which was disputed, Teare J. concluded that the case in favour of the arbitration agreement was not strong enough to justify an anti-suit injunction. He further decided he could not determine the matter without a trial and witness evidence, ''as to the terms on which the July contract was agreed''.[13] For Teare J., it was only once the existence of the main contract was determined that the court could, ''then decide whether or not to appoint an arbitrator and continue the anti-suit injunction indefinitely''.[14]

In circumstances where the Tunisian court had refused to determine the validity of the arbitration agreement, Teare J. was concerned that a state court somewhere needed to decide the question of arbitral jurisdiction:

> ''[I]f this court refused to grant an anti-suit injunction and the decision of the Tunisian court were upheld on appeal there would be a stalemate. Neither court would determine whether the July contract contained a London arbitration clause.''

The other possibility, advanced by Midgulf, that arbitrators should, in the first instance at least, decide the question on the basis of *compétence-compétence* under s.30 of the Arbtiration Act was rejected by Teare J.:

> ''Whenever a court is asked, pursuant to the New York Convention Article II, to refer a dispute before it to arbitration on the grounds that there is a London arbitration clause it may decide the question whether a London arbitration clause has been agreed.''[15]

For the judge, the conclusion of the July contract was, ''a question which relates directly to the arbitration agreement and therefore is not one which can only be determined in arbitration''.[16]

After hearing the witnesses, Teare J. focused his inquiry on whether, and when, the July contract was concluded. For the court at first instance, the parties' agreement to arbitrate depended on the formation of the main contract. In a second decision, on July 13, 2009, the judge found that GCT's July 7 fax constituted a ''counter offer'' subsequently accepted by Midgulf.[17]

The conclusions of Teare J. were based on three interpretations of the GCT's fax of July 7, 2008. He considered that this communication introduced a ''new condition'' concerning maximum draft for the delivery vessel at the ports of Gabès and Sfax of 31ft of water ''at high tide,'' although this point had not been argued by either party and no evidence of the depth of the ports was ever before the judge.[18] The language of GCT's fax confirming the purchase ''at the following conditions'' indicated to the judge that GCT was not intending to contract on the terms put forward by Midgulf in its offer of July 2 or in the June contract.[19] Finally, Teare J. decided that GCT had not expressly accepted other terms which were to be incorporated from the June contract, including the arbitration agreement:

> ''The fax was therefore a counter offer, not only because of the maximum draft condition (which was not identical to that set out in the draft contract dated 27 July which did not limit the warranty to high tide) but also because the terms on which GCT was willing to contract did not include the detailed terms referred to in the offer of 2 July which were to be incorporated from the draft contract dated 27 June.''[20] (Emphasis added.)

Accordingly, Teare J. dismissed Midgulf's applications for the appointment of an arbitrator and for the continuation of the anti-suit injunction. On the same day, however, Teare J. granted permission to appeal on the basis that Midgulf:

> ''[H]ave a real prospect of succeeding on appeal in saying that this was a contract in writing which contained a London arbitration clause.''

The decision, at first instance, confirmed the English courts' disregard for the separate nature of the arbitration agreement. No consideration was given to the existence

11. *Midgulf v Groupe Chimique Tunisien* Unreported February 19, 2009 Comm Ct at [22].
12. *Midgulf v Groupe Chimique Tunisien* Unreported February 19, 2009 Comm Ct at [24].
13. *Midgulf International* [2009] EWHC 1684 (Comm) at [43].
14. *Midgulf International* [2009] EWHC 1684 (Comm) at [43].
15. *Midgulf International* [2009] EWHC 1684 (Comm) at [57] and [59].
16. *Midgulf International* [2009] EWHC 1684 (Comm) at [58].
17. *Midgulf International* [2009] EWHC 1684 (Comm).
18. *Midgulf International* [2009] EWHC 1684 (Comm) at [24].
19. *Midgulf International* [2009] EWHC 1684 (Comm) at [25].
20. *Midgulf International* [2009] EWHC 1684 (Comm) at [24].

of a separable arbitration agreement in writing, whether it might survive a ''counter offer'' which concerned only the terms the main contract or the effect of GCT's acceptance of terms, even if partially on GCT's case, which GCT knew and accepted were governed by an arbitration agreement. Nor was any consideration given to the parties' performance of the contract prior to the ''counter offer'' under various offers by Midgulf which were all governed by an arbitration agreement.

In addition to the parties' performance of the contract, statements by GCT (which would have been accorded weight by an international arbitral tribunal) were also disregarded in accordance with rules of court excluding post-contractual evidence. In correspondence on July 22, 2008, GCT had referred to the July contract complaining that the goods were not delivered in accordance, ''with the specifications stated by your offer dated 02.07.08 on basis of which our agreement has been mutually concluded''. On July 24, 2008, GCT had again referred to Midgulf's offer of July 2 in relation to complaints about the quality of the goods which it alleged was not in accordance with the, ''guaranteed ash content... as per your offer dtd 02/07/08''. Finally, GCT's letter dated July 14, 2008 concerning the ''Crushed sulphur contract'', proposed to ''amend'' (importantly, not to ''negotiate'') specific terms of the long-form June contract (S/S/Sulphur/2008/06/27), and consequently those of the July contract, concerning the choice of law and arbitration provisions. Finally, once Midgulf commenced arbitral proceedings under the July contract, GCT accepted the appointment of a three-member tribunal, on condition the arbitrators first render a preliminary award on jurisdiction, post-contractual conduct, maybe, but nonetheless an exchange of correspondence exchanged in arbitral proceedings that acknowledged the arbitration agreement in accordance with s.5(5) of the Arbitration Act. In contrast, Burton J. had relied, at [25] of his judgment, on GCT's statement of July 22 as a ''particularly significant'' statement ''when a dispute arose about quality'' and evidence of agreement to arbitrate for the purposes of the anti-suit injunction, notwithstanding that it was post-contractual.

The court's approach at first instance confirmed the application of weak principles of separability and *compétence-compétence* which have continued to be applied in England despite the adoption of reforms in the 1996 Arbitration Act.

Jurisprudence prior to Arbitration Act 1996

Jurisprudence under former arbitration regimes confirmed a limited principle of separability that stopped short of arbitration agreements in inchoate contracts, even in circumstances where: (a) the parties raised no objection to the arbitration agreement during negotiations; and (b) performance commenced under a draft contract containing an arbitration agreement in writing.

The traditional approach is set out in the Court of Appeal decision in *Smith & Gordon Ltd v John Lewis Building*[21] where the ineffectiveness of an arbitration clause followed directly from the parties' failure to complete underlying contractual documents. Mann L.J. stated, ''the law requires a firm foundation for the establishment of an arbitration agreement''.[22] The Court of Appeal refused to stay legal proceedings in *Jarvis Interiors Ltd v Galliard Homes Ltd*[23] where disputes arose out of construction works commenced while the parties were still conducting negotiations on the basis of a JCT standard form that contained a provision for arbitration. Although the parties and the engineer administered the works as if the JCT form was in force, no agreement was reached on pricing. The possible autonomous application of the arbitration clause was excluded by Lindsay J.:

> ''It is not suggested by either side that there was here any 'arbitration agreement' wholly independent of any other contract or contracts; if there was any arbitration agreement at all, it came about only by way of its incorporation in some larger contract.''[24]

In declining to enforce arbitration agreements, under the old regime, English courts commonly focused attention exclusively on the existence of the principal contract despite the clear affirmation of a strong principle of separability by Hoffmann L.J., as he then was, in *Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd:*

> ''[I]n every case it seems to me that the logical question is not whether the issue goes to the validity of the contract, but whether it goes to the validity of the arbitration clause.''[25]

Disputes arising out of incomplete contracts, however, did not attract this analysis. Instead, the courts extended the absence of contractual agreement to the parties' consent to arbitration whether or not the arbitration provision, itself, was subject to negotiation or any objection by either party and even where performance commenced under the draft contract.

Jurisprudence since the Arbitration Act 1996

Adoption of the much broader Model Law principle of separability in the 1996 Arbitration Act seemed to position arbitration provisions well and truly beyond defect or even failure in formation of the underlying contract, especially in circumstances where the parties commenced performance. Section 7 of the Act provides that an arbitration agreement contained in another

21. *Smith & Gordon Ltd v John Lewis Building* [1993] 44 Con. L.R. 11.
22. *Smith & Gordon Ltd v John Lewis Building* [1993] 44 Con. L.R. 11 at [15].
23. *Jarvis Interiors Ltd v Galliard Homes Ltd* [2000] B.L.R. 33.
24. *Jarvis Interiors Ltd v Galliard Homes Ltd* [2000] B.L.R. 33 at [42].
25. *Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701 at 724.

agreement, ''shall not be regarded as invalid, non-existent or ineffective because that other agreement... did not come into existence''. Further, s.6 defines an arbitration agreement to include reference of present or future disputes, ''whether they are contractual or not''.[26]

As a matter of statutory law, the conventional requirement for a ''firm foundation'' no longer appeared to be a necessary pre-condition to arbitral jurisdiction. Moreover, s.30 of the Act directs arbitrators to determine their jurisdiction only on the basis of, ''whether there is a valid arbitration agreement''. Peter Nygh observed that the effectiveness of an arbitration agreement even in the absence of an underlying contract was ''placed beyond doubt'' in the 1996 Act.[27]

These same statutory provisions ensure the survival of dispute resolution clauses in other Model Law jurisdictions. The Delhi High Court enforced arbitration under a construction contract that was never executed in *Engineering Development Co v Municipal Corp of Delhi.* The court relied on the arbitration clause contained in general conditions of tender documents and one party's commencement of work. Kapoor J. stated:

> ''[T]he arbitration agreement is not required to be signed separately, it is only required that it should be in writing and it is in writing. Further, since the parties have acted upon the said agreement contained in the conditions of the contract annexed with the tender document, the respondent cannot claim that there was no arbitration agreement. It may be mentioned that an arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a definite legal relationship whether contractual or not.''[28]

Likewise, the Supreme Court of British Columbia stayed legal proceedings in *Cecrop Co Ltd v Kinetic Sciences Inc*,[29] although the principal agreement never came into force under effective date provisions that required completion of development work and formal notice of prototype acceptance. Failure of these preconditions was not an obstacle to arbitral jurisdiction because the question that arose, for the Canadian court, was whether the arbitration clause was effective. Cole J. found that the arbitration agreement:

> ''[S]ubsists as a separate agreement despite the failure of the parties to complete the work under the development plan. Therefore, it cannot be determined that the arbitration agreement itself is 'null and void, inoperative or incapable of being performed' because the Licensing Agreement itself never came into effect.''[30]

The French Cour de Cassation reached a similar result without the benefit of Model Law statutory provisions:

> *''[L]e principe d'autonomie de la clause compromissoire... permet de se prévaloir de cette clause même lorsque le contrat signé par les parties n'a pu entrer en vigueur, dès lors que le différend qui les oppose est lié à sa conclusion.''*[31]

This general principle was criticised as too restrictive[32] and other decisions in France less supportive of arbitration in the absence of a concluded contract also met with doctrinal censure.[33]

Ultimately, in *Société Omenex v M Hugon,*[34] the Cour de Cassation enforced arbitration despite the inexistence of the host contract under a clear statement of principle to this effect:

> ''*[E]n application du principe de validité de la convention d'arbitrage et de son autonomie en matière internationale, la nullité non plus que l'inexistence du contrat qui la contient ne l'affectent.*''[35]

Surprisingly, in dicta under the 1996 Arbitration Act, English courts continued to adhere to the view that arbitral jurisdiction depends on the pre-existence of a host contract. During an application for a full hearing on jurisdiction in *Azov Shipping Co v Baltic Shipping Co,* Rix J., as he then was, stated:

26. The arbitration rules of many administering institutions support the principle of separability. See, for example, art.6(1) of the ICC Rules, ''the Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent'', and art.23.1 of the LCIA Rules, ''a decision by the Arbitral Tribunal that such other agreement is non-existent... shall not entail ipso jure the non-existence... of the arbitration clause''.

27. *Autonomy in International Contracts* (Oxford: Clarendon, 1999), p.75.

28. *Engineering Development Co v Municipal Corp of Delhi* [2001] 1 Arb. L.R. 269 at 271.

29. *Cecrop Co Ltd v Kinetic Sciences Inc* (2001) 16 *Business Law Reports* (3d) 15.

30. *Cecrop Co Ltd v Kinetic Sciences Inc* (2001) 16 *Business Law Reports* (3d) 15 at [20].

31. *Société Navimpex Centrala Navala v Société Wiking Trader* (1989) *Revue de l'arbitrage* 641 at 642, note B. Goldman (translation): ''The principle of separability of an arbitration agreement... allows it to be relied on even when the contract signed by the parties has not entered into force, where the dispute between them concerns its conclusion.''

32. Goldman, (1989) *Revue de l'arbitrage* 641, 649 and 650, argued that the principle should apply to a broader category of circumstances, notably, those where contract negotiations take place over a long period of time or are broken off in bad faith.

33. See *Société L & B Cassia v Société Pia Investments* (1990) *Revue de l'arbitrage* 851 Cour d'appel and (1992) *Clunet* 168 *Cour de cassation*, note E. Loquin et al. (1996) *Traité de l'arbitrage commercial international* 376 and 595 and Y. Derains (1997) *Revue de l'arbitrage*, note sous *Société Gefimex v Société Transgrain* 434, 435.

34. *Société Omenex v M Hugon* (2006) *Revue de l'arbitrage* 103, note Jean-Baptiste Racine.

35. Translation: ''[P]ursuant to the principle of the validity of the arbitration agreement and its separability in international disputes, neither the invalidity nor the inexistence of the contract in which it is contained affects it.''

> ''[I]t is in issue as to whether Azov is a party to that agreement. That agreement contains an arbitration clause which, of course, is only binding on Azov if it is a party to the agreement in the first place.''[36]

In a third-party application for discovery in the same case, Rix J. commented:

> ''[I]f the plaintiffs succeed in showing that there was no contract and therefore no agreement to arbitrate, they can hardly be prejudiced by premature discovery in the arbitration.''[37]

The issue was also a source of some confusion in the ill-fated first instance decision in *LG Caltex Gas Co Ltd v China National Petroleum Co*.[38] Aikens J. stated:

> ''[T]he party faced with a plea of 'no contract' has to appreciate that the arbitrator therefore lacks jurisdiction to determine that issue and has to protest this lack of jurisdiction.''[39]

In another case, Colman J. noted that ''no contract'' claims were, ''an increasingly prevalent situation in jurisdictional challenges to arbitration'' and stated:

> ''[O]n the preliminary issue of jurisdiction the arbitrator or the Court, as the case may be, is called upon to decide whether any contract exists between the parties and, if there is found to be no such contract, the claim may necessarily fail.''[40]

In still another case, H.H. Judge Raymond Jack QC affirmed that an arbitration clause enjoys no legal existence on its own:

> ''[I]f it remains undecided whether there was a contract, it must also remain undecided whether there was an agreement to arbitrate. For, as the arbitration provision is contained in the putative contract, it can have no independent contractual force.''[41]

William Oakley v Airclear Environmental[42] provides a measure of the conceptual difficulties that arise for English courts, in the absence of a strong principle of separability, where arbitral jurisdiction appears without a concluded contract. Both parties, in this case, relied on dispute resolution provisions in never-completed subcontract documentation. Airclear appointed an adjudicator while Oakley, who contested the existence of the underlying contract, nonetheless sought to refer disputes to arbitration. Oakley's recourse to arbitration led the court to deduce the existence of the entire underlying contract. Correctly, however, H.H. Judge Chambers QC saw:

> ''[N]o reason in principle why an estoppel by convention should not arise *where two parties proceed under a mutual assumption (which has been communicated between them) that a code or codes of dispute resolution shall be available to resolve a dispute* that has arisen between them.''[43] (Emphasis added.)

The court did not limit operation of this estoppel to separable provisions for arbitration, but unnecessarily extended it to the balance of the main agreement.

On appeal, Etherton J. agreed that it was not open to Oakley to rely on the contractual provision for arbitration and at the same time contest the existence of the host contract. But whereas the County Court concluded it was, ''too late. . . for Oakley to resile from the position that there was an agreement that provided for the resolution of the dispute by arbitration,'' the High Court found, incorrectly, that Oakley had, in fact, subsequently resiled and that it was not unconscionable for Oakley to do so treating the arbitration agreement as an integral part of the main contract.[43a] The court's failure to apply separability, in effect, allowed one party unilaterally to withdraw consent to arbitration.

The Court of Appeal also confirmed that a party who contests the existence of contractual relations risks loss of the right to have disputes determined by an arbitrator. In *Downing v Al Tameer Establishment,* Potter L.J. considered that an arbitration agreement must be analysed:

> ''[B]y applying the traditional principles of the law of contract and, in particular, the doctrine of repudiation whereby if one party, by words or conduct, demonstrates an intention no longer to be bound by the contract, it is open to the other party to accept such demonstration as a repudiation and thereby bring the contract to an end.''[44]

The Court of Appeal held that one party's contention that no contract existed, together with a refusal to co-operate in the appointment of arbitrators, sufficed to free the other party to institute and maintain court proceedings.

The Court of Appeal's ruling was, in effect, a reversion to the weak principle of separability applicable under the pre-1996 statutory regime:

> ''[I]f the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the

36. *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 at 69.
37. *Manatee Towing Co Ltd v Oceanbulk Maritime SA (The Bay Ridge) (Discovery)* [1999] C.L.C. 1197 at 1203.
38. *LG Caltex Gas Co Ltd v China National Petroleum Co* [2001] B.L.R. 215. Appeal allowed by the Court of Appeal [2001] 1 W.L.R. 1892.
39. *LG Caltex Gas Co Ltd v China National Petroleum Co* [2001] B.L.R. 215 at 251.
40. *Kalmneft JSC v Glencore International AG* [2002] 1 Lloyd's Rep 128 at 134; [2001] C.L.C. 1805.
41. *CHF Chevreau Haeute und Felle AG v Conceria Vignola Nobile* Unreported November 7, 2000 Comm Ct, per H.H. Judge Raymond Jack QC at [6].
42. *William Oakley v Airclear Environmental* [2001] Arb. L.R. 45.
43. *William Oakley* [2001] Arb. L.R. 45 at [47].
43a. *William Oakley* [2001] Arb. L.R. 45 at [46].
44. *Downing v Al Tameer Establishment* [2002] Arb. L.R. 12 at [25].

> clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined the submission.''[45]

It must be doubted whether the Court of Appeal's purely domestic contractual analysis in *Downing v Al Tameer Establishment* is appropriate for arbitration agreements, even as a matter of English law.[46] Arbitration clauses are not normally considered inoperative only because one party refuses to appoint arbitrators. Waiver of rights to arbitration generally requires express agreement or submission to the jurisdiction of local courts by actual participation in legal proceedings. In the event of mere failure by one party to participate in the appointment of an arbitral tribunal, courts are available as a default appointing authority, not a default forum for the merits.

In contrast to *Downing v Al Tameer*, the US District Court (Kansas) enforced a London arbitration agreement although the existence of the main contract had been denied by the defendant in *Malarky Enterprises (US) v Healthcare Technology (UK).*[47] The earlier denial was held to be ''irrelevant'' in light of the defendant's subsequent affirmation of the contract (and arbitration agreement) once litigation was attempted, but there is no inherent reason, under a strong principle of separability, why arbitration should not be enforced at the request of a party who maintains a denial of contractual relations.[48] In *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd*, for example, Steel J. enforced an ad-hoc arbitration agreement and granted an anti-suit injunction despite one party's appointment of an arbitrator without prejudice to its position that it was not and never had been a party to the charter party in dispute or the arbitration clause it contained.[49]

The courts refused to enforce arbitration in *Birse Construction Ltd v St David Ltd* because the parties did not finalise or execute the contract, although work proceeded under a draft JCT standard form which contained an arbitration clause never, itself, subject to any objection by either party.[50] Judicial resolution of the dispute over arbitral jurisdiction involved three proceedings: two at first instance and one before the Court of Appeal.

In the initial proceeding at first instance, H.H. Judge Humphrey LLoyd QC, rejected Birse's contention that the existence of the arbitration agreement was a question that ought to be decided by an arbitrator.[51] The judge ruled in favour of arbitral jurisdiction over the merits on the ground that one party ought not to be allowed unfair advantage from its refusal formally to execute the contract, but also had regard to the broad definition of arbitration agreements under s.5 of the 1996 Arbitration Act which does not require signature.

The Court of Appeal, per Aldous L.J., confirmed the dependence of the arbitration agreement on the prior existence of the principal contract:

> ''At the heart of this case is the question whether or not there was a concluded agreement between the parties. If there was, it contained an arbitration clause and these proceedings should be stayed.''[52]

No evidence before the court in *Birse Construction* suggested that the parties had not agreed to arbitrate disputes or that the arbitration clause in the JCT standard form was ever in issue prior to the moment disputes arose. But in the subsequent second proceeding at first instance, the court once more limited its analysis to the existence of the main contract emphasising formalism in its examination of contractual intentions:

> ''[T]he parties did intend that the contract should only be concluded when the documents agreed between the respective negotiators had been considered and approved by their corporate superiors, been properly drawn up and been signed or executed.''[53]

Recorder Colin Reese QC considered that:

> ''[N]ot only are the parties 'masters of their contractual fate' they are also and equally to be left to their 'non-contractual fate' in the event that negotiations are allowed to become protracted and they then fail to conclude a contract.''[54]

The recorder concluded:

> ''[I]f substantial construction works are, in fact, carried out by one party at the request of the other whilst contract negotiations (which are never concluded)

45. *Heyman v Darwins* [1942] A.C. 356 at 365 per Viscount Simon LC.
46. In *Heyman v Darwins* [1942] A.C. 356 at 372–373, Lord Macmillan distinguished arbitration agreements from other contractual obligations: ''I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. *It is quite distinct from the other clauses.* The other clauses set out the obligations which the parties undertake towards each other hinc inde; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in an ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement.''
47. *Malarky Enterprises (US) v Healthcare Technology (UK)* (1998) *Yearbook Commercial Arbitration* XXIII 949.
48. *Malarky Enterprises (US) v Healthcare Technology (UK)* (1998) *Yearbook Commercial Arbitration* XXIII 946.
49. In *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd* [2001] Arb. L.R. 55 at [64].
50. *Birse Construction Ltd v St David Ltd* (2000) 78 Con. L.R. 121.
51. *Birse Construction Ltd v St David Ltd* [1999] B.L.R. 194 at 196–197.
52. *Birse Construction Ltd v St David Ltd* (1999) 70 Con. L.R. 14.
53. *Birse Construction Ltd v St David Ltd* (2000) 78 Con. L.R. 121.
54. *Birse Construction Ltd v St David Ltd* (2000) 78 Con. L.R. 121.

> are on-going, I can see no reason why the courts cannot determine disputes which might arise.''[55]

Birse Construction involved a domestic arbitration. An approach that substitutes local courts as a default forum where parties fail to complete or formally execute a contract, does not fully respect party autonomy or arbitral independence in the context of the United Kingdom's obligations to enforce arbitration agreements under the New York Convention. Refusal to enforce arbitration on these grounds in international disputes can deprive parties of the only effective forum in which to resolve disputes.

In *Downing v Al Tameer Establishment,*[56] for instance, English courts assumed jurisdiction over disputes between UK and Saudi nationals, thereby undermining the parties' attempt to constitute a neutral forum by including an arbitration provision in their contract. In *Malarky Enterprises (US) v Healthcare Technology (UK),*[57] in contrast, the United States District Court specifically referred to its duties to enforce international arbitration agreements under the New York Convention, ''to ensure efficacy and to unify the standards of international commercial transactions''.

The decision in *Azov Shipping Co v Baltic Shipping Co*[58] further illustrates how judicial formalism in relation to international agreements might undermine parties' intentions to constitute an effective arbitral forum. The High Court set aside an arbitrator's preliminary award on jurisdiction because Azov had consistently protested one aspect of underlying contractual arrangements between some nine shipping companies to trace and account for the interchange of containers, namely US dollar accounting. Under the Soviet Union, the shipping companies had all been state-owned and operated. The need for new contractual arrangements—and provision for international arbitration—arose with the collapse of the Soviet Union and the disappearance of the state agency, Morflot, which previously had been responsible for monitoring container interchanges within the Union. The companies suddenly found themselves within newly-independent states.

Azov was one of five shipping companies that initiated discussions aimed at replacing arrangements governing the interchange of containers. Azov actively participated in meetings held to structure a new system to be administered by Transglobe, an agency responsible under the old regime for monitoring interchanges at ports outside the Soviet Union.

The new system took the form of a draft umbrella agreement between all of the shipping companies. It contained an arbitration clause in respect of, ''all claims and property controversies''.[59] All companies except Azov, whose objections were expressly limited to US dollar accounting, signed the agreement. No objection was ever raised to the arbitration agreement.

Despite its non-signature, Azov continued to exchange containers under the new system administered by Transglobe. Azov does not appear to have protested correspondence from other parties that treated Azov as a participant. In fact, in response to a call for rationalisation of procedures for the operation of the multi-party agreement, Azov signed a document entitled, ''Addendum No 4 - the technical conditions of interchange procedure''. The court acknowledged that this:

> ''[W]as clearly intended to be a fourth addendum to the [agreement] and to be treated as an integral part of the contractual machinery for giving effect to the monitoring of interchanges by [Transglobe] as provided for in the main part of the agreement.''[60]

Whereas the sole arbitrator had based his jurisdiction on a finding, ''that Azov was bound by an arbitration agreement'',[61] the court focused its enquiry solely on the formation of the multi-party agreement. In his view, Colman J. did not accept that continued interchanges necessarily occurred under the parties' agreement even though, as specified in that agreement, these appear to have been monitored, with the co-operation of all parties, by the replacement administering authority, Transglobe. In the absence of evidence to the contrary, the court considered that interchange balances might have built up on an ad-hoc basis. The territory in respect of which Transglobe provided tracing and accounting services increased as a result of the parties' agreement, but the court viewed Transglobe as merely providing services, ''of a similar nature to that which it would have provided prior to [the agreement] coming into force''.[62] The court also viewed Baltic's delay in bringing a claim for compensation from Azov (an accounting for accumulated hire and return of the balance of containers) as inconsistent with a belief that Azov was a party to the agreement.

The conclusion of Colman J. was that the umbrella agreement did not come into existence as between Azov and the other shipping companies, although he accepted that but for US dollar accounting, Azov might have signed it. Separability was not applied:

> ''[A]t least in English law, a party does not become bound to those terms of a multi-party agreement to which it agrees, but not to the term to which it does not agree, unless all other parties agree to be bound to that party on terms excluding that which it does not accept.''[63]

Colman J. concluded that the parties' failure to complete the principal contract led directly to the absence of arbitral jurisdiction.[64]

Azov Shipping bears comparison with the well-known American decision, *Republic of Nicaragua v Standard*

55. *Birse Construction Ltd v St David Ltd* (2000) 78 Con. L.R. 121 at 129.
56. *Downing v Al Tameer Establishment* [2002] Arb. L.R. 12.
57. *Malarky Enterprises (US) v Healthcare Technology (UK)* (1998) *Yearbook Commercial Arbitration* XXIII 949.
58. *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 159; [1999] C.L.C. 1425.
59. *Azov Shipping* [1999] 2 Lloyd's Rep. 159 at 162.
60. *Azov Shipping* [1999] 2 Lloyd's Rep. 159 at 167.
61. *Azov Shipping* [1999] 2 Lloyd's Rep. 159 at 161.
62. *Azov Shipping* [1999] 2 Lloyd's Rep. 159 at 169.
63. *Azov Shipping* [1999] 2 Lloyd's Rep. 159 at 165.
64. *Azov Shipping* [1999] 2 Lloyd's Rep. 159 at 170.

Fruit Co.[65] The Ninth Circuit Court of Appeals enforced arbitration under a memorandum of intent notwithstanding incomplete negotiations and non-signature by Standard Fruit Co (SFC). As in *Azov Shipping,* a need to restructure existing business relations arose following political upheaval (associated with the overthrow of American-supported right-wing dictatorship in Nicaragua).

The new Nicaraguan government entered into discussions with SFC and its two parent companies concerning nationalisation of the banana industry. All parties except SFC signed a memorandum which envisaged the renegotiation of SFC's contracts with Nicaragua. The memorandum also set out interim procedures and prices for fruit purchases. The parties, including SFC, continued trade under the memorandum, but never completed replacement contractual arrangements. The American Court of Appeals noted, however, that the parties referred to the memorandum as a ''contract'' in correspondence and that, ''all parties to the memorandum treated SFC and its two parents as a single entity during the contract negotiations''. Citing policy in favour of arbitration and the absence of any evidence that the arbitration clause in the memorandum was non-severable, the Appeals Court concluded that it must, ''enforce any agreement to arbitrate regardless of where it is found''.[66] The American court fully recognised the significance of separability in international disputes, ''when international parties commit themselves to arbitrate a dispute they are in effect attempting to guarantee a forum for any disputes''. Obviously, in this case, the neutrality of the forum was also a paramount consideration.

The Appeals Court held that the judge at first instance had, ''erred in considering the contract as a whole'' as a starting point to determine whether the agreement to arbitrate was enforceable. It viewed non-existence of the main contract as nothing more than a possible defence on the merits to be left to the arbitral tribunal and noted, ''arbitrators may apply their own rules of contract interpretation to the question''. Nicaragua's delay in asserting a claim in arbitration, ''did not foreclose the remedy''.

In another American decision, *BHP Power Americas Inc and King Ranch Power Co v Walter F Baer Reinhold*,[67] the Kansas District Court compelled arbitration and granted an anti-suit injunction on the basis of correspondence and drafts of a consulting agreement which contained an arbitration clause. The court held that failure to conclude a contract was ''irrelevant'':

> ''[A] binding contract is not required in order to compel arbitration... an arbitration clause is treated as a separate agreement severable from the contract in which it is found... the court cannot examine on the merits the validity of the contract before it first determines whether the making of the arbitration clause is in issue. If it is not, the court must compel arbitration and refrain from consideration of any defence on the contract.''

Recent decisions suggest that the weak principle of separability in England is under pressure and that a more liberal approach to arbitration without a contract is emerging. In *CHF Chevreau Haeute und Felle AG v Conceria Vignola Nobile,*[68] a defendant successfully resisted litigation in Italy on the basis of a London arbitration clause in an International Council of Hides, Skins and Leather Traders Association standard form. Although the existence of the underlying contract was in dispute, the Italian court found that it lacked jurisdiction because of the parties' provision for arbitration (as did the Tunisian court in *Midgulf v Groupe Chimique Tunisien*). Before English courts, however, the same defendant sought to avoid arbitration in London on the ground that no contract existed. H.H. Judge Raymond Jack QC considered that the arbitration clause could have no existence separate from the contract, but ruled that the decision of the Italian court estopped the defendant from contesting that the dispute should go to arbitration.

In *RG Carter Ltd v Edmund Nuttall Ltd*,[69] a decision on adjudication under the Construction Act, the parties' failure to complete agreement on all contractual terms could not be relied on to secure direct recourse to the courts. H.H. Judge Thornton QC stated:

> ''[T]here is not in existence a bundle of documents sewn together and signed by the parties as - and I use the colloquial language that is often used in this context - the 'contractual bible.' It does not follow from that, of course, that there is no contract in writing sufficient to entitle adjudication in existence between the parties, or indeed that there is no contract at all.''[70]

Another case involving performance under an unfinished contract, *American Design Associates v Donald Insall Associates,*[71] suggests that arbitral jurisdiction depends more on evidence of the parties' agreement to arbitrate than the existence of the principal contract. In that case, H.H. Judge Bowsher QC set aside an arbitral award because one party had specifically objected, in

65. *Republic of Nicaragua v Standard Fruit Co* 937 F 2d 469 (US Ct of Appeals 9th Cir 1991).
66. See also the statement by Ralph Gibson L.J. in *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep. 225 at 235: ''Once it is clear that the assent to the written terms or evidence of it is not required to be contained in the written agreement *but that assent to the written terms may be proved by other evidence*, then, in my judgment, any evidence which proves that the parties agreed to be bound by an agreement to submit contained in a document or documents is sufficient to make the document or documents an agreement in writing within the 1975 [Arbitration] Act.'' (Emphasis added).
67. *BHP Power Americas Inc and King Ranch Power Co v Walter F Baer Reinhold* (1998) XXIII *Yearbook Commercial Arbitration* 949.
68. *CHF Chevreau Haeute und Felle AG v Conceria Vignola Nobile* Unreported November 7, 2000 Comm Ct.
69. *RG Carter Ltd v Edmund Nuttall Ltd* Unreported June 21, 2000 TCC, H.H. Judge Thornton QC.
70. *RG Carter Ltd v Edmund Nuttall Ltd* Unreported June 21, 2000 TCC at [70].
71. *Design Associates v Donald Insall Associates* Unreported November 19, 2000 TCC, per H.H. Judge Bowsher QC at [82].

correspondence, to the arbitration agreement contained in standard form conditions put forward by the other party.

In *Fiona Trust v Privalov*,[72] Lord Hoffmann confirmed, at [17], a strong principle of separability in accordance with the express provisions of s.7 of the Arbitration Act 1996 and international practice:

> ''The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement. . .
>
> Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.''

Notwithstanding that these views may have been stated obiter, Gross J. relied on them in *UR Power GmbH v Kuok Oils and Grains Pte Ltd*.[73] As in the Canadian decision *Cecrop Co Ltd v Kinetic Sciences*, referred to above, the dispute concerned performance of a pre-condition to a contract becoming effective. Distinguishing the arbitration agreement from the main contract, Gross J. stated:

> ''To my mind, the wording of s.7 of the Act makes it plain that even though the underlying contract never came into existence, the arbitration agreement may still be binding. In this regard, it is worth underlining the wording in s.7 'or was intended to form part of' and 'or did not come into existence'. See too, Russell on Arbitration (23rd ed.), at para. 2-008. It is in any event at least a tenable view that, in this context, too much can sometimes be made of the distinction between a contract which is void and one which never came into existence: see, Fouchard Gaillard Goldman on International Commercial Arbitration, at para. 411.
>
> So far as concerns authority, even if Lord Hoffmann's observations at [18] of his speech in Fiona Trust (supra) are obiter, they are, with respect, of very great persuasive force. Moreover, they are very much in point. For my part, I do not read anything said by Colman J in Vee Networks (supra), as telling against the provisional conclusion to which I am attracted; the observations of Colman J at the end of [19] were directed at a somewhat different situation.
>
> In principle, therefore, an arbitration agreement may be binding even though the underlying contract has not come into existence. With respect to Mr. Collett's argument to the contrary, it does not follow that in every case where pre-contractual negotiations have not resulted in a binding (underlying or matrix) contract, an arbitration clause discussed in the course of those negotiations would be binding. Whether it is or not will necessarily be a question of fact and degree, depending on the circumstances of the individual case.
>
> In the present case, by the 25th October and even more so by the 27th October, 2006, there was on any view a very considerable measure of agreement between the parties. By the 27th October, as set out in para. 6.15 of the Appeal Award, such agreement extended to: (1) the goods (Nigerian crude palm oil); (2) the quantity (10,000 mt); (3) the CIF nature of the transaction, including a nominated load and discharge port; (4) the price ($480.00 per mt); (5) the incorporation of FOSFA 80, so including the agreement to arbitrate (cl. 30 of FOSFA 80); (6) payment by transferable letter of credit to be opened and confirmed after delivery of the POP Certificate, with detailed documentary instructions.
>
> Against this background, it is at least strongly arguable that the outline of the agreement of which the agreed arbitration clause (cl. 30 of FOSFA 80) was intended to form part, was clear indeed. There was in particular no doubt and had not been since the 18th October that the parties intended their disputes arising out of their (intended) contract to be referred to arbitration; the incorporation of FOSFA 80 had been agreed since then. All that remained was the discrete question of whether Kuok's obligation to open a conforming letter of credit was or (on one view) remained a contingent condition precedent and so stood in the way of the parties having entered into a binding contract. There is, to my mind, at least a powerful argument for concluding that the parties must be taken to have intended that discrete question to be referred to arbitration in accordance with FOSFA 80. It is perhaps to be underlined that the question here went not to the existence of any consensus ad idem but instead to the nature of Kuok's obligation.''[74]

Consequences of weak principle of separability

The continued operation of a conceptual framework that is no longer current in English law prevents parties from arbitrating disputes in England. Support for arbitral jurisdiction, consistent with the express provisions of the Arbitration Act 1996 and international practice, depends on judicial acknowledgment of the specificity of arbitration agreements as distinct and separate from the host contract in which they are contained.

Considerations relevant to determining consent to arbitration are not necessarily identical to rules that govern

72. *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.
73. *UR Power GmbH v Kuok Oils and Grains PTE Ltd* [2009] EWHC 1940 (Comm).
74. *UR Power GmbH v Kuok Oils and Grains PTE Ltd* [2009] EWHC 1940 (Comm); [2009] 2 Lloyd's Rep. 495 at [40].

formation of the underlying contract. Where contractual negotiations take place against a background of existing liabilities, ongoing economic activity, commencement of performance or receipt of benefits, the possibility of a binding agreement to arbitrate should not be dismissed a priori only because parties fail to complete all aspects of the principal contract, especially where there is no evidence of objection to arbitration before disputes arise.

Maintenance of the requirement for a ''firm foundation'' to arbitral jurisdiction in the form of a completed contract does not give effect to the reform of the English principle of separability introduced by the 1996 Arbitration Act. Nor is it consistent with the statutory liberalisation of writing requirements under s.5 of the Arbitration Act. Most importantly, judicial pre-emption of arbitrator's exercise of *compétence-compétence* hinders the development of a strong arbitration culture because it leaves English judges and practitioners less exposed to alternative arbitral techniques of resolving jurisdictional issues.

Judicial proceedings conducted without a strong principle of separability are costly. In *Welex AG v Rosa Maritime Ltd,*[75] the High Court had to consider a telex that confirmed the terms of a proposed charterparty and included the brief mention: ''Arb in London.'' Disputes arose between the parties to a subsequent bill of lading that incorporated the terms of the charterparty. Welex argued that because the charterparty never came into existence, the bill of lading could not have incorporated an inexistent arbitration clause. The existence of the bill of lading itself, however, was not disputed. In addition, the parties' intentions to arbitrate were set out in the bill of lading by express reference to arbitration in the incorporation language.[76]

Rather than apply separability or directly give effect to the parties' intention to arbitrate—clearly evidenced in the bill of lading—the court undertook a full investigation of the legal effect of the prior confirmation telex and the existence of the underlying charterparty. This involved an examination of witnesses and an analysis of case law unrelated to the arbitration agreement. The judgment of Steel J. ultimately found in favour of arbitration on the basis of both the telex and ''convincing evidence'' that the charterparty had been executed, but deplored the parties' expenditure of £250,000 in legal fees as, ''disproportionate to the sums at stake, let alone when incurred in the context of a threshold jurisdictional point''.[77] The judicial concern about costs did not prevent the parties from continuing the dispute over the validity of the arbitration agreement before the Court of Appeal where Lord Phillips M.R. noted that the parties' legal costs had, by then, reached £400,000–£500,000 and found it, ''regrettable that so much time, energy and expense has in this case been devoted to the issue of jurisdiction''.[78]

Diminished principle of compétence-compétence

Following entry into force of the Arbitration Act 1996, English courts expressed conflicting views about the extent to which the courts should examine questions of arbitral jurisdiction that were matters for the arbitrators. A number of early decisions under the Arbitration Act referred questions concerning the scope, validity and existence of an arbitration clause to arbitrators in accordance with the principle of *compétence-compétence* and the non-interventionist policy of the Act.

For example, in *West of England Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Hellenic Industrial Development Bank*[79]—a case decided under the old arbitration statutes—the court nonetheless applied a prima facie test for commencement of arbitration and left the merits of the issue of jurisdiction to be analysed and decided by an arbitrator and accepted to appoint an arbitrator for this purpose. In that case, a notice of arbitration failed to ask the respondent to agree the appointment of an arbitrator (as seemingly required by the language of s.12 of the Arbitration Act).

Clarke J., as he then was, held that it was appropriate for him to appoint an arbitrator because there was an ''arguable case'' that good notice had operated to commence arbitration proceedings. Further analysis of the validity of the arbitration notice and the application of a time bar were matters for the arbitrator. The prima facie approach adopted by Clarke J. accords the greatest respect to party autonomy and the parties' arbitration agreement. It gives maximum effect to the parties' decision not to involve local courts in line with the spirit of the Arbitration Act and international practice.

In *ABB Lummus Global Ltd v Keppel Fels Ltd,* Clarke J., as he then was, stated, ''the purpose of the [Arbitration] Act was to restrict the role of the court at an early stage of the arbitration''.[80] In *Grimaldi Compagnia v Sekihyo Line*, Mance J., as he then was, held that, ''the dominant icon where litigation and arbitration inter-net is now

75. *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* [2002] Arb. L.R. 42.

76. See *Lucky Goldstar International (H.K.) Ltd v Ng Moo Kee Engineering Ltd* [1993] 1 H.K.C. 404 where Kaplan J enforced arbitration notwithstanding the parties' reference to a non-existent institution. He did so on the basis that the parties' intent to arbitrate was nonetheless clearly expressed. See as well *HZI Research Centre Inc v Sun Instruments Japan Co Inc* 1995 U.S. LEXIS 13707 and *Grossman SA v Forest Laboratories Inc* 295 N.S.S. 2d 756. In *Owners and Parties Interested in the Vessel MV Baltic Confidence v State Trading Co of India* [200] 7 S.C.C. 473, the Supreme Court of India refused to give priority to the wording of the charter party which was possibly inconsistent with an incorporation provision in a bill of lading and, instead, enforced arbitration on the basis of the, ''clear intention of the parties as evident from the incorporation clause'' of the bill of lading which referred to the arbitration agreement.

77. *Welex* [2002] Arb. L.R. 42 at [20].

78. *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* [2003] Arb. L.R. 46 at [14].

79. *West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg) v Hellenic Industrial Development Bank* [1999] 1 Lloyd's Rep. 93.

80. *ABB Lummus Global Ltd v Keppel Fels Ltd* [1999] 2 Lloyds Rep. 24 at 30.

party autonomy''.[81] Mance J. expressly drew attention, in that case, to, ''international obligations to recognise and enforce non-domestic arbitration agreements''.[82] Accordingly, where one party objected to the courts' jurisdiction to decide the existence and application of contractual time bars, the judge stayed proceedings under s.9 and referred those questions to the arbitrators. Likewise, in *Gibson v Imperial Homes*, Toulmin J. concluded, in relation to adjudication:

> ''The question of whether or not CN Associates had authority to contract with Mr Gibson is a matter which goes to the merits rather than to jurisdiction and is therefore a matter for the adjudicator.''[82a]

In *Ahmad Al-Naimi (t/a Buildmaster Constructions Services) v Islamic Press Agency Inc,* the Court of Appeal overturned a first instance decision that had granted a stay, and referred the parties' dispute about the existence of an arbitration clause to the arbitrator.[83] The Court of Appeal ruled that judges should go beyond prima facie evaluation to decide the validity of an arbitration clause finally at the outset in the interest of avoiding jurisdictional challenges after the expense of a complete arbitration.[84] Waller L.J. endorsed reasons for this approach given by H.H. Judge Humphrey LLoyd QC, at first instance, in *Birse Construction Ltd v St David Ltd*:

> ''The dominant factors must be the interests of the parties and the avoidance of unnecessary delay or expense. Where the rights and obligations of the parties are clear the court should enforce them . . . The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal. . .. in other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement. One of the matters that a court is bound to take into account is the likelihood of the challenge to an award on jurisdiction under section 67 or, under section 69, on some important point of law connected to the existence of the agreement for which leave to appeal might be given (if it is plainly discernible at that stage), e.g. its proper law, since it cannot be in the interests of the parties to have to return to the court to get a definitive answer to a question which could and should be decided by the court before the arbitrator embarks upon the meat of the reference. Such a course would mean that the arbitral proceedings would not be conducted without unnecessary delay or expense.''[85] (Emphasis added.)

This analysis is flawed. In the first place, it is questionable that the ''dominant interest'' is the avoidance of unnecessary expense. The primary consideration, at least in an international arbitration, must be party autonomy and respect for their election to arbitrate disputes. The decision in *Birse Construction Ltd v St David Ltd* to which the Court of Appeal referred was a domestic dispute. The interventionist approach approved by the Court of Appeal does not fully respect party autonomy under Model Law-inspired legislation in international disputes. It has long been accepted that a positive choice by parties who opt for arbitration carries with it a ''negative choice'' to exclude local courts.[86] Arbitral *compétence-compétence* is generally protected from judicial pre-emption by the fact that the courts can only be involved after an arbitrator's decision on jurisdiction.[87]

Secondly, it is not obvious that H.H. Judge Humphrey LLoyd's cost-effectiveness proposition is tenable. In *Ahmad Al-Naimi,* the parties' disputes were ultimately referred to arbitration, but only at the expense of litigation before the Court of Appeal in order to uphold the validity of the arbitration agreement. The House of Lords confirmed parties' rights to appeal from first instance decisions to grant or refuse stays under s.9,[88] and the position outlined in *Ahmad Al-Naimi* greatly expand the potential scope (and cost) of this pre-arbitral litigation.

In granting a stay of proceedings in favour of arbitration, Coté J.A. of the Alberta Court of Appeal stated in *International Resource Management (Canada) Ltd and Anr v Kappa Energy (Yemen) Inc*:

> ''Arbitration only after a lawsuit about arbitration is likely to be slower and more expensive than the lawsuit which the parties contracted not to have.''[89]

Just four months after the Court of Appeal decision in *Ahmad Al-Naimi*, Thomas J. formulated an alternative view of the courts' role in *Vale do Rio Doce Navagaçao SA v Shanghai Bao Steel Ocean Shipping Co Ltd.*[90] The court was asked for a declaration that Bao Steel was a party to the arbitration agreement:

81. *Grimaldi Compagnia di Navigazione SpA v Sekihyo Lines Ltd (The Seki Rolette)* [1999] 1 W.L.R. 708; [1998] 3 All E.R. 943.
82. *Grimaldi Compagnia di Navigazione* [1999] 1 W.L.R. 708; [1998] 3 All E.R. 943 at 952.
82a. *Gibson v Imperial Homes* [2002] EWHC 676 (QB) at [62].
83. *Ahmad Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [1999] C.L.C. 212; (2000) 2 T.C.L.R. 160.
84. *Ahmad Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep. 522.
85. *Ahmad Al- Naimi* [2000] 1 Lloyd's Rep. 522 at 524–525 and *Birse Construction Ltd v St David Ltd* [1999] B.L.R. 194 at 196–197.
86. See René David (1982) *Arbitrage Dans Le Commerce International* 290. The ''negative effect'' is an accepted feature of English doctrine in relation to jurisdiction. See James Fawcett, ''Non-exclusive jurisdiction clauses in private international law'' [2001] *Lloyd's Maritime and Commercial Law Quarterly* 234.
87. Model Law art.16 and s.30 of the English Arbitration Act 1996.
88. *Inco Europe Ltd v First Choice Distribution* [2000] 1 W.L.R. 586; [2000] 1 Lloyd's Rep. 467;.
89. *International Resource Management (Canada) Ltd v Kappa Energy (Yemen) Inc* 16 *Business Law Reports* (3rd) 163 at 164 Alberta Court of Appeal.
90. *Vale do Rio Doce Navagaçao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep. 1; [2000] C.L.C. 1200.

> ''The Act sets out in very clear terms the steps that a party who contends that there is another party to an arbitration agreement should take. First he should appoint an arbitrator. If the other party appoints an arbitrator, then s. 31(1) makes it clear that his appointment of an arbitrator does not prevent him challenging the substantive jurisdiction of the tribunal. If the other party does not appoint an arbitrator, then the default provisions (s. 17) or failure of appointment procedures (s. 18) apply. Once the arbitral tribunal is constituted, then *in accordance with the policy of the Act it is for that tribunal to rule on its own jurisdiction, save in the circumstances specified in s. 32*. Any award made can then be challenged under s. 67. The rights of the party who challenges the existence of the arbitration agreement and takes no part are protected by s. 72; he is given the right of recourse to the Courts in the circumstances set out. Those provisions, in my view, provide a clear and workable set of rules which the owners should have followed in this case. I can see no reason which would justify the Court intervening in the circumstances of this particular case, as it is no different from many others.''[91] (Emphasis added.)

The decision of Thomas J. expressly rejected the arguments of convenience that were formulated by H.H. Judge Humphrey LLoyd in *Birse Construction* and endorsed by the Court of Appeal in *Ahmad Al-Naimi*:

> ''The owners contended that it would be in the overall interest of justice for the Court to hear this application because it would generally be convenient to do so and that the argument over the validity of the arbitration agreement was bound to arise at a later stage. However this argument fails to take into account one of the underlying principles of the Act that the parties should resolve their dispute by the methods they have chosen and the Court's intervention should be limited.''[92]

The analysis of Thomas J.'s more completely acknowledges, and preserves, arbitral independence and *compétence-compétence*. The judge rejected suggestions that practice directions, which appear to invite pre-emption of arbitral jurisdiction, in any way alter the non-interventionist principles of the Arbitration Act.[93]

Likewise, in *XL Insurance Ltd v Owens Corning*, a decision rendered several months after *Vale do Rio Doce Navigaçao,* Toulson J., as he then was, rejected arguments that the validity of an arbitration agreement should be determined by the courts for reasons of convenience. He enforced arbitration by way of anti-suit injunction although the validity of the arbitration agreement was in dispute:

> ''[U]nder the arbitration clause and the provisions of the Act, it will be for the arbitral tribunal to rule on the validity of the arbitration agreement, if Owens Corning challenges its jurisdiction on that ground, unless the matter is referred to the Court for determination under Clause 32.''[94]

In *Cygnet Healthcare Plc v Higgins City Ltd,* where parties agreed to submit all disputes, including the respondent's contention that the contract did not exist, to arbitration, enforcement of an adjudicator's decision rendered in parallel proceedings between the same parties raised the question before the courts. Refusing to take any step that might pre-empt arbitral jurisdiction, H.H. Judge Thornton QC stated:

> ''[A]s a matter of good case management, and in compliance with the overriding objective, which of course all business in this court is conducted pursuant to, namely that the parties should save expense and should have the case dealt with in ways that are proportionate given the amount of money involved, expeditiously and fairly *the arbitrator's decision as to the existence of the contract should come first. ... the appropriate course is to take such steps as will least interfere with, and least potentially affect, the outcome of the arbitration of the dispute as to the question of the existence of the underlying contract.*''[95] (Emphasis added).

91. *Vale do Rio Doce Navagaçao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep. 1 at 11; [2000] C.L.C. 1200.

92. *Vale do Rio Doce Navagaçao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep. 1 at 11; [2000] C.L.C. 1200. The same controversy has arisen in the field of adjudication. See *Workplace Technologies v E Squared* Unreported February 16, 2000 TCC, per Wilcox J. (extracts published at [2000] C.I.L.L. 1607). One party sought a declaration that an adjudicator, appointed under the Construction Act, had no jurisdiction. Querying the court's powers to grant such relief while the adjudication was ongoing, Wilcox J. stated: ''I am not persuaded there is a power to grant an injunction to restrain a party initiating a void reference and pursuing proceedings which themselves are void and which may give rise to a void and thus unenforceable decision. There does not appear to be any legal or equitable interest such as an injunction would permit. Doubtless the initiation of such proceedings may be conceived to be a source of harassment, pressure, or needless expense. In the analogous field of arbitration no action lies to prevent this.'' See, contra, *Shepherd Construction Ltd v Mecright Ltd* [2000] B.L.R. 489 where H.H. Judge Humphrey LLoyd QC, agreed to grant a declaration that an adjudicator had no jurisdiction: ''[I]t is perfectly right at this stage for Shepherd to ask for a declaration as to the parties' rights and liabilities. If a party has no right to seek adjudication the other party is equally entitled to have the absence of any correlative duty in law declared by the court. Indeed an intervention of this kind, if correct, avoids the cost of management and other time and of considerable expense, or even if not correct, either wholly or in part, will provide a surer foundation for the adjudication. It is not necessary nor may it be desirable to wait until the adjudication is concluded.'' See also *ABB Power Construction Ltd v Norwest Holst Engineering Ltd* (2000) 2 T.C.L.R. 831; 77 Con. L.R. 20.

93. *Vale do Rio Doce Navagaçao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep. 1. The practice directions featured as an element of both the Court of Appeal's decision in *Ahmad Al-Naimi* [2001] 1 Lloyd's Rep. 522 at 525 and H.H. Judge Humphrey LLoyd's decision in *Birse Construction v St David Ltd* [1999] B.L.R. 194.

94. *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep. 500 at 509.

95. *Cygnet Healthcare Plc v Higgins City Ltd* (2000) 16 Const L.J. 394 at 399.

This confidence in arbitration is not yet uniformly shared by English judges who will accept to rule on arbitral jurisdiction at the outset and despite the prima facie appearance of an arbitration agreement.

As a result, arbitration may be delayed—often tactically—by the party raising the ''no contract'' defence. In addition, the interpretation of international arbitration agreements is sometimes at risk of being conducted from a judicial perspective and with reference to norms and imperatives that are not relevant to international arbitral jurisdiction. In particular, as discussed above, the fate of an arbitration agreement has remained inextricably linked to the existence of the host contract.

Court of Appeal decision in Midgulf

Following three hearings before two judges at first instance, Midgulf's application for the appointment of an arbitrator reached the Court of Appeal.

In addition to contesting Teare J.'s conclusion that the ''reasonable person'' or ''bystander'' would have regarded GCT's fax of July 8 as a ''counter offer'', notably on the basis that there was no requirement that an offer and counter offer be ''identical'', Midgulf argued that an arbitrator ought to be appointed in accordance with the principles of separability and *compétence-compétence* under ss.7 and 30 of the Arbitration Act 1996, particularly in relation to the parties' oral agreement of July 4 confirming the July contract and their immediate performance of it prior to GCT's fax of July 8.

In response to GCT's contention that the long form of the June contract containing the London arbitration provision had never been agreed because GCT had not signed or returned it, Midgulf relied on s.5(3) of the Arbitration Act which provides for the formation of an arbitration agreement where, ''parties agree otherwise than in writing by reference to terms which are in writing''. As part of the context in which a ''reasonable person'' might regard the parties' contractual correspondence, Midgulf also filed evidence of the parties' practice, since 1984, of concluding contracts invariably governed by an arbitration agreement.

GCT protested, only in its written submissions filed months after Midgulf's notice of appeal, that the grounds of separability and *compétence-compétence* did not come within Teare J.'s grant of permission to appeal and objected to the ''new evidence'' concerning the parties' course of dealings. GCT also opposed Midgulf's reliance on the oral confirmation of the July contract as outside the permission to appeal granted at first instance.

Both parties' submissions, on appeal, concerned the underlying contractual correspondence, their conduct in performing obligations under the contract, Tunisian law and an anti-suit injunction, as well as the point Teare J. relied on at first instance concerning the depth of water in the Tunisian ports of Gabès and Sfax (the 31ft point) where the goods were to be delivered. GCT's submissions, however, did not join issue with Midgulf's reliance on the Arbitration Act or the principles of seperability and *compétence-compétence*, but focused only on the conclusion of the main contract which was, on GCT's case, Midgulf's acceptance of GCT's ''counter offer''.

In response to additional evidence filed by GCT on Tunisian law, Midgulf filed reply evidence. Both parties submitted additional evidence—including expert witness statements—and submissions on the 31ft issue, as no pleadings or evidence on this point had been filed by either party at first instance. While they agreed that the depth of water at Sfax was always 31ft whether or not there was a high tide and that accordingly, Teare J.'s conclusion that the addition of the words ''at high tide'' could not constitute a ''counter offer'' in relation to Sfax, they differed as to the information available for the port of Gabès. Admiralty charts and website information confirmed that depths of water at Gabès were always 31ft whatever the tide, however, GCT relied on a 2007 port circular and evidence from the UK Hydrographic Office concerning the accuracy of the admiralty charts.

The oral hearing before the Court of Appeal was limited to one-and-a-half days, a time constraint the Court repeatedly, and rightly, sought to maintain in the weeks leading up to the hearing, notwithstanding both parties' ancillary applications, which were accompanied by supporting authorities, concerning additional evidence and grounds for appeal.

While deciding in Midgulf's favour, the Court of Appeal strongly criticised Midgulf for the length of its submissions and supporting authorities. What the Court of Appeal plainly took issue with was Midgulf's reliance on strong principles of *compétence-compétence* and separability and the cost involved in hearing these grounds supported by emerging English case law as well as doctrine and comparative jurisprudence in other New York Convention Member States.

Unfazed by s.7 of the Arbitration act 1996 and the DAC Report on the legilsative history of s.5(3) of the Act, the Court, per Lord Justice Toulson, rejected these principles and authorities as ''irrelevant'' and unnecessary since, from his perspective, the issue could be resolved by the Court itself coming to its own conclusions as to whether the parties had concluded the main contract in their written exchanges including, at first instance, by hearing witnesses.[96] Indeed, his Lordship went so far as to commend GCT for not joining issue with

96. *Midgulf* [2010] EWCA Civ 66 at [36] and [73]. See, in contrast, *Hebdo Mag Inc v 125646 Canada Inc* (1992) 22 *Business Law Reports* 72, a decision of the Supreme Court of British Columbia. The parties were unable to close a transaction governed by an arbitration clause. When Hebdo Mag commenced litigation contending that the agreement was void ab initio because the parties did not reach agreement on certain of the main terms, the numbered company applied to stay the proceedings. Enforcing arbitration under a strong principle of separability, Blair J. stated, at p.78: ''Clearly the legislature, in drafting the arbitration agreement, meant to include only those terms in an agreement relating to arbitration. Implicit within this interpretation is that the viability of the remainder of the agreement was not relevant to the functioning of s.15 of the Commercial Arbitration Act.'' Section 15 of the Commercial Arbitration Act provides for the courts to stay legal proceedings commenced in breach of an agreement to arbitrate.

Midgulf on the applicability of these principles which concerned, instead, only the question of the parties' separate arbitration agreement.[97]

The Court set aside the decision of Teare J. and accepted Midgulf's arguments concerning the parties' contractual correspondence. Essentially, the Court, per Toulson L.J., decided that ''a reasonable person'' would have regarded the parties as having completed offer and acceptance of the main contract despite the lack of clarity in their exchanges and would not have regarded GCT's fax of July 8 as a ''counter offer''. Further, the Court of Appeal found the 31ft point not to be determinative choosing instead to characterise the addition of the words, ''at high tide'' as a ''clarification'', rather than a new term forming a ''counter offer''.

However, Lord Justice Toulson was somewhat unfair to suppose that Midgulf should have been able to count on these particular interpretations alone and the Court's willingness to ignore the 31ft point in preparing their appeal. After all, that approach had not been accepted by a Commercial Court judge at first instance who considered that he could not decide the matter on the basis of the correspondence alone and without hearing all of the witnesses and came to a different conclusion as to how a ''reasonable person'' might have understood the same correspondence.

Had the Court of Appeal been in favour of Teare J.'s offer and counteroffer analysis of the main contract, the only basis for enforcing the arbitration agreement would have been strong principles of separability and *compétence-compétence*, neither of which are indigenous to English law or fully accepted by the courts despite their entrenchment in the Arbitration Act.

In the event, the Court of Appeal wrongly stated the law on separability, ignoring the combined effect of ss.7 and 5(3) as well as DAC commentary on the purpose and meaning of s.5(3) and practice in other New York Convention States. For Toulson L.J.:

> ''The only reference to English arbitration in the communications between the parties during the relevant period was in the part of Midgulf's first fax of 2 July which stated that all other terms and conditions pertaining (among other things) to arbitration were to be as per the draft contract dated 27 June and in clause 15 of the draft contract. In the absence of any subsequent specific reference to the subject of arbitration, Midgulf had to show that GCT accepted its sale offer in terms broad enough to encompass the relevant arbitration clause.''[98]

The Court of Appeal, however, accepted Midgulf's position that, ''by confirming the July purchase, without any reservation as to its terms, Mr Hamrouni would have been understood by the hypothetical bystander to be accepting Midgulf's offer'',[99] in the oral conversation on July 4. This was, moreover, confirmed by the parties' immediate performance of the July contract, conduct which occurred prior to GCT's fax of July 8 which concerned only the terms of the main contract, not the arbitration agreement. The Court of Appeal accepted this as a ''more reasonable conclusion''. In those circumstances, the Court of Appeal's reversion to a traditional contractual approach analysing offer and acceptance was unnecessary. No need arose for specific acceptance by GCT of the arbitration agreement.

This very question, and GCT's reliance on its own failure to sign or return a copy of the long form June contract, arose in the Hong Kong decision of *Smal Ltd v Goldroyce Garment Ltd*.[100] A agreed to buy a quantity of goods from B on certain terms contained in an order which was sent to B with a request that B sign and return the order. The order contained an arbitration clause. B did not sign it or reply but did manufacture and deliver the goods. When disputes arose, A applied to court for the appointment of an arbitrator which B opposed on the ground that there was no arbitration agreement contained in a document signed by the parties or in an exchange of correspondence between the parties. Reluctantly, Kaplan J. found that the absence of written confirmation by B of the arbitration clause meant there was no evidence of an arbitration agreement which complied with the definition set out in art.7(2) of the Model Law:

> ''An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.''[101]

In extra-judicial comment, in the course of delivering the Sixth Goff Lecture in Hong Kong, Kaplan J. criticised the result in *Smal v Goldroyce* as one that is ''technically correct'', but ''produces an absurd result which is inconsistent with commercial reality''.[102] His criticisms led, in part, to extensive amendments to s.7(2) of the Model Law when it was adopted in England (as s.5 of the Arbitration Act) precisely in order to avoid this defect in the Model Law.

In relation, in particular, to s.5(3) of the Arbitration Act, the *DAC Report* comments that this avoids the need—identified by the Court of Appeal in Midgulf—for any confirmation of ''acceptance'' by GCT of the arbitration agreement:

> ''This is designed to cover, amongst other things, extremely common situations such as salvage operations, *where parties make an oral agreement which incorporates by reference the terms of a written form of agreement (eg Lloyds Open Form), which contains an arbitration clause*. Whilst greatly extending the definition of 'writing,' the DAC is of the view that given the frequency and importance of such activity,

97. *Midgulf* [2010] EWCA Civ 66 at [71].
98. *Midgulf* [2010] EWCA Civ 66 at [36].
99. *Midgulf* [2010] EWCA Civ 66 at [43].
100. *Smal Ltd v Goldroyce Garment Ltd* [1994] 2 H.K.C. 526.
101. *Smal Ltd v Goldroyce Garment Ltd* [1994] 2 H.K.C. 526.
102. Neil Kaplan, ''Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?'' (1996) 12(1) *Arbitration International* 27 at 30.

> it was essential that it be provided for in the Bill. The reference could be to a written agreement containing an arbitration clause, or to a set of arbitration rules or to an individual written agreement. This provision would also cover agreement by conduct. For example, party A may agree to buy from party B a quantity of goods on certain terms and conditions (which include an arbitration clause) which are set out in writing and sent to party B with a request that he sign and return the order form. If, which is by no means uncommon, party B fails to sign the order form, or send any document in response to the order, but manufactures and delivers the goods in accordance with the contract to party A, who pays for them in accordance with the contract, this could constitute an 'agreement otherwise than in writing with reference to terms which are in writing. . .' and could therefore include an effective arbitration agreement. The provision therefore seeks to meet the criticisms that have been made of Art 7(2) of the Model Law in this regard (see e.g. The Sixth Goff Lecture delivered by Neil Kaplan QC in Hong Kong in November 1995 (1996) 12 Arb Int 35). A written agreement made by reference to a separate written term would, of course, be caught by s 5(2).''[103] (Emphasis added).

The English amendments to s.7(2) (s.5 of the Arbitration Act 1996) were eventually adopted as amendments to the Model Law enacted in Hong Kong with the result that *Smal v Goldroyce* is no longer good law in that jurisdiction as confirmed in *Winbond Electronics (HK) Ltd v Achieva Components China Ltd* where Deputy Judge Abu B bin Wahab stated:

> ''Certain amendments were made to the Ordinance with effect from 1997. As a result, local cases decided before those amendments must be read with caution. Miss Lam, Counsel for the Appellant, referred to the case of H Smal Ltd v Goldroyce Garment Ltd (1994) 2 HKC 526, 529 where it was said that 'There is no basis for arguing that the arbitration agreement can be established by a course of dealings or the conduct of the parties . . .unless there is a record whereby the defendant has in writing assented to the agreement to arbitrate.' In view of the present Section 2AC, what was there said or held is no longer the law - the arbitration agreement may now be established by a course of dealings or conduct of the parties provided there is reference to terms (of arbitration) that are in writing.''[104]

The US Court of Appeals for the Second Circuit came to an entirely similar result in *Pervel Industries Inc v T M Wallcovering Inc* where T M Wallcovering sought to avoid arbitration on the ground that a large number of purchase orders containing an arbitration clause were never signed or returned:

> ''Although T M's president avers that a 'large majority' of these confirmation forms were not signed and returned to Pervel, it is undisputed that some of them were. Seven such documents, several of which were signed by T M's president, are included in the record on appeal. We agree with the district court that there was a binding arbitration agreement between the parties. Where, as here, a manufacturer has a well established custom of sending purchase order confirmations containing an arbitration clause, a buyer who has made numerous purchases over a period of time, receiving in each instance a standard confirmation form *which it either signed and returned or retained without objection*, is bound by the arbitration provision. . .. This is particularly true in industries such as fabrics and textiles where the specialized nature of the product has led to the widespread use of arbitration clauses and knowledgeable arbitrators.''[105] (Emphasis added.)

In *Midgulf*, all contracts between the parties since the 1980s contained arbitration agreements in accordance with practice in that industry and trade sector. The July contract was preceded by the June contract concluded less than two weeks beforehand. It contained an arbitration provision expressly referred to in Midgulf's offer of July 2. Several decisions in the United States have taken into account prevailing industry norms and the parties' course of dealing in enforcing arbitration agreements where the party opposing arbitration must have been aware that the transaction was governed by an arbitration agreement.

In *Chelsea Square Texti v Bombay Dyeing and MA*, for example, orders for goods by Chelsea Square were made by various means: formal, written confirmation; informal, written confirmation by letter or fax; and oral confirmation of the order. Bombay Dyeing responded to each purchase order by sending its standard confirmation which contained an arbitration agreement. Chelsea Square denied ever receiving or reading the reverse side of the form. It also contended that it never discussed arbitration with Bombay Dyeing (an argument GCT raised in relation to the oral conversation of July 4). The District Court had declined to enforce the arbitration agreement. In allowing an appeal from the lower court, the Court of Appeals for the Second Circuit did not require any confirmation of the arbitration agreement, but relied instead on established custom in the industry and Chelsea Square's failure to object to arbitration at any time:

> ''We believe that a textile buyer is generally on notice that an agreement to purchase textiles is not only likely, but almost certain, to contain a provision mandating arbitration in the event of disputes, and must object to such a provision if it seeks to avoid arbitration. See Helen Whiting, Inc. v. Trojan Textile Corp. , 307 N.Y. 360, 367 (1954) ('From our own experience, we can almost take judicial notice that arbitration clauses are commonly used in the textile industry. . .'); see also In re Gaynor- Stafford , 384 N.Y.S.2d at 790-91; Leadertex , 67 F.3d at 25; Pervel Indus., Inc. v. T M Wallcovering, Inc. , 871 F.2d

103. Departmental Advisory Committee on Arbitration Law, *Report on The Arbitration Bill* (February 1996), para.36.

104. *Winbond Electronics (HK) Ltd v Achieva Components China Ltd* Unreported July 11, 2007 District Court of Hong Kong, per Deputy District Judge Abu B bin Wahab at [6].

105. *Pervel Industries Inc v TM Wallcovering Inc* 871 F.2d 7, 8 (2d Cir.1989).

> 7, 8 (2d Cir. 1989) (holding that textile buyer was bound by purchase order confirmations containing an arbitration clause where buyer did not object to provision, in part on the ground that arbitration clauses are 'widespread' in textile industry); Imptex Int'l Corp. v. Lorprint, Inc. , 625 F. Supp. 1572, 1572 (S.D.N.Y. 1986) ('The New York courts have repeatedly held that, as arbitration clauses are commonly used in the textile trade, a textile buyer's failure to object to an arbitration clause upon receipt of both the sales agreement signed by the seller and the initial shipment of goods binds the buyer to the arbitration clause.').
>
> For these reasons, we hold that Chelsea was bound by the arbitration clause printed on the reverse side of the Bombay Dyeing Confirmations to which it did not object.''[106]

A number of decisions in the English courts have, likewise, not required separate agreement to an arbitration clause, but held it sufficient to accept terms of a contract that are governed by a referral of disputes to arbitration. For example, H.H. Judge Bowsher QC, rendering a decision in a dispute still governed by the former arbitration statutes, nevertheless relied on s.6(2) of the 1996 Arbitration Act as leaving, ''it to the court to decide in the individual case what reference validly incorporates an arbitration clause'' in *Secretary of State for Foreign and Commonwealth Affairs v Percy Thomas Partnership and Kier International Ltd*.[107] The old law remained only as a ''guide''. Disputes arose out of two contracts for the construction of the British Embassy in Amman, one with architects, Percy Thomas, another with the main contractors, Kier International. The Secretary of State for Foreign and Commonwealth Affairs (FCO) brought two applications for the appointment of sole arbitrators under the 1950 Arbitration Act. The FCO's contractual documents and correspondence with Kier referred to and included the terms of standard form of contract C4009, similar to GC/Works/1 which contains an arbitration clause. In an exchange of correspondence, the FCO also entered into a contract with Percy Thomas on the basis of the Architects Appointment RIBA 1982 which, likewise, contains an arbitration clause. In neither case did the parties specifically refer to the arbitration clauses in the standard terms. Both Kier and Percy Thomas contended that they were not bound by the arbitration clauses.

The court decided that general words of incorporation sufficed. Reviewing the rather unsettled question of incorporation of arbitration agreements by reference in English law, H.H. Judge Bowsher QC criticised the logic of the strict approach to the question of incorporation which originated from two conflicting decisions in *Aughton v MF Kent Services*[108] of Sir John Megaw on the one hand (who required express mention of arbitration in incorporating language) and Ralph Gibson L.J. on the other (who considered that general words of incorporation sufficed):

> ''Sir John Megaw has been taken to require that the test for the formation of an arbitration agreement, contrary to the general rule, shall be a subjective test. The result would be that if two parties signed a written agreement which contained an arbitration clause, those parties would be bound by all of the terms, even if they had not read them, save only for that the arbitration clause would not be binding on a party unless it could be proved that he had read it and 'consciously and deliberately agreed' to be bound by it.''[109]

H.H. Judge Bowsher QC concluded there was no consistent line of authority requiring application of Sir John McGaw's narrow test and granted a stay of proceedings on the basis of the arbitration clause contained in the Green Form.

Other decisions have emphasised the awareness a party contesting the existence of the arbitration agreement had or ought to have had when accepting terms of a contract. For example, in *Stretford v Football Association Ltd*,[110] Sir Andrew Morritt held a licensed agent bound by an arbitration agreement contained in the Football Association rules. The licence required the agent to abide by the rules which became a term of the contract between agent and association. The agent had a duty to keep himself informed of the rules which were published in an annual *Association Handbook*. Indeed, the agent had exhibited extracts of the rules, including the arbitration clause, to his witness statement in the court proceedings he had initiated.

Awareness of the arbitration agreement was also a factor in *Sea Trade Maritime Corp v Hellenic Mutual Corp*.[111] Clarke J. enforced arbitration where insurance cover was given in accordance with Hellenic's rules which contained an arbitration agreement. Sea Trade's contention that the arbitration clause had not been incorporated into the parties' contract, which made no specific reference to it, was rejected. Whether or not Sea Trade was actually aware of the arbitration agreement was irrelevant when it was familiar with and had copies of the rules through its agents, the brokers.

In *Midgulf v Groupe Chimique Tunisien*, GCT at no time alleged that it was not aware of the arbitration agreement when it confirmed its purchase of the goods from the appellant either orally on July 4 or by conduct immediately thereafter. The Court of Appeal's requirement for an expression of acceptance ''in terms broad enough to encompass the relevant arbitration clause'' is not in accordance with international practice and finds little basis in English arbitration law.

106. *Chelsea Square Texti v Bombay Dyeing and MA* 189 F3d at 296 August 23, 1999 US Court of Appeals for the Second Circuit, per Kearse, Walker and Pooler C.JJ.
107. *Secretary of State for Foreign and Commonwealth Affairs v Percy Thomas Partnership* (1998) 65 Con. L.R. 11.
108. *Aughton v MF Kent Services* [1991] 57 B.L.R. 1
109. *Aughton v MF Kent Services* [1991] 57 B.L.R. 1 at [64].
110. *Stretford v The Football Association Ltd* [2006] Arb. L.R. 57. Appeal dismissed by the Court of Appeal, [2007] EWCA Civ 238.
111. *Sea Trade Maritime Corp v Hellenic Mutual Corp* [2006] EWHC 2530 (Comm); [2007] 1 All E.R. (Comm) 183; [2007] 1 Lloyd's Rep. 280.

The Court of Appeal also rejected Midgulf's reliance on *compétence-compétence* on the ground that it was:

> ''[T]oo late for Midgulf to seek to raise such an argument when it had not sought to appeal against the order made by Teare J on 11 May 2009 and the trial of the issue which he had then ordered had taken place.''[112]

The court at first instance was, of course, bound by Court of Appeal authority limiting the application of *compétence-compétence* and requiring the determination by the courts of the validity of arbitration agreements on applications for the appointment of an arbitrator or a stay of proceedings. Midgulf had argued the point in the first hearing before Teare J. and ought to have been free to request that the Court of Appeal reverse its own case law on this question on appeal reserving rights on the question should the matter proceed to the Supreme Court. The Court of Appeal's suggestion, requiring a separate appeal on this point alone, would have been a costly exercise by Midgulf at that stage of the proceedings and likely have required a resolution by the Supreme Court.

What the Court of Appeal missed is that the application of strong principles of *compétence-compétence* and separability not only accord with the United Kingdom's international obligations to enforce arbitration agreements under the New York Convention, but also resolve the issue of costs that arise as a result of the involvement of local courts in the merits of disputes governed by arbitration agreements. They provide a short, and inexpensive, answer to objections by parties who contest the existence of a separable arbitration agreement on the basis of issues arising out of the main or ''host'' contract. The observation of the Alberta Court of Appeal, per Coté J.A., cited above, that, ''Arbitration only after a lawsuit about arbitration is likely to be slower and more expensive than the lawsuit which the parties contracted not to have,''[113] is not yet accepted in England where the courts still pursue the development of English contract law, producing footnotes to *Chitty* at the expense of parties who choose to arbitrate there.

In contrast to the approach in England, Tunisian courts deciding the same issue under the same contract were able to reach the same result directly and without the need for a trial and witness testimony or any considerations relative to the merits of the underlying contract which trespass upon arbitral jurisdiction. Unlike the English courts, the only question arising for Ms Reem Al Nifati, deputy judge of the Tunis court of first instance, was the existence of an arbitration agreement. She was thus able to decline jurisdiction only on the grounds of separability and *compétence-compétence* which is the correct and most economical approach and one applied uncontroversially in numerous other jurisdictions as the authorities which were put before the Court of Appeal demonstrated.[114]

Significantly, this had also been the approach of Burton J. who first granted the anti-suit injunction before the matter went to Teare J. The conclusion of Burton J. that there was nothing in the parties' correspondence about the main terms of the contract ''that ousted the arbitration agreement'' was spot on. Contrary to the view of the Court of Appeal, per Lord Justice Toulson, the legislative history of ss.7 and 5(3) of the Arbitration Act makes it clear that confirmation of an arbitration agreement is not required where parties act on the basis of the contract which contains it (as the DAC commentary sets out).

At the conclusion of the oral hearing in *Midgulf*, Lord Justice Mummery questioned Midgulf's reliance on foreign jurisprudence, given that the matter before the Court was only a ''contractual dispute'' governed by English law. In its final judgment, the Court of Appeal also considered, at [73], the parties' submissions on appeal should have been restricted to the formation of the main contract. Lord Justice Toulson stated that only the ''communications between the parties'' together with authorities limited to ''the ordinary principles of contract law'' should have been before the court describing, at [71], the authorities Midgulf relied on relative to separability and *compétence-compétence* as of ''peripheral relevance'' because the issues did not ''arise'' on appeal. In other words, Midgulf should have relied only on how the Court of Appeal might assess the ''reasonable person's'' understanding of the parties' contractual documents, a tall order in a jurisdiction that prides itself on the absence of any general principle of ''good faith'' in contract interpretation.

With respect to the enforcement of arbitration agreements, specifically the principle of separability, the Court of Appeal itself, as well as the House of Lords, relied on German and American jurisprudence in *Fiona Trust*. While undoubtedly a ''contractual dispute'', the enforcement of international arbitration agreements also involves the English legislator's definition of arbitration agreements and an interpretation of the UK's obligations under an international treaty. Comparative jurisprudence and State practice in other member jurisdictions, not to mention the Arbitration Act 1996 itself, are clearly relevant. International treaties and the increasing harmonization of local laws supported by the adoption of the UNCITRAL Model Law mean that enforcement of arbitration (and awards) is no longer a matter for ''this jurisdiction'' alone and in isolation from practice in what is now a ''global arbitration village''.

The Court of Appeal's attention to the main contract only and its preference for a traditional approach focusing solely on the parties' contractual correspondence is redolent of pre-1996 reasoning and now discredited doctrine, pursuant to which the fate of an arbitration agreement necessarily follows that of the main contract. The problem was not, as the Court of Appeal saw it, an issue of procedure, namely a conflict between appellate practice in other jurisdictions and those in ''this jurisdiction'' (England), but one of conflicting approaches in ''this jurisdiction'' itself where ''new'' principles under the Arbitration Act still compete with *Chitty on Contract*. It is notable that the decisions in *Midgulf* both at first instance and in the Court of Appeal barely mention the Arbitration Act 1996 or arbitral practice.

112. *Midgulf* [2010] EWCA Civ 66 at [27].
113. *International Resource Management (Canada) Ltd v Kappa Energy (Yemen) Inc* (2001) 16 *Business Law Reports* (3rd) 163 at 164 Alberta Court of Appeal.
114. The Tunisian first instance decision is annexed in English translation to this article.

The Court of Appeal did no favours to parties choosing to arbitrate in London by failing to address the currently confused state of English case law and, instead, maintaining an approach to arbitral jurisdiction founded solely on principles of English contract law. English courts continue to be in a period of transition long after the 1996 reforms and it is to be regretted that the Court of Appeal, in this instance, did not take the opportunity to follow the direction set by the House of Lords in *Fiona Trust*.

The principles of *compétence-compétence* and separability arose specifically to limit intervention by local courts in international arbitration. Parties arbitrating in England, however, appear now to be able to deploy only principles of considerably-diminished application against the risks of costly litigation before local courts in order to enjoy rights to arbitrate.

The *Global Arbitration Review*[115] reported that GCT have applied to the Supreme Court for permission to appeal on the basis that the Court of Appeal cannot overturn a High Court decision on issues of fact and law, where the trial judge heard all of the witnesses, particularly where, ''the trial judge said he could not decide on documents alone and needed to hear the witnesses as well''. If this is correct, Midgulf will once more have to avail itself of strong principles of separability and *compétence-compétence* which the Arbitration Act makes available to parties who choose to arbitrate here. Let's hope Midgulf are not precluded from doing so by the Court of Appeal's complaint regarding the costs of hearing submissions on these fundamental principles however unfamiliar they may still be to the courts in ''this jurisdiction''.

Annexe: Translation of Decision of Tunisian Court of First Instance decision 23/23796 of March 28, 2009

THE TUNISIAN REPUBLIC

MINISTRY OF JUSTICE AND HUMAN RIGHTS

COURT OF FIRST INSTANCE OF TUNIS

COMMERCIAL JUDGMENT

CASE NO: 23/23796

DATE OF JUDGMENT: 28/03/2009

The Commercial Chamber No 23 of the Court of First Instance Court in Tunis in open session on 28 March 2009 in hearing room No 3 in the Court of Justice in Tunis presided by Mrs Reem Al Nifati, Deputy Judge of the Court, in the presence of the two commercial members, Mr Salem Al Iamaam and Mr Abdul Hameed Trouish, and with the assistance of the court clerk, Mr Mohamad Ubaid, gave the following judgment:

BETWEEN:

Claimant: Groupe Chimique Tunisien in the person of its legal representative, a limited liability company, RC n°B133611997, with headquarters at Avenue Saudi Arabia 1002 Belvedère, Tunis, represented by its lawyer, Mr Othman Ben Fadhel,

on one part

And

Defendant: Midgulf International Limited, in the person of its legal representative, electing domicile at the office of its legal representative, Mr Noureddine Ferchiou, of Ferchiou and Associates Meziou Knani, and Mbezaa, 34, Place du 7 November 1987, Tunis,

on the other part

By application dated 24 October 2008 served on the Defendant on the same date by bailiff in Tunis, Mr Mohammad Farhat al Qumurti, under reference no 45291 giving notice to the Defendant to present its defence in this matter with all supporting documents, through a lawyer, at the latest, no later than the first hearing of 15 November 2008 to review the following matter:

SUBJECT OF THE DISPUTE

The Claimant contends that it concluded an initial agreement with the Defendant for the supply of 150,000 mt of crushed sulphur in several shipments at a price of USD 895.00 per metric tonne on CFR basis. Accordingly, the Claimant issued a documentary letter of credit with terms for the first shipment of 35,000 mt of crushed sulphur. The Claimant received the first shipment subject to said letter of credit pursuant to which the Defendant received payment of the price. The Claimant asserts, however, that the cargo was not in accordance with agreed specifications.

The Claimant therefore asked the Defendant to appoint a representative for sampling of the cargo by an independent inspection company. The Defendant refused to attend the sampling, so the Claimant appointed Messrs Intertec Calebbret and sought a court order to appoint a legal expert to establish non-conformity of the cargo with the required specifications. The court granted this order and appointed an expert, Mr Belhassan al Ghoul, under Court Order No 46763 dated 9 September 2008.

The Claimant also alleged that the Defendant did not comply with its obligations in good faith and breached the contract as it did not respect contractual specifications for the goods delivered. The Claimant refused to take any more deliveries from the Defendant as it had not honoured its contractual obligations, although the Defendant was seeking to require the Claimant to take the remaining shipments of the 150,000 mt of crushed sulphur.

The Claimant asserted further that the Defendant intended to refer the dispute to arbitration in London in accordance with its Notice of Arbitration served by bailiff, Mr Hamid Abrouq (reference number 34224 dated 25 August 2008), to which the Claimant replied by bailiff, Mr Mohammad Farahat al Qumurti (reference number 45061 dated 29 August 2008).

115. *Global Arbitration Review*, February 19, 2010.

According to the Claimant, an arbitration agreement must be evidenced in writing or by an exchange of correspondence in accordance with Art 6 of the Arbitration Code, but no evidence of such an exchange has been produced in the file.

The Claimant, therefore, brought this application seeking, pursuant to Art 6 of the Arbitration Code, a declaration that the arbitration clause relied on in the Defendant's Notice of Arbitration served on the Defendant at the Claimant's request by Bailiff, Mr Hamid Abrouq, under reference number 34224 on 25 August 2008, is null or inexistent.

PROCEDURE

Accordingly, the case was filed in the commercial register under reference number 23796 and was set down for the preliminary hearing indicated in the Claimant application, where Mr Ben Fadhel accepted Mr Ferchiou's request for postponement to reply; the case was then subject to several hearings, the last of which was held on 7 February2009, attended by Mr Ben Fadhel who orally presented the case in the course of his submissions who pointed out that the Defendant accepted the application of Tunisian law. Mr Kamoun attended on behalf of Mr Ferchiou and orally presented his defence contending that this court is not competent and that the fax dated 8 July 2008 does not represent a new offer, but an acceptance and requested dismissal of the case, and hence the case was reserved for further review in order to give judgment in the hearing dated 28 February 2009 where it was again adjourned to give judgment in the hearing dated as stated above. After deliberations we say as follows:

DOCUMENTS

This application seeks a judgment in accordance with Claimant's claim.

The Claimant supported its claim relying on a copy of the documentary letter of credit, the court order, a notice of arbitration served by the Bailiff, report no 34224 and a reply served by Bailiff, report no 45061.

The Defendant responded to this claim asserting that the Claimant purchased as a first shipment a quantity of sulphur of 23,000 tonnes; that the first purchase was in accordance with the general terms dated 27 June2008; and these terms clearly stated the following:

> ''Article 14: the contract is to be construed and governed in all respects in accordance with the English law. And
>
> Article 15: arbitration clause: ('arbitration in London and English law to apply').''

The Claimant did not object or make any reservation as to these terms at any time.

The Defendant further asserted that the Claimant later requested supply of an additional quantity of about 150,000 mt of sulphur with the same specifications and the new contract was concluded between the two parties in accordance with the Defendant's offer dated 2 July 2008 and the Claimant's acceptance dated 7 July 2008. The Defendant's offer dated 02 July 2008 referred to all terms and conditions provided under the general terms dated 27 June 2009, regarding shipment, payment, delivery, force majeure, jurisdiction and arbitration.

The Defendant asserted that the Claimant accepted this offer, and their acceptance letter stated that, ''referring to the offer dated 02 July 2008, we are pleased to confirm our acceptance to purchase of 150,000 mt''. The Claimant refused to continue performance under the Contract and decided to treat it as terminated. The Defendant informed the Claimant that it was commencing arbitration in accordance with their offer referring to the terms and conditions of the contract dated 27 June 2008 which clearly states that disputes would be referred to arbitration.

The Defendant added that the Claimant had already notified its acceptance to purchase and later confirmed, by letter dated 22 July 2008, that agreement to purchase the crushed sulphur was as per the content of the offer dated 02 July 2008, and that during all negotiations for the first and second contracts, the Claimant did not raise any objection with respect to the terms specified in the Defendant's letter dated 02 July 2008, which referred to the terms and conditions specified in the document dated 27 June 2008. Therefore, the Claimant must have been aware of the arbitration agreement, which may be proven by any available evidence such as correspondence. Moreover, pursuant to the principle, well established in jurisprudence, that the arbitration agreement is regarded as separate from the main contract, there was no need to insert the arbitration clause in the July 2008 contract because the offer refers to the terms stipulated in the document dated 27 June 2008 and the reference of 2 July 2008 to the terms and conditions dated 27 June 2008 was mentioned in a way that the arbitration clause must be considered to be part of the contract accepted by the Claimant on 7 July 2008.

Pursuant to Art II of the New York Convention of 1958, the arbitration clause may be included in a contract or in an exchange of correspondence or telegraph. Also, jurisprudence in matters of international arbitration, considers that the existence of an arbitration clause may be established by way of its repetition in a course of dealings, or by way of earlier contracts between the two parties.

Hence the Defendant requested the court to dismiss the application and filed a counterclaim for the legal costs incurred, and also requested that the Claimant be ordered to pay costs of no less than 5,000 TND.

Counsel for the Claimant replied noting that the dispute between the parties is whether or not the Claimant accepted the two terms in the Defendant's contract reference ss/sulphur/2008/06/27 dated 27 June 2008 (arts 14 and 15). The Claimant asserted that it raised objections to these terms on 14 July 2008 and in an exchange of correspondence. Further, prior to the agreement to purchase of 150,000 mt of sulphur, the Claimant had purchased 23,000 mt of sulphur; during the course of these earlier negotiations, both parties exchanged many communications by fax, the last of which was the Defendant's fax dated 27 June 2008 asking the Claimant to sign and stamp the attached contract. The Claimant refused to sign the document and return it stamped and the Defendant accepted this. The contract dated 7 July

2008 was concluded under a letter of credit dated 7 July 2008, which is the only document materialising the agreement between the two parties for the purchase of the 23,000 mt of crushed sulphur.

On 2 July 2008, the Defendant sent a fax to the Claimant offering the sale of a 150,000 mt of sulphur in a number of shipments to be delivered between July and September 2008 and this offer stipulated that the contract was based on all terms and conditions dated 27 June 2008. The validity of this offer was extended to noon, Tunis time, on 7 July 2008. The Claimant did not reply within the period of validity for the offer, hence the Defendant must be considered as no longer obliged by its offer pursuant to Art 33 of the Code des Obligations et des Contrats.

On 8 July 2008, the Claimant approached the Defendant with a new proposal with separate conditions, without any acceptance of the Defendant's previous terms unless pertaining to quality specifications of the goods, which the Claimant accepted to be as per the Defendant's offer dated 2 July 2008, and that the mention of the Defendant's offer reference could not be considered as acceptance of the content of the previous offer. The Claimant requested, in its new proposal, shipment schedules for the third quarter for its own approval and nomination of the two vessels in order to arrange insurance for the cargo in accordance with the requirements of Tunisian law.

The Claimant added that its letter was an initial agreement presented to the Defendant which did not contain all the terms of the contract. Further, on 4 July 2008, the supply department within GCT wrote to the financial and legal departments to give their opinions on the contract proposed by the Defendant, and the Claimant in its fax dated 8 July 2008 expressed initial agreement on concluding the contract without any position as to other key issues related to shipment schedules, cargo inspection, jurisdiction and the competence of the courts in case of litigation, left for later agreements in accordance with internal legal and management instructions. According to the Claimant, a contract for a value of 134 million dinars could not be concluded by a state-owned company without taking all required steps.

According to the Claimant, the Defendant replied on 09 July 2008 to the Claimant's fax on the assumption that the Claimanthad accepted the terms of its letter dated 02 July 2008. However, negotiations between the parties continued until 17 July 2008 which clearly supports the Claimant's interpretation of its fax of 08 July 2008. Claimant believes it was bound to the Defendant on the basis of its preliminary offer of 08 July 2008 only. On 14 July 2008, the Claimant sent a fax to the Defendant proposing amendments to clauses 14 and 15. The Defendant raised no objection to these proposals which means it must have accepted them. The Claimant rejected the Defendant's proposal dated 10 July 2008 for payment and negotiations then continued until 17 July 2008, the date of issuance of the letter of credit which materialized the agreement between the two parties and which indicated a payment term of 30 days from the date of the bill of lading. The Defendant accepted this term and other terms. Thus, the Claimant's initial agreement dated 7 July 2008 was the basis for later negotiations until a contract for the purchase of 35,000 mt of crushed sulphur was concluded.

The Defendant, on the other hand, contends that the existence of the arbitration clause implies that arbitrators have jurisdiction to decide any dispute arising from the contract and that the arbitration clause is valid. As the Claimant has refused to appoint an arbitrator, the Defendant applied to the English court to appoint a sole arbitrator and the Claimant has already appointed representatives before the English courts. The Claimant cannot now ignore the arbitration clause and the arbitrators are competent to decide the validity of the arbitration agreement and their own jurisdiction pursuant to the principle of compétence-compétence, prior to review by the court, in accordance with international arbitral jurisprudence and writings of the eminent Professor Philippe Fouchard. Accordingly, the Defendant sought to have the Claimant's application dismissed or, alternatively, suspended until arbitrators decide their jurisdiction in the first instance.

The file was communicated to the public attorney pursuant to art 251 of the Tunisian Code de Procédure Civile et Commerciale.

THE COURT

This application involves a claim for a declaration that the arbitration clause referred to in the correspondence addressed to the Claimant by the Defendant in a notification issued by the bailiff, Mr Hamid Ben Abrouq, reference number 34224 dated 25 August 2008, is void, in accordance with art 6 of the Arbitration Code.

It is clear from the facts that the parties concluded an agreement under which the Defendant undertook to supply the Claimant with several shipments of a quantity of 150,000 mt of crushed sulphur, and the first shipment was completed per the documentary letter of credit dated 17 July 2008; the Claimant contested the quality of the cargo and obtained an order to appoint a legal expert to verify the quality and refused to continue supplies from the Defendant.

The Defendant gave notice to the Claimant of its intention to refer to arbitration the dispute concerning the performance of the contract as per the notification issued by the bailiff, Mr Hamid Abrouq reference number 34224 dated 25 August 2008.

The Claimant asserted there is no exchange of correspondence evidencing the arbitration agreement, and requested, in accordance with Art 6 of the Arbitration Code, and Art II(3) of the New York Convention approved by Tunisia by law no 12 of 1967, a decision declaring the arbitration clause void or null as a result of the said correspondence.

The Defendant contended that the arbitration clause is valid and referred to the reference made in its offer dated 2 July 2008, which was accepted by the Claimant, to all the terms agreed by both parties dated 27 June 2008, including the arbitration clause, and requested the application be dismissed on the basis of this court's lack of jurisdiction pursuant to the principle of compétence-compétence.

The dispute between the parties is whether or not this court has jurisdiction to review the question of the validity and existence of the arbitration clause.

There is no doubt that arbitration possesses an inherently judicial nature and, as such, is governed by common principles governing the administration of justice among which is the jurisdiction of every judicial authority to determine its own jurisdiction, in order to preserve the welfare of the judicial authority and the administration of justice;

The Tunisian legislator, like all modern foreign legislators, has confirmed the principle of compétence-compétence, in matters of international arbitration disputes, under Art 61(1) of the Tunisian Arbitration Act which provides:

> ''The arbitration tribunal has jurisdiction to decide its own jurisdiction, including any objections to the existence or validity of the arbitration agreement. For that purpose, the arbitration agreement included in a contract shall be treated as an agreement independent of the other terms. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration agreement.''

Accordingly, in accordance with arbitrators' jurisdiction to decide its own jurisdiction, the arbitral tribunal is competent to be the first to decide the existence and the validity of the arbitration agreement and whether it has jurisdiction or not, prior to review by any other authority, which is an inevitable consequence of the separability of the arbitration clause in international arbitration.

The Claimant's claim is based on Article II(3) of the UN Convention on the Recognition and Enforcement of Arbitration Awards (the ''New York Convention'') in order to give this court a basis to decide the validity of the arbitration clause.

Pursuant to Article II(3) of the New York Convention:

> ''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 [an arbitration agreement], shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.''

Consequently, arbitrators' jurisdiction to decide their own jurisdiction prior to any State court has some restrictions and the same position is reflected in Art 52 of the Tunisian Code de l'arbitrage which states that the Court, when seized in a matter in respect of which the parties have made an arbitration clause, has the power to decide on the arbitrator's jurisdiction despite the existence of an arbitration agreement, if it finds said agreement to be null and void, inoperative or incapable of being performed.

Since the principal issue raised in this dispute concerns the validity of the arbitration clause, this Court is not entitled to decide the validity and the existence of the arbitration agreement as to do so would contravene the arbitrator's jurisdiction, established by law, to decide on its own jurisdiction, pursuant to the principle of compétence-compétence. The only means by which the Court could decide on the arbitrator's jurisdiction would be where an objection to jurisdiction were raised before a court in answer to a substantive claim in respect of which the parties had concluded an arbitration agreement, pursuant to Art II(3) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and Art 52 of the Tunisian Arbitration Act, and this is not the case in this dispute. Accordingly, the court dismisses the Claimant's application on grounds of lack of jurisdiction.

The Defendant has filed a counter-claim for costs in accordance with Arts 226 and 227 of the Tunisian Code de Procedure Civile et Commerciale (CPCC), which the Court accepts.

The Court orders that the Claimant pay the Defendant's costs in the sum of 300 TND in accordance with Article 128 of the CPCC, which states that costs will be borne by the party against whom the decision is made.

ON THESE GROUNDS

The Court dismisses the Claimant's principal application.

The Court formally accepts the Defendant's counter-claim and orders the Claimant to pay to the Defendant 300 TND in legal costs and to pay all legal fees

