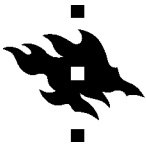


The Doctrine of Separability and the Interaction between the Main Agreement and the Arbitration Clause

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<p>The basis for an arbitral proceeding is usually an arbitration agreement. In most situations, the arbitration agreement is included as an arbitration clause in the main agreement. Even if the arbitration clause seems to be a part of the main agreement, it has in accordance with the doctrine of separability to be regarded as a separate agreement from the main agreement. Without the doctrine of separability, the arbitral tribunal would lose its competence by ruling the main agreement, of which the arbitration clause would be a part invalid, terminated or non-existent. Consequently, the alleged invalidity of the main agreement does not automatically affect the arbitration clause and a separate assessment of the validity of the arbitration clause has to be done.</p> <p>The doctrine of separability has been justified with both the intent of the parties to solve all disputes regarding the main agreement by arbitration and with efficiency arguments, as for instance protection of the competence of the arbitral tribunal. In most jurisdictions, the doctrine of separability is accepted, but the exact scope and applicability of the doctrine varies from one jurisdiction to another.</p> <p>This thesis aims to determine the scope of the doctrine of separability and in addition, to create general rules for assessing the scope of the doctrine. The thesis aspires to clarify the legal state regarding the scope and applicability of the doctrine of separability in Finland. However, there is not much case law and legal doctrine concerning the doctrine of separability in Finland. Therefore, in addition to the legal dogmatic method, also a comparative method is used. The comparison is done with both international arbitration practice and as a Nordic comparison, focusing mainly on Sweden. The doctrine has been more thoroughly studied in both Sweden and internationally than in Finland. By clarifying the scope of the doctrine of separability, many conflicts regarding the competence of the arbitral tribunal could be avoided.</p> <p>The thesis is structured to first assess specific situations of applicability of the doctrine of separability and then assess if any general rules for the scope and applicability of the doctrine can be made. Regarding the specific situations of applicability, the doctrine is in Finland applied for at least separating the arbitration clause from a main agreement that is allegedly invalid or terminated. When it comes to a main agreement alleged to be non-existent, there is no consensus regarding if the doctrine should be applied. In the thesis, I have argued that the doctrine of separability should be applied even if the main agreement is allegedly non-existent. Otherwise, for instance a concluded arbitration clause in a draft agreement would be regarded as non-existent, if the main agreement is not concluded.</p> <p>When it comes to the applicability of the doctrine of separability to choice of law clauses in the main agreement, Finnish doctrine seems to have taken the standpoint that a separate assessment of the law applicable to the arbitration clause has to be done. Consequently, a choice of law clause in the main agreement does not automatically reach to the arbitration clause. However according to Finnish case law and literature, the doctrine of separability cannot reach to the interpretation and adjustment of arbitration clauses. In accordance with general contract law principles, arbitration clauses have to be interpreted and adjusted in the light of the main agreement.</p> <p>The second part of the research regards if any general rules can be applied to determine the scope and applicability of the doctrine of separability. I suggest that the doctrine of separability should be applied to all situations where the main agreement and the arbitration clause interconnects. The arbitration clause is a procedural agreement that is auxiliary to the substantive main agreement and thus has certain tasks and features that have to be protected by evaluating the arbitration clause separately. The doctrine of separability is a tool for contractual construction, which enables the courts and tribunals to give proper effect to the arbitration clause and the will of the parties. It does in no other way prevent the interaction between the agreements. When separately assessing and interpreting the arbitration clause, the general contract law rules determine the outcome of the assessment.</p>			
Avainsanat – Nyckelord – Keywords			
Arbitration clause – Arbitration agreement – Main agreement – Doctrine of separability – Erillisyyssoppi			
Säilytyspaikka – Förvaringställe – Where deposited			
Muita tietoja – Övriga uppgifter – Additional information			

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II. Index of Abbreviations

2018 International Arbitration Survey	White & Case & Queen Mary University of London: 2018 International Arbitration Survey: The Evolution of International Arbitration
Brussels I	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
Brussels Convention	1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
CISG	United Nations Convention on Contracts for the International Sale of Goods
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
Hague Convention	Convention of 30 June 2005 on Choice of Court Agreements
Human Rights Charter	Charter of Fundamental Rights of the European Union
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration
New York Convention	The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
NOU	Norges offentlige utredninger
PeVL	Perustuslakivaliokunnan mietintö
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
Rome Convention	1980 Rome Convention on the law applicable to contractual obligations
SOU	Statens offentliga utredningar
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration

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1. Introduction

1.1 Background

Because of its benefits, today many commercial disputes are resolved by arbitration instead of litigation. Particularly in cross-border matters, arbitration has gained ground from the traditional court proceedings.¹ There are several reasons for commercial parties to choose arbitration instead of general courts, for instance the flexibility of the proceeding, the finality of the award, its speed and the confidentiality of the proceeding and the award.²

Arbitration is an old method of solving disputes that has been used for centuries.³ Arbitration clauses are probably the oldest dispute resolution clauses used, at least in the Western World.⁴ Even if arbitration has long been used, at least courts in common law countries were reluctant to enforce arbitration agreements for many centuries.⁵ During the 20th century arbitration has gradually been made more attractive, for instance by the introduction of the doctrine of separability.

To gain all benefits connected with arbitration, the careful drafting of the arbitration clause is vital. Especially the finality, the speed and the flexibility of the proceeding depends on the arbitration clause.⁶ A conflict regarding the validity of the clause or regarding the content of the clause can lead to challenges in general courts, which affects the finality of the award, delays the proceeding and rises the costs. A poorly drafted arbitration clause also decreases the possibility for a tailor-made and flexible proceeding.

It is more common that the parties use an arbitration clause in the main agreement, than that they conclude a separate arbitration agreement.⁷ However, an arbitration agreement separate

¹ Möller 1997, p. 8.

² Möller 1997, p. 7-8; Hemmo has highlighted the following factors as the benefits of arbitration; 1. The speed of the proceeding; 2. The flexibility of the proceeding; 3. The expertise of the tribunal; 4. The possibility to affect the formation of the tribunal; and 5. The confidentiality of the proceeding and the award, Hemmo 2005, p. 371-373.

³ For instance in the US, arbitration was already used during the colonialization, Poser 1993, p. 1095.

⁴ Koulu 2009, p. 72; In the Western World, arbitration has been used at least since medieval times, Cohen & Dayton 1926, p. 266; In Finland and Sweden, arbitration has been used at least since the 17th century, Möller 1996, p. 441.

⁵ Van Wezel Stone 1999, p. 973; In England, the scepticism subsided in the end of the 18th and in the beginning of the 19th centuries and in the US and internationally in the beginning of the 20th century, Van Wezel Stone 1999, p. 974-976.

⁶ According to Savola, a poorly drafted arbitration clause can lead to the invalidity of the clause or to the arbitral award being null and void or set aside. Even if the consequences are not always that serious, a poorly drafted clause can at least lead to conflicts that slows down the proceeding and raises the costs for the parties, Savola 2008, p. 15.

⁷ Koulu 2009, p. 17.

from the main agreement does not raise as many concerns regarding the interpretation and validity of the agreement than the clause does.⁸ Arbitration clauses are usually only short standard clauses. This raises questions regarding the interpretation of the clause, since it is less detailed than an arbitration agreement. Often the clause is formulated as a boilerplate clause, which means that it is formulated identically regardless of the type or content of the main agreement.⁹ According to a study by the Queen Mary University of London, 48 % of all used arbitration clauses are standard clauses.¹⁰ This is problematic, since in a conflict situation the clause can turn out to be ill-fitted for the conflict at hand. Out of context, the clause is not very informative and needs other interpretative sources to fulfil its function properly.

The most logical approach would be that the arbitration clause would be considered as a part of the main agreement and interpreted in the light of the main agreement. This is the starting point for interpretation of contract clauses in general contract law.¹¹ However, the well accepted doctrine of separability restricts the interaction between the main agreement and the arbitration clause, since according to the doctrine the main agreement and the arbitration clause are two separate agreements.¹² Originally, the aim with the doctrine has been to protect the arbitration clause from the invalidity of the main agreement, but in many legal systems the scope of the doctrine is broader and covers also other aspects of the interaction between the arbitration clause and the main agreement.

The doctrine of separability is much younger than arbitration as a manner of dispute resolution and it needed time to break through in the Western world.¹³ During the first part of the 18th century, it was in many countries normal to regard the arbitration clause as a part of the

⁸ A separate arbitration agreement is usually more detailed than an arbitration clause since it is less dependent of the main agreement. Also, an arbitration agreement is usually more carefully considered compared to an arbitration clause. The arbitration clause is usually only included in the main agreement at a late stage of the drafting of a contract, without any comprehensive negotiations. The arbitration agreement is often concluded after the conflict already has escalated and consequently the parties are well aware of the needs and demands of the upcoming conflict.

⁹ Koulu 2009, p. 48.

¹⁰ Queen Mary University of London: International Arbitration: Corporate Attitudes and Practices 2006, p. 11.

¹¹ Regarding the interpretation of contract clauses, see chapter 4.1.

¹² Regarding the definition of the doctrine of separability, see chapter 2.1.

¹³ Poudret & Besson 2007, p. 168; In the United States, the doctrine of separability was first introduced by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 US 395 (1967), p. 403-404; In France, the doctrine was introduced by the Cour de Cassation in 1963, *Raymond Gosset v. Carapelli*, JCP, Ed. G., Pt. II, No. 13,405 (1963); In the United Kingdom, the doctrine was quite lately accepted by the Court of Appeal in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*, 1 Q.B. 701 (1993) and a couple of years later added to the Arbitration Act in 1996.

main agreement.¹⁴ Today, the doctrine has become one of the most fundamental cornerstones of international arbitration.¹⁵ As evidence of this evolution, in addition to the acceptance of the doctrine of separability in most countries, the doctrine is also codified in many international conventions.¹⁶

In some countries, the doctrine of separability is included in the legislation and in others it has evolved by case law.¹⁷ There are also examples of countries where the doctrine has first been accepted in case law and later explicitly codified in national legislation.¹⁸ Even if the doctrine in its modern form is quite recently accepted, the benefits of the doctrine have been recognised long before. Historically in some countries, the arbitration clauses had to be made in a separate physical agreement to avoid the problems related to pleas of the non-binding or invalid nature of the main agreement.¹⁹

The doctrine of separability was introduced in the Nordics quite early compared to many other Western countries.²⁰ In Finland, the first writings regarding the doctrine date back to the 1940s. Already in 1943, Tirkkonen summarized the international discussions concerning the separability doctrine and concluded that the legal state was unclear.²¹ He stated that in his opinion the arbitration clause should be regarded as a separate agreement, which can be considered as the first reference to the existence of the doctrine in Finland.²² As sources for

¹⁴ Born 2014A, p. 354.

¹⁵ See e.g. Prop. 1998/99:35, p. 75; Madsen 2016B, p. 654; Born 2014A, p. 350; Hobér 2011, p. 107; Susler 2009, p. 119; Fouchard et al. 1999, p. 202; Svernlöv 1992, p. 115; It is difficult to find national decisions, national legislation or international awards rejecting the doctrine, Born 2014A, p. 395; Despite this, there are also scholars supporting the abolishment of the doctrine, Ware 2007, p. 119; The scholars not accepting the doctrine have been called the “*non-separability doctrine scholars*”, Möller 1981, p. 57.

¹⁶ According to Born, the doctrine was first developed in the national legal systems before being codified in international conventions, Born 2014A, p. 358; In addition to the codification of the doctrine in many arbitration related conventions and treaties, a form of the doctrine is also included in the CISG, article 81(1).

¹⁷ Craig et al. 2000, p. 515.

¹⁸ Fouchard et al. 1999, p. 203-204; For instance in all Nordic countries, except for Finland, see e.g. Sweden where the doctrine was first accepted in the Supreme Court decision AB Norrköpings Trikäfabrik v. AB Per Persson (NJA 1936, p. 521) and later codified in the Swedish Arbitration Act, section 3 in 1999; In Norway, the doctrine had long been accepted before being added to the Arbitration Act in 2004, Berg 2006, p. 200; In Denmark, the doctrine was first accepted in the decision, Maritime and Commercial Court, Ugeskrift for Retsvaesen 1987.945 SH (27.8.1987) (referred to in Lookofsky & Kristoffersen 2006, p. 55) before being added to the new Danish Arbitration Act in 2005, Lookofsky & Kristoffersen 2006, p. 55.

¹⁹ Schwebel 1987, p. 5.

²⁰ For instance, the doctrine of separability was accepted in Sweden by the Supreme Court in 1936 in AB Norrköpings Trikäfabrik v. AB Per Persson (NJA 1936, p. 521).

²¹ Tirkkonen 1943, p. 124.

²² Tirkkonen 1943, p. 124-125; Tirkkonen also wrote about the competence of the tribunal to solve disputes regarding the validity and termination of the main agreement, Tirkkonen 1943, p. 104; Today that competence is called as competence-competence or kompetenz-kompetenz, of which the latter term is derived from the German origins of the doctrine.

his thoughts, he quoted mostly German and Swedish sources, which means that the doctrine of separability was brought to Finland from the civil law tradition.²³

In case law, the doctrine has been recognized at least in connection to terminated agreements as early as in 1954 in KKO 1954 II 11. There is not much case law regarding the matter in Finland, but the doctrine was finally generally established in the decisions KKO 1988:55 and KKO 1996:61. Today, the doctrine is generally accepted as a part of the Finnish procedural law.²⁴ The subject has not been much researched in Finland, which makes the legal state regarding the scope of the doctrine of separability unsettled. This thesis aims to clarify the unsettled legal state in this respect.

1.2 The Aim of the Thesis

The aim of this thesis is to clarify the scope of the doctrine of separability and its effects on the interaction between the main agreement and the arbitration clause. *The main question is, how broad is the scope of the doctrine of separability and can any general rules regarding the applicability of the doctrine be made?* Since the legal state is unclear in Finland, the aim is to clarify the legal state and present options for solving these ambiguities in Finnish arbitration law. The circumstances in which the doctrine applies have been discussed on a case-by-case basis, which has led to a situation where no general rules regarding the applicability of the doctrine has been developed. Thus, I will also try to find general rules regarding the scope of the doctrine of separability that could be applied generally to all situations where the applicability of the doctrine is ambiguous.

There are many ways to solve the ambiguities. Without any legislative measures, the courts will get the task on their table sooner or later. By producing case law, the courts can solve the problems covered in the thesis, but it can take years for the right case to come up. The problems with waiting are significant, since the legal uncertainty can lead to costly proce-

²³ Tirkkonen 1943, p. 124-125; Generally, it seems that the civil law tradition adopted the doctrine of separability earlier than many common law countries. For instance, Switzerland adopted the doctrine already in 1931, Leboulanger 2007, p. 6; In Sweden, the doctrine was already adapted by the Supreme Court in the decision AB Norrköpings Triåfabrik v. AB Per Persson (NJA 1936, p. 521). When it comes to the common law countries, at least in the United States, the doctrine was accepted in the 1960s (Prima Paint Corp. v. Flood & Conklin Mfg. Co, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 US 395) and in the United Kingdom as late as in the 1990s (Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd, 1 Q.B. 701).

²⁴ Frände et al. 2017, p. 1307.

dural conflicts because there is not much material for the tribunals to consider in their decision making. This can lead to erroneous decisions and inconsistent case law by arbitral tribunals.

Another way of solving the ambiguity, is to use legislative measures. The benefits with legislative measures are their accurateness and their authority. The measures are aimed to result in a clear rule solving the question or at least in guidelines on how the courts shall assess the matter. The Arbitration Act will be amended in the upcoming years, but it is unclear if there is a will to consider the interaction between the arbitration clause and the main agreement when updating the Act.²⁵ Certainly this is a possibility, since there have been discussions about using the UNCITRAL Model Law as a base for the amendments and the doctrine of separability is included in the Model Law.²⁶

The way this *pro gradu* will assess the problem, is by letting the legal doctrine take part in the discussion and give well-grounded solutions and arguments aimed for solving the problem. Even if the courts does not always quote the legal doctrine, it is well-known that they use the literature as a source when making decisions and that lawyers use the literature in their argumentation. Compared to other countries, there is not much legal doctrine regarding the research question in Finland. Hopefully, prominent legal academics will take part in the discussion in the coming years.

By better understanding how the interaction between the main agreement and the arbitration clause works, the drafting of arbitration clauses would be easier and many conflicts could certainly be avoided. Eventually, a more careful drafting will lead to economic gain and would avoid wasting the benefits of arbitration by arguing about procedural matters. The wideness of the problem is not known due to the confidential nature of the awards, but since most arbitration clauses are only standard clauses without for instance choice of law provisions, they pose a great risk for procedural conflicts.

²⁵ The Minister of Justice, Antti Häkkinen begun the evaluation of the need for reformation of the Act in the autumn 2018 and in late January 2019 he promised to begin the modernisation of the Act during this spring. Oikeusministeri Häkkinen: Välimiesmenettelylainsäädännön uudistaminen käynnistetään (25.1.2019) https://oikeusministerio.fi/artikkeli/-/asset_publisher/oikeusministeri-hakkanen-valimiesmenettelylainsaadannon-uudistaminen-kaynnistetään; Ministeri Häkkinen: Tehokas riidanratkaisu on yritysten kilpailukykytekijä – Välimiesmenettelyn uudistamistarpeet arviointiin (11.8.2018) https://valtioneuvosto.fi/artikkeli/-/asset_publisher/1410853/ministeri-hakkanen-tehokas-riidanratkaisu-on-yritysten-kilpailukykytekija-valimiesmenettelyn-uudistamistarpeet-arviointiin.

²⁶ Both the doctrine of competence-competence and the doctrine of separability are included in the UNCITRAL Model Law, article 16(1).

1.3 Research Questions and the Structure of the Thesis

The research will be divided into four different research questions, every question dealt within a separate chapter. The research questions will assess the problem from a Finnish perspective.

The first question regards the core of the doctrine of separability. How is the core of the doctrine of separability defined in Finland and how broad is the scope of the core? The core refers to the part of the doctrine that protects the arbitration clause from the alleged invalidity, expiration and non-existence of the main agreement. This function of the doctrine of separability is widely accepted in most legal systems, but there are differences of opinion as to which situations should be included in the scope of the core. The core is closely connected with the aim of the doctrine, which consequently has to be studied thoroughly. Of interest is also how strong the core of the doctrine is. Is the invalidity of the arbitration clause determined by general contract law rules or is the protection of the validity of the arbitration clause evaluated differently from the evaluation of the validity of the main agreement?

The second question regards choice of law clauses in the main agreement. Does the doctrine of separability prevent a choice of law clause in the main agreement from being applied to the arbitration clause? I will also assess other aspects affecting the choice of law and how they interact with the doctrine of separability.²⁷ Since the applicability of the doctrine to the choice of law is not necessary for the fulfilment of the aim of the doctrine, it is important to also ask if the doctrine can be used as an argument at all, when deciding the law applicable to the arbitration clause.

The third question regards interpretation and adjustment of arbitration clauses. How does the doctrine of separability affect the interpretation and adjustment of the arbitration clause? This question is interesting from a Finnish perspective. Some legal systems, especially those governed by common law adopts a more textual interpretation of clauses, while the Finnish system focuses primarily on a contextual interpretation.²⁸ Even if Finland gets a lot of influences from other jurisdictions regarding arbitration, national principles regarding the manner of interpreting agreements is strong. In a contextual interpretation, it would be

²⁷ I will however only briefly assess the other aspects of the choice of law question since it is a complex question more appropriately answered in a separate thesis.

²⁸ The Finnish way of interpreting contracts is similar to the way used in the other Nordic countries and the Continental Europe, Lando 2016, p. 28; However, the aim of the interpretation is regardless of jurisdiction to find the common intent of the parties, Annola 2016, p. 51; Especially the English way of interpreting agreements seems to be textual, even if it is evolving into a more contextual direction, Annola 2015, p. 53.

logical to take the main agreement into consideration when interpreting the arbitration clause. Thus, the question regarding the applicability of the doctrine of separability is vital for the interpretation of arbitration clauses.²⁹

Regarding adjustment, section 36 of the Contracts Act allows taking into consideration all circumstances, for instance the entire agreement when adjusting contract clauses. This makes the question interesting from the perspective of the doctrine of separability. If there are two separate agreements it would not be possible to consider the main agreement when adjusting the arbitration clause.

Finally, the fourth research question aims to find general rules for assessing the scope and applicability of the doctrine of separability. The problem is that the application of the doctrine to invalidity, termination and non-existence of the main agreement and to choice of law clauses in the main agreement have been thoroughly researched abroad, but no general rules for the applicability and scope of the doctrine of separability have been made.³⁰ To decide the scope and the borders of the doctrine of separability, it is necessary to find general rules that could be applied to ambiguous situations to which the applicability of the doctrine is unsure.

1.4 Methodology and Branch of Law

As methods, I have used a comparative method and a legal dogmatic method. As the research regards arbitration, the comparative method is necessary. Arbitration is an important way of solving cross-border disputes and this in itself makes it necessary to consider also international sources. Also, arbitration is partly based on transnational principles and practice, which makes it inevitable to compare how these questions are solved in other countries and internationally.

Since many aspects of the research questions are unresolved in Finland, this thesis will make a comparison with other Nordic countries and international arbitration practice and princi-

²⁹ Also, it has to be decided if the general contract law rules are applied to the interpretation or if there are special principles for the interpretation of arbitration clauses.

³⁰ A good example of the problems occurred are boilerplate clauses, for instance waiver and change of control clauses that are commonly used in the main agreements. Which makes them problematic, is that they are often used clauses which usually are included in the agreement "to be on the safe side" and without any further negotiations. There are often no hints about whether the parties intended the clauses to also be a part of the arbitration clause. This leaves the doctrine of separability as an important rule governing them, if applicable.

ples. The Nordic comparison will mostly be made with Sweden where the doctrine of separability and also arbitration have been studied more extensively than in Finland and the other Nordic countries.³¹ The comparative method does not give directly applicable and compelling results for the Finnish Courts but the method helps to deepen and improve the national legal argumentation.³²

With the legal dogmatic method is meant, research about the valid and binding law, especially the interpretation and the systematisation of the law.³³ The aim of the method is to give practitioners (e.g. judges, lawyers) practical information and advice aimed to help them solve legal problems. The legal dogmatic method is inevitable for understanding the content of the law, interpreting the law and eventually for resolving legal problems and offering interpretational solutions regarding the current legislation. The method is used in this research for interpreting and determining the content of the doctrine of separability in Finland.

The methods used supplement each other. As the aim of the thesis is to fill gaps in Finnish arbitration law, interpretation of the existing law and a comparative study of other legal systems gives the tools to successfully fulfil this aim. As the question regards a specific field of contract law, the general principles of contract law is the main source for gap-filling and interpretation. Arbitration is a cross-border matter, which is partly governed by international law and principles and also gets a lot of influences from other legal systems. For a comprehensive study, which leads to a proper solution of the problem, the results from the both methods have to be compared and used in a way acceptable both from the viewpoint of the Finnish legal system and internationally.

The thesis will focus on both procedural and contract law. Questions regarding arbitration clauses get influences from both branches of law and work in the contact surface of the two branches.³⁴ The connection also leads to frictions between the principles of both branches of law. The general principles governing arbitration clauses are taken from the general contract law, but as a dispute resolution clause it also has features specific to procedural law.

³¹ For more regarding the sources, see chapter 1.5.

³² Husa 2013, p. 33-34; Especially when solving "hard cases", the comparative method can give advice on how to fill gaps and implement the legislation, Husa 2013, p. 92.

³³ Hirvonen 2011, p. 22.

³⁴ Koulu 2009, p. 228.

Also, as arbitration clauses have special features there can be a tension between general procedural law and the needs of arbitration. For instance, it is not yet clear how interconnected arbitration clauses and other dispute resolution clauses are which asks for caution when using analogy between different kinds of dispute resolution clauses.³⁵

1.5 Sources

The research questions will be covered from a Finnish perspective, but a Swedish, Nordic and international comparison is necessary since there is not much material regarding the matter in Finland.³⁶ In Finnish legal doctrine, the question regarding the doctrine of separability has often been avoided which makes the legal position uncertain.³⁷ I have strongly relied on Risto Koulu's books, since there are no other comprehensive works about arbitration clauses than Koulu's works.³⁸ Koulu's findings are mostly based on a Nordic perspective and he also partly relies on international sources.³⁹

In addition to the foreign materials, I have used general principles and rules of Finnish contract law. In the Nordic countries, there is a consensus that general contract law principles are applied to arbitration clauses.⁴⁰ Even if the doctrine of separability is only applicable to dispute resolution clauses, it has some connections to general contract law which has to be remembered and taken into consideration when committing research regarding arbitration clauses. The problem connected to the effects of the alleged invalidity of the main agreement on the arbitration clause is also present in contract law, when only a part of a contract is invalid and it has to be decided what effect the invalidity has on the rest of the agreement.⁴¹

³⁵ About the connection between different dispute resolution clauses, see chapter 1.5.

³⁶ For instance, Möller has only superficially written about the subject, see e.g. Möller 1981, p. 57-62; Möller 1984, p. 370-372; Also, Kurkela has only shortly written about the doctrine of separability during the 1990s, see e.g. Kurkela 1996A, p. 351-352.

³⁷ As a reason for this, it has been claimed that the usage of the doctrine is often avoided as it is ambiguous, Koulu 2008, p. 76-77.

³⁸ Generally about dispute resolution agreements, Koulu has written "*Sopimukset oikeudenkäynnin varalta*" (Koulu 2009) and about arbitration clauses "*Välityssopimus välimiesmenettelyn perustana*" (Koulu 2008).

³⁹ In Swedish literature, the doctrine of separability has been discussed in-depth by at least Lindskog, Hobér and Heuman. Internationally, there are also comprehensive works about the doctrine, for instance Born has written a lot about the subject, see e.g. Born 2014A, p. 401-471.

⁴⁰ Koulu 2008, p. 32; In Sweden, Prop. 1998/99:35, p. 47; Runesson 2006, p. 5; In Norway, Ot.prp. nr. 27 (2003-2004), p. 11; In Denmark, Forslag L 127 (2004/2), p. 11-12; However, in Denmark at least before the enactment of the new arbitration act it was uncertain if the arbitration clause was governed by private law or procedural law principles. It was also suggested that an *in casu* evaluation of the problem had to be done and based on the characteristics of the specific arbitration clause, the applicable principles should be chosen, Hjelje 1987, p. 22-23; Internationally, it seems that the general contract law has not given much influences to at least the interpretation of the doctrine of separability, Born 2014A, p. 359.

⁴¹ Koulu 2008, p. 74.

The main rule in general contract law is that the invalidity of a part of an agreement makes the whole agreement invalid.⁴² The situation concerning arbitration clauses is the opposite because of the doctrine of separability. When using general contract law one therefore has to be careful since the doctrine can also be considered as an exception to general contract law or the differences as specific features for dispute resolution clauses.

Another important question regards whether there are specific interpretative rules for dispute resolution or arbitration clauses.⁴³ In general, Koulu is of the opinion that there are general principles for the interpretation of dispute resolution agreements and so analogy could in theory be used between the different types of dispute resolution agreements.⁴⁴ However, more value should be given to the type of the dispute resolution agreement, since there are significant differences between the different agreement types.⁴⁵

The agreement type closest connected to arbitration agreements are prorogation agreements.⁴⁶ Both agreement types change the competence from one court to another court/tribunal. The only difference is that when it comes to arbitration agreements, the competence is moved outside the state's court system. This makes it possible to use analogy between the two types as long as care is taken to acknowledge the specific features of each agreement type.⁴⁷

Koulu argues that the doctrine of separability was developed with arbitration clauses in mind.⁴⁸ What makes the applicability of the doctrine of separability to prorogation clauses

⁴² Koulu 2008, p. 78.

⁴³ Systematically, Koulu has divided the dispute resolution agreements into competence agreements and procedure agreements. The competence agreements decide the forum for the proceeding while procedure agreements shape the procedure of the court. The competence agreements can further be divided into three subgroups; 1. prorogation agreements; 2. instance agreements; and 3. form of procedure agreements. Koulu does not systemize arbitration agreements as competence agreements in its narrow meaning. In its narrow meaning, the subgroup only includes agreements changing the competence inside the state's court system and does not include alternative dispute resolution occurring outside the court system. Nevertheless, Koulu seems to include arbitration agreements in the broad meaning of the subgroup, Koulu 2009, p. 21-22.

⁴⁴ Koulu 2009, p. 53.

⁴⁵ Koulu 2009, p. 74; Prorogation agreements are considered as the oldest and most developed dispute resolution agreement type among the agreement types keeping the competence within the jurisdiction of the state courts. Because of this, prorogation agreements can be used as a basis for comparison and analogy with other types of dispute resolution agreements when the similarities between the agreement types allow for comparison, Koulu 2009, p. 22.

⁴⁶ For analogy to be possible, there has to be enough similarities between the different contract types, Halila & Hemmo 2008, p. 27.

⁴⁷ Both prorogation and arbitration clauses are quite new types of agreements and thus do not have long interpretational backgrounds. However, Koulu states that it seems that the arbitration clauses are older than the prorogation clauses. Therefore, it is probable that originally the rules regarding arbitration clauses analogically have been used for interpreting and developing the prorogation clauses, Koulu 2009, p. 156.

⁴⁸ Koulu 2009, p. 204.

problematic, is that there is no institutional support for the standpoint.⁴⁹ There can only be found older Finnish legal doctrine that accepts the applicability of the doctrine of separability to prorogation clauses.⁵⁰ Since there are no further explanations for the applicability of the doctrine of separability in the legal literature, the applicability seems to be an analogy from arbitration law.⁵¹ Despite this, Koulu criticizes the usage of analogy since he is of the opinion that prorogation clauses and arbitration clauses are so different that the doctrine of separability cannot directly be applied by analogy.⁵² He states that it seems that the principles and rules applied to arbitration clauses have been moved to competence clauses without any critical review.⁵³

However, the ECJ decision *C-269/95 Benincasa* rules that the doctrine of separability is also applied to jurisdiction clauses.⁵⁴ Today, also the Brussels I Regulation accepts the applicability of the doctrine of separability, which means that the doctrine has institutional support at least in cross border matters. According to article 25(5) of the Regulation, the prorogation clause shall be treated as an independent agreement and it is also clarified that the validity of the prorogation clause cannot be contested on the grounds that the main agreement is invalid.⁵⁵ In addition, the doctrine is also institutionalized in the Hague Convention, article

⁴⁹ Koulu 2009, p. 110, 204-205.

⁵⁰ At least by Lager, Lappalainen and Walamies; According to Lager, the parties intend to solve all disputes, also regarding the invalidity of the main agreement in the court chosen in the prorogation clause. As a consequence, she states that the invalidity of the main agreement does not mean that the prorogation clause would be invalid, Lager 1974, p. 138-139; Lappalainen does not use the term "*erillisyysooppi*", but from his book can clearly be seen the same definition and characteristics described as the doctrine has. According to him, general rules of contract law have to be applied to determine the validity of the prorogation clause and that the invalidity of the main agreement does not necessarily make the prorogation clause invalid. The standpoint is justified by him, because one of the aims with the prorogation clauses is to enable the determination of the validity of the main agreement, Lappalainen 1995, p. 232; Walamies explains that the usage of analogy can be justified if the doctrine of separability is considered as a consequence of the will of the parties. He alleges that the will of the parties is regarding both prorogation and arbitration clauses to solve disputes regarding the invalidity and termination of the main agreement in the chosen forum, Walamies 1988, p. 104.

⁵¹ Koulu 2009, p. 208; The situation seems to be similar in at least the United Kingdom, Briggs 2008, p. 72.

⁵² Koulu 2009, p. 205.

⁵³ Koulu 2009, p. 230, 235.

⁵⁴ *C-269/95, Francesco Benincasa v Dentalkit Srl* (3.7.1997), pp. 21-32; Another interesting decision is the Norwegian Court of Appeal decision LB-2008-117512. The decision concerned a settlement agreement including a prorogation clause. According to the Court of Appeal, even if the claimant submitted that the settlement was null and void, the proceeding covering the validity of the prorogation clause should be held in the Court referred to in the prorogation clause. This is a clear indication of the applicability of the doctrine of separability in Norway, Borgarting lagmannsrett 24.10.2008 LB-2008-117512 (summarized in Koulu 2009, p. 205).

⁵⁵ The explicit rule in Brussels I can be seen as only a codification of the doctrine already introduced in the law of the European Union with the *Benincasa* case, Lindell 2017, p. 265.

3(d), according to which choice of court agreements shall be treated independently from the main agreement they are included in.⁵⁶

Finally, it appears that the doctrine of separability can be applied to all dispute resolution clauses, but that the strength of the doctrine seems to depend on the type of the dispute resolution clause.⁵⁷ As a conclusion, referring to the above mentioned arguments, it seems justifiable to use analogy from prorogation clauses and of course use the general interpretative principles for dispute resolution agreements when assessing and interpreting arbitration clauses and the doctrine of separability.⁵⁸

There is also a tension between the national and international sources. The international materials often give a more accurate and applicable answer to the problem than the Finnish contract law, but the general contract law is much stronger as a source of law.⁵⁹ Many arbitration law matters have just not been assessed in Finland and neither is the general contract law well suited for the assessment of arbitration clauses.

Even if the Finnish contract law is strong as a source of law, there are many arguments that supports an interpretation of the national arbitration law in a way that is in line with international arbitration law. Firstly, even if there is yet no harmonisation of the arbitration law in the European Union, it is highly possible that EU will later regulate and harmonise also the arbitration law since the Union has already taken alternative dispute resolution (ADR) as a

⁵⁶ The Convention is signed by EU, Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements (2009/397/EC); It is claimed by Koulu that the doctrine of separability applied to prorogation clauses also covers all competence and choice of law matters, Koulu 2009, p. 206.

⁵⁷ Koulu 2008, p. 35-36; Koulu 2009, p. 75, 110; As a reason, Koulu considers the doctrine as necessary for all dispute resolution clauses, Koulu 2008, p. 71-72; However, Koulu further argues that the scope of the doctrine of separability should be equally broad for all dispute resolution clauses as opposed to the legal state he thinks is prevailing. As main arguments for this interpretation, Koulu highlights the importance of uniform rules for all dispute resolution clauses and the need to avoid conflicts regarding procedural matters, Koulu 2009, p. 209-210, 235; See also, Frände et al. 2017, p. 1307.

⁵⁸ However, one has to be careful and take into consideration the special features of the type of the dispute resolution clause to find the differences between the clause types which in some aspects can restrain from the usage of analogy.

⁵⁹ The contract law can be divided into a general and specific part. The general part of the contract law, includes all norms applicable to all types of contracts. The specific part includes norms applicable to only specific contract types, Taxell 1987, p. 25-29; Comparative perspectives are only regarded as allowed sources of law, Aarnio 2006; However, Husa alleges that the comparative perspective could either be regarded as an allowed source or as a weakly binding source of law, Husa 1998, p. 35.

focus area.⁶⁰ As the odds are on harmonisation, it seems to me that it is in Finland's interest to already begin the conformation with the rest of Europe.

Secondly, arbitration law is one of the aspects of law where uniformity with international law is especially important. Arbitration is economically beneficial for the country chosen to be the seat for a cross-border arbitration. One of the most important factors for parties when choosing the seat, is that the national arbitration law does not include any surprising elements, in other words it should be in accordance with international practice and standards.⁶¹ Among the most important factors considered when choosing an arbitral seat are the local arbitration law and the easiness to enforce arbitral awards.⁶² Conclusively, it is in Finland's interest to conform both the arbitration law and the enforcement of arbitral awards to international practice.⁶³

Thirdly, there are international standards that are accepted across jurisdictional borders and can thus be considered as reliable by the parties of the proceeding.⁶⁴ The importance of the international unity regarding arbitration laws can be illustrated by the fact that 16 of 28 EU countries have implemented the UNCITRAL Model Law.⁶⁵ Consequently, it is beneficial for Finland to interpret and develop the Finnish arbitration legislation in accordance with international standards, especially with the Model Law which is widely accepted.

Already, the present Finnish Arbitration Act has been influenced by the Model Law.⁶⁶ Nevertheless, it has to be kept in mind that some parts of the Model Law differs from the Arbitration Act, some parts of the Act are more detailed than the Model Law and that there are parts of the Model Law that are not included in the Act. Even if the UNCITRAL Model Law

⁶⁰ Koulu 2007B, p. 66; There is however still some debate concerning if the Commission has the competence to make legislative measures regarding ADR, Ervasti 2006, p. 327.

⁶¹ Savola 2017A, p. 503-504.

⁶² 2018 International Arbitration Survey, p. 10.

⁶³ As a good example of the importance of uniformity, Madsen suggest that the since the Swedish Arbitration Act is often applied by foreign practitioners, it should be interpreted in line with international practice. As examples of principles that should be uniformly interpreted, he mentions the doctrine of competence-competence and the doctrine of separability, Madsen 2007, p. 53.

⁶⁴ In addition to the New York Convention, which is signed by 159 countries, <http://www.newyorkconvention.org/countries> (16.3.2019); Finland has both ratified the Convention and incorporated the Convention into Finnish law.

⁶⁵ A total of 80 countries have implemented the Model Law, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (13.3.2019); In addition, many countries have also used the Model Law as a model and inspiration for their national arbitration laws, for instance Sweden, Prop. 1998/99:35, p. 37-38, 43-46.

⁶⁶ Koulu 2007B, p. 67; Many of the sections in the Arbitration Act are meant to be equivalent to and have been justified with the Model Law. This can be seen by reading the detailed explanations in the Government Proposal for the Arbitration Act (HE 202/1991), see for instance HE 202/1991, p. 11, 15, 19, 22, 24.

is not applicable law in Finland and cannot overrule the national law, the national law is in parts quite ambiguous, which enables the usage of the Model Law as a tool for the interpretation of the national law as soft law.⁶⁷

In addition, also Nordic sources are useful. Sweden has had the UNCITRAL Model Law as a model for their Arbitration Act,⁶⁸ and both Norway and Denmark have implemented the Model Law.⁶⁹ Mostly, I have used Swedish sources but I have also when needed considered Norwegian and Danish legal solutions.⁷⁰ The legal tradition, particularly regarding civil law is quite similar in the Nordic countries which raises the value of Nordic sources, especially contract law sources.⁷¹

Finally, there is not much case law concerning the doctrine of separability in Finland. Regarding the matter, there is only a couple of cases and they are not very informative.⁷² As arbitration is confidential, also generally the amount of case law is small. Therefore, I have used mostly legal doctrine for the research. In Finland, the cases usually become available only if the decisions are challenged to the state courts and published on internet if they are challenged as far as to the Supreme Court.⁷³ However, there are also some cases from other jurisdictions and I have tried to use the few Finnish cases found as effectively as possible.

⁶⁷ The same can be said for all widely accepted international materials. Since the legislator or Supreme Court have not taken a stand in the research question, there is much space for using soft law in the interpretation and reasoning of the doctrine of separability.

⁶⁸ Even if the Swedish Arbitration Act is based on the Model Law, there are some differences. When drafting the Act, the legislator has in connection with every section explained if the Model Law is followed or not, Madsen 2006, p. 48.

⁶⁹ For Denmark, see Forslag L 127 (2004/2), p. 10; For Norway, see Ot.prp. nr. 27 (2003-2004), p. 25; However, even if the Model Law is the basis for the Norwegian Arbitration Act, there are some differences and the Norwegian Act is at some points more detailed than the Model Law. The differing provisions are non-mandatory and therefore the parties can agree to apply the Model Law provisions instead of the differing provisions included in the Act, Ot.prp. nr. 27 (2003-2004), p. 25; Berg 2006, p. 36.

⁷⁰ This is mostly because Sweden is regarded as a popular arbitral seat and there is far more legal doctrine and case law about arbitration than in the other Nordic countries.

⁷¹ Nordic or Scandinavian law is usually regarded as an own family of law because of the similarities in the laws of the Nordic countries. The Nordic law is a part of the civil law tradition and highly influenced by continental law, especially German law, Lando 2016, p. 14; However, also some influences have been taken from the common law countries, Mannheimer Swartlinger 2014, p. 124; In addition, there is a strong Nordic tradition of exploiting the legal doctrine of other Nordic countries. The importance of the Nordic doctrine depends on the similarities between the Nordic countries for each contract type, Hemmo 2003A, p. 43-44.

⁷² See e.g. KKO 1954 II 11; KKO 1988:55; KKO 1996:61.

⁷³ Nevertheless, Koulu thinks that there are a good amount of Nordic arbitration cases available, but that the procedural matters are not well covered in the summaries released, Koulu 2008, p. 16-17.

1.6 Terminology

There is no consensus on what would be the most appropriate term to describe the character of the arbitration clause as a separate agreement.⁷⁴ The doctrine has many names, for instance the “*principle of severability*”, “*doctrine of independence*” and the “*autonomy principle*”.⁷⁵ I will use the term “*doctrine of separability*”, also used by e.g. Born.⁷⁶ Generally, common law jurisdictions have used the terms “*severability*” and “*separability*” and civil law countries the terms “*autonomy*” and “*independence*”.⁷⁷ In Finland, the doctrine has been named “*erillisyysooppi*”⁷⁸, but from the English term also “*separabiliteettiperiaate/oppi*”⁷⁹, “*erotettavuusteoria/oppi*”⁸⁰, “*itsenäisyysoppi*”⁸¹ and “*autonomiadoktriini*”⁸² have been used.

However, as Koulu mentions there is a slight difference between the terms “*separability*” and “*autonomy*”. “*Autonomy*” is broader as a term, and includes also the choice of law and competence-competence.⁸³ Similarly, Born has considered the terms “*independence*” and “*autonomy*” as meaning a stronger doctrine than the term “*separability*”.⁸⁴ Also, there is a difference in describing the separability of the arbitration clause as a “*doctrine*” or as a “*principle*”. Consequently, the terminological choice can also be seen as an opinion on the scope of the doctrine. Nevertheless, my choice of terminology for the doctrine of separability shall not be considered as a take regarding the scope and applicability of the doctrine.

In addition to the traditional meaning of the term, the doctrine of separability can also mean that the arbitration agreement is separable from all national laws.⁸⁵ This concept of separability which is connected with the traditional doctrine of separability, but much broader and

⁷⁴ Born 2014A, p. 351.

⁷⁵ Landolt 2013, p. 513; Kurkela 2005, p. 65; Craig et al. 2000, 48-49; Schwebel 1987, p. 3; van den Berg 1981, p. 145.

⁷⁶ For a discussion on the appropriateness of the usage of the different terms, see Born 2014A, p. 351-353.

⁷⁷ Born 2014A, p. 351-352; Fouchard et al. 1999, p. 198; The terms “*autonomy*” and “*severability*” are often used in the United States instead of the term “*separability*”, Susler 2009, p. 122; The Swedish legal academics have in addition to “*separabilitetsprincipen*” also at least used the terms “*separationsprincipen*” and “*principen om särskiljbarhet*”, Lindskog 2012, p. 290; Öhrström 2009, p. 36.

⁷⁸ See e.g. Koulu 2008, p. 71.

⁷⁹ See e.g. Lindfelt 2011, p. 208.

⁸⁰ See e.g. Walamies 1988, p. 103-104.

⁸¹ See e.g. Kurkela 1996A, p. 351.

⁸² See e.g. Koulu 2009, p. 204.

⁸³ Koulu 2009, p. 204.

⁸⁴ Born 2014A, p. 352.

⁸⁵ Dimolitsa 1999, p. 224; Fouchard et al. 1999, p. 197, 218.

seldom accepted is not to be confounded with the traditional doctrine and will neither be assessed in this *pro gradu*.⁸⁶

To avoid confusion, I will use the term “*arbitration clause*”, instead of “*arbitration agreement*”. Some academics and even the Swedish Supreme Court⁸⁷ uses the term arbitration agreement for both individual arbitration agreements and arbitration clauses included in the main agreement. Since I will only focus on arbitration clauses included in main agreements, I will use the term arbitration clause to limit the scope of the thesis and to avoid confusion.⁸⁸ The usage of the term “*arbitration agreement*” can be regarded as a stronger statement on that the arbitration clause shall be considered as a separate agreement than the term “*arbitration clause*”. However, my choice of terminology shall not be seen as a take on the questions covered in this *pro gradu*.

Finally, it is necessary and desirable to define the terms *lex fori* and *lex arbitri*. *Lex arbitri* is defined as the law of the country where the arbitration is carried out.⁸⁹ More problematic is the term *lex fori*. The term has been used in the legal doctrine as both the law of the country where the arbitration is carried out as a synonym to *lex arbitri*, but also as the law of the country of the court where a challenge regarding the arbitral proceeding is tried.⁹⁰ To avoid confusion with the term *lex arbitri*, I will use the term *lex fori* as meaning the law of the country of the court where a challenge regarding the arbitral proceeding is tried.

⁸⁶ This application of the doctrine has also been named the “*doctrine of autonomy*” in its broad meaning, since it is much broader than the original doctrine, Dimolitsa 1999, p. 255; This application of the doctrine is at its strongest in France, where it has also been accepted in the case law, Dimolitsa 1999, p. 224; Also in general, the doctrine of separability has been regarded as strongest in France, Leboulanger 2007, p. 3.

⁸⁷ Bulgarian Foreign Trade Bank, Ltd v. A.I. Trade Fin.,Inc (2001), Högsta Domstolen 27.10.2000, T 1881-99; The terms have been used interchangeably in the Finnish Supreme Court decision KKO 2007:39.

⁸⁸ Apparently, I will use the term “*arbitration agreement*” when explicitly assessing those.

⁸⁹ Koulu 2009, p. 78.

⁹⁰ Koulu 2009, p. 78; Bühring-Uhle 2006, p. 33.

2. The Core of the Doctrine of Separability

This chapter assesses the core of the doctrine of separability. First, I will determine the definition and aim of the doctrine of separability. The reason for this, is that these are important factors when determining the applicability and scope of the doctrine. They affect both the core of the doctrine of separability assessed in this chapter and the situations assessed in chapters 3-5.

As the core of the doctrine, I count situations where the alleged invalidity, termination or non-existence of the main agreement could result in the arbitral tribunal losing its competence. In addition to assessing if the doctrine of separability applies to these three aforementioned situations, I will also assess if the doctrine affects the assessment of the invalidity of the arbitration clause.

2.1 Definition of the Doctrine of Separability

The precise definition of the doctrine of separability varies between different jurisdictions and depending on which legal academic you ask.⁹¹ The differences between the definitions are mostly small and the basis for the doctrine is similar in most jurisdictions.⁹² In Finland, the doctrine of separability has been defined in two different ways. The first definition is an open definition and according to the definition the doctrine stipulates that the arbitration clause and the main agreement are two separate agreements.⁹³ According to the other definition, the arbitration clause and the main agreement are two different agreements when determining the validity of the arbitration clause.⁹⁴ Consequently, the two definitions of the doctrine differs since the scope of the latter definition is narrower.

The doctrine of separability has internationally been explained as separating the arbitration clause from the main agreement, which means that there are two different agreements, the main agreement and the independent arbitration agreement.⁹⁵ The doctrine of separability is

⁹¹ Also, the precise “*content, basis and effects*” of the doctrine is ambiguous in most legal systems, Born 2014A, p. 350-351; See also, Siig 2003, p. 253.

⁹² However, the scope and applicability of the doctrine can differ significantly between some jurisdictions, Leboulanger 2007, p. 4.

⁹³ Frände et al. 2017, p. 1307; Tamminen 2017, p. 30; Koulu 2008, p. 72; Tirkkonen 1943, p. 124-125.

⁹⁴ Möller 2004, p. 13; Möller 1997, p. 28; Kurkela 1994, p. 7.

⁹⁵ See e.g. Madsen 2016A, p. 92-93; Born 2015, p. 54; Redfern et al. 2015, p. 104; Hobér 2011, p. 106; Jarvin 2008, p. 99; Lew et al. 2003, p. 102; From an international perspective Switzerland and United Kingdom are interesting as both are often used seats for cross-border arbitration. Both countries have incorporated the doctrine in their respective legislation. Section 7 of the British Arbitration Act stipulates that an arbitration clause shall be treated as a separate agreement; “*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall*

also included in the UNCITRAL Model Law, article 16(1) and in the ICC Rules, article 6(9). The Model Law defines that because of the doctrine, the arbitration clause is an independent agreement and that the invalidity or non-existence of the main agreement does not directly make the arbitration clause null and void.⁹⁶ Similarly, the ICC Rules states that the tribunal has jurisdiction regardless of the validity or existence of the main agreement as long as the arbitration clause is valid.⁹⁷

The doctrine of separability is not included in the Finnish Arbitration Act, but as mentioned earlier the doctrine has long been well established in Finland.⁹⁸ In general, many countries do not have any legislative support for the applicability of the doctrine, as is the situation in Finland.⁹⁹ However in the other Nordic countries, the doctrine of separability is raised to the level of law, which helps defining the content of the doctrine.¹⁰⁰

In Sweden, the doctrine is included in Lag om Skiljeförfarande, section 3.¹⁰¹ According to the section, an arbitration clause shall be regarded as a separate agreement when deciding the validity of the main agreement.¹⁰² The Norwegian Lov om voldgift, section 18 almost

not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement". Section 178(3) of the Swiss Federal Statute on Private International Law is not that informative but still clearly states that the doctrine is a part of Swiss arbitration law; *"The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen".*

⁹⁶ *"The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*, UNCITRAL Model Law, article 16(1).

⁹⁷ *"Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void."*, ICC Rules, article 6(9).

⁹⁸ See e.g. Möller 1997, p. 28; Even if there is no reference to the doctrine of separability in the Finnish Arbitration Act, the doctrine is so well established that there seems to be no other reason for adding it into the Act later than to clarify the scope of the doctrine. However, since the Ministry of Justice has promised to begin the modernisation of the Act during this spring, there could be possible amendments to the Act in the coming years.

⁹⁹ Koulu 2009, p. 204-205.

¹⁰⁰ For a comparison of the Nordic solutions, see Lindskog 2012, p. 289.

¹⁰¹ Originally in Swedish: *"När giltigheten av ett skiljeavtal som utgör en del av ett annat avtal skall bedömas vid prövningen av skiljemännens behörighet, skall skiljeavtalet anses som ett särskilt avtal."*, Lag om skiljeförfarande, section 3.

¹⁰² The Swedish Arbitration Act from 1999 was amended in 2018 and the amendments came into force by Lag (2018:1954) om ändring i lagen (1999:116) om skiljeförfarande on 1 March 2019. Section 3 regarding the doctrine of separability was not amended, but for instance section 2 regarding the doctrine of competence-competence was slightly amended.

similarly states that the arbitration clause shall be considered as a separate agreement when deciding the validity of the main agreement.¹⁰³ The doctrine is also similarly included in the Danish Arbitration Act, chapter 4, section 16.¹⁰⁴

2.2 Aim and Justification of the Doctrine of Separability

The function of dispute resolution clauses has by Koulu been defined as getting a satisfactory and final decision to the dispute.¹⁰⁵ The exact function of a dispute resolution clause can vary depending on the aim of the parties. In this chapter, I will assess the aim and justification of the doctrine of separability.

Internationally, Schwebel who is one of the leading academics who has researched about the doctrine of separability finds four aims behind the doctrine; 1. The aim of the parties to get all the disputes regarding their agreement solved by arbitration. If the parties would have wanted to exclude some conflicts regarding the agreement from the scope of the clause, they would have explicitly agreed on it; 2. Without the doctrine it would be easy for a party who wants to abuse the proceeding to claim that the agreement is invalid to avoid arbitration. The speediness of the proceeding would suffer and the process would be costly if the parties would have to first argue on the validity of the arbitration clause in a general court; 3. Historically, as a matter of legal presumption the parties make two different agreements; and 4. If there would not be two separate agreements, the tribunals/courts would have to investigate also the substantial matter to solve the procedural question regarding their competence.¹⁰⁶

¹⁰³ Originally in Norwegian: *"Ved avgjørelser etter første ledd skal en voldgiftsavtale som utgjør en del av en kontrakt, anses som en selvstendig avtale uavhengig av de andre deler av kontrakten. En avgjørelse av voldgiftsretten om at kontrakten er ugyldig, medfører ikke i seg selv at voldgiftsavtalen er ugyldig."*, Lov om voldgift, section 18; However, according to Koulu, the doctrine is regarded weaker in Norway than in the other Nordic countries, Koulu 2008, p. 246. Nevertheless, Koulu does not rely on any Norwegian or Nordic sources to support his argument.

¹⁰⁴ Originally in Danish: *"Voldgiftsretten afgør spørgsmål om sin egen kompetence, herunder indsigelser mod voldgiftsaftalens eksistens eller gyldighed. En voldgiftsklausul, der udgør en del af en kontrakt, anses i denne sammenhæng for en selvstændig aftale uafhængig af kontraktens øvrige dele. En afgørelse fra voldgiftsretten om, at kontrakten er ugyldig, medfører ikke i sig selv, at voldgiftsklausulen er ugyldig."*, Voldgiftsloven, chapter 4, section 16.

¹⁰⁵ Koulu 2009, p. 136.

¹⁰⁶ Schwebel 1987, p. 3-6; Samuel has also made an own list of the four aims behind the doctrine of which numbers 1-2 are similar to those listed by Schwebel. According to Samuel, the doctrine can be justified with; 1. The intention of the parties; 2. The reduction of the risk that a party abuses the proceeding by claiming that the main agreement invalid; 3. The removal of the distinction between arbitration clauses and arbitration agreements; and 4. The doctrine reflects the function of the arbitration clause as a measure to solve disputes regarding the main agreement, Samuel 1989, p. 156-157.

According to Heuman, the justification of the doctrine has two dimensions; 1. The general aim to make arbitration more effective by giving the arbitrators competence to rule on question regarding the validity and expiration of the main agreement; and 2. The aim of the parties to get conflicts regarding the validity and expiration of the main agreement solved by the tribunal.¹⁰⁷ With effectivity is above all meant the speed and flexibility of the proceeding.¹⁰⁸ Important is also the costliness of the proceeding.¹⁰⁹ As Heuman, also other academics have split up the justification of the doctrine in two parts. Schöldström calls the efficiency argument the practical reasoning of the doctrine and the intention of the parties as the theoretical justification of the doctrine of separability.¹¹⁰ In the following when assessing the subject, I will also use the same distinction as Heuman and Schöldström. Firstly, I will assess the practical justification and secondly, the theoretical justification of the doctrine.

2.2.1 The Practical Justification of the Doctrine of Separability

Traditionally, the task of the doctrine of separability has been to protect the arbitration clause from invalidity of the main agreement.¹¹¹ Without the doctrine, the tribunal could not rule the main agreement invalid without losing its own competence and integrity.¹¹² It could easily be claimed in a general court that the tribunal lacked competence, since the arbitration clause becomes invalid as an effect of the invalidity of the main agreement.

In the Nordics, the doctrine of separability has also been reasoned with the restricted competence of the courts and tribunals. It is well-established that the courts cannot refuse to enforce an arbitral award on material grounds.¹¹³ Without the doctrine of separability, the arbitral tribunal would have to make a material investigation into the main agreement to solve the procedural question about their competence.¹¹⁴ As a consequence, also the court would have to make a material assessment of the matter to decide if the tribunal has exceeded

¹⁰⁷ Heuman 1999, p. 62-63; Heuman 1997, p. 536; The division is also accepted by Hobér, Hobér 1983, p. 263-264.

¹⁰⁸ The Stockholm Chamber of Commerce 1984, p. 27.

¹⁰⁹ Born 2014A, p. 399.

¹¹⁰ Schöldström 1998, p. 264-265.

¹¹¹ Koulu 2008, p. 74; This is also accepted internationally, Craig et al. 2000, p. 49; For instance according to the Swedish Government Proposal, the reason behind the doctrine is to avoid the invalidity of the main agreement to undermine the competence of the arbitrators, Prop. 1998/99:35, p. 74.

¹¹² Koulu 2009, p. 204; Koulu 2008, p. 77-78; For Sweden, see Öhrström 2009, p. 36; If the tribunal rules the main agreement unenforceable, it would have no competence to make its ruling if the arbitration clause also automatically would be unenforceable as a consequence of the finding.

¹¹³ See Finnish Arbitration Act, sections 40-41; Swedish Arbitration Act, sections 33-34; Norwegian Arbitration Act, sections 43 and 46; Danish Arbitration Act, sections 37 and 39.

¹¹⁴ Koulu 2008, p. 72.

its competence.¹¹⁵ Möller also highlights the practical effects of the doctrine of separability. It is not practical to let the general courts solve questions regarding the validity of the main agreement and the tribunals to interpret the main agreement.¹¹⁶ Usually the same facts and circumstances have to be considered in both situations.¹¹⁷

A common reason for justifying the doctrine of separability is that it makes arbitration more effective.¹¹⁸ It has been stated that the speed and flexibility of the proceeding would suffer without the doctrine, especially if one of the parties tries to undermine the proceeding.¹¹⁹ The doctrine is regarded as an effective way to prevent abuses and bad-faith attempts by a party claiming that the tribunal lacks competence.¹²⁰ It can also be argued that the doctrine aims to make the whole arbitration institute more efficient.¹²¹ As a part of the effectivity argument can also be claimed that the doctrine of separability enhances procedural economy since prolonged procedural conflicts regarding the competence of the tribunal are costly.

It has also been argued that the nature of the agreements is a reason for keeping them separate. Since the main agreement determines the substantial content in the parties' relationship and the arbitration clause determines the procedural issues, they are different kinds of agreements.¹²² Consequently, it has been argued that they are two different agreements, one material and one procedural.¹²³

The aim of the doctrine of separability has also been described as to make arbitration more attractive compared to traditional court litigation.¹²⁴ The doctrine makes arbitration more independent from the state and the more independent arbitration is from the court system,

¹¹⁵ Heuman 2003, p. 44-45; Regarding jurisdiction clauses, also the ECJ highlighted the importance of that the Court only assesses the procedural side of the conflict when deciding on its competence, C-269/95, pp. 27.

¹¹⁶ Möller 1984, p. 371; Möller 1981, p. 59; This possible benefit with the doctrine of separability has also been acknowledged internationally, Siig 2003, p. 256.

¹¹⁷ Möller 1984, p. 371.

¹¹⁸ Jarvin 2008, p. 99; For instance, Born pictures the aim of the doctrine of separability as to protect the effectivity of the proceeding, Born 2014A, p. 391; The problem with the doctrine is that since its scope and existence is not totally settled, the doctrine itself can lead to costly conflicts within a present conflict, Koulu 2009, p. 236; This aim is also accepted in Sweden, Madsen 2016A, p. 80; Heuman 1997, p. 536; There seems to be a Nordic consensus regarding the question, since in addition to Finland and Sweden also Norway accepts the aforementioned aim, Ot.prp. nr. 27 (2003-2004), p. 45; Woxholth 2013, p. 484; Berg 2006, p. 199.

¹¹⁹ Woxholth 2013, p. 484; Hobér 2011, p. 107; Park 2006, p. 96-97; Hobér 1983, p. 263-264.

¹²⁰ Várady 2015, p. 179; Hjelje 1987, p. 22; Wetter 1987, p. 334; Möller 1981, p. 59.

¹²¹ NOU 2001:33, p. 72.

¹²² Leboulanger 2007, p. 14.

¹²³ However, this justification has also got a lot of criticism, Leboulanger 2007, p. 14.

¹²⁴ Landolt 2013, p. 512.

the faster and more reliable is arbitration for the parties.¹²⁵ Consequently, the parties can then better trust the finality of the award and the enforceability of the arbitration clause.

In connection with the theoretical justification of the doctrine, it is in place to briefly assess the close connection between the doctrine of separability and doctrine of competence-competence (Kompetenz-Kompetenz).¹²⁶ The doctrine of competence-competence gives the arbitral tribunal the right to rule on its own jurisdiction instead of letting a general court decide on its competence.¹²⁷ The aim with the competence-competence is as the aim with the doctrine of separability to enhance efficiency and to prevent abuse of the proceeding occurring from a lack of competence of the arbitral tribunal.¹²⁸ As is the doctrine of separability, also the doctrine of competence-competence is included in the UNCITRAL Model Law, article 16(1).

While the doctrine of competence-competence gives the tribunal the right to decide the competence of the tribunal, the doctrine of separability protects the competence of the tribunal by keeping the arbitration clause valid even when ruling the main agreement invalid or terminated. It can be said that the doctrine of separability gives a material base for the tribunal's competence and the doctrine of competence-competence gives a procedural base for the tribunal to decide on its competence.¹²⁹

¹²⁵ Landolt 2013, p. 512.

¹²⁶ As with the doctrine of separability, also the doctrine of competence-competence is widely accepted internationally, Prop. 1998/99:35, p. 75; Madsen 2016B, p. 654; Hobér 2011, p. 106; Susler 2009, p. 119.

¹²⁷ Landolt 2013, p. 511; Svernlöv & Carroll 1991, p. 37; It is a well-known expression that "*every tribunal is the judge of its own competence*", Schwebel 1987, p. 9; In Finland, the competence-competence of the tribunal includes at least the evaluation of the validity of the arbitration clause, Möller 1997, p. 66.

¹²⁸ Madsen 2016A, p. 80; Svernlöv & Carroll 1991, p. 37; Without the doctrine of separability, the tribunal would have to wait for a court decision determining their competence before proceeding to the substantial part of the proceeding, Landolt 2013, p. 514; The procedural assessment completed in a general court instead of in the tribunal would add an extra procedural step to the process and make the process longer and more expensive, Ware 2007, p. 132; However, in many countries (for instance Finland) the general courts have the final jurisdiction to decide if the arbitral tribunal had competence or not. For instance, according to section 41, subsection 1, paragraph 1 of the Finnish Arbitration Act, an award can be set aside by a general court if the tribunal has exceeded its competence.

¹²⁹ The connection and interaction between these doctrines is probably best explained by an example from the Swedish Arbitration Act. According to section 2 of the Act, the arbitrators have the competence to rule on their own competence. In the following section, section 3 is laid out that when deciding on the competence, the doctrine of separability protects the arbitration clause from invalidity.

2.2.2 The Theoretical Justification of the Doctrine of Separability

In Finland, it has also been argued that the doctrine of separability can be justified with the will of the parties.¹³⁰ This opinion suggests that the parties' intention is to determine issues regarding the validity of the main agreement in an arbitral tribunal.¹³¹ It has been alleged by some academics that this is a presumed and hypothetical will of the parties.¹³² As the intent of the parties is the starting point in contractual interpretation, the mere inclusion of an arbitration clause in the main agreement does not as such set aside the common will of the parties and make the clause a part of the main agreement.¹³³ There are also scholars suggesting that the intent of the parties is to apply the doctrine of separability.¹³⁴ It is indeed difficult to explain that the parties have intended to make two contracts, not only one contract.¹³⁵ The intent is consequently more appropriately formulated as the intent to solve all disputes regarding the agreement by arbitration,¹³⁶ than to intend to apply the doctrine of separability. To properly fulfil the intention of the parties, it is necessary to apply the doctrine of separability. Nevertheless, there are also opinions that suggest that the parties' intent is only to make a binding agreement.¹³⁷

Consequently, the intent of the parties can also counteract the doctrine of separability since it is allowed to depart from the doctrine.¹³⁸ However, the presumption is that the parties have

¹³⁰ Koulu 2008, p. 72; Koulu 2007A, p. 388; Walamies 1988, p. 104; Already Tirkkonen justified the doctrine of separability with the will of the parties. If the parties would have wanted to have the disputes regarding the validity and termination of the main agreement outside the scope of the clause, they would have explicitly mentioned it, Tirkkonen 1943, p. 123-124; Also in Sweden, the doctrine has been justified with the intention of the parties, Madsen 2016A, p. 93; Heuman 1999, p. 62-63; Hobér 1983, p. 263; This standpoint is also accepted internationally, Born 2014A, p. 353, 390-391; Lew et al. 2003, p. 102; Siig 2003, p. 256.

¹³¹ Koulu 2008, p. 72; Tirkkonen 1943, p. 124-125; In Sweden, the intent has been constructed as an intent to solve all disputes regarding the agreement by arbitration, Madsen 2016A, p. 93; Heuman 1999, p. 62-63; Hobér 1983, p. 263; Also internationally, the intention has often been regarded as the will to solve all disputes regarding the main agreement by arbitration, see e.g. Craig et al. 2001, p. 49-50; Mayer 1999, p. 263.

¹³² Koulu 2008, p. 72; In Sweden, Heuman 1999, p. 62-63; In Norway, Woxholth 2013, p. 484; This view has also been criticized, see Lindskog 2012, p. 290, 294.

¹³³ Hobér 1983, p. 263.

¹³⁴ See e.g. Born 2014A, p. 353.

¹³⁵ Schwebel 1987, p. 9.

¹³⁶ As have been done in Sweden and internationally, for Sweden see Madsen 2016A, p. 93; Heuman 1999, p. 62-63; Hobér 1983, p. 263; For the international standpoint, see e.g. Craig et al. 2001, p. 49-50; Mayer 1999, p. 263.

¹³⁷ Craig et al. 2000, p. 50; For instance, Samuel is of the opinion that it is only a speculative possibility that the parties when concluding the agreement have thought about the fate of the arbitration clause if the main contract is not functioning properly, Samuel 1989, p. 157; According to Samuel, the justification is better constructed as a presumption of what could be in the parties' best interests, Samuel 1989, p. 161-162.

¹³⁸ Lindskog 2012, p. 291; Heuman 1999, p. 69; Samuel 1989, p. 176; This has been reasoned by the fact that the doctrine of separability does not protect a public interest, only the parties' desire for an effective dispute resolution mechanism, Siig 2003, p. 254; The possibility for the parties to agree otherwise is for instance explicitly included in the British Arbitration Act, section 7 and the ICC Rules, article 6(9).

intended to get all their disputes solved by arbitration, but the presumption can be proved wrong by a party.¹³⁹ The presumption is according to Born derived from the “*expectations of reasonable commercial parties*” and the parties are thus also free to agree differently.¹⁴⁰

As Craig has stated, the doctrine of separability cannot be justified with pure logic but it is still necessary to apply for the arbitration clause to be effective.¹⁴¹ Neither can the doctrine convincingly be justified by theoretical arguments.¹⁴² It is better understood as a construction of legal fiction.¹⁴³ The arguments favouring the doctrine are mostly practical.¹⁴⁴ Since from a perspective of the parties the clause is an important part of their agreement and in general contract law it would be both part of and interpreted in the light of the main agreement, a somewhat artificial doctrine is necessary to break the connection between the main agreement and the arbitration clause. The doctrine of separability gives the tribunal the right to decide the state of the substantive contract, regardless of if the substantive contract is null and void or terminated.

2.3 Invalidity of the Main Agreement

As have been shown before in chapters 2.1-2.2, the doctrine of separability is defined and aimed to protect the arbitration clause from the invalidity of the main agreement and thus this part of the doctrine is accepted both in Finland and internationally.¹⁴⁵

In Finland, the alleged invalidity of the main agreement does not affect the arbitration clause according to Supreme Court praxis in the decisions KKO 1988:55 and KKO 1996:61.¹⁴⁶ In

¹³⁹ Woxholth 2013, p. 487; Poudret & Besson 2007, p. 133; However, Mayer is of the opinion that the presumption should be the opposite if the arbitration clause is narrowly drafted, Mayer 1999, p. 263.

¹⁴⁰ Born conceive the doctrine of separability as not a mandatory rule nor a rule dictated by legal sources and not even necessarily derived from legal sources, Born 2014A, p. 396; Born has also nicknamed the doctrine as the “*separability presumption*” since the parties can depart from the doctrine, Born 2014A, p. 353.

¹⁴¹ Craig et al. 2000, p. 49; At first sight, it seems apparent to accept that an agreement including an arbitration clause shall be regarded as a single agreement when the parties have added the arbitration clause to the agreement on purpose before concluding it.

¹⁴² Craig et al. 2000, p. 50.

¹⁴³ Schwebel 1987, p. 9; It has even been said that the doctrine of separability is only a technique for protecting the arbitration clause from the invalidity of the main agreement, Briggs 2008, p. 12.

¹⁴⁴ Heuman 1983, p. 259-260.

¹⁴⁵ For a Finnish viewpoint, see e.g. Möller 1997, p. 28; For an international viewpoint, see Born 2014A, p. 351; Poudret & Besson 2007, p. 133; Lew et al. 2003, p. 103; Craig et al. 2000, p. 515-516; It is good to keep in mind that the doctrine also applies to enable the validity of the main agreement even if the arbitration clause is invalid, Tamminen 2017, p. 30; Born 2014A, p. 466-467; The invalidity of the arbitration clause which does not automatically affect the main agreement is also called “*reverse separability*”, Paulsson 2014, p. 62.

¹⁴⁶ In Sweden, the first decision regarding the invalidity of the main agreement was resolved in 1936. In the decision AB Norrköpings Triåfabrik v. AB Per Persson (NJA 1936, p. 521), the Supreme Court stated that the alleged invalidity of the main agreement does not necessary mean that the arbitration clause is invalid. The

KKO 1988:55 the issue was whether the arbitration clause was valid even if it was alleged that the CEO of a limited liability company had had no right to sign and accept the main agreement, which consequently would have made the main agreement null and void. The Court applied the doctrine of separability to assess the validity of the arbitration clause. According to the Court, even if the CEO probably had no right to accept the main agreement, the acceptance of the arbitration clause was not a measure unusual or extensive proportioned to the scope and nature of the activities of the company. In other words, the court assessed the validity of the arbitration clause separately. As a conclusion, the Court stated that since the arbitration clause was valid, the Court had no competence to solve the substantial question regarding the validity of the main agreement.

In KKO 1996:61, KKO stated that the alleged invalidity of the main agreement does not affect the evaluation of the validity of the arbitration clause. The District Court had, based on case law and legal doctrine, concluded that if the plaintiff claims that the same ground of invalidity affects both the main agreement and the arbitration clause, the arbitral tribunal lacks competence. The Court of Appeal upheld the decision regarding the jurisdictional plea.¹⁴⁷ The Supreme Court overruled the decisions of the lower courts. According to the Supreme Court, the alleged invalidity of the main agreement does not affect the validity of the arbitration clause. The statement of reason of the Court was quite short but the Court clearly accepted that the doctrine of separability is applicable in Finland.

There is also a public decision made by an arbitral tribunal upholding the doctrine of separability, since the award was challenged to the Court of Appeal.¹⁴⁸ In the decision COMI 30:2007, the main agreement was alleged (and ruled) invalid because of a contravention of the formal requirements set down in the Code of Real Estate. Referring to Tirkkonen, Möller and the existing case law, the tribunal stated that when deciding on the validity of the arbitration clause, the clause shall be regarded as an independent agreement.¹⁴⁹ As different formal requirements are applied to the arbitration clause than the requirements included in the

applicability of the doctrine to the alleged invalidity of the main agreement was later upheld by the Supreme Court in *Hermansson v. AB Asfaltbeläggningar* (NJA 1976, p. 125).

¹⁴⁷ The interpretation made by the District Court and the Court of Appeal is difficult to understand. There was already a decision, KKO 1988:55 accepting the doctrine of separability and legal doctrine from the forties and eighties accepting the separability doctrine (Tirkkonen 1943, p. 124-125, Möller 1981, p. 57-62. Möller 1984, p. 370-372).

¹⁴⁸ COMI 30:2007, referred to in Turunen 2007, p. 371-376.

¹⁴⁹ COMI 30:2007, referred to in Turunen 2007, p. 373. Furthermore, the Court stated that some of the invalidity grounds alleged to hit the main agreement can also reach to the arbitration clause, as an example of such a ground was mentioned coercion.

Code of Real Estate, the arbitration clause was ruled valid even if the main agreement was later ruled invalid by the tribunal after an assessment of the substantive dispute.¹⁵⁰ The challenge did not concern the validity of the arbitration clause.

As an analogy from case law assessing other dispute resolution clauses it is in place to shortly cover the *Benincasa case*, which regarded whether the alleged invalidity of a franchising agreement affects a jurisdiction clause included in the franchising agreement.¹⁵¹ The court highlighted that the aim of the doctrine of separability is that the court easily could assess its competence without investigating the substantial matter.¹⁵² Also, the court mentioned that if a party by claiming that the main agreement is invalid could frustrate the jurisdiction clause, the legal protection of the other party could be endangered.¹⁵³ The court ruled that even if a party claims that the franchising agreement is invalid, the court designated in the jurisdiction clause has jurisdiction to decide on the validity of the franchising agreement if the jurisdiction clause is validly concluded.¹⁵⁴

2.4 Invalidity of the Arbitration Clause

How strong is the doctrine of separability and when will the arbitral tribunal lose its competence? One of the main arguments put against the doctrine of separability is that the doctrine makes the standard of consent to arbitrate lower than when forming normal contractual relationships.¹⁵⁵ The academics opposing the doctrine are of the opinion that a party cannot be forced to arbitrate if the arbitration clause is a part of a contract that is unenforceable.¹⁵⁶ In the following, I will assess if the invalidity of the arbitration clause is decided by general contract law rules or if the doctrine of separability raises the threshold for finding the arbitration clause invalid.

¹⁵⁰ COMI 30:2007, referred to in Turunen 2007, p. 373-374.

¹⁵¹ C-269/95, *Francesco Benincasa v Dentalkit Srl* (3.7.1997); The case regarded the interpretation of the Brussels Convention. It is still good to keep in mind that according to the Brussels Convention, article 1(2)(4) the Convention does not apply to arbitration. The same also applies for the Brussels I Regulation, according to article 1(2)(d) of the Regulation.

¹⁵² C-269/95, pp. 27.

¹⁵³ C-269/95, pp. 29; Based on the case, it seems that the same justifications for the applicability of the doctrine of separability to arbitration clauses also applies to other dispute resolution clauses, at least jurisdiction clauses.

¹⁵⁴ C-269/95, pp. 32.

¹⁵⁵ Ware 2007, p. 120.

¹⁵⁶ Ware 2007, p. 121; Also, a strong doctrine of separability leads to a strong onus of proof for a party to prove that the doctrine should not be applied in the case at hand or that the arbitration clause is valid regardless of the alleged invalidity of the main agreement. This can lead to the same result as a higher threshold for invalidity, Koulu 2008, p. 78.

It seems that those criticizing the doctrine of separability do not criticize the doctrine itself, but that it has been applied in a way that infringes the individual's right to a fair trial.¹⁵⁷ The doctrine only states that the arbitration clause is a separate contract and thus has to be evaluated separately.¹⁵⁸ Problems occur from a human rights perspective if when evaluating the arbitration clause separately, the tribunal gives the clause effect even if it is encumbered with an invalidity ground.¹⁵⁹ It is easy to agree with the criticism since as misinterpreted the doctrine can cause harm to the due process, but it has still to be remembered that properly used the doctrine is inevitable for an effective and fair procedure.

By keeping the procedural and the material questions separate, the tribunal can assess its own competence first and avoid to assess the material question without competence. If the arbitration clause is invalid, the general courts have the competence to assess the substantial matter even if the same invalidity ground often also hits the main agreement. Since the main agreement usually also is invalid, this change of forum leads to a procedural economic problem.¹⁶⁰ The matter has to be moved to the general courts even if the same invalidity ground found by the tribunal probably hits both the main agreement and the arbitration clause.¹⁶¹

2.4.1 The European Convention on Human Rights and the Invalidity of the Arbitration Clause

As shown above, the applicability of the doctrine of separability can lead to a collision between procedural economy and the right to a fair trial even if the aim of the doctrine is to enhance efficiency. Finland is bound by the European Convention on Human Rights after ratifying the Convention in 1990. Finland is also a part of the European Union since 1995

¹⁵⁷ The aim of the criticism seems to be to harmonize the invalidity grounds applied to the arbitration clause to those of general contract law and not to necessarily abolish the whole doctrine of separability, Ware 2007, p. 127-128.

¹⁵⁸ See e.g. Born 2014A, p. 458-459; Park 2006, p. 294-295; Craig et al. 2000, p. 515-516 and chapter 2.1 of the thesis; By primarily assessing the validity of the arbitration clause, the tribunal can dismiss the claim on procedural grounds before assessing the material part of the matter. Thus, if assessing the matters in the right order, the tribunal could not infringe the rights of the parties by assessing the material question without having competence or by giving the alleged invalidity of the main agreement value in the evaluation of the arbitration clause; In Norway, the situation is clarified by explicitly mentioning that the doctrine of separability does not prevent the tribunal from by a separate evaluation find that the same invalidity ground allegedly encumbering the main agreement encumbers the arbitration clause, NOU 2001:33, p. 77.

¹⁵⁹ Problematic is also that there is a conflict of interest when the tribunal is deciding about its competence. The arbitral tribunal has an interest to get competence, since otherwise they have no right to an award, Koulu 2008, p. 73; Ovaska 2007, p. 249.

¹⁶⁰ Also Ware recognizes the problem. According to him, the economic efficiency is important too, but has to surrender to the benefit of the right to litigate and consequently also the right to a fair trial, Ware 2007, p. 132-134.

¹⁶¹ This situation is probable at least if the invalidity ground regards the formation of intent.

and therefore bound by the Charter of Fundamental Rights of the European Union. Article 6 of the ECHR, article 47 of the Human Rights Charter and section 21 of the Constitution of Finland guarantee the right to a fair trial. Of the aforementioned fundamental legal frameworks, the ECHR should be considered as the leading legal framework which sets the minimum level of protection of the human rights.¹⁶² The ECHR sets the minimum level of protection that the national law has to afford to the human rights.¹⁶³ Furthermore, the national courts shall apply a human rights-favourable interpretation of the national legislation.¹⁶⁴

Article 6 of the ECHR, which sets out the principle of the right to a fair trial, has a wide scope of application but the wording of the article does not give detailed information on how and to which extent it is applied. The extent and applicability of the article has been shaped and become concrete by the case law of the European Court of Human Rights. The Court has accepted the benefits received from arbitration and thus also accepts waiving the right to a fair trial by the usage of arbitration agreements/clauses.¹⁶⁵ However, the waiver has to be made freely, lawfully and unequivocally.¹⁶⁶ Most problematic from the point of view of the doctrine of separability is that the waiver has to be made freely. In the light of the case law of the European Court of Human Rights, the arbitral tribunals have no right to solve the substantial dispute regardless of the doctrine of separability, if the parties have not accepted the arbitration clause freely, lawfully and unequivocally.¹⁶⁷

2.4.2 From the European Convention on Human Rights to the Applicability in Practice

Since Finland is bound by the European Convention on Human Rights, the right to a fair trial has to be given more value than the procedural economic aspects. What is alarming is that it has been alleged that the doctrine of separability in practice has been applied so that well-grounded claims that the arbitration clause is invalid have been rejected based on the doctrine. The rejections have allegedly been made without separately assessing the validity

¹⁶² For instance, article 52(3) of the Human Rights Charter states that the protection given by the Charter shall at least be the same as the protection given by the ECHR.

¹⁶³ Hallberg et al. 2011, p. 192.

¹⁶⁴ PeVL 25/1994, p. 4; PeVL 2/1990, p. 3.

¹⁶⁵ See e.g. *Pastore v. Italy* 46483/99 (25.5.1999) (dec.); *Deweere v. Belgium*, 6903/75 (27.2.1980), pp. 49.

¹⁶⁶ See e.g. *Tabbane v. Switzerland* 41069/12 (1.3.2016), pp. 27; *Suda v. Czech Republic* 1643/06 (28.10.2010), pp. 48; The decisions are made in French, using the wording "*libre, licite et sans equivoque*" as the criterion for the waiver.

¹⁶⁷ Even if the guidelines and case law of the Court seems clear and sound, the Court has been criticized for not having used these guidelines in practice which has led to a situation where the protection of the human rights in arbitration solely relies on the national courts, Koulu 2008, p. 208-209.

of the arbitration clause before assessing the material question.¹⁶⁸ After studying case law from the other Nordic countries, Koulu is of the opinion that this problem also could occur in the other Nordic countries.¹⁶⁹

Despite the criticism, Finnish arbitration law should in theory be in accordance with the Convention. An arbitral award can be set aside by a court upon request of a party in accordance with the Arbitration Act, section 41, subsection 1, paragraph 1, if “*the arbitrators have exceeded their authority*”. This is for example possible if there is no valid arbitration clause concluded between the parties.¹⁷⁰ According to Möller, this also includes situations where there is no arbitration clause entered into.¹⁷¹ Chapter 3 (sections 28-38) of the Finnish Contracts Act covers the invalidity of contracts. At least sections 28-31 of the chapter are enacted to make agreements that are entered into without free will null and void.¹⁷² The general invalidity grounds in Finnish contract law are applied to arbitration clauses.¹⁷³ If the arbitral award contravenes an invalidity ground in the Contracts Act, the Court can upon request of a party set aside the award.¹⁷⁴ Consequently, the Finnish arbitration law and the applicability of the doctrine of separability do not seem to breach the European Convention on Human Rights.

The standpoint also seems to be settled in the legal doctrine. The legal academics are of the opinion that an invalidity ground could possibly only hit the arbitration clause or the main agreement, or could be found to hit both the main agreement and the arbitration clause after a separate assessment.¹⁷⁵ Both Kurkela and Möller seems to be of the opinion that some

¹⁶⁸ Koulu 2008, p. 208.

¹⁶⁹ Koulu 2008, p. 208; Koulu does however not mention any Nordic cases supporting his standpoint.

¹⁷⁰ HE 202/1991, p. 26.

¹⁷¹ Möller 1997, p. 85.

¹⁷² Sections 28 and 29 cover coercion, section 30 covers fraud and section 31 covers the taking advantage of another's distress, lack of understanding, imprudence or position of dependence.

¹⁷³ Koulu 2008, p. 32; Also according to Tirkkonen, the arbitration agreement is invalid if it is encumbered with a civil law ground of invalidity, Tirkkonen 1943, p. 123.

¹⁷⁴ The parties cannot strengthen the doctrine of separability to raise the threshold for invoking the invalidity of the arbitration clause, Lindskog 2012, p. 291; Koulu 2008, p. 74; Koulu justifies the standpoint with the general contract law principle that one cannot agree on restricting the applicability of grounds of invalidity in advance, Koulu 2008, p. 74.

¹⁷⁵ Möller 1997, p. 28; Kurkela 1996A, p. 351; As examples of invalidity grounds, Kurkela mentions coercion and fraud which are also included in the Finnish Contracts Act, Kurkela 1996A, p. 351; But observe that Lager states that the invalidity grounds included in the Contracts Act are not as such applicable to at least prorogation clauses and that a breach of an invalidity ground has to be especially serious to make the prorogation clause invalid, Lager 1974, p. 139.

invalidity grounds encumbering the main agreements also automatically could cover the arbitration clause.¹⁷⁶ This standpoint can however be criticized. Even if there are invalidity grounds that most likely also make the arbitration clause invalid, a separate assessment should always be done to assess the invalidity of the arbitration clause in accordance with the doctrine.¹⁷⁷

There is not much case law regarding the issue, but in the aforementioned decision COMI 30:2007 the matter was assessed. The Tribunal stated that some of the invalidity grounds alleged to encumber the main agreement could also reach to the arbitration clause.¹⁷⁸ All in all, for instance a violation of one of the invalidity grounds in the Finnish Contracts Act regarding formation of will usually covers both the main agreement and the arbitration clause, because the formation of intent has been formed similarly and usually also timely at the same moment for both the main agreement and the arbitration clause.¹⁷⁹ However, a separate assessment of the invalidity of the arbitration clause should be preferred in order not to infringe the doctrine of separability and since it is possible that the alleged invalidity ground does not affect the validity of the arbitration clause.

In Sweden, the invalidity grounds in the Swedish Contracts Act also apply to arbitration clauses.¹⁸⁰ Nevertheless in practice, at least before 2011, there were no cases where the invalidity grounds in the Swedish Contracts Act had been relied on.¹⁸¹ According to Lindskog, it would be absurd to apply the doctrine of separability as to always give the tribunal competence when the main agreement is alleged invalid, without assessing the validity of the arbitration clause separately.¹⁸² There also appears to be a Nordic consensus on this, since

¹⁷⁶ Möller 1997, p. 28; Kurkela 1996B, p. 18; Kurkela 1994, p. 7; Möller 1981, p. 60.

¹⁷⁷ For instance, invalidity grounds connected to the formation of will usually, but not always make the arbitration clause invalid. As an example, coercion could be used for only getting one or a couple of contract clauses included into the agreement and consequently the coercion does not necessary also cover the arbitration clause.

¹⁷⁸ As an example was mentioned coercion to sign the agreement, COMI 30:2007, referred to in Turunen 2007, p. 373.

¹⁷⁹ In practice, the invalidity of the arbitration clause is often caused by the same invalidity ground alleged to encumber the main agreement. Seldom the alleged ground for invalidity of the main agreement cannot also be applied on the arbitration clause, Frände et al. 2017, p. 1307; Tirkkonen 1977, p. 536.

¹⁸⁰ Prop 1998/99:35, p. 47; Madsen 2016A, p. 352; Mannheimer Swartling 2014, p. 28.

¹⁸¹ Hobér 2011, p. 114.

¹⁸² Lindskog 2012, p. 293; Of course, regardless of the doctrine of separability, there are situations where both the main agreement and the arbitration clause are invalid. It seems that if there is an invalidity ground connected to the concluding of the main agreement, it also makes the arbitration clause invalid. However, if the invalidity ground is explicitly connected to the performance of the main agreement, it is more probable that the arbitration clause could still be valid, Lindskog 2012, p. 300, 302-303; However as an exception, Heuman is of the opinion that even if a party claims that the main agreement is made by a person without legal capacity and the alleged invalidity ground also hits the arbitration clause, the tribunal has competence to try

also the Danish and Norwegian view seems to be that the same invalidity ground hitting the main agreement could also make the arbitration clause invalid.¹⁸³

Also, internationally there seems to be scholars accepting that there are invalidity grounds that could affect both the arbitration clause and the main agreement after a separate assessment.¹⁸⁴ Internationally, the importance of only assessing the arbitration clause when deciding on the competence of the tribunal before assessing the alleged invalidity of the main agreement has been stressed.¹⁸⁵

The UNCITRAL Model Law, article 16(1) also seems to accept the invalidity of the arbitration clause in at least some circumstances. It is suggested that the wording “*A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*” means that even if the agreements are separate, this does not mean that the invalidity ground applied to the main agreement cannot also be applied to the arbitration clause.¹⁸⁶ Born has interpreted the Model Law as to mean that both the intention of the parties and specific invalidity grounds can lead to the invalidity or non-applicability of the arbitration clause.¹⁸⁷

As a solution to the problem, Koulu suggests that the scope of the doctrine of separability should be narrowed.¹⁸⁸ In my opinion, the viewpoint of Koulu can be criticized. Firstly, I

the validity of the main agreement, Heuman 1999, p. 67; Hobér and Magnusson have clarified the meaning of the doctrine by stating that the invalidity of the main agreement does not “*automatically*” make the arbitration clause invalid. This emphasizes that the arbitration clause can only be found invalid by a separate assessment, Hobér & Magnusson 2008, p. 61.

¹⁸³ For Denmark, see Siig 2003, p. 247; Hjelje 1987, p. 21; According to the Norwegian Arbitration Act, section 18, subsection 2, the invalidity of the main agreement does “*ikke i seg selv*” (not as such) make the arbitration clause invalid; The invalidity grounds in the Finnish Contracts Act are also similar to those in the other Nordic countries, since the Finnish Contracts Act is based on the contract laws of the other Scandinavian countries, HE 66/1927, p. 1; Even if the Finnish Contracts Act was enacted about 10 years later than the other Nordic contract laws, all the acts are based on a common Nordic law-drafting, Hemmo 2003A, p. 43.

¹⁸⁴ Born 2014A, p. 393; Paulsson 2014, p. 61; Poudret & Besson 2007, p. 133; Park 2006, p. 295; Usually the alleged invalidity grounds affecting also the arbitration clause are caused by the lack of consent when concluding the main agreement, Born 2014A, p. 457.

¹⁸⁵ Park highlights the importance of only assessing the arbitration clause when deciding on the competence of the tribunal, Park 2006, p. 294-295; According to Lew et al., the invalidity of the main agreement does not “*automatically*” affect the arbitration clause, Lew et al. 2003, p. 104; Lew et al. also make a clear distinction between solving the procedural and substantial issues, Lew et al. 2003, p. 130; Born highlights that to be correct, the invalidity of the arbitration clause shall be assessed separately, Born 2014A, p. 460.

¹⁸⁶ Born 2014A, p. 407; The article is poorly formulated since based on its wording, it could be interpreted to suggest that the validity of the main agreement shall be assessed before assessing the validity of the arbitration clause.

¹⁸⁷ Born 2014A, p. 378.

¹⁸⁸ Koulu 2008, p. 209; Ware is a bit more drastic and suggests that to solve the problem, the whole doctrine of separability should be abolished, Ware 2007, p. 121.

suggest that the scope of the doctrine is not too broad, the doctrine is only interpreted wrongly.¹⁸⁹ According to the earlier mentioned definition of the doctrine, it only separates the arbitration clause from the main agreement so that the invalidity of the clause is assessed separately. From the wording used to define the doctrine, it cannot be concluded that the threshold to rule the arbitration clause invalid should be higher than the threshold under general contract law, especially under the invalidity grounds in the Contracts Act. Secondly, it seems that Koulu first determines the validity of the main agreement before assessing the arbitration clause, since he states that the invalidity of the main agreement too seldom reflects to the arbitration clause.¹⁹⁰ This is not justifiable in terms of procedural efficiency or in accordance with the division of competence between the court and the tribunal. The court or tribunal has to determine its competence first before assessing the material part of the case.

Consequently, two separate assessments have to be done, first one to determine the validity of the arbitration clause and then secondly to determine the validity of the main agreement. The same threshold for the invalidity shall be applied in the both assessments. In this way the right to a fair trial is properly protected.

2.5 Expiration of the Main Agreement

In general contract law, the main rule is that the expiration of an agreement affects all contract clauses and obligations under the contract.¹⁹¹ With expiration, I mean different ways the binding character of the agreement ends, for instance by becoming invalid, terminated, the end of the agreement period and other reasons forcing the valid contractual relationship between the parties to end. There are some exceptions to the main rule. As examples of these exceptions, Hemmo explicitly mentions prorogation and arbitration clauses.¹⁹² As a main rule, he states that the expiration of the main agreement does not affect clauses that have been included in the contract to be applied at the time of the expiration of the agreement.¹⁹³

¹⁸⁹ Also Park criticizes the extension of the competence of the tribunal by the doctrine of separability with the misunderstanding of the operation of the doctrine, Park 2006, p. 295.

¹⁹⁰ Koulu 2008, p. 209.

¹⁹¹ Hemmo 2003B, p. 369; See also, Lindfelt 2011, p. 208.

¹⁹² Hemmo 2003B, p. 369; See also, Lindfelt 2011, p. 208.

¹⁹³ Hemmo 2005, p. 304; Hemmo 2003B, p. 369; According to Hemmo, there are seldom disputes about the validity of these clauses since the continued validity of these clauses is usually self-evident, Hemmo 2005, p. 304; In the United Kingdom, the legal state seems to be similar regarding at least jurisdiction clauses, see Briggs 2008, p. 67.

The general opinion in the Finnish legal doctrine seems to be that the doctrine of separability is also applied to a terminated main agreement.¹⁹⁴ The standpoint seems to be correct both from the perspective of the parties' intention and in accordance with the aim of the doctrine. As earlier discovered, by adding an arbitration clause to the agreement, the parties seem to intend to solve all disputes regarding the main agreement by arbitration.¹⁹⁵ It also seems to be against the aim of the doctrine to make the proceeding more efficient not to apply the doctrine of separability to disputes regarding expired main agreements.¹⁹⁶ There are two Supreme Court decision covering the effect of the termination of the main agreement to the arbitration clause, KKO 1954 II 11 and KKO 1980 II 103. In its both decisions, the Supreme Court ruled that even if the parties had terminated the main agreement, the arbitration clause was still valid and the conflicts could be decided by an arbitral tribunal.

The European Court of Human Rights has also assessed the applicability of the doctrine of separability to a terminated main agreement in *Stran Greek Refineries and Stratis Andreadis v. Greece*.¹⁹⁷ The Court stated that even if the Greek authorities had the right to terminate the main agreement with the refinery, the termination could not affect the arbitration clause.¹⁹⁸ The standpoint was justified with both the doctrine of separability and the fact that the rejection of the doctrine would have deprived the other party the right to a fair trial.¹⁹⁹

2.6 Allegations that the Main Agreement is Non-existent

Even if the legal state is unclear in Finland, it seems that based on the legal doctrine, the leading opinion is that the doctrine of separability cannot be applied if the main agreement is alleged non-existent.²⁰⁰ It is difficult to claim that the parties have agreed to use arbitration

¹⁹⁴ Möller 1997, p. 28-29; Kurkela 1994, p. 7; The same seems to follow from Savola's definition of the doctrine of separability, Savola 2015, p. 137; However, Koulu alleges that the legal state is still unclear, Koulu 2008, p. 79; Also in Sweden, the applicability of the doctrine of separability to a terminated main agreement is accepted, Prop. 1998/99:35, p. 75; The legal state is similar in Denmark, Forslag L 127 (2004/2), p. 13; Also internationally, it seems that the termination of the main agreement does not affect the arbitration clause, Born 2014A, p. 351; Moses 2008, p. 18; Grant 2007, p. 873; Poudret & Besson 2007, p. 133; Lew et al. 2003, p. 103; Fouchard et al. 1999, p. 437.

¹⁹⁵ See chapter 2.2; It has also been argued that the competence to arbitrate a dispute regarding a terminated contract could also solely be based on the parties' will. Consequently, the result could also be justified with general contract law rules instead of with the doctrine of separability, Frände et al. 2017, p. 1307.

¹⁹⁶ See chapter 2.2.

¹⁹⁷ *Stran Greek Refineries and Stratis Andreadis v. Greece* 13427/87 (9.12.1994).

¹⁹⁸ *Stran Greek Refineries and Stratis Andreadis v. Greece* 13427/87 (9.12.1994), pp. 72.

¹⁹⁹ *Stran Greek Refineries and Stratis Andreadis v. Greece* 13427/87 (9.12.1994), pp. 72-73.

²⁰⁰ Kurkela 1996A, p. 352; However according to Möller, the applicability of the doctrine of separability to non-existent main agreements should in principle also be accepted. Nevertheless, he states that in most cases the non-existence of the main agreement also extends to the arbitration clause, Möller 2004, p. 13.

in the situation of a conflict regarding an agreement, if they have not even concluded the agreement. There is neither any theoretical basis for the doctrine to rely on, since there is no agreement from which the clause could be separated.²⁰¹ However, the standpoint taken in the Finnish legal doctrine can be criticized.

An interesting situation where the doctrine of separability gets a practical role even if an agreement is never entered into are draft agreements. As I see it, the doctrine of separability has to be applied to draft agreements to enable the tribunal to rule an arbitration clause included in a draft agreement valid. Without the doctrine of separability, the arbitration clause cannot be entered into, if the main agreement is not entered into. Consequently, the tribunal would lose its own competence by ruling the main agreement non-existent. There is one case assessing the problem decided by the Arbitration Institute of the Finnish Chamber of Commerce. The case is summarized by Mika Savola.²⁰²

In the case, the parties had exchanged drafts to an agreement including an arbitration clause. One of the parties had taken the dispute regarding the agreement to arbitration, but the other party objected the arbitration by claiming that the agreement was never signed and accepted. As a basis for its evaluation, the Tribunal stated that the doctrine of separability applies and that the existence of the arbitration clause has to be evaluated separately. Consequently, the tribunal did a separate evaluation of the validity of the arbitration clause and came to the conclusion that even if the main agreement was alleged non-existent, the arbitration clause was valid. Without the doctrine of separability such a ruling would not have been possible. Similar opinions can also be found in the international arbitral doctrine.²⁰³

The ruling is also supported by article 16(1) of the UNCITRAL Model Law that states that the arbitral tribunal shall have the competence to rule on its own jurisdiction at least “*with respect to the existence or validity of the arbitration agreement*”.²⁰⁴ The article continues with explaining that the doctrine of separability shall be applied to the aforementioned situations regarding the tribunal’s competence-competence.²⁰⁵ The interpretation of the article is not clarified further in the explanatory note, but it seems that based on its wording, the

²⁰¹ Koulu 2008, p. 75, 78-79.

²⁰² Savola 2017B.

²⁰³ Born 2014A, p. 458-459; Paulsson 2014, p. 66-67.

²⁰⁴ “*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*”, UNCITRAL Model Law, article 16(1).

²⁰⁵ “*For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract*”, UNCITRAL Model Law, article 16(1).

article shall be interpreted so that the doctrine shall be applied to allegedly non-existent agreements.²⁰⁶ In addition, the ICC Rules, article 6(9) accepts the applicability of the doctrine of separability to the alleged non-existence of the main agreement.²⁰⁷

From a Nordic perspective, it seems that the doctrine of separability also applies to non-existent main agreements. In Norway and Denmark, this stems from their respective arbitration acts.²⁰⁸ The Swedish Arbitration Act does not directly support the viewpoint, but the Government Proposal broadens the applicability of the doctrine of separability to also cover agreements never entered into.²⁰⁹ Internationally, the legal state is somewhat unclear.²¹⁰ Poudret and Besson have comprehensively compared the different international views and came to the conclusion that the opinion accepting the applicability of the doctrine to agreements never entered into can be considered as the leading one.²¹¹

However, as the aim of the doctrine of separability is to avoid abuse, a mere allegation that the agreement does not exist should at least not eliminate the competence of the tribunal even if the applicability of the doctrine would not be accepted in Finland.²¹² The argument has to be at least stronger to move the competence from a tribunal to the general courts. The applicability of the doctrine of separability would however better protect the arbitral proceeding from these attempts of abuse. Another argument supporting the applicability of the doctrine of separability to non-existent main agreements is that the distinction between a void and non-existent agreement is difficult to draw, which can lead to procedural conflicts and forum shopping which consequently make the procedure ineffective.²¹³ Also, if it is accepted that the intent of the parties is to solve all their contractual disputes by arbitration,

²⁰⁶ Also Koulu seems to support the interpretation, Koulu 2008, p. 79.

²⁰⁷ *“Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties’ respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void”*, ICC Rules, article 6(9); The applicability of the doctrine of separability to non-existent main agreements is also for instance included in the British Arbitration Act, section 7.

²⁰⁸ See Norwegian Arbitration Act, section 18 and Danish Arbitration Act, chapter 4, section 16.

²⁰⁹ Prop. 1998/99:35, p. 75; Before the enactment of the Swedish Arbitration Act in 1999, it has been argued that the doctrine did not reach to contracts never entered into, The Stockholm Chamber of Commerce 1984, p. 28.

²¹⁰ Academics accepting the applicability of the doctrine of separability to non-existent agreements are for instance, Born 2014A, p. 351; Moses 2008, p. 18; Grant 2007, p. 873; Poudret & Besson 2007, p. 133; Lew et al. 2003, p. 103; Fouchard et al. 1999, p. 210; Against the applicability are for instance, Svernlöv & Carroll 1991, p. 38; van den Berg 1981, p. 145; As a national example, in for instance the US, if the main agreement is non-existent the arbitration clause cannot be valid, Leboulanger 2007, p. 25.

²¹¹ Poudret & Besson 2007, p. 133-136.

²¹² Fouchard et al. 1999, p. 211; Svernlöv & Carroll 1991, p. 49.

²¹³ Fouchard et al. 1999, p. 211.

why would then the disputes regarding the invalidity of the main agreement be arbitrated, but regarding the existence of the main agreement be solved by general courts?²¹⁴

Concludently, as can be seen from the arbitral award regarding draft agreements, the doctrine of separability has an important task to fill regarding agreements never entered into. Since also all the other Nordic countries, the Model Law and the ICC Rules apply the doctrine of separability to non-existent main agreements, it is well-grounded to claim that the doctrine of separability also in Finland should be applied to agreements alleged to never have been entered into.

2.7 Burden of Proof

The allocation of the burden of proof affects the possibilities to successfully refer to the doctrine of separability. Therefore, the burden of proof also affects the strength of the doctrine.

Generally in contract law, there is a presumption that an agreement is binding if the opposite is not proved.²¹⁵ In general courts where the Code of Judicial Procedure applies, the “*free evaluation of evidence*” applies.²¹⁶ However, according to Chapter 17, section 2, subsection 1 of the Code of Judicial Procedure, the party shall prove the circumstances on which his or her claim or objection is based. Even if the Code of Judicial Procedure is not applied to arbitration, it is well-known that it affects the proceeding in the arbitral tribunal. Since the national law is applied as *lex arbitri* and *lex fori*, it is usually difficult to justify procedural rules that are not in line with the national procedural rules, if the parties have not otherwise agreed. In addition, most of the evidential rules included in the Act can be seen as general procedural principles.²¹⁷ As a result, value can be given to the Code of Judicial Procedure even when the matter is decided in an arbitral tribunal.

According to Koulu, in general courts, the Act is interpreted so that the applicant has to prove that the arbitration agreement has been terminated, is invalid or unreasonable and the respondent that the arbitration clause is entered into, is fulfilled and covers the dispute at

²¹⁴ Leboulanger 2007, p. 27.

²¹⁵ Annola 2016, p. 41.

²¹⁶ In other words, this means that the Court has to determine what has been proven and what has not.

²¹⁷ For instance, in Helsinki Court of Appeal S 15/2325, 1551 (HeHO 2016:19, 21.10.2016), the Court ruled that the arbitral award was valid and enforceable, since the burden of proof set on the applicant for the casual connection between the injury and the act, as also codified in the Code of Judicial Procedure was a general procedural principle. Thus, the challenge was rejected.

hand.²¹⁸ Regarding non-existent main agreements, Koulu's standpoint seems well-grounded. At least it is easier for a party alleging that there is an existing arbitration clause to show evidence that an arbitration clause has been concluded. The burden of proof shifts to the other party, if evidence of the arbitration clause can be shown. When it comes to terminated main agreements, it is also easy to agree with Koulu. Since it is presumed that the parties have intended to solve all disputes regarding the main agreement by arbitration, it is logical that the party alleging that disputes regarding a terminated main agreement shall not be solved by arbitration shall have the burden of proof.

Regarding invalidity, Koulu seems to be of the opinion that the burden of proof is on the party claiming that same facts allegedly causing the main agreement to be invalid also causes the invalidity of the arbitration clause, even if he admits that the legal state is not yet settled in Finland.²¹⁹ I agree with Koulu. Since the doctrine of separability is a *lex specialis* provision aimed to prevent misuse of justice, it could be justifiable to set a heavier burden of proof for the respondent who claims that the tribunal has no jurisdiction (and the applicant in a general court). Consequently, the presumption would be that the arbitration clause is valid, but the presumption could be rebutted by evidence of the opposite.

2.8 Conclusions

Even if there are some differences in the scope of the core of the doctrine of separability, there is at least an international consensus that the doctrine is defined as separating the main agreement and the arbitration clause to two separate agreements. This is also accepted in Finland. As regards the differences in the definitions, some of the definitions only include

²¹⁸ Koulu 2008, p. 229; Even if Koulu's book is written before the amendment of the rules regarding evidence in the Code of Judicial Procedure, the legal state should still be the same since the rules regarding burden of proof have not changed. Only the wording of the section has been modernized, since the former rules were from 1948. The old rules were included in Chapter 17, section 1, subsection 1 of the Code of Judicial Procedure in the following form: *"In a civil case the plaintiff shall prove the facts that support the action. If the defendant presents a fact in his or her favour, also he or she shall prove it"*.

²¹⁹ Koulu 2009, p. 78; Koulu 2008, p. 209; In general contract law, the burden of proof regarding that the invalidity of one contract clause does not reach to the whole of the agreement is on the party claiming the partly invalidity, Koulu 2008, p. 78; In Sweden, it seems that the party alleging the invalidity of the main agreement has to show that the alleged invalidity ground also makes the arbitration clause invalid, Heuman 2011, p. 338; Hobér 2011, p. 108; Interesting is that based on the Nordic doctrine, Koulu states that as regards prorogation clauses, the burden of proof is on the party claiming that the alleged invalidity of the main agreement does not affect the prorogation clause. This seems to be opposite to the burden of proof applied to arbitration clauses. Nevertheless, Koulu does not give any sources for his standpoint, Koulu 2009, p. 208; Internationally, at least Paulsson is of the opinion that the burden of proof is on the party claiming that the alleged invalidity of the main agreement also causes the invalidity of the arbitration clause, Paulsson 2014, p. 61.

the invalidity of the main agreement, some also include terminated and non-existent main agreements, and some are open definitions. However, the exact scope of the doctrine of separability does not necessarily depend on the definition since the doctrine has in most jurisdictions been shaped by both case law and legal doctrine.

The aim of the doctrine of separability is to express the will of the parties, enhance the efficiency of the proceeding and give competence to the tribunal.²²⁰ It seems logical that the presumed will of the parties is to get all disputes regarding the main agreement solved by arbitration. But is it necessary to justify the doctrine of separability with the will of the parties, when the will of the parties can be respected by interpreting the arbitration clause in the light of the presumed will of the parties? It seems to me that the doctrine is better justified with efficiency arguments than with the will of the parties, which is better aimed for the actual separate assessment of the arbitration clause.²²¹

There is a wide international and Finnish consensus that when deciding on the invalidity of the main agreement, the arbitration clause shall be considered as a separate agreement. However, the question regarding the invalidity of the arbitration clause is more complex. The ambiguity regards if the alleged invalidity ground of the main agreement can automatically reach to the arbitration clause and if the invalidity grounds in general contract law shall be applied to arbitration clauses as such or if the threshold for invalidity shall be higher.

From a Finnish perspective it seems that the European Convention on Human Rights and the Constitution forces us to apply an approach demanding that the parties have to freely express their will to arbitrate. Applying this approach, it is natural that the invalidity grounds in general contract law have to be applied as such to arbitration clauses to keep the doctrine in accordance with the Convention. To avoid exceeding its competence, the tribunal primarily has to decide if the arbitration clause is valid before assessing the substantial matter and the validity of the main agreement.

Consequently, the doctrine gets a bit toothless, since most of the invalidity grounds allegedly making the main agreement invalid probably also encumber the arbitration clause even if a separate assessment of the arbitration clause is done.²²² If the arbitration clause is invalid

²²⁰ Without the doctrine of separability, the tribunal would still have competence-competence to rule on its own jurisdiction but by ruling the main agreement invalid or terminated it would remove its own competence.

²²¹ I will assess this matter further in chapter 5.4.

²²² If the alleged invalidity ground of the main agreement is based on a deficient formation of intent, it is nevertheless unlikely that the arbitration clause is valid. However, as long as the deficient formation of intent is only intended towards a part of the main agreement, it is still possible that the arbitration clause is not

because of an error in the formation of the will, also the main agreement is most likely invalid since the will is usually formed simultaneously. The Tribunal could not decide on the material question even if it solves it simultaneously with the procedural matter since this would lead to a breach of the right to a fair trial. From a procedural economic perspective this leads to an unwanted situation.

When it comes to the expiration of the main agreement, it seems to be well established that the doctrine of separability applies as long as the will of the parties is not to also terminate the arbitration clause. The alleged non-existence of the main agreement is a more complex question, even if the leading standpoint in the Finnish doctrine seems to be that the doctrine of separability cannot be applied to allegedly non-existent main agreements. However, there is also an arbitral award applying Finnish law accepting the applicability of the doctrine to non-existent main agreements. Nonetheless, it seems that there is a need for applying the doctrine of separability also to non-existent agreements. For instance, an arbitration clause included in a draft agreement could be valid even if the draft agreement is not entered into. In such a situation and without the doctrine of separability, a valid arbitration clause would also be non-existent as a part of the draft agreement never concluded.

Concludently, the legal state in Finland is clear regarding the applicability of the doctrine of separability to invalid and terminated main agreements but uncertain regarding non-existent main agreements. Since the legal state is uncertain and there is a need for applying the doctrine to non-existent main agreements, an inclusion of the definition of the doctrine of separability would be needed when amending the Arbitration Act. The definition of the doctrine should as in the UNCITRAL Model Law include the invalidity, expiration and non-existence of the main agreement.²²³

defected; In for example the US, the problem does not occur since it seems that many of the contract law invalidity grounds affecting the main agreement does not affect the arbitration clause, Ware 2007, p. 120-121.

²²³ Also the other Nordic countries can be used as models for the amendment of the Finnish Arbitration Act. In Norway and Denmark, the definition included in the legislation covers the invalidity and non-existence of the main agreement. In Sweden, the definition in the Arbitration Act only includes the invalidity of the main agreement, but in the Government Proposal it is clarified that the doctrine also applies to non-existent and terminated main agreements; In Denmark, it has been alleged that the inclusion of the doctrine of separability in the legislation was necessary from an international perspective. Even if the doctrine was already accepted in Danish arbitration practice, the inclusion was seen as important so that also people not familiar with Danish arbitration practice, especially international parties could verify the applicability of the doctrine of separability in Denmark, Lookofsky & Kristoffersen 2006, p. 55.

3. Choice of Law and the Doctrine of Separability

In this chapter, I will assess if the doctrine of separability can affect the choice of law of the arbitration clause. Firstly, I will assess if the doctrine of separability is applicable to the choice of law of the arbitration clause. Secondly, if applicable, which effect the doctrine of separability has on the choice of law of the arbitration clause. The questions are interesting since a strict application of the doctrine of separability would prohibit the application of the choice of law of the main agreement to the arbitration clause. On the other hand, the aim of the doctrine does not require the applicability of the doctrine of separability to the choice of law. Without the doctrine of separability, there has to be an explicit choice of law in the arbitration clause or otherwise *lex contractus* will be applied to the arbitration clause as the law of the only agreement. The stronger the effect of the doctrine of separability is, the more likely it is that *lex arbitri* will be applied instead.

The importance of the matter cannot be overestimated since the rules regarding the validity and interpretation of dispute resolution agreements differs considerably from one country to another. The choice of law matter could be subject to an entire *pro gradu*, but I will only assess the overall choice of law matter as broadly as necessary to solve the question regarding the applicability of the separability doctrine to the choice of law.²²⁴ Without understanding the process of choosing the law for the arbitration clause, one cannot correctly apply the doctrine of separability in the context of choice of law.

Firstly, I will assess how the choice of law is made in general contract law. Secondly, I will assess the division between material and procedural questions and how the division affects the choice of law and the doctrine of separability. Thirdly, I will assess how it is determined if *lex arbitri* or *lex contractus* should be applied to the arbitration clause. Fourthly, I will assess the different methods of choosing the law applicable and finally, how the doctrine of separability affects the choice of law.

3.1 General Contract Law Rules

Generally, the choice of law of international contracts is governed by the principle of freedom of contract.²²⁵ Consequently, in the simplest of situations the parties have agreed on a choice of law clause in their agreement. Unfortunately, the law governing the arbitration

²²⁴ As has been stated by Born, there are several different scholars preferring different approaches to the choice of law question and consequently there is no consensus regarding the question, Born 2014B, p. 821.

²²⁵ Liukkonen 2012, p. 81.

clause is rarely specified. If no intention of the parties can be found, the law with the closest connection to the agreement will usually be applied.²²⁶ Since there is more often a law chosen for the main agreement, the question regarding the applicability of the doctrine of separability to protect the arbitration clause from the choice of law clause in the main agreement actualizes.

The choice of law is regulated both in international conventions and in the European Union, but the problem from an arbitration point of view is that arbitration agreements are excluded from the scope of these instruments.²²⁷ In Finland, the main rule is that *lex fori* will be applied to questions regarding the procedural part of a matter.²²⁸ According to Koulu this would include also dispute resolution agreements and consequently as a main rule, *lex fori* is applied to dispute resolution clauses.²²⁹ However regarding prorogation clauses, the rule can only be seen as a weak main rule.²³⁰ Interesting from a separability point of view is which role the doctrine of separability has in the choice of *lex fori* as the main rule in the choice of law for dispute resolution clauses.

3.2 Is the Question regarding the Choice of Law a Material or Procedural Question?

3.2.1 The Arbitration Clause

It is a natural starting point that *lex fori* or *lex arbitri* is applied to the procedural matters and *lex contractus* or the law chosen by the parties is applied to the substantial matters of a conflict.²³¹ The starting point is logical, since *lex fori* and *lex arbitri* are vital for the competence of the tribunal and the enforcement of the award in the country of the arbitral seat or the

²²⁶ Born 2014B, p. 816-817.

²²⁷ For instance, article 1(2)(d) of the Rome Convention and article 1(2)(e) of the Rome I Regulation states that arbitration agreements are not included in the scope of the Convention nor the Regulation. Nevertheless, there could be a possible analogy between the choice of law of arbitration clauses and the Convention and Regulation, since general rules of Finnish civil law are to be applied also to arbitration clauses, Kurkela 1996B, p. 10; However one has to be careful since the exclusion of the arbitration agreements from the scope of the Convention and Regulation is an explicit choice by the legislator.

²²⁸ Koulu 2009, p. 74.

²²⁹ Koulu 2009, p. 74; Internationally there is no consensus on the applicability of *lex fori* or *lex contractus* to competence clauses, Koulu 2009, p. 74; As will be shown in chapter 3.3, *lex arbitri* is usually applied instead of *lex fori* to arbitration clauses. This is probably because *lex fori* is difficult to predict since it depends on the country where the party wants to execute the award.

²³⁰ According to Koulu, the type of the dispute resolution clause determines how strong the *lex fori* principle is, Koulu 2009, p. 74.

²³¹ With *lex fori* is meant the law of the country of the proceedings, with *lex arbitri* the law of the country of the arbitral seat and with *lex contractus* the law of the main agreement. In practice, usually at least both *lex fori* and *lex arbitri* leads to the same law applicable, but also *lex contractus* can often lead to the same applicable law.

country of the enforcing court.²³² Thus it is usually possible for the parties to choose the law for the substantial matter without any intervention by the national court, but possibly the court could apply *lex fori* or *lex arbitri* to the procedural questions to protect its own procedure, regardless of the intent of the parties. This division is sometimes also used as a starting point when choosing the law of the arbitration clause. It has been alleged that the procedural validity of the arbitration clause always should be governed by *lex arbitri* but that the law applied to the substantive validity of the clause could be chosen by the parties.²³³

From a Finnish perspective, jurisdictional agreements are often classified as procedural matters.²³⁴ Nevertheless according to Koulu, an arbitration clause includes both procedural and material elements which can lead to a possible problem with different laws applicable to different parts of the arbitration clause.²³⁵ In accordance with this view, *lex arbitri* should be applied to matters regarding arbitration law which could include the arbitrability of the dispute, the form of the agreement, criteria for the content of the agreement and the supplementing of the clause.²³⁶ It is however not certain which law should be applied to the general conditions for contractual commitment, for instance the conclusion and termination of an agreement.²³⁷ It could either be *lex contractus* or *lex arbitri*. In Sweden, at least Madsen suggests that no division is needed since the law chosen by the parties or the law with the closest connection should be applied to all parts of the arbitration clause.²³⁸

Even if the division is correct from a theoretical viewpoint and the aim with the theory is to protect the arbitration clause from invalidity by applying *lex arbitri* or *lex fori* to the procedural part of the matter, it seems that the disadvantages of the theory are significant. There are some problems connected to the drawing of a border between the material and procedural matters which can lead to costly conflicts, for instance conflicts within the dispute regarding

²³² Otherwise it would be difficult to carry out the arbitral proceeding or enforce the award, Koulu 2008, p. 64.

²³³ Moses 2008, p. 65.

²³⁴ Koulu 2009, p. 76.

²³⁵ Koulu 2008, p. 63-64; Generally about this problem when it comes to all dispute resolution agreements, see Koulu 2009, p. 75.

²³⁶ Koulu 2008, p. 64; Regarding prorogation clauses, see Taivalkoski 2001, p. 703-704.

²³⁷ Koulu 2008, p. 64; Because of the division, it would be most logical to apply *lex contractus* to the contractual commitment, but on the other hand to avoid fragmentation of the choice of law, *lex arbitri* would be a more suitable choice. In the end and based on the freedom of contract, the law applicable would most appropriately be decided based on the will of the parties; According to Taivalkoski there is no clear answer to the question when it comes to prorogation clauses, Taivalkoski 2001, p. 703-704.

²³⁸ Madsen 2016A, p. 437; However, see also Zettermarck, who is of the opinion that *lex arbitri* always shall be applied to the question regarding the arbitrability of the conflict even if another law would be applied to other issues concerning the arbitration clause, Zettermarck 2006, p. 115-116.

the law applicable to different parts of the arbitration clause.²³⁹ There are also more dimensions to consider when choosing the applicable law than only the procedural/substantial matter division, for instance the intention of the parties, the recognition and enforcement of the award and other the benefits and disadvantages with different applicable laws.

From the point of view of the doctrine of separability, a division between procedural and substantial questions is interesting. Without the doctrine of separability, the law of the main agreement would also be applied to the arbitration clause. When applying the doctrine of separability there could possibly be a similar division as shown in this chapter. There could be two separate agreements, the substantial main agreement to which *lex contractus* would be applied and the procedural arbitration clause to which *lex arbitri* would be applied.

3.2.2 The Doctrine of Separability

The division between procedural and substantial matters can also affect the law applicable to the doctrine of separability.²⁴⁰ The real nature of the doctrine of separability is still not decided in Finland nor internationally.²⁴¹ If the doctrine of separability is recognized as a prerequisite for the tribunal to effectively exercise its competence-competence, the doctrine could be regarded as procedural.²⁴² On the other hand, if the doctrine is regarded as a special feature of the arbitration clause, it could be deemed as a substantial matter.²⁴³ There are scholars supporting both *lex fori*, *lex arbitri* and the law of the arbitration clause (this would be *lex contractus* or *lex arbitri*) as the law applicable to the doctrine of separability.²⁴⁴ This question is important since even if the doctrine of separability is accepted worldwide, there are significant differences in the strength and scope of the doctrine. In Finland, the question

²³⁹ Also Koulu accepts the problems with the division, Koulu 2008, p. 64.

²⁴⁰ Even if Koulu prefers the application of *lex arbitri* to the doctrine of separability, he admits that the leading Nordic standpoint is that the law applicable to the arbitration clause should be applied. However, Koulu does not validate the Nordic standpoint with any Nordic sources, Koulu 2008, p. 65; The Nordic standpoint (if accepted) again leads us back to the main question of this chapter, which is the law applicable to the arbitration clause? It could be argued that Koulu's choice would be a simpler and more unambiguous rule.

²⁴¹ This systematization problem is common for all dispute resolution agreements and thus analogy can also be taken from the general principles or from prorogation clauses; About the Finnish legal state, see Koulu 2008, p. 64; For an international perspective, see Siig 2003, p. 253.

²⁴² Siig 2003, p. 253.

²⁴³ Siig 2003, p. 253; At least if the main agreement is allegedly invalid, it can be argued that the question regarding the validity of the arbitration clause is a material question, since the question is not anymore about competence but about the special features of the arbitration agreement, Siig 2003, p. 245.

²⁴⁴ For instance, van den Berg supports the applicability of *lex fori* to the doctrine, Van den Berg 1981, p. 146; Koulu supports the applicability of *lex arbitri*, Koulu 2008, p. 65; Siig is one of the academics supporting the applicability of the law applicable to the arbitration agreement, Siig 2003, p. 254.

has not been assessed and internationally there is not much research concluded about the problem.

The application of *lex arbitri* would be suitable from the point of view of the actual arbitral proceeding, which is also governed by *lex arbitri*. The application of *lex fori* to the scope of the doctrine of separability would be the most suitable choice from an enforcement point of view. The underlying principle of freedom of contract supports the applicability of the law of the arbitration clause. From a theoretical point of view it seems to be more justifiable to apply the law of the arbitration clause also to the doctrine of separability, to protect the freedom of contract of the parties. It is on the parties' responsibility and for the choice of law rules to decide, the most suitable law for both the arbitration clause and the doctrine of separability.

3.3 Lex Arbitri and Lex Contractus

This chapter aims to assess how the choice of law between *lex arbitri* and *lex contractus* is generally made.²⁴⁵ Chapter 3.5 will then discuss whether the doctrine of separability affects the assessment between the two competing laws. It is good to keep in mind that usually both *lex arbitri* and *lex contractus* leads to the same law and that the problem only actualises when they lead to different laws.²⁴⁶

At least in Finland, the situation is ambiguous since arguments for both the applicability of *lex contractus* and *lex arbitri* have been raised.²⁴⁷ According to Koulu, *lex fori* (*lex arbitri* when it comes to arbitration) is better understood by the Court and therefore the applicability of *lex fori* would lead to a better quality of the decisions and less costs.²⁴⁸ Koulu recognizes that a choice of law clause in the main agreement could express the intent of the parties to

²⁴⁵ As regards arbitration clauses, the choice of law debate is usually between the choice of *lex contractus* or *lex arbitri*, Landolt 2013, p. 518; Savola 2008, p. 24-25; It has been alleged that *lex arbitri* is applied to the applicability of competence-competence, Várady 2015, p. 179.

²⁴⁶ The question gets important when the different laws lead to different results. When it comes to the arbitration clause, the worst scenario is that one of the laws leads to the invalidity of the arbitration clause.

²⁴⁷ For the scholar supporting *lex contractus*, see Kurkela & Uoti 1995, p. 72; For the scholar supporting *lex arbitri*, see Koulu 2008, p. 63; Koulu would apply *lex fori* to the other types of dispute resolution clauses, Koulu 2009, p. 201.

²⁴⁸ Koulu 2009, p. 201; If the arbitration has an international aspect, *lex arbitri* seems to get an even higher value since it is important to get the award executed and that the arbitration clause is valid in the country of the arbitral tribunal, Savola 2008, p. 27; Not all countries accept the validity of the arbitration clause under another law chosen by the parties than the law of the court/tribunal as the basis for the competence of the tribunal. If *lex fori* and *lex arbitri* differs, *lex fori* is a safer choice since the award is not always enforced in the country of the seat. However, at the time of the drafting of the arbitration clause and at the time of the arbitral proceeding it is often difficult to predict in which country or countries the award will later be executed.

also apply *lex contractus* to the arbitration clause, but claims that it is not alone enough to supersede *lex arbitri*.²⁴⁹

In Sweden, the Government Proposal of the Arbitration Act stipulates that the choice of law for the arbitration clause has to be made explicitly.²⁵⁰ Section 48 of the Swedish Arbitration Act, which regards arbitration clauses with international connection, only states that *lex arbitri* is applied to the proceeding if the parties have not otherwise agreed.²⁵¹ The wording used in the Government Proposal was upheld by the Swedish Supreme Court decision *Bulgarian Foreign Trade Bank, Ltd v. A.I. Trade Fin., Inc (2001)*,²⁵² where the Court ruled that a choice of law clause in the main agreement does not affect the choice of law of the arbitration clause. The agreement between the parties included a choice of law clause stating that Austrian law would apply to the agreement. The Supreme Court briefly stated that since there was no choice of law clause explicitly governing the arbitration clause, *lex arbitri* (in this case the Swedish Law) applies.²⁵³ The Court did not give any further reasons for the standpoint, but since it was undisputed that there was a choice of law clause in the main agreement, the decision is in line with the Government Proposal.

Therefore, the term “*kommit överens*” means that the parties have to agree about the choice of law explicitly in the arbitration clause. The choice is not considered as explicitly agreed, if there is only a general choice of law clause in the main agreement.²⁵⁴ Even if the Swedish

²⁴⁹ However, it is unsure what else is needed to supersede *lex arbitri* since Koulu does not continue the argument further, Koulu 2009, p. 78.

²⁵⁰ Prop. 1998/99:35, p. 191; It could be claimed that the doctrine of separability has influenced section 48 of the Swedish Arbitration Act. Since the doctrine states that there are two separate agreements, it can be alleged that the demand for an explicit choice of law for the arbitration clause strengthens the doctrine when ruling out the possibility to extend the applicability of a choice of law clause in the main agreement to the arbitration clause; However, According to the Government Proposal it seems that the main reason for the need for an explicit choice of law for the arbitration clause was that the Government interpreted article V(1)(a) of the New York Convention as to demand the choice of law to be explicit, Prop. 1998/99:35, p. 190-191.

²⁵¹ Lindskog’s opinion is in line with the Government Proposal. The parties have to agree explicitly in the arbitration clause about the choice of law, otherwise *lex arbitri* will be applied. Lindskog does not justify the use of *lex arbitri* instead of *lex contractus* with the doctrine of separability, Lindskog 2012, p. 1105.

²⁵² *Bulgarian Foreign Trade Bank, Ltd v. A.I. Trade Fin., Inc (2001)*, Högsta Domstolen 27.10.2000, T 1881-99.

²⁵³ *Bulgarian Foreign Trade Bank, Ltd v. A.I. Trade Fin., Inc (2001)*, Högsta Domstolen 27.10.2000, T 1881-99, p. 4. The parties had not referred to the choice of law question so the Court determined the law applicable *ex officio*.

²⁵⁴ This rule makes the choice of law easy if there only is a choice of law clause in the main agreement, but problems can occur when defining what “*explicitly agreed*” means. In Sweden, the problem was avoided by defining the threshold for “*explicitly agreed*” in the Government Proposal.

solution seems to be an easy and working solution, it seems that the Swedish law is one of the few laws including provisions regarding the choice of law of the arbitration clause.²⁵⁵

There is not a similar section included in the Finnish Arbitration Act. An important question in Finnish arbitration law is therefore, if there is any principle requiring clarity of the choice of law made for the arbitration clause?²⁵⁶ If there is, it would make it more difficult to conclude that a choice of law clause in the main agreement also covers the arbitration clause, even if it still could be possible by interpreting the arbitration clause in accordance with the intention of the parties.²⁵⁷ Otherwise if no such rule exists in Finnish arbitration law, it could be argued that a choice of law clause in the main agreement is intended to also reach to the arbitration clause as an implicit choice of law. This would lower the bar to apply the choice of law of the main agreement to the arbitration clause in Finland. However, also the choice of an arbitral seat could be considered as an implicit choice of law, since the procedural questions are generally solved in accordance with the law of the seat.²⁵⁸ According to Koulu, traditionally in Finnish contract law it has been regarded that a choice of law shall be unambiguous and precise.²⁵⁹ Consequently, it seems that a requirement of an explicit choice of law of the arbitration clause could be justified also in Finland.

Internationally, the New York Convention which is ratified by a huge number of countries, has a significant impact on the choice of law applicable to the arbitration clause. Especially as an argument favouring the applicability of *lex arbitri*.²⁶⁰ According to article V(1)(a) of the Convention, the enforcement and recognition of an award can be refused if the agreement is not valid under the law the parties have subjected to the agreement or otherwise under the law of the country where the award was made.²⁶¹ The article has often been interpreted in a

²⁵⁵ Savola 2008, p. 24-25.

²⁵⁶ Koulu 2008, p. 67.

²⁵⁷ Koulu 2008, p. 68.

²⁵⁸ In Sweden, it has been alleged as an alternative explanation of the connection between section 48 of the Arbitration Act and the New York Convention that also a choice of an arbitral seat can be regarded as an implicit choice of law for the arbitration clause, Prop. 1998/99:35, p. 191.

²⁵⁹ Koulu 2009, p. 78.

²⁶⁰ However, internationally there are scholars supporting both the applicability of *lex arbitri* and *lex contractus* to the arbitration clause, which makes the legal state unclear in international arbitration, Poudret & Besson 2007, p. 142; Redfern & Hunter 2004, p. 129-130; There also seems to be a difference between common law and civil law countries. In common law countries, *lex contractus* has a stronger support and in civil law countries, *lex arbitri* is usually preferred, Savola 2009, p. 56.

²⁶¹ "The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made", The New York Convention, article V(1)(a).

way favouring the arbitration clause being valid under the law of the country of the tribunal, in other words under *lex arbitri*. It seems that the common interpretation only accepts the parties to explicitly subject the arbitration clause to a specific law.

For instance, the Swiss Federal Tribunal has ruled that according to the New York Convention, the scope of the arbitration clause shall be decided in accordance with *lex arbitri*.²⁶² The practice regarding the ICC Rules seems to support the applicability of *lex arbitri* for practical reasons. The ICC Rules, article 42 states that the tribunal “*shall make every effort to make sure that the award is enforceable at law*”. In ICC Case 4472 (1984), the Tribunal interpreted the article as that the tribunal has to make sure that the arbitration clause is valid under *lex arbitri* before deciding on their competence.²⁶³ Also as earlier mentioned, the Government Proposal for the Swedish Arbitration Act states that the Convention should be interpreted as demanding an explicit choice of law in the arbitration clause.²⁶⁴

Nevertheless, the standpoint taken by the Swedish legislator and in case law can also be criticized. Even if article V(1)(a) of the New York Convention has been interpreted as promoting the use of *lex arbitri*, the wording of the article does not directly support this view. The article states that the agreement has to be “*valid under the law the parties have subjected it*” to. In its ordinary meaning, “*subjected*” does not necessary mean that the law has to be chosen explicitly as alleged in the proposal for the Swedish Arbitration Act. Apparently, either a choice of law clause in the main agreement or a choice of an arbitral seat could be interpreted as indications of which law the parties have subjected the agreement to. In legal doctrine, there is support for both the view that the choice shall be explicit and that the choice can be implicit.²⁶⁵ Nonetheless, the legal state is still unclear both in Finland and internationally.

²⁶² Swiss Federal Tribunal, judgement of 21.3.1995 (referred to in Craig et al. 2000, p. 54).

²⁶³ ICC case No. 4472 (1984) (referred to in Craig et al. 2000, p. 54).

²⁶⁴ Prop. 1998/99:35, p. 190-191; The proposals to the Finnish, Norwegian and Danish Arbitration Acts do not clarify if the choice of law shall be explicit or if it could be implicit.

²⁶⁵ For instance, van den Berg does not accept implicit choices of law, van den Berg 1981, p. 292-293; On the contrary, Born does interpret the Convention as to allow both explicit and implicit choices of law, Born 2014A, p. 499.

Finally, the applicability of *lex contractus* or *lex arbitri* depends on the national court applying the law since there is no international consensus regarding the question.²⁶⁶ From a practical point of view, it is in the parties' interest to choose the law of the seat to govern the main agreement so that both *lex arbitri* and *lex contractus* leads to the same applicable law.

3.4 The Aim of the Parties and the Closest Connection

When deciding the applicable law between *lex arbitri* and *lex contractus*, another division also has to be done. As mentioned before in chapter 3.1, the freedom of contract is the foremost principle of contract law and thus also has to be the base for the choice of law. However, if no explicit or implicit (if implicit choices are accepted) choice of law can be found, the law with the closest connection will be applied to the arbitration clause.²⁶⁷ Therefore, the intent of the parties is the primary way to choose the law applicable, but secondly if no choice can be found, the law with the closest connection will be applied.²⁶⁸

If the principle of closest connection is applied, both the law of the arbitral seat and the choice of law of the main agreement will affect the outcome. There seems to be no consensus

²⁶⁶ For instance in United Kingdom, *lex contractus* is also applied to the arbitration clause based on the Court of Appeal decision *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.*, 1 W.L.R. 102 (2012). According to the Court of Appeal, if there is a choice of law clause in the main agreement, *lex contractus* should also govern the arbitration clause. The standpoint was justified by the Court of Appeal because it strongly indicates "*the parties' intention in relation to the agreement to arbitrate*". Interesting with the case is that one of the parties claimed the opposite, based on the doctrine of separability. The Court however discarded the argument by claiming that the aim of the doctrine of separability is only to reflect the parties' presumed intention to keep the arbitration clause effective even if the main agreement is null or void. Thus the doctrine could not be applied to the choice of law, *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.*, 1 W.L.R. 102 (2012), pp 26; Opposite the British approach, the Singaporean Supreme Court has applied *lex arbitri* to arbitration clauses despite a choice of law clause in the main agreement. In its decision *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others* (2014) SGHCR 12, the Supreme Court separated the substantive dispute and the dispute resolution mechanism as two distinct relationships. The Court stated that the presumption should be that the parties intended that their dispute (including the arbitration clause) should be governed by *lex arbitri*, as the neutral law governing the proceeding. The parties' intention is according to the Court based on the fact that the parties intend their award to be enforceable and recognized. The Court interpreted the New York Convention and the UNCITRAL Model Law so that an award can be set aside if the arbitration clause is invalid under the law of the arbitral seat. However, the Supreme Court did not use the doctrine of separability in its argumentation and instead used the parties' intention as justification for setting aside the substantive law, *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others* (2014) SGHCR 12, pp 13-14.

²⁶⁷ Koulu 2008, p. 68-69; In Sweden, the situation is different. The Swedish Arbitration Act, section 48 states that if no explicit choice of law is made, *lex arbitri* will be applied to the arbitration clause. Therefore, there is no space and need for the closest connection principle in Swedish arbitration law.

²⁶⁸ Koulu 2008, p. 68-69.

in Finland which law is preferred even if it is alleged by Koulu that for prorogation clauses, *lex fori* (for arbitration clauses *lex arbitri*) could be a weak main rule.²⁶⁹

Also internationally the law with the closest connection to the arbitration has been accepted as a base for the choice of law, if no common intent of the parties can be found.²⁷⁰ Similarly as in Finland, the main rule is that the law chosen by the parties applies (again the situation regarding implicit choices is unsure) but otherwise the law with the closest connection will be applied.²⁷¹

These two methods are of interest also when deciding the scope of the doctrine of separability. Firstly, it is possible that the parties' intention is to apply the doctrine of separability to the choice of law. Secondly, the doctrine could be taken into consideration when deciding which law has the closest connection to the arbitration. The doctrine of separability could be used to argue that since there are two separable agreements, *lex arbitri* has a closer connection to the procedural agreement than *lex contractus* as the law of the substantive contract.²⁷²

3.5 The Doctrine of Separability

3.5.1 The Doctrine of Separability as a prerequisite for the Choice of *Lex Arbitri*

The applicability of the doctrine of separability to the choice of law seems to be settled even if there are some differing opinions. Also the extent to which the doctrine of separability applies to the choice of law appears to be settled.

²⁶⁹ Koulu 2008, p. 69; Regarding the closest connection, Koulu also mentions that the evaluation differs depending on if there is only a single arbitration clause in the agreement or also other dispute resolution clauses. It is natural that the law of the main agreement should be applied to all clauses to avoid different laws applied to the different dispute resolution clauses, but if there is only a single clause it is easier to justify the applicability of *lex arbitri*, Koulu 2008, p. 69-70.

²⁷⁰ Born 2014B, p. 816-817; Also called the method of "*most significant relation*", Born 2014A, p. 506.

²⁷¹ Born 2014A, p. 506; However, Born is personally of the opinion that instead of the principle of "*closest connection*", the validation rule should be applied. The validation rule states that the arbitration clause is valid if it is valid under any of the laws that could be applied to the clause. According to Born, the rule is based on the objective of the parties to solve all conflicts regarding the agreement by arbitration, Born 2014B, p. 834; In Finland, Kurkela also supports the principle he calls *favorem validitatis*, which means that the arbitration clause shall be interpreted in a way upholding its validity and in accordance with the intention of the parties, which is to have their dispute resolved by arbitration. This forces the tribunal to make sure that the clause is valid in accordance with the law applicable before making the decision on the applicable law, Kurkela 1996A, p. 352.

²⁷² Born 2015, chapter 2, pp. 32.

The aim of the doctrine of separability is to protect the arbitration clause from invalidity and inefficiency and the aim of dispute resolution clauses is to get a satisfactory and final judgment.²⁷³ However, even if the original aim of the doctrine of separability has only been to protect the arbitration clause from invalidity, it has in Finland been alleged that the doctrine also could protect the arbitration clause from choice of law clauses in the main agreement.²⁷⁴ Internationally, it has been alleged that a separate choice of law assessment for the arbitration clause and the main agreement was already in the beginning accepted as a consequence of the doctrine of separability.²⁷⁵ This interpretation does not seem to have been objected later.²⁷⁶

In Finland, there is not much case law regarding the matter. The only Supreme Court decision assessing the matter is KKO 2007:39. In the decision, there was no explicit choice of law made in the arbitration clause. Unfortunately, both the law of the main agreement and *lex arbitri* were Norwegian law, which meant that the court did not have to make a choice of law decision between the both possibilities.²⁷⁷ The Supreme Court only stated that the law applicable to the main agreement is not necessary applicable to the arbitration clause.²⁷⁸ This can possibly be considered as a reference to the doctrine of separability and interpreted so that the doctrine of separability enables other laws than *lex contractus* to be applied to the arbitration clause.²⁷⁹

It seems that the Court did not want to take a stand in the question and thus reasoned its decision with the fact that both *lex arbitri* and *lex contractus* lead to the applicability of Norwegian law. Regardless of the wording of the case, Koulu is of the opinion that case shall be read so that the applicable law should be determined by the law applicable to the main agreement.²⁸⁰ I do not agree with Koulu's interpretation of the case, since it seems clear that KKO did not take a standpoint on which law is more suitable to apply to the arbitration

²⁷³ See chapter 2.2.

²⁷⁴ Koulu 2008, p. 74-75; In general, Koulu is sceptic about the applicability of the doctrine of separability to the choice of law of the arbitration clause, Koulu 2008, p. 65-66.

²⁷⁵ Dimolitsa 1999, p. 219.

²⁷⁶ Dimolitsa 1999, p. 219; But see e.g. Landolt for criticism on the applicability of the doctrine of separability to the choice of law, Landolt 2013, p. 518.

²⁷⁷ The Court only stated that since both *lex contractus* and *lex arbitri* were Norwegian law, it was apparent that Norwegian law should be applied to the arbitration clause, KKO 2007:39, pp. 3.

²⁷⁸ KKO 2007:39, pp. 3.

²⁷⁹ The same wording has also been used in the legal doctrine to explain the effects of the doctrine of separability on the choice of law, see e.g. Saarikivi 2008, p. 34.

²⁸⁰ Koulu 2008, p. 66, 69; Koulu does not give any reasons for his interpretation but he states that there are many problems with applying the doctrine of separability in the context of choice of law, Koulu 2008, p. 66.

clause, *lex arbitri* or *lex contractus*.²⁸¹ However, the leading opinion in Finnish doctrine seems to be that as a consequence of the applicability of the doctrine of separability to choice of law matters, the law applied to the arbitration clause shall be assessed separately from the choice of law of the main agreement.²⁸² This viewpoint seems to be in accordance with the decision KKO 2007:39.

The doctrine of separability does however not have any other effects on the choice of law of the arbitration clause. Firstly, it seems that there is no reason to apply the doctrine further to prohibit a choice of law clause in the main agreement to also reach to the arbitration clause. The freedom of contract does not support such an extension. The foremost principle in interpreting agreements is the intent of the parties and it is fully possible that the parties aim could be to apply *lex contractus* to the arbitration clause. The Supreme Court decision KKO 2007:39 also only states that *lex contractus* is not necessarily applied to the arbitration clause. Neither does the doctrine of separability support such a standpoint since the doctrine is only interpreted as to allow the arbitration clause to be governed by another law than the main agreement.²⁸³ The doctrine only forces the courts to make a separate assessment of the law applicable to the main agreement and to the arbitration clause.

Secondly, regarding the actual choice of law, one has to ask if the doctrine of separability is a factor favouring the applicability of *lex arbitri*. As shown in chapter 3.4, in determining the applicable law primarily the aim of the parties and secondly the closest connection have to be assessed. When it comes to the aim of the parties, it seems that there is no space for the doctrine of separability to be applied in favour of *lex arbitri*. It is not well-grounded to allege that the aim of the parties would be to apply *lex arbitri* instead of *lex contractus* based on the doctrine of separability. However, when assessing the closest connection there could

²⁸¹ "Korkein oikeus toteaa, että välityssopimukseen sovellettava laki ei määräydy välttämättä pääsopimukseen sovellettavan lain mukaisesti vaan siihen saattaa soveltua jonkun muun valtion laki. Tässä tapauksessa välityssopimukseen sovellettavasta laista ei ole sovittu. Kun kuitenkin välimiesmenettelyn paikaksi on sovittu Norja ja kun lisäksi siihen vakuutusopimukseen, johon A perustaa oikeutensa, on sovittu sovellettavaksi Norjan lakia, myös välityslausekkeen sitovuutta A:han nähden on perusteltua arvioida Norjan lain mukaisesti.", KKO 2007:39, pp. 3.

²⁸² Saarikivi 2008, p. 34; Savola 2008, p. 14; Kurkela 1996A, p. 352; Kurkela 1996B, p. 10; However according to Kurkela and Uoti, a choice of law clause in the main agreement also covers the arbitration clause and thus the doctrine of separability cannot be applied. However, if there is no choice of law clause in the main agreement, *lex arbitri* will apply, Kurkela & Uoti 1995, p. 72: According to Koulu, it is still unclear if the choice of law of the main agreement does not extend to the arbitration clause because of the doctrine of separability. It has also been argued by Koulu that the doctrine of separability is not as strong in Finland regarding choice of law as in the other Nordic countries, Koulu 2008, p. 65-66; In Sweden, it is codified in section 48 of the Arbitration Act that a choice of law clause in the main agreement does not reach to the arbitration clause.

²⁸³ Saarikivi 2008, p. 34; Kurkela 1996A, p. 352.

possibly be some space for arguments based on the doctrine of separability. The doctrine reduces the connection between the main agreement and the arbitration clause which could be a factor favouring *lex arbitri* when putting a greater weight on the connection between the arbitral seat and the arbitration clause. One has still to keep in mind that there is no support for such an interpretation in case law or legal doctrine and that such an interpretation is not in line with the aim of the doctrine of separability.

In Sweden, section 48 of the Arbitration Act could be understood as expressing a strong doctrine of separability applicable to the choice of law since as a consequence of the section, the law applicable to the main agreement does not reach to the arbitration clause.²⁸⁴ In the Swedish doctrine, even before the present Arbitration Act was enacted, it was alleged that the doctrine of separability enabled that the arbitration clause “*might*” be governed by another law than the main agreement because there are two separate agreements.²⁸⁵ Therefore, the starting point in the evaluation is similar in both Finland and Sweden, even if the Swedish Arbitration Act now has codified that *lex arbitri* will be applied to the arbitration clause if no explicit choice of law is made.

Opposite to the Finnish standpoint, it has in Norwegian doctrine been alleged that the doctrine of separability could prevent a tribunal from applying *lex contractus* to the arbitration clause. According to Sørensen, *lex arbitri* applies to the arbitration clause and the view is justified with the doctrine of separability, which seems to prohibit the law applicable to the main agreement to reach to the arbitration clause.²⁸⁶ In international arbitration, the legal state seems settled. It appears that because of the doctrine of separability, the law applicable to the main agreement and the arbitration clause have to be assessed separately and thus may be governed by different laws.²⁸⁷ Some legal academics also seems to keep the doctrine as a

²⁸⁴ See for instance, Mannheimer Swartling 2014, p. 25; However, the official reason for the wording of the section seems to be that the Government interpreted the New York Convention as to not accept implicit choices of law in the main agreement to also cover the arbitration clause, see chapter 3.3.

²⁸⁵ The Stockholm Chamber of Commerce 1984, p. 21; Even today, because there are two separate agreements, Hobér states that they “*may*” be governed by different laws, Hobér 2011; See also Madsen 2016A, p. 96.

²⁸⁶ Sørensen 2018, p. 401.

²⁸⁷ Born 2014A, p. 351, 476-477; Redfern et al. 2015, p. 159; Leboulanger 2007, p. 16; Poudret & Besson 2007, p. 141-142; Redfern & Hunter 2004, p. 125-126; Lew et al. 2003, p. 107; Craig et al. 2000, p. 107-108; Fouchard et al. 1999, p. 209-210, 212; As the definition of the doctrine states, the evaluation of the law applicable has to be done separately for the main agreement and for the arbitration clause, Born 2014A, p. 464; Some academics have used the term “*may*” be applied to illustrate that the doctrine only enables the applicability of different laws to the separate agreements, see e.g. Ferrari & Kröll 2011, p. 28.

prerequisite for applying a different law to the arbitration clause than to the main agreement or the aforementioned as a direct consequence of the doctrine.²⁸⁸

3.5.2 Criticism

There is also some international criticism targeting the applicability of the doctrine of separability to the choice of law. According to Landolt, the usage of the doctrine of separability to the choice of law is problematic. In his opinion, the usage of the doctrine infringes the will of the parties, and offers a third choice of law option besides *lex contractus* and *lex arbitri*.²⁸⁹ He also states that it is not an easy task to find a connecting factor between the arbitration clause and the applicable law.²⁹⁰ The problem with Landolt's criticism is that the doctrine of separability does not offer a third option to the choice of law, it only offers a way to justify the possibility to apply *lex arbitri* in the form it is applied in accordance with the aforementioned international consensus. The doctrine does neither infringe the will of the parties since it does not prohibit the evaluation of the choice of law in accordance with the will of the parties. In addition, the same problem to find a connecting factor between the arbitration clause and the law applicable also occurs in other situations. An exception could be situations where the choice of law is based on an exact legislative rule, as for instance in Sweden.²⁹¹

Even if Landolt's criticism is not well-grounded there is still space for some criticism of the applicability of the doctrine of separability to the choice of law. Problematic is still the justification of the usage of the doctrine to choice of law clauses, since the aims of the doctrine to protect the arbitration clause and to make arbitration more efficient does not support the applicability. The arbitration clause can fulfil its aim and work properly even if *lex contractus* is automatically applied to the arbitration clause.²⁹² As a reason for the applicability of the doctrine of separability has been suggested the need for applying *lex arbitri* to the arbitration clause.²⁹³ However, the doctrine is not a guarantee for the application of *lex arbitri*

²⁸⁸ Born 2014A, p. 475; Born 2014B, p. 819; Fouchard et al. 1999, p. 209-210; There are however no indications that the doctrine could have any other further going effects on the choice of law question.

²⁸⁹ Landolt 2013, p. 518.

²⁹⁰ Landolt 2013, p. 518.

²⁹¹ The Swedish approach found in the Arbitration Act, section 48 is based on that *lex arbitri* will be applied if an explicit choice of law is not made in the arbitration clause. Another possibility could be the application of the law of the main agreement, if no explicit choice of law is made in the arbitration clause.

²⁹² Koulu 2008, p. 75.

²⁹³ Koulu 2008, p. 75.

to the arbitration clause since it only enables an equal assessment of the applicable law between *lex arbitri* and *lex contractus*.²⁹⁴

As shown earlier, Born is of the opinion that the doctrine of separability is a prerequisite for the applicability of different laws to the main agreement and the arbitration clause. In Finland however, it seems that it is fully possible to choose different laws to be applied to different parts of a single contract.²⁹⁵ Thus, the effect of the doctrine in Finland only appears to be that a separate evaluation has to be done to decide the law applicable to the arbitration clause but the doctrine is not a prerequisite for choosing different laws for the separate agreements. Without the doctrine, it seems that *lex contractus* automatically would be applied to the arbitration clause if there is no separate choice of law made in the arbitration clause. Therefore, when applying the doctrine of separability, *lex arbitri* and *lex contractus* are theoretically on the same line when assessing the choice of law matter.

Similarly in Finland, Sweden, Norway and international arbitration, the applicability of the doctrine of separability to the choice of law has been accepted without any critical evaluation. However, the applicability of the doctrine to the choice of law is in line with the wording of the doctrine and useful in at least jurisdictions where different parts of agreements cannot be governed by different laws.

3.6 Conclusions

The question regarding which law shall be applied to the arbitration clause appears to be unsettled in both Finland and internationally.²⁹⁶ However, the applicability of the doctrine of separability to the choice of law and the extent to which the doctrine is applied to the choice of law seems to be settled even if there are some differing opinions. Because of the doctrine of separability, the choice of law of the main agreement and the arbitration clause shall be made separately.

The leading opinion seems to be that the applicability of the doctrine of separability to the choice of law enables the parties to choose different laws applicable to the arbitration clause

²⁹⁴ The applicability of the doctrine of separability only leads to the result that a choice of law clause included in the main agreement does not cover the arbitration clause, Koulu 2008, p. 65; It does not in any other way affect the choice of law of the arbitration clause.

²⁹⁵ Koulu 2008, p. 65; Nevertheless, Savola seems to be of the opinion that the doctrine of separability enables the parties to choose different laws to be applied to the main agreement and the arbitration clause, Savola 2008, p. 14.

²⁹⁶ However, without a choice of law clause in the main agreement it seems quite settled that *lex arbitri* shall be applied to the arbitration clause at least in Finland, see e.g. Kurkela & Uoti 1995, p. 72.

and the main agreement. Another question is, if the doctrine is necessary to apply in Finland, since it seems that general contract law accepts the choice of different laws to different parts of a single contract. The definition of the doctrine of separability enables such an interpretation of the doctrine, but criticism can be given to the way of adapting such an interpretation of the doctrine. The adaption has been made without any critical review of the applicability of the doctrine, based on the aim of the doctrine as a factor restricting the applicability.

However, the doctrine of separability does not favour the applicability of *lex arbitri* nor prohibit the law applied to the main agreement from reaching to the arbitration clause. The doctrine of separability only enables an equal assessment of *lex arbitri* and *lex contractus* as possible applicable laws and consequently respects the intent of the parties as the foremost principle in the process of deciding the applicable law.

For the future, it seems that since the scope of the doctrine of separability regarding the choice of law is settled, the actual ambiguity regards the actual choice of law between *lex arbitri* and *lex contractus*. When amending the Arbitration Act, there is a possibility to clarify the legal state. A good example of a successful clarification of the legal state is the Swedish Arbitration Act which demands for an explicit choice of law in the arbitration clause or otherwise *lex arbitri* will apply. Since *lex arbitri* seems to have strong support among the legal academics in Finland, a similar section in the Finnish Arbitration Act would not be a drastic change to the Finnish legal state but more of a clarification of the legal state.

Even if the amendment would be done for practical reasons, the amendment would probably also symbolize a strong doctrine of separability since the law of the main agreement would not anymore affect the choice of law of the arbitration clause. Nevertheless, the amendment would lead to a situation where the intent of the parties has to be expressed explicitly or otherwise the law of the seat will be applied regardless of the intent of the parties.

4. Interpretation and Adjustment of Arbitration Clauses

In this chapter, I will assess how the doctrine of separability affects the interpretation and adjustment of the arbitration clause. Since the doctrine of separability separates the main agreement and the arbitration clause to two separate agreements, a strict application of the doctrine would lead to an interpretation and adjustment of the arbitration clause without any influences from the main agreement. First, I will assess how the doctrine of separability affects the interpretation and then, the adjustment of the arbitration clause.

4.1 Interpretation of Arbitration Clauses and the Doctrine of Separability

Arbitration clauses are often formulated as short standard clauses as a part of the main agreement. Therefore, a textual interpretation of the arbitration clause is often difficult since the wording of the clause does not always give an answer to the problem occurred. A contextual interpretation of the arbitration clause in the light of the main agreement seems to be a better solution since the clause is drafted as a part of that agreement. Problems may arise if the doctrine of separability is applied to the interpretation of arbitration clauses. If there were two different agreements, it could be argued that the doctrine could prevent the main agreement from being taken into consideration in the interpretation.

Under Finnish law, the objective of the interpretation of contract clauses is to find the common intention of the parties.²⁹⁷ The starting point in contractual interpretation and in finding the common intent of the parties is the wording of the contract clause.²⁹⁸ However according to general contract law, when interpreting a contract clause attention shall also be given to the whole agreement.²⁹⁹ The importance of contextual interpretation depends on how precisely formulated the interpreted contract clause is.³⁰⁰ Even other agreements closely connected to the interpreted agreement can be considered as permissible sources for contextual interpretation.³⁰¹ Since the wording of arbitration clauses is often not that informative, it

²⁹⁷ Tamminen 2017, p. 36; Annola 2016, p. 24; The objective is similar in Sweden, see e.g. NJA 2016:58, pp. 10 (p. 698); The same objective is applied in Norway also, Woxholth 2013, p. 299; According to Lando, the objective is similar in all Nordic countries and the whole continental Europe, Lando 2016, p. 28.

²⁹⁸ Tamminen 2017, p. 36; Annola 2016, p. 26; The starting point is similar in Sweden, Ramberg & Ramberg 2016, p. 161; This also applies for Norway, Woxholth 2013, p. 303.

²⁹⁹ Therefore, the entire agreement can affect how a single clause will be interpreted, Hemmo 2003A, p. 586.

³⁰⁰ Annola 2016, p. 27; The importance of the main agreement as a source is based on the fact that in situations where there are disagreements regarding the content of the agreement, the most valuable source material is the material showing the parties' consensus in the strongest possible way. In other words, a written agreement, Annola 2016, p. 168.

³⁰¹ Annola 2015, p. 135; These connected agreements can be regarded as a strong indication of the parties' consensus.

leads to a greater need for a contextual interpretation and especially gap filling, to cover issues left open by the shortly formulated clause.³⁰²

4.1.1 The Impact of the Contract Type

Are there general principles for the interpretation of arbitration clauses and if there are, does the doctrine of separability form a part of these principles? The question is important, because otherwise the interpretation would only depend on general contract law principles. At least as a main rule in contract law, the interpretative rules are dependent on the type of agreement interpreted.³⁰³ Arbitration agreements are not always classified as an own agreement type but the arbitration agreement has so many special characteristics that Koulu is of the opinion that there is a need for own interpretative rules for arbitration agreements.³⁰⁴ Consequently, there could be some specific interpretational rules applicable to arbitration clauses in addition to the general interpretational rules.

It has been argued that the leading interpretational method for arbitration clauses could be either a narrow or wide interpretational method.³⁰⁵ When applying a narrow interpretational method, the attention is focused on the wording of the clause and an ambiguous arbitration clause is interpreted narrowly and to the detriment of the drafter of the clause.³⁰⁶ The method has been justified with the better procedural safety given by the general courts.³⁰⁷ A broad interpretational method refers to an interpretation in accordance with the presumed aim of the parties to have all parts of their dispute and all related disputes solved by arbitration.³⁰⁸ The method has been justified with the avoidance of fragmentation of the conflict,³⁰⁹ and the

³⁰² It does not seem to be meaningful to make a distinction between regular interpretation and gap filling, Ramberg & Ramberg 2016, p. 160.

³⁰³ Häyhä 1991, p. 21.

³⁰⁴ Koulu 2008, p. 188; The approach with specific interpretational principles applied to arbitration clauses is also common in many other developed jurisdictions, Born 2014A, p. 1317; Nevertheless, in Norway only general contract law principles seems to apply to the interpretation of arbitration clauses, Woxholth 2013, p. 299; Also in Sweden, it seems that only general contract law principles are applied to the interpretation of arbitration clauses, Mannheimer Swartling 2014, p. 29.

³⁰⁵ Tamminen 2017, p. 35.

³⁰⁶ Frände et al. 2017, p. 1305; Koulu 2008, p. 189.

³⁰⁷ Tirkkonen 1943, p. 102.

³⁰⁸ Frände et al. 2017, p. 1305; Möller 1997, p. 30.

³⁰⁹ Heuman 2003, p. 53.

intent of the parties to solve all their disputes by arbitration.³¹⁰ It seems that the narrow interpretational method which earlier was the leading way of interpreting arbitration clauses has declined and the broad interpretational method seems to be the leading method today.³¹¹

According to Koulu, when interpreting arbitration clauses there are three dimensions of the interpretation; 1. The type of the clause; 2. The scope of the clause; and 3. The content of the clause.³¹² With the type of the clause is meant what kind of dispute resolution clause the parties have concluded. The doctrine of separability is not a problem when deciding the type of the clause. The type of the clause is not dependent on the content of the main agreement, but rather on how the clause is formulated and thus does not raise any problems regarding the connection with the main agreement.

The doctrine does not seem to be applicable when deciding the scope of the arbitration clause, since the scope of the clause is primarily decided by the scope of the main agreement.³¹³ Primarily, importance has to be given to the material scope of the main agreement which offers the borders for the applicability of the clause.³¹⁴ Of course, the wording of the clause is the paramount source of the intent of the parties and can thus either broaden the scope of the clause to also include matters outside the main agreement or limit the scope (sometimes intentionally) to only cover some aspects of the main agreement. It is apparent that the doctrine of separability cannot be given any value when deciding the scope of the arbitration clause. Applying the doctrine strictly to prohibit taking into consideration the main agreement would lead to a situation where it would be impossible to determine the scope of the clause.

Regarding the content of the arbitration clause, which includes for instance the determining of the rules and the type of arbitration the parties have decided on, Koulu is of the opinion that general principles of contract law will apply.³¹⁵ Problematic in this regard is that the

³¹⁰ Heuman 1997, p. 535.

³¹¹ Frände et al. 2017, p. 1305; The same can also be said in Sweden, Hobér 2011, p. 102-103; The legal state is similar in Norway, Woxholth 2013, p. 299; Internationally the legal state also seems to be similar, Redfern et al. 2015, p. 93-94; For the traditional school, see e.g. Tirkkonen 1943, p. 102.

³¹² Koulu 2008, p. 185.

³¹³ Koulu goes a step further and is of the opinion that the wording of the clause has almost no value in deciding the scope of the arbitration clause, Koulu 2008, p. 185-186; Such an interpretation is in line with the broad interpretational method, since the clause is interpreted as to include all disputes regarding the main agreement instead for strictly interpreting the arbitration clause in accordance with its wording.

³¹⁴ Koulu 2008, p. 185.

³¹⁵ Koulu 2008, p. 187; This was already claimed by Tirkkonen regarding the interpretation of arbitration clauses in general, Tirkkonen 1943, p. 102; In Sweden, the legal state is similar. The approach has been justified with the aim of the parties, Lindskog 2012, p. 115; Hobér 2011, p. 102.

clause is usually a standard clause and not thoroughly negotiated, which means that neither the wording nor the intention of the parties give much interpretative guidance. However, it seems that the factors to be taken into consideration include at least a procedural economic aspect, the Arbitration Act and the wording of the clause.³¹⁶

4.1.2 The Doctrine of Separability

Even if there are some special features regarding the interpretation of arbitration clauses, the main rule is that the clause has to be interpreted in the light of the main agreement.³¹⁷ According to Koulu, the doctrine of separability cannot prohibit the considering of the environment and surroundings of the clause as an important part of the interpretation of the arbitration clause.³¹⁸ With the environment and the surroundings is meant the environment where the parties are operating.³¹⁹ According to Annola, a separate agreement which is relevant for the interpretation of an agreement can be used as a source for the interpretation as a part of the contextual material permissible for the interpretation.³²⁰ Arbitration clauses are often included in agreements in the last minute, in standard form and without any negotiations. How would one interpret the clause, without any supporting materials? Therefore, it seems logical that the doctrine of separability cannot reach to the interpretation of arbitration clauses.

In Sweden, it is also clear that the doctrine of separability does not reach to the interpretation of arbitration clauses.³²¹ The standpoint has been justified with the intention of the parties.³²² The aim of the parties is in Sweden both considered as the basis for the interpretation of arbitration clauses and as the basis for the justification of the entire doctrine. Since the main

³¹⁶ Koulu is of the opinion that a context-based interpretation cannot be used since there have usually been no negotiations regarding the clause and therefore there are not any additional materials available for the interpretation. Consequently, the wording of the clause gets an important role in the interpretation, Koulu 2008, p. 187; Of major importance are also the rules of arbitration and the legal doctrine and practice interpreting the rules, if specific rules have been chosen.

³¹⁷ Koulu 2008, p. 75; These special features are not based on the doctrine of separability but on the characteristics of dispute resolution clauses, Koulu 2009, p. 207; However, Koulu states that the legal state is not totally clear, Koulu 2009, p. 236.

³¹⁸ Koulu 2009, p. 207.

³¹⁹ Annola 2015, p. 105.

³²⁰ Annola 2015, p. 135; The contextual material is not as strong as a source as the material that is part of the interpreted agreement but because the actual agreement does not always solve the interpretable problem, the contextual material has to be considered, Annola 2015, p. 157; The threshold for being relevant for the interpretation of the arbitration clause should easily be exceeded by the main agreement.

³²¹ Heuman 2003, p. 63-64; Heuman 1999, p. 82; The legal state is similar in Norway, Woxholth 2013, p. 486-487.

³²² Heuman 2003, p. 63-64; Heuman 1999, p. 82.

agreement assists the court/tribunal to discover the intention of the parties, the Swedish standpoint seems logical.³²³ Internationally, based on case law it also seems like the doctrine of separability does not reach to the interpretation of arbitration clauses.³²⁴

The aforementioned standpoints seems to be well-grounded. Even a strict interpretation of the wording of the doctrine of separability should not lead to a result preventing the usage of the main agreement in the interpretation of arbitration clauses. Even then, general contract law rules accept the consideration and effects of a connected agreement in the interpretation of another agreement. Regardless if the doctrine of separability is justified with the intention of the parties or effectivity arguments, the applicability of the doctrine to the interpretation of arbitration clauses is not necessary for the fulfilment of the aim of the doctrine.

4.2 Adjustment of Arbitration Clauses and the Doctrine of Separability

According to section 36 of the Contracts Act, a clause which is unfair or its application would lead to an unfair result may be adjusted or set aside.³²⁵ Section 36 of the Contracts Act states that the “*entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract*” shall be taken into consideration when determining if a clause is unfair.³²⁶ Among the most common reasons for adjustment can be found an unequal amount of expertise or financial assets between the parties.³²⁷ The aforementioned unequal positions are usually only relevant for the adjustment, if one of the parties is a consumer or a small company.³²⁸ These inequalities could possibly be prob-

³²³ Heuman 2003, p. 63-64; Heuman 1999, p. 82.

³²⁴ “*The clause must always be interpreted as part of, and in the light of, the particular contract in which it appears*”, ICC case No. 5754 (1988) (referred to in Craig et al. 2000, p. 90).

³²⁵ Unclear is what happens if the law applicable to the arbitration clause does not accept adjustment. However, Koulu keeps the adjustment section in the Contracts Act as an *ordre public* provision, which means that a Finnish court could refuse to enforce an award based on an unfair arbitration clause, Koulu 2005, p. 39; The *ordre public* principle is codified in section 40, subsection 1, paragraph 2 of the Arbitration Act. The scope and meaning of the principle is not further clarified in the Government Proposal, HE 202/1991, p. 25; Even if Koulu seems to be quite sure about his standpoint, it has to be kept in mind that there are not much case law and doctrine about *ordre public* and that the threshold to apply the principle is high.

³²⁶ The English translation of section 36 of the Finnish Contracts Act; Section 36 of the Finnish Contracts Act is similar to the provisions regarding adjustment in the other Nordic countries, see section 36 of the Swedish Contracts Act, section 36 of the Norwegian Contracts Act and section 36 of the Danish Contracts Act.

³²⁷ Hemmo 2003B, p. 65, 69-70; Nevertheless even if rare, adjustment is possible even if the parties are in an equal position, since an equal position cannot always guarantee equal contractual terms, Telaranta 1990, p. 381.

³²⁸ Usually, adjustment is only possible if one party is in an unequal position towards the other party, Hemmo 2003B, p. 64; In international arbitration, both parties are usually equally positioned companies, which makes the scope for adjustment in international arbitration narrow.

lematic when it comes to arbitration since the proceedings can be more expensive than general court proceedings and the need for legal expertise is significant. Regarding arbitration clauses, adjustment is however quite uncommon since consumers cannot accept to take an upcoming dispute to arbitration in advance.³²⁹

It is accepted that arbitration clauses can be adjusted based on the Contracts Act, section 36.³³⁰ In accordance with section 36 of the Contracts Act, the whole agreement has to be considered when adjusting a contract clause. One of the special feature for arbitration clauses is that the adjustment of an arbitration clause usually leads to the invalidity of the whole clause, instead of only a partly adjustment of the clause.³³¹ Nevertheless, the adjustment of arbitration clauses is generally more common than the adjustment of arbitration agreements.³³²

4.2.1 The Doctrine of Separability

The doctrine of separability could possibly restrain the main agreement from being considered as a factor in the adjustment of the arbitration clause.³³³ Nevertheless according to Koulu, the lack of importance of the main agreement in the adjustment of arbitration clauses is not necessarily because of the doctrine.³³⁴ There is simply no connection between the main agreement and the lack of access to justice which could follow from the arbitration clause.³³⁵ When assessing if a party has access to justice and if the proceeding therefore should be

³²⁹ See Consumer Protection Act, chapter 12, section 1d; However as can be seen from the decision KKO 2003:60, there is still space and need for the adjustment of arbitration clauses.

³³⁰ This has been accepted in the decisions KKO 1996:27 and KKO 2003:60; As in Finland, the Swedish legislation enabling adjustment of contract clauses also applies to arbitration clauses, Prop. 1976/77:81, p. 147; Prop. 1998/99:35, p. 47; Lindskog 2012, p. 124; The same applies for Norway also, NOU 2001:33, p. 64; The adjustment of arbitration clauses is however rare in at least both Finland and Sweden, Frände et al. 2017, p. 1306; Hobér 2011, p. 104-105.

³³¹ Koulu 2008, p. 211; A partly adjustment of the clause seems to be possible, if only a single condition in the arbitration clause is unfair and the condition could either be amended or left without notice, Lindskog 2012, p. 124; This reluctance to partly adjust the arbitration clause seems to be mainly because the financial inequality between the parties makes the arbitral proceeding as such unfair. The best way to secure a fair trial in such a situation would then be to move the trial to the general state courts. Another possibility would be to order the costs to be shared differently.

³³² Koulu 2008, p. 211; Arbitration agreements are usually not concluded until the conflict is already at hand, compared to the arbitration clauses which are concluded at the same time as the main agreement. At the time the main agreement is entered into, the effects of the arbitration clause cannot always be predicted. When the conflict is already at hand, it is easier for a party to assess the benefits and disadvantages with arbitration, Möller 1996, p. 449.

³³³ Koulu 2008, p. 75.

³³⁴ Koulu 2008, p. 75.

³³⁵ Koulu 2008, p. 75; Usually the only reason for adjustment is that arbitration would lead to a lack of access to justice for the weaker party, which is only caused by the arbitration clause and not connected with the main agreement.

moved to the state courts to make the proceeding fair, it is natural that the main agreement gives no additional value to the evaluation.

In Finnish doctrine, the leading opinion is that the adjustment of the arbitration clause shall be made in accordance with the wording of section 36 of the Contracts Act, which means taking into consideration the main agreement as a part of the overall assessment when determining if the arbitration clause is unfair.³³⁶ Also in Sweden, it is clear that in accordance with ordinary contract law rules an overall assessment shall be made and therefore the doctrine of separability cannot be applied to the adjustment of the arbitration clause.³³⁷ In Norway, it also appears that the doctrine of separability does not reach to the adjustment of arbitration clauses. In the Norwegian report evaluating the need for amending the Arbitration Act, it was clearly stated that the adjustment provision in the Contracts Act is applied to arbitration clauses.³³⁸ The procedural nature of the arbitration clause does not prevent adjustment since the arbitration clause is a part of the overall contractual relationship between the parties.³³⁹

There is not much case law regarding the matter in Finland. One of the few cases dealing with the matter is KKO 1996:27.³⁴⁰ As earlier mentioned, it is unusual that arbitration clauses are adjusted, since they are often concluded between equally positioned companies. In this case however, the parties were unequally positioned. One of the parties was a big company and the other a rather small one with not much resources compared to the bigger company. Most importantly, it was alleged by the claimant that the reason for the unfairness of the

³³⁶ Turunen 2005, p. 158; Even if Möller also favours the overall assessment, he however accepts that there can also be arguments supporting the adjustment of arbitration clauses without taking into account the main agreement even if it would contradict the common interpretation of section 36 of the Contracts Act, Möller 1996, p. 444; Even if he thinks that the legal state still is a bit ambiguous, Koulu also accepts that by applying section 36 of the Contracts Act, the adjustment of an arbitration clause should be based on an overall assessment of the fairness of the clause, in which also the main agreement is considered. Since section 36 demands for an overall assessment, it would anyway be difficult to give reason for an adjustment of the clause where the main contract would not be taken into account at all, Koulu 2008, p. 211.

³³⁷ Grönfors & Dotevall 2016, p. 294.

³³⁸ NOU 2001:33, p. 64.

³³⁹ "Skulle det oppstå et tilfelle hvor det på grunn av omkostningene i uventet og i helt særegen grad viser seg å bli urimelig om voldgift skal anvendes, må for øvrig en avtale om voldgift kunne tenkes satt til side etter avtaleloven § 36. Det kan ikke være til hinder for dette at avtalen om voldgift gjelder et prosessuelt forhold. Også voldgiftsavtalen er en del av det totale avtaleforholdet mellom partene.", NOU 2001:33, p. 64; Even if the report clearly states that the agreements are separate, the arbitration clause is still a part of the overall contractual relationship between the parties. This indicates that when it comes to adjustment, the main agreement would be taken into consideration; It seems that also Woxholth is of the same opinion, since he states that an overall assessment has to be done and that the adjustment can lead to changes in both the arbitration clause and the main agreement, Woxholth 2013, p. 346.

³⁴⁰ See also the later decision KKO 2003:60, also dealing with the adjustment of arbitration clauses.

arbitration clause in this case was that the party did not have financial means for financing the arbitral proceeding. In a scenario like this, there is not much need for using the main agreement in the assessment.

Nevertheless, even if the Court did not adjust the arbitration clause, the case contains some important *obiter dicta*. Even if the clause was not adjusted, it is interesting that the Court considered that an arbitration clause can be adjusted, for instance if the legal question is clear and the economic interest is small which can make the contractual relationship as a whole unreasonable.³⁴¹ It could be alleged, that these aforementioned factors are connected to the main agreement and not to the arbitration clause. In addition, the Court stated that the arbitration agreement is only a clause included in the main agreement.³⁴² From the Supreme Court's statement of reason can be interpreted that KKO meant that the arbitration clause shall be adjusted in the light of the main agreement and that KKO considered that the doctrine of separability cannot be applied to the adjustment of arbitration clauses.

Hemmo interprets the case as stating that the contract type and the type of business can be taken into consideration when adjusting arbitration clauses.³⁴³ Möller goes a step further and interprets the case as stating that the arbitration clause shall only be considered as a part of the overall contractual relationship between the parties when adjusting the arbitration clause.³⁴⁴ Nevertheless, it seems that the doctrine of separability is not applied to the adjustment of arbitration clauses.

Another example of the consideration of the main agreement in the adjustment of dispute resolution clauses is the Supreme Court decision KKO 1986 II 50, which regarded the adjustment of a prorogation clause. A Finnish employee had worked for a Swiss company in Finland and the parties had made a prorogation clause stating that conflicts between the parties should be solved in Basel. The employee claimed in a Finnish court that the prorogation clause should be adjusted and that the court therefore had jurisdiction to decide the substantial dispute. The Court found that the need to protect the employee, the financial circumstances and the connection of the case to Finland favoured the jurisdiction of the Court and

³⁴¹ "Lisäksi välityslauseketta voidaan pitää kohtuuttomana muun muassa silloin, kun riitakysymys on selvä ja yksinkertainen ja sen taloudellinen arvo on vähäinen, jolloin välimiesmenettelystä sopijapuolelle aiheutuvat kustannukset olisivat sopimussuhde kokonaisuudessaan huomioon ottaen kohtuuttomat.", KKO 1996:27.

³⁴² "Kaupalliseen yhteistoimintasopimukseen otettuna välityslauseke ei ole kuitenkaan epätavallinen tai yllätyksellinen sopimusehto.", KKO 1996:27.

³⁴³ Hemmo 2003B, p. 84.

³⁴⁴ Möller 1996, p. 456.

therefore the prorogation clause was adjusted.³⁴⁵ According to Koulu, the assessment made by the Court can be considered as a substantial overall assessment.³⁴⁶ At least the connection of the case to the Finnish jurisdiction is a factor connected to the substantive part of the contractual relationship. Therefore, it seems that the Court examined the substantial agreement as a part of the evaluation of the fairness of the arbitration clause.³⁴⁷

In Sweden, even a step further has been taken since it is alleged that the whole agreement, including the arbitration clause shall be assessed at once in a substantial adjustment assessment.³⁴⁸ Consequently, the court/tribunal could exceed its competence if setting aside the arbitration clause as a consequence of the adjustment. In addition, the court/tribunal assesses the main agreement without having yet decided on its competence, which could be regarded as inefficient since at the time of the adjustment assessment, it is still unsure if the court/tribunal has competence to investigate the main agreement. This interpretation has also in the legal doctrine been criticised for making the proceeding inefficient.³⁴⁹

Does then the adjustment of the main agreement also reach to the arbitration clause? Theoretically and strictly applied in accordance with its wording, the doctrine of separability could restrict the adjustment of the main agreement from also covering at least prorogation clauses.³⁵⁰ It seems logical that the adjustment of the main agreement does not cover the prorogation clause (and by analogy also the arbitration clause), since the adjustment can lead to the main agreement being set aside which consequently also would lead to the dispute resolution clause being set aside.³⁵¹ If the adjustment leads to the whole agreement being set aside and the doctrine of separability would not be applied, this would lead to a situation where the tribunal would lose its competence by adjusting the main agreement. The applicability of the doctrine seems self-evident also since the court/tribunal primarily has to assess

³⁴⁵ "Työntekijän suojelu ja taloudelliset seikat edellyttävät, että A voi ajaa kannettaan Suomessa. Jutussa on myös liittymäkohtia Suomen oikeuteen. Edellä olevan perusteella Kuopion raastuvanoikeus on toimivaltainen käsittelemään jutun.", KKO 1986 II 50.

³⁴⁶ Koulu 2009, p. 222.

³⁴⁷ The decision has been criticized for being economically inefficient, since the Court had to make a material examination before even deciding if it has jurisdiction. In addition, the decision has also been criticized for making the competence question unpredictable since the examination was made *in casu*, based on the material agreement instead of being based on clear rules governing the choice of forum, Koulu 2009, p. 222.

³⁴⁸ Grönfors & Dotevall 2016, p. 294.

³⁴⁹ Grönfors & Dotevall 2016, p. 294.

³⁵⁰ Koulu 2009, p. 209, 221; The doctrine of separability has been given the same strength in both arbitration law and regarding prorogation clauses, Koulu 2009, p. 235; In Norway, the adjustment of the main agreement does not necessary cover the arbitration clause, Woxholth 2013, p. 489.

³⁵¹ Koulu 2009, p. 209.

if it has competence based on the alleged unfairness, expiration, non-existence or invalidity of the arbitration clause before adjusting the substantial agreement.

In Sweden, at least a separate assessment of the arbitration clause has to be done before setting aside the arbitration clause in connection to the setting aside of the main agreement based on section 36 of the Contracts Act.³⁵² This has been justified with the doctrine of separability which prohibits setting aside the arbitration clause because of the setting aside of the main agreement without a separate assessment of the fairness of the clause.³⁵³ Also internationally it seems that since the aim of the doctrine is to protect the integrity of the proceeding, the unfairness of the main agreement or the arbitration clause does not automatically make the other agreement unconscionable without a separate assessment of the other agreement.³⁵⁴

4.2.2 Criticism

The standpoint taken in case law and legal doctrine can be criticised from an efficiency perspective as have been done in Sweden and by Koulu, or from a jurisdictional perspective. The competence to assess the substantial part of a conflict depends on the result of the procedural assessment. If the result of the procedural assessment is that the tribunal has no jurisdiction, the assessment of the main agreement has been unnecessary. Also, by taking into consideration the main agreement in the adjustment of the arbitration clause, the court/tribunal could exceed its competence by assessing the substantial matter before yet having decided on its competence.³⁵⁵ In addition, one of the objectives of the doctrine of separability is to enhance arbitration and with giving the state courts the right to also assess the substantial side of the dispute, it can be argued that arbitration is not enhanced.

4.3 Conclusions

The legal state regarding the interpretation of arbitration clauses seems to be clear both in Finland and internationally. When interpreting an arbitration clause, the main agreement has

³⁵² Heuman 2003, p. 105-106; Heuman 1999, p. 123.

³⁵³ Heuman 2003, p. 105-106; Heuman 1999, p. 123.

³⁵⁴ Born 2015, chapter 3, pp. 23.

³⁵⁵ The importance of the division between the procedural and material side can be illustrated by the fact that an arbitral award can only be set aside on procedural grounds. It can however be argued that setting aside an award based on section 40, subsection 1, paragraph 2 of the Arbitration Act on the ground that the award is against Finnish *ordre public* could be a material ground, and thus an exception to the rule.

to be taken into account as a part of the contextual interpretation and consequently the doctrine of separability cannot be applied.

Also, the question regarding the adjustment of arbitration clauses seems to be settled. Based on Supreme Court praxis and legal doctrine it seems well established that the main agreement can be taken into account when adjusting the arbitration clause. The adjustment is based on Contracts Act, section 36, which states that when adjusting a contract clause, the whole content of the contract has to be taken into account in an overall assessment of the fairness of the contract clause. However from an opposite point of view, the adjustment of the main agreement cannot affect the arbitration clause. The setting aside of an arbitration clause can only be made based on a separate assessment because of the doctrine of separability and since the arbitration clause already has to be adjusted before assessing the main agreement.

The assessing of the main agreement as a part of the adjustment of the arbitration clause has been criticized on efficiency grounds and from a competence perspective. By assessing the substantial main agreement when adjusting the arbitration clause, a general court could exceed its competence at least if ruling the arbitration clause valid and the tribunal exceed its competence at least if ruling the clause invalid.³⁵⁶ In addition, the substantial assessment is unnecessary, if the court/tribunal after the assessment decides that it does not have jurisdiction to assess the main agreement.

³⁵⁶ If the court/tribunal gives itself competence, the failure would only be the mixing up of the procedural and substantive parts of the proceeding.

5. General Rules for the Applicability of the Doctrine of Separability

This chapter will assess if any general rules for the scope and applicability of the doctrine of separability can be found or constructed. Firstly, I will discuss the friction between the definition of the separability doctrine, which possibly broadens the scope of the doctrine and the aim of the doctrine, which possibly narrows the scope of the doctrine. Secondly, I will assess the practical situation of assigning the arbitration clause in connection to the assignment of the main agreement since the scope of the doctrine has been debated in connection to the assignment of agreements. Thirdly, I will assess if any general rules for the applicability of the doctrine of separability can be found. Finally, I will conclude the findings, and based on them, suggest my own construction of general rules for the scope and applicability of the doctrine of separability.

5.1 Is the Scope of the Doctrine broader than the Original Aim of the Doctrine?

There is a conflict between the aim and the definition of the doctrine of separability. As the doctrine is defined, there are two independent agreements, the main agreement and the arbitration clause. This literally means that these shall be totally separate, including interpreted and adjusted separately. As a consequence, clauses in the main agreement, for instance the choice of law clause cannot affect the arbitration clause. However, the arbitration clause would without the main agreement have no use, task and meaning.

The aims of the doctrine of separability are to protect the arbitration clause from invalidity, to protect the efficiency of the proceeding and express the intention of the parties. These aims demand a weaker separability doctrine. For instance, it does not seem necessary for the effectiveness of the proceeding to apply the doctrine of separability to the choice of law. If the doctrine would be interpreted in accordance with its aims, it would be quite narrow and would not prevent other influences of the main agreement apart from those contradicting the aims of the doctrine.

In the following subchapters, I will assess if there can be found general rules for the applicability of the doctrine of separability that could also be applied to other situations than those presented in chapters 2-4. As an example of such a situation, I will use the assignment of the main agreement to which the doctrine of separability could be applied in accordance with the definition of the doctrine, but to which the applicability could be in conflict with the aim of the doctrine. Even if the aim of this chapter is to find general rules for the applicability of the doctrine of separability, it is necessary to also thoroughly study specific situations where

the applicability of the doctrine is ambiguous. Since there is no comprehensive research regarding the matter and no generally accepted rules governing the applicability, the problems have occurred in certain isolated situations and therefore it is necessary to study these situations comprehensively.

It is still not certain how broad the scope of the doctrine of separability is in Finland.³⁵⁷ There are different scholars supporting different strengths of the doctrine of separability. The most extreme scholars either deny the doctrine totally,³⁵⁸ or state that the doctrine has an almost endless scope and no exceptions.³⁵⁹ It is at least accepted that the doctrine has in some situations been used to develop the arbitration law by applying the doctrine of separability further than the original aim of the doctrine.³⁶⁰ An extensive interpretation of the doctrine apparently broadens the jurisdiction of the tribunal and a narrow interpretation favours the general courts, which is good to keep in mind when critically evaluating the question.

5.2 Transfer of the Main Agreement

One of the typical situations where problems with a strong doctrine of separability can occur is the transfer of the main agreement. Certainly, the will of the parties usually is to also transfer the arbitration clause in connection with the transfer of the main agreement. However, if strictly adapting the doctrine of separability, it should explicitly be mentioned that also the arbitration clause is transferred since there are two separate agreements. Since the scope of the doctrine of separability is ambiguous, the scope of the doctrine has been debated in connection to the transfer of the main agreement. The automatic transferability of the arbitration clause has been considered as a good test for the strength and scope of the doctrine of separability.³⁶¹

In Finland, the decision KKO 2007:39 states that the transferee is bound by the arbitration clause even after the main agreement has been transferred.³⁶² The case regards an insured company that went bankrupt and the injured party's rights and obligations under the insur-

³⁵⁷ Neither is there internationally any consensus about how far the doctrine reaches in practice, Siig 2003, p. 253.

³⁵⁸ Ware 2007, p. 119.

³⁵⁹ Koulu 2008, p. 77.

³⁶⁰ Fouchard et al. 1999, p. 213; One of these situations seems to be the choice of law, since the original aim of the doctrine of separability does not seem to support the applicability of the doctrine to the choice of law.

³⁶¹ Leboulanger 2007, p. 30.

³⁶² A comprehensive analysis of the choice of law question risen in the decision can be found in chapter 3.5.

ance agreement concluded between the insurer and the company. The Court applied Norwegian law to both the insurance agreement and the arbitration clause. The Court stated that since both Norwegian and international doctrine supports the view that also the arbitration clause is transferred with the main agreement, there was no reason to make an exemption from the principle formulated in the legal doctrine.³⁶³ Based on the wording of the case, it remains unclear if the Court made a separate assessment of the arbitration clause or if it was assigned automatically as a part of the main agreement.³⁶⁴

In addition, since the Court applied Norwegian law it is not sure if the same principles would be applied in a purely Finnish case. In Norway, it is accepted that even if the arbitration clause is a separate agreement it is not totally unconnected with the main agreement.³⁶⁵ As the aim of the doctrine is to enhance the efficiency of arbitration, the doctrine of separability cannot be used to prevent the transferability of the clause in connection with the transfer of the main agreement, since it would be against the aim of the doctrine.³⁶⁶ However, as the Court stated that also in accordance with international doctrine the transferee is bound by the arbitration clause, there are strong arguments for adopting the principle also in Finland.³⁶⁷

Today, the Norwegian Arbitration Act, section 10, subsection 2 clarifies that it is presumed that the parties intend to also assign the arbitration agreement in connection to the transfer of the main agreement.³⁶⁸ The use of the word “*voldgiftsavtale*” indicates that the arbitration clause is a separate agreement and consequently that the doctrine of separability today could be applied to the assignment. As a consequence, it could be alleged that even if it is presumed that the parties intend to transfer the arbitration clause in connection to the transfer of the main agreement, a separate assessment of the transfer of the arbitration clause has to be done.

³⁶³ KKO 2007:39, pp 7-8.

³⁶⁴ By invoking the agreement, it can be alleged that the injured party implicitly also accepted the arbitration clause included in the agreement. Problematic in this situation is that the injured party had no other choice than accepting the agreement to get the possibility to claim damages. Another problematic aspect of the case is that the Court did not use the terminology coherently. The Court used both terms “*arbitration clause*” and “*arbitration agreement*” interchangeably.

³⁶⁵ Sørensen 2018, p. 404.

³⁶⁶ NOU 2001:33, p. 72; The standpoint taken in the report was adapted in the present Norwegian Arbitration Act enacted in 2004 (came into force in 2005), section 10, subsection 2.

³⁶⁷ KKO 2007:39, pp 7; This principle also applies in Denmark, Woxholth 2013, p. 338.

³⁶⁸ According to section 10, subsection 2 of the Norwegian Arbitration Act; “*Hvis ikke annet er avtalt mellom partene i voldgiftsavtalen, følger voldgiftsavtalen med ved overføring av det rettsforhold den omfatter*”. Consequently, it is presumed that the parties also intend to assign the arbitration agreement.

The present Norwegian Arbitration Act enacted in 2004 was not applicable to the Supreme Court case.³⁶⁹

According to Norros, the legal state was already settled in Finland before the decision, but he gives the case value as it strengthens the prevailing legal state.³⁷⁰ Also Möller accepts the standpoint.³⁷¹ However, Möller sets as a prerequisite for the transfer that the transferee should have known about the arbitration clause.³⁷² Kurkela is of the opinion that even if the doctrine of separability makes the arbitration clause independent, it is still ancillary to the main agreement which means that assigning an arbitration clause without the main agreement would not be possible since the arbitration clause would lose its “*substance or meaning*”.³⁷³ Consequently, it seems that the main rule is that an arbitration clause binds the transferee also according to Finnish law, but the role of the doctrine of separability in the assessment is still unsure.³⁷⁴

In Sweden, similarly as the justification of the doctrine of separability in general, also the justification of the transfer of the arbitration clause in connection to the transfer of the main agreement could be justified with the will of the parties. The Supreme Court decision NJA 1997:147 accepts the transfer of the arbitration clause in connection to the transfer of the main agreement.³⁷⁵ It is however unclear from the reasoning of the decision if the transfer

³⁶⁹ KKO 2007:39, pp. 7.

³⁷⁰ Norros 2007, p. 260.

³⁷¹ According to Möller, this is based on general contract law rules, Möller 2004, p. 13; Is then the original party of the agreement bound by the arbitration clause towards the transferee? According to Möller, the answer is positive, the original party is bound by the arbitration clause. Möller also gives weight to the parties' intention and thus the arbitration clause is not binding if the intention has been that it could only be invoked by the original parties. It seems that Möller suggests that this intention only prevents the transferee from invoking the clause against an original party, Möller 1997, p. 22-23; The standpoint seems strange since the transfer of the clause would then put the original party in a better position than the transferee.

³⁷² Möller 1997, p. 22-23. When the arbitration clause is a part of the main agreement, there only seems to be a theoretical possibility to waive that the party did not know about the clause, since the transferee has a strict duty to investigate the agreement before accepting the transaction. By accepting the transfer, the party should be aware of that there is an arbitration clause included in the agreement and it can thus also be argued that the party conclusively accepts the assignment of the arbitration clause.

³⁷³ Kurkela calls the result of a strict application of the doctrine of separability to the assignment of agreements absurd and nonsense. In his opinion, the question is more about interpretation of the agreement and that the presumption should be that also the arbitration clause is transferred, if an intention of the contrary is not shown, Kurkela 2005, p. 72.

³⁷⁴ The same can also be said regarding prorogation clauses, Oikeusministeriö: Työryhmämietintö 2007:15, Riita-asioiden oikeuspaikkasäännösten uudistaminen, p. 50; Since arbitration clauses are seen as more fateful than prorogation clauses, the transferability of a prorogation clause to a third party should happen even easier than the transfer of an arbitration clause, Koulu 2009, p. 155; In Norway, prorogation clauses have been regarded as binding on the transferee if the main agreement gives the transferee rights, Schei et al. 2013, p. 173.

³⁷⁵ NJA 1997:147 (p. 866); The question concerning codification of the ambiguous rules regarding the transferability of the arbitration clause in connection with the transfer of the main agreement was discussed in

was automatic or based on a separate assessment of the transfer of the arbitration clause. The Supreme Court justified its decision with the presumed aim of the parties to include the arbitration clause in the transfer.³⁷⁶ If the party would not have wanted to be bound by the arbitration clause, the party was free not to acquire the main agreement.³⁷⁷ Hobér and Magnusson have interpreted the case so that the Court did not contradict the doctrine of separability in its reasoning.³⁷⁸

According to Lüning, the automatic transfer of the arbitration clause to the transferee of the main agreement is a natural effect of the presumed will of the parties.³⁷⁹ According to him, this would not violate the doctrine of separability since the will of the parties is only a presumption that can be disproved in favour of the applicability of the doctrine of separability.³⁸⁰

Hobér and Magnusson suggests another explanation for the transferability of the arbitration clause in connection with the transfer of rights. They suggest that the transfer of the clause is not automatic since the doctrine of separability also applies to the assignment of the main agreement.³⁸¹ Consequently, the arbitration clause is transferred separately as a separate agreement and the transfer shall be assessed separately even if it should be presumed that the parties intend to also transfer the arbitration clause when they assign the main agreement.³⁸²

Nevertheless, it seems that the doctrine of separability should at least be applied to evaluate the validity of the transfer since the validity requirements for the assignment could differ for

the Government Proposal of the present Arbitration Act. Even if it was admitted that the legal state was unclear, it was decided to leave the question to be solved by the administration of justice, Prop. 1998/99:35, p. 63-66; The Government Proposal is based on a report from the Ministry of Justice (SOU 1994:81). According to the report, the applicability of the doctrine of separability to the assignment of the main agreement was unsure. The report suggested that for the arbitration clause to be transferred, it has to be implicitly or explicitly agreed on the transfer. Otherwise the clause would not to be transferred in connection to the transfer of the main agreement, SOU 1994:81, p. 91-94; As shown above, the Government Proposal rejected the proposal made in the report.

³⁷⁶ NJA 1997, p. 872.

³⁷⁷ NJA 1997, p. 872; The Supreme Court accepted that in certain circumstances the arbitration clause cannot bind the transferee even if the main agreement is transferred, NJA 1997, p. 873.

³⁷⁸ Hobér & Magnusson 2008, p. 73.

³⁷⁹ Lüning 2016, p. 637.

³⁸⁰ Lüning 2016, p. 637; See also Hobér, who comes to the same conclusion, Hobér 2011, p. 129.

³⁸¹ Hobér & Magnusson 2008, p. 72.

³⁸² Hobér & Magnusson 2008, p. 72; Consequently, the presumed will of the parties is according to Hobér and Magnusson important when making the separate assessment of the transfer. Regarding the evaluation of the applicability of the doctrine of separability to the assignment of agreements, they do not seem to give the presumed will of the parties any value.

the arbitration clause and the main agreement.³⁸³ Otherwise, the validity of the transfer of the arbitration clause would always depend on the validity of the transfer of the main agreement. Consequently, the doctrine of separability should at least give the tribunal competence to separately evaluate the validity of the transfer of the main agreement and the arbitration clause, even if it would be presumed that also the arbitration clause is automatically transferred.

Contrary to the transfer of rights, where the legal state regarding the applicability of the doctrine of separability seems to be unclear, at least in Sweden the doctrine appears to apply to boilerplate clauses included in the main agreement.³⁸⁴ However, the presumption in favour of the applicability of the doctrine can be rebutted, if it can be shown that the parties otherwise intended.³⁸⁵ Therefore, boilerplate clauses included in the main agreement only reaches to the arbitration clause if it can be shown that the parties intended so.

Even if the result is different when it comes to boilerplate clauses compared to the transfer of arbitration clauses, the justification is similar to that suggested by Heuman regarding the transfer of arbitration clauses. The only difference is that the presumption of the applicability of the doctrine of separability is opposite. If the intention of the parties is shown to oppose the applicability of the doctrine, it cannot be applied. However, it is not reasoned why the presumption should be different in different situations when determining if the doctrine shall be applied. From a theoretical perspective, the applicability of the doctrine has been regarded as the presumed aim of the parties. Therefore, the construction used by Madsen regarding boilerplate clauses seems stronger and more logical from the theoretical perspective. On the other hand, in practice it appears odd to presume that the parties do not intend to also transfer the arbitration clause when transferring the main agreement.

Internationally, the transfer of the main agreement has often been argued to represent a delimitation of the scope of the doctrine of separability.³⁸⁶ The leading international standpoint seems to accept the automatic assignment of the arbitration clause in connection with the

³⁸³ Heuman 1997, p. 554.

³⁸⁴ Madsen 2016, p. 96.

³⁸⁵ Madsen 2016, p. 96.

³⁸⁶ Leboulanger 2007, p. 5; However, Leboulanger is of the opinion that the transfer of the arbitration clause could be regarded as independent in accordance with the doctrine of separability even if it is transferred in connection with the main agreement, Leboulanger 2007, p. 30-31.

assignment of the main agreement even if there are some differing opinions.³⁸⁷ At least it is presumed that the parties intend to also transfer the arbitration clause but as in Sweden, this presumption can be rebutted by the actual aim of the parties.³⁸⁸ According to Born, since the aim of the arbitration clause is to provide a dispute resolution remedy for solving conflicts regarding the main agreement, it would be against the aim of the arbitration clause to apply the doctrine of separability to the assignment of the main agreement.³⁸⁹ However, the separability doctrine has to be applied when determining the validity of the transfer, since otherwise the validity of the transfer of the arbitration clause would automatically be determined by the validity of the transfer of the main agreement.³⁹⁰

The presumed transfer of the arbitration clause in connection to the transfer of the main agreement has also been argued to be a consequence of the nature of the arbitration clause. The arbitration clause is considered by Mayer as auxiliary to the main agreement.³⁹¹ The auxiliary nature of the arbitration clause means that its only function is to assist in the fulfilment of the main agreement.³⁹² When it comes to arbitration clauses, the function is to solve conflicts and determine the future of the main agreement.³⁹³ The function of the arbitration clause can be explained with the presumed will of the parties.³⁹⁴ When transferring the main agreement, the clause should consequently follow with the main agreement or otherwise the clause could not fulfil its auxiliary function to solve conflicts and determine the future of the

³⁸⁷ Born 2014A, p. 1466-1469; As Fouchard has explained it, if the arbitration clause would not be transferred with the main agreement, it would have no objective. Fouchard is of the opinion, that regardless of the doctrine of separability, it should be presumed that the parties intend to also transfer the arbitration clause if the opposite is not shown. It is unsure from his reasoning if the transfer is automatic or if a separate assessment of the transfer of the arbitration clause has to be done, Fouchard et al. 1999, p. 427-428; At least most civil law countries seems to accept that the arbitration clause is also transferred to the transferee when the main contract is transferred. Contrary to the civil law countries, the legal state in the common law countries is still not clear. Leboulanger is of the opinion that regardless of if it is presumed that the parties intend to also transfer the arbitration clause, the transfer of the arbitration clause is independent, and thus in accordance with the doctrine of separability, Leboulanger 2007, p. 29-31; However, there are still opinions that suggests that even if the main agreement is transferred it does not even trigger a presumption that also the arbitration clause is transferred, even if most legal systems accept the automatic transferability, Born 2014A, p. 1468-1469; Landolt 2013, p. 516, 518; Landolt is also of the opinion that the legal state should be similar, regardless of the type of dispute resolution clause transferred, Landolt 2013, p. 518.

³⁸⁸ Born 2014A, p. 1468; Fouchard et al. 1999, p. 427-428.

³⁸⁹ Born 2014A, p. 1469.

³⁹⁰ Born 2014A, p. 1470.

³⁹¹ Mayer 1999, p. 262-264.

³⁹² Mayer 1999, p. 262-264.

³⁹³ As one of its auxiliary functions is to assist in determining the future of the main agreement, it is clear that the arbitration clause should survive the invalidity, termination and non-existence of the main agreement, Mayer 1999, p. 262-264.

³⁹⁴ Mayer 1999, p. 263.

main agreement.³⁹⁵ Therefore, based on the auxiliary nature of the arbitration clause, it should be presumed that also the arbitration clause is transferred.³⁹⁶

However, Mayer does not see a conflict between the nature of the arbitration clause and the doctrine of separability. He even states that because of the nature of the arbitration clause, the doctrine of separability is vital for the fulfilment of the function of the clause to determine the future of the agreement as both severable and auxiliary to the substantive part of the agreement.³⁹⁷ Consequently, the arbitration clause has to be separable in at least some situations to fulfil its auxiliary function.³⁹⁸

5.3 Possible Constructions for General Rules on the Applicability of the Doctrine of Separability

Based on the thesis and the aforementioned examples, it is time to conclude if there are any general rules that can be applied to decide the scope of the doctrine of separability. There are some different options which I will assess. Firstly, I will assess Koulu's theory focusing on variations in the strength of the doctrine of separability, which is the only Finnish theory considering the scope and applicability of the doctrine. Secondly, I will analyse different theories restricting the applicability of the doctrine of separability based on the intention of the parties and the aim of the doctrine. Thirdly and lastly, I will assess if the scope and applicability of the doctrine of separability can be determined by the definition of the doctrine, especially by definitions enacted by the legislator.

5.3.1 Differences in the Strength of the Doctrine of Separability³⁹⁹

Even if the matter has not been thoroughly studied in Finland, some necessary advice for the construction of general rules can however be taken from Koulu's research. Koulu suggests that depending on the situation to which the doctrine of separability is applied, the strength of the doctrine varies.⁴⁰⁰ This theory would suggest that the doctrine is at its strongest when the main agreement is allegedly invalid since both the presumed aim of the parties and the

³⁹⁵ Mayer 1999, p. 263; It has also been argued that the application of the doctrine of separability would be against the purpose of the transfer, Brekoulakis 2010, p. 32; This argument is quite close to the argument regarding the auxiliary function of the clause, since it could be argued that the auxiliary function of the clause is the reason for also transferring the arbitration clause in connection to the transfer of the main agreement.

³⁹⁶ Fouchard et al. 1999, p. 427-428.

³⁹⁷ Mayer 1999, p. 263.

³⁹⁸ In some situations, for instance when the main agreement is assigned, the arbitration clause has to be non-separable to fulfil its auxiliary function, Mayer 1999, p. 263-264.

³⁹⁹ Koulu calls it "*Erillisyysoopin vahvuusvaihtelu*", Koulu 2008, p. 76-79.

⁴⁰⁰ Koulu 2008, p. 78.

function of the arbitration clause supports the applicability of the doctrine.⁴⁰¹ The doctrine is weak when it comes to the alleged non-existence of the main agreement. Even if the applicability is formally accepted in for instance the UNCITRAL Model Law and the function of the arbitration clause supports the applicability, there could according to Koulu be no intention of the parties to apply the doctrine since there is not even an agreement concluded between them.⁴⁰² Between these examples of a strong and a weak doctrine are the expired main agreements.⁴⁰³ The doctrine of separability could be applied to expired main agreements since it could be argued that there is an operative necessity for applying the doctrine and the presumed party will supports the applicability.⁴⁰⁴ However according to Koulu, from a legal standpoint it could be difficult to separate the situation from that of the non-existence of the main agreement.⁴⁰⁵

As I interpret Koulu's thoughts, it would be necessary to compare different factors, for instance the intent of the parties and the function of the arbitration clause. Based on the comparison, a case by case analysis should be made on what strength the doctrine shall be given. As with many of the other theories, the aim of the parties and the function of the dispute resolution clause seems to be in the centre of Koulu's theory. The value of this theory is that it takes into consideration the aims of the arbitration clause and the intent of the parties and so prevents the doctrine of separability from being applied to situations counteracting the aims of the clause and the intention of the parties.

5.3.2 Constructions Focusing on the Intention of the Parties and the Aim of the Doctrine

As Koulu's research also suggests, the intention of the parties, the aim of the doctrine and the aim of the arbitration clause have been regarded as the most important factors to consider when assessing the scope of the doctrine of separability.⁴⁰⁶

⁴⁰¹ Koulu 2008, p. 78.

⁴⁰² Koulu 2008, p. 78-79.

⁴⁰³ Koulu calls it "*keskivahva erillisyyssoppi*", Koulu 2008, p. 79.

⁴⁰⁴ Koulu 2008, p. 79.

⁴⁰⁵ This could enable forum shopping, since a party could allege that the agreement was never entered into instead of alleging that it has expired, Koulu 2008, p. 79.

⁴⁰⁶ As will be shown in this chapter, many academics have put more focus on the aim of the doctrine of separability than on the aim of the arbitration clause, see e.g. Heuman 2003, p. 47; Heuman 1999, p. 66; The aim of the arbitration clause is to get all disputes regarding the main agreement solved by arbitration. The aim of the doctrine of separability is to enhance efficiency and to give the tribunal competence. This division seems to be more of a theoretical one since both usually lead to the same results. Apparently, one of the most important things aimed with the doctrine of separability is to protect the arbitration clause so that it could fulfil its own aim.

According to Heuman, the doctrine of separability can only be applied if the application is in accordance with the intention of the parties.⁴⁰⁷ The intention is considered as a hypothetical intention of a typical party.⁴⁰⁸ It has been stated that normally the intention of the parties is to get all their contractual disputes solved by arbitration and that this presumption prevails if it is not overturned by the actual will of the parties.⁴⁰⁹ Consequently, the doctrine of separability cannot be applied if the actual will of the parties or the hypothetical will of the average party can be shown to oppose the applicability of the doctrine.⁴¹⁰ This kind of construction of the will of the parties cannot necessarily be found in general contract law but can be regarded as a political striving to give competence to the arbitral tribunal.⁴¹¹ The strength of the theory is that without the will of the parties, there is no meeting of minds and thus the doctrine of separability cannot be a part of the agreement concluded.⁴¹²

Lindskog criticizes the theory regarding the hypothetical or average aim of the parties as unmotivated to apply to a party with no intent to even conclude the main agreement and since the parties do not usually consider the possibility that their agreement is invalid when concluding the agreement.⁴¹³ Even if Lindskog's criticism is well-grounded as the construction appears artificial, the theory can be defended by a party's possibility to prove that the intent has not been to apply the doctrine. The threshold for proving this should be quite low or the presumption even opposite in some situations. For instance when transferring the main agreement, it could be presumed that the parties are aware of the arbitration clause included in the main agreement before accepting the assignment.⁴¹⁴

⁴⁰⁷ Heuman 1997, p. 536.

⁴⁰⁸ Heuman 1999, p. 62-63; This presumption has also been described as a rule of contractual construction rather than the actual intention of the parties, Schöldström 1998, p. 265.

⁴⁰⁹ The Stockholm Chamber of Commerce 1984, p. 27.

⁴¹⁰ Heuman 1997, p. 536; For instance, the hypothetical will of the parties regarding the assignment of the main agreement seems to be to also assign the arbitration clause in connection with the main agreement and therefore the doctrine of separability cannot be applied if the opposite is not shown.

⁴¹¹ It is also possible that the will of the parties can be expressed by interpreting the agreement in the way respecting the average will of the parties, Heuman 1997, p. 547.

⁴¹² However, if the doctrine of separability is only seen as a tool for contractual interpretation and the intention of the parties is only taken into consideration in the actual separate interpretation of the arbitration clause, the problem with justifying the doctrine would also be solved, see chapter 5.4.

⁴¹³ Lindskog 2012, p. 290, 294.

⁴¹⁴ For more about the doctrine of separability and the transfer of the main agreement, see chapter 5.2.

In Finland, there seems to be no such thing as the hypothetical or average aim of the parties in contractual interpretation. However, in the objective interpretation of agreements the perspective of a reasonable man has to be taken into consideration.⁴¹⁵ With this is meant to interpret the agreement so as to find the intent of the parties from a neutral viewpoint and with a normal, reasonable understanding.⁴¹⁶ All in all, even if there is no such interpretational standard as the average or hypothetical aim of the parties, the construction is however quite close to the ordinary Finnish interpretative standards.

Later, Heuman has focused on the underlying aims of the doctrine of separability to give the tribunal competence and make the proceeding more efficient.⁴¹⁷ In his later writings, he has come to the conclusion that the doctrine of separability cannot be applied in contradiction with its aims.⁴¹⁸ Even if the definition and wording of the doctrine opens for a wide application of the doctrine, the aim narrows the scope of the doctrine.⁴¹⁹ As an example of such a situation can be mentioned the application of the doctrine of separability to transfer of rights, since if the arbitration clause would not be transferred and not bind the transferee, the tribunal would not anymore have competence.⁴²⁰

⁴¹⁵ Annola 2016, p. 117; The starting point for the interpretation of agreements in Finland is an intersubjective interpretation, which aims to find the common intent of the parties. This cannot often be found and thus the next step is to find the common intent of the parties with an objective interpretation, based on the viewpoint of a reasonable man, Annola 2016, p. 88-89; However, if the common intent of the parties cannot be found from an intersubjective, objective or subjective interpretation, one has to resort to a risk-sharing interpretation. The risk-sharing interpretation is not anymore based on the aim of the parties but on a group of objective norms used for deciding the content of the agreement, Annola 2016, p. 257-258; One of the objective norms possibly applied is the normality rule (tavallisuussääntö), which stipulates that if the intention of the parties cannot be found, the interpretation has to be done in accordance with common practice, Annola 2016, p. 283-284; When drawing a border between the normality rule and the objective interpretation, the interpretation has been considered as objective if the source for the interpretation demonstrates the intent of the parties and as risk-sharing if the used source for the interpretation does not demonstrate the intent of the parties, Annola 2016, p. 260; There seems to be some elements of common intent regarding the implications of agreeing on an arbitration clause, for instance it could be alleged that there is a common intent to solve all disputes regarding the main agreement by arbitration. Consequently, it appears that the average or hypothetical aim of the parties is better positioned as a part of the objective interpretation even if it fairly could be argued that it also could be considered as a part of the normality rule.

⁴¹⁶ Annola 2016, p. 79; This way of interpreting agreements when the intersubjective intentions of the parties cannot be found is similar in all Nordic countries and the continental Europe, Lando 2016, p. 28.

⁴¹⁷ Heuman 2003, p. 44; Heuman 1999, p. 62-63; Heuman was earlier in his article from 1997 sceptical about which weight could be given to the fact that the applicability of the doctrine of separability can counteract the aims of the doctrine, especially the aim of giving competence to the tribunal, Heuman 1997, p. 546-547; However, already then he mentioned that it is possible that the Supreme Court in NJA 1997:147 did not apply the doctrine of separability, since it did possibly counteract the aim of the doctrine to give competence to the tribunal, Heuman 1997, p. 557.

⁴¹⁸ Heuman 2003, p. 47; Heuman 1999, p. 66.

⁴¹⁹ Heuman 2003, p. 47; Heuman 1999, p. 66.

⁴²⁰ Heuman 1997, p. 546.

Also, internationally there are scholars suggesting that the doctrine of separability cannot be applied further than the original aim of the doctrine.⁴²¹ However, Lindskog stresses that one has to be careful when restricting the applicability of the doctrine of separability based on the aim of the doctrine, since the prohibition of the applicability of the doctrine to other situations than those regarding the competence of the tribunal cannot in his opinion be drawn.⁴²²

As a conclusion of Heuman's theories, it seems that the starting point is that the doctrine of separability can be applied to all interactions between the main agreement and the arbitration clause. The scope of the doctrine is however narrowed by the aim of the doctrine and the intention of the parties. As factors narrowing the doctrine Heuman considers; 1. The parties' intention not to apply the doctrine; 2. The applicability of the doctrine does not make the proceeding more efficient; and 3. The applicability of the doctrine does counteract the aim of giving competence to the tribunal. Heuman's argumentation is important in Sweden, where the doctrine of separability is strong and there seems to be a need for restricting the applicability of the doctrine from situations where the applicability of the doctrine in accordance with its wording would lead to unwanted results.

As shown in the examples regarding boilerplate clauses and transfer of the main agreement, the leading basis for the applicability of the doctrine of separability seems at least in Sweden to be the aim of the parties. The interpretation of the scope of the doctrine of separability in the case law regarding the transferability of the arbitration clause has lots of similarities with Heuman's theory and a stronger institutional support. It is however not sure if the transfer of the arbitration clause in the case law was based on the automatic assignment of the arbitration clause or a separate assessment of the transfer of the arbitration clause. Nevertheless, the will of the parties seems to be the basis for the transfer of the arbitration clause in the Supreme Court decision NJA 1997:147 regardless of if the aim of the parties affected the applicability of the doctrine of separability or the separate assessment of the arbitration clause. In Norway, the matter regarding the transfer of the arbitration clause when transferring the main agreement has been solved by referring to the efficiency aim of the doctrine of separability instead of the aim of the parties. If the arbitration clause is not transferred, the

⁴²¹ See e.g. Veeder who is of the opinion that the doctrine of separability can only be used for the "creation and validity" of the arbitration clause, Veeder 1996, p. 292.

⁴²² Lindskog 2012, p. 291.

conflict would have to be solved in a general court which is against the efficiency objective of the doctrine.⁴²³

It can be argued that the intention of the parties, the aims of the arbitration clause and the aims of the doctrine of separability are closely connected. It could be alleged that the presumed intention of the parties is to solve all conflicts regarding the contract by arbitration. This also seems to be the aim of the arbitration clause. The aim of the doctrine of separability seems to be to fulfil these aims by make the proceeding more efficient and give competence to the tribunal.

The strength of the intention of the parties is its close connection to general contract law and especially interpretation and construction of agreements. It is indisputable that the objective when interpreting Finnish contracts is to find the common intent of the parties.⁴²⁴ The principle is strong in Finland and can only be set aside by mandatory law. The strong force behind the principle is the freedom of contract.⁴²⁵ Therefore, it seems legitimate to justify the borders of the doctrine of separability with the aim of the parties and in the separate assessment of the arbitration clause interpret the clause in accordance with the intent of the parties.

As Mayer has stated, the arbitration clause has an auxiliary function to the main agreement, which is to solve disputes and determine the future of the main agreement. This construction seems to be used in a similar way in general contract law when deciding which clauses of an agreement stay valid even if the agreement is terminated. Mayer uses the doctrine of separability to justify the separate assessment of the arbitration clause in situations where it is needed for the fulfilment of the auxiliary function of the arbitration clause.⁴²⁶ Consequently, the scope of the doctrine of separability could also be determined by asking if the applicability of the doctrine is necessary for the protection of the use of arbitration as the way of solving the contractual conflicts between the parties and the future of the main agreement.

⁴²³ NOU 2001:33, p. 72; To resolve the ambiguous legal state, the Norwegian Government added a provision clarifying the legal state regarding the transfer of arbitration clauses in connection with transfers of main agreements in section 10, subsection 2 of the Arbitration Act.

⁴²⁴ Annola 2015, p. 24.

⁴²⁵ Annola 2015, p. 59; The freedom of contract is the basis of all Nordic contract laws, Lando 2016, p. 26.

⁴²⁶ Also Hobér and Magnusson accepts the auxiliary nature of the arbitration clause. According to them, the auxiliary nature of the arbitration clause and the doctrine of separability are not in conflict with each other, Hobér & Magnusson 2008, p. 72.

5.3.3 The Definition of the Doctrine of Separability as a Factor Affecting the Scope of the Doctrine

Both in the legislation and legal doctrine there can be found both exhaustive and inclusive definitions of the doctrine of separability. This subchapter aims to assess if the definition of the doctrine can assist in determining the scope of the doctrine of separability. Because of its value as a source of law, definitions enacted by the legislator are of particular interest. This kind of determination of the scope of the doctrine based on the wording of the definition can however be criticized for being jurisprudence of concepts.

The legislator's choices regarding the scope of the doctrine of separability have to be evaluated, and if explicit enough, they have to be respected. In the Nordic countries, it seems that the legislator has tried to restrict the applicability of the doctrine of separability to only the invalidity and non-existence of the main agreement.⁴²⁷ The legislative technique is similar in all Nordic countries, except Finland where the doctrine is not codified in the Arbitration Act. First, the Nordic arbitration acts define the situations where the Court has competence-competence, and in the following sentence, subsection or section that the doctrine of separability is applied to the aforementioned situations.⁴²⁸ It appears that this could be an explicit choice made by the legislator to restrict the applicability of the doctrine. Otherwise the legislator would only have stated that "*the arbitration clause shall be regarded as a separate agreement*", without explicitly mentioning that the applicability is restricted to the situations mentioned in connection with the competence-competence of the court. However, in at least Sweden and Norway, the doctrine has been given a broader scope in legal doctrine than could be read from the wording of their respective arbitration acts.⁴²⁹

⁴²⁷ In Sweden, the Government Proposal also mentions that the doctrine of separability should be applied to expired main agreements, Prop. 1998/99:35, p. 75.

⁴²⁸ Swedish Arbitration Act, sections 2-3, Norwegian Arbitration Act, section 18 and Danish Arbitration Act, chapter 4, section 16.

⁴²⁹ For instance in Sweden and Norway, the doctrine of separability seems to be applied to the choice of law, see chapter 3.5; On the contrary, in some jurisdictions the scope of the doctrine of separability could be narrow, caused by a narrow definition of the doctrine. For instance, in United Kingdom the definition included in the Arbitration Act seems to restrict the scope of the doctrine. The last phrase of section 7 of the British Arbitration Act could be said to cut the grounds for using the doctrine in other situations than the invalidity, non-existence and ineffectiveness of the main agreement, as it states that: "*Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement*"; Regarding the choice of law of the arbitration clause, it also seems that the doctrine is not applied in United Kingdom, see *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.*, 1 W.L.R. 102 (2012) in chapter 3.5; There was no mentioning of section 7 of the Arbitration Act in the

In Finland, the situation is different since the doctrine is not defined in the Arbitration Act. Neither is there case law explicitly determining the borders of the doctrine of separability. From the case law can only be determined that the doctrine reaches to terminated and invalid main agreements and that it enables the separate assessment of the applicable laws to the main agreement and the arbitration clause.⁴³⁰ Neither does Finnish legal doctrine give any further assistance. Some of the academics have defined the scope of the doctrine of separability to only include the invalidity of the main agreement and some have given the doctrine an open scope.⁴³¹ In addition, there are also legal academics explicitly accepting the applicability of the doctrine to the choice of law of the arbitration clause.⁴³²

An exhaustive definition of the doctrine could also possibly be modelled from Born's list of situations where the doctrine of separability is applied. Born lists the matters to which the doctrine is applicable as; 1. The validity of the arbitration clause when the main agreement is allegedly invalid (including non-existence and termination of the main agreement); 2. Choice of law; 3. The possibility to apply different legal rules within the same legal system to the arbitration clause and the main agreement; and 4. The validity of the main agreement when the arbitration clause is invalid.⁴³³ Even if Born does not mention if his list is exhaustive or inclusive, in his later book from 2015 which is not as comprehensive as the 2014 book, Born uses the same list but mentions that it is only an example list.⁴³⁴

In addition, Born has also stressed that the separability doctrine forces the courts/tribunals to make a separate assessment of the binding effect of the arbitration clause, also in other situations than the situations included in the aforementioned list.⁴³⁵ This is interesting since it enables a wide application of the doctrine, with focus on the separate assessment of the arbitration clause instead of the restriction of the applicability of the doctrine of separability.

Court of Appeal decision, but the narrow scope of the doctrine applied in the case was justified with the intent of the parties to only apply the doctrine in situations where the applicability prevents the ineffectiveness of the main agreement, *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.*, 1 W.L.R. 102 (2012), pp. 26; Consequently, it seems that the definition could be a reason for the narrow interpretation of the doctrine of separability in the United Kingdom. It also has to be kept in mind that the doctrine of separability has historically been weak in the United Kingdom which can be a reason for the narrow definition of the term codified in the Arbitration Act in 1996 and for the restrictive use of the doctrine in the case law.

⁴³⁰ KKO 1954 II 11 and KKO 1980 II 103 (termination); KKO 1988:55 and KKO 1996:61 (invalidity); KKO 2007:39 (choice of law).

⁴³¹ See chapter 2.1.

⁴³² See chapter 3.5.1.

⁴³³ Born 2014A, p. 401.

⁴³⁴ Born 2015, chapter 2, pp 23.

⁴³⁵ Born 2014A, p. 1413 (regarding non-signatory parties), 1458 (regarding third party beneficiaries).

Consequently, it seems that the scope of the doctrine of separability cannot easily be exhaustively determined. The scope of the doctrine of separability is ambiguous and the doctrine can be applied to a wide variety of situations not easily listed.

Finally, as regards the scope of the doctrine of separability, there seems to be at least two different scholars. The first one stresses that the aim of the doctrine and intention of the parties are important to take into account when applying the doctrine. If the application of the doctrine of separability contravenes the aim of the doctrine or the aim of the parties, it cannot be applied. The other scholar strongly supports an approach where the doctrine has to be interpreted in accordance with its definition. According to this scholar, the doctrine keeps the evaluation of the main agreement and the arbitration clause separate in all situations. Based on the legal doctrine, it seems that the scholar keeping the doctrine narrow by not applying the doctrine to situations where the application would be against the aim of the parties or the aim of the doctrine, is the leading one.

5.4 Can any General Rules for Assessing the Applicability of the Doctrine be made?

In the following, I will argue that in accordance with the doctrine of separability, the assessment of the arbitration clause shall always be made separately. This does not however prevent the usage of the main agreement to find out the intention of the parties when separately assessing the arbitration clause.

5.4.1 The Scope of the Doctrine of Separability

When determining the scope of the doctrine of separability, there are two different options; 1. It is possible that the doctrine of separability can be set aside when the applicability of the doctrine is not in accordance with the aim of the parties and/or the aims of the arbitration clause and the doctrine itself;⁴³⁶ and 2. It could be alleged that based on the special features of the arbitration clause, the assessment of the arbitration clause shall always be made separately from the main agreement.⁴³⁷ I suggest that the second option should be applied. This approach would be a construction respecting both the special features of the arbitration clause and the intention of the parties. The nature of the arbitration clause requires that the evaluation of the clause is made separately to avoid the tribunal losing its competence and

⁴³⁶ Heuman is one of the academics strongly supporting this option.

⁴³⁷ I would suggest that Hobér & Magnusson supports this option based on their opinions regarding the applicability of the doctrine of separability to the transfer of rights.

the arbitration clause losing its efficiency. On the other hand, the result of the separate assessment of the arbitration clause has to be based on the will of the parties since general contract law rules and the specific interpretational rules for arbitration clauses are to be applied to the assessment.

Consequently, there are two different dimensions of the evaluation of an arbitration clause included in a main agreement; 1. Because of the nature and character of the arbitration clause as a dispute resolution clause, the main agreement and the arbitration clause shall be assessed separately; and 2. The separate assessment of the arbitration clause has to be done in accordance with the general interpretational rules and the specific interpretational rules for arbitration clauses.

The applicability of the doctrine of separability to all situations is a tool for contractual construction which is aimed at protecting the specific features and nature of the arbitration clause. As the arbitration clause is auxiliary to the main agreement and as it needs to fulfil its procedural functions related to the main agreement, it has to be evaluated as a separate agreement. These functions cannot be fulfilled, if the arbitral tribunal loses its competence or the arbitration clause becomes ineffective because of the clause being a part of the main agreement. The separate assessment can best be explained and justified with the doctrine of separability.

There is no reason for restricting the applicability of the doctrine of separability to only certain situations since it is only the tool for the contractual construction which does not affect the actual evaluation of the arbitration clause nor infringe the will of the parties. The doctrine of separability does not prevent other interactions between the main agreement and the arbitration clause.

The first and foremost function and aim of the doctrine of separability is to protect the competence and efficiency of the tribunal. Therefore, it could be alleged that the doctrine should only be applied to situations where the competence and efficiency of the tribunal is at risk. However, since the applicability of the doctrine of separability to the choice of law has been accepted already from the beginning both in Finland and internationally, it seems that the doctrine cannot be restricted to only the aforementioned situations. The application of the doctrine of separability to the choice of law only enables an equal assessment of whether *lex contractus* or *lex arbitri* will be applied to the arbitration clause and does not protect the efficiency and competence of the tribunal. Only in concrete situations, the choice of either

lex arbitri or *lex contractus* can lead to the tribunal losing its competence, but the doctrine of separability cannot protect the arbitration clause in these *in casu* evaluations where the applicable law is decided by the parties or by the closest connection. Consequently, the doctrine of separability cannot in the context of choice of law be explained with efficiency arguments.

One could ask if the problem could be solved without the doctrine of separability, by respecting the intention of the parties and the function of the arbitration clause, for instance by contractual interpretation. In general contract law, arbitration clauses are interpreted in accordance with their function of solving disputes regarding the main agreement.⁴³⁸ Even if the main agreement has expired, the arbitration clause stays valid to solve the conflicts regarding the main agreement and to determine the future of the agreement.⁴³⁹ However, this construction does not work for instance if the main agreement is invalid or non-existent. If there is no validly concluded main agreement or the agreement was never entered into, there is no base for the arbitrators' competence since there is neither a valid or existent arbitration clause to interpret. By applying the doctrine of separability, there is a separate arbitration clause and the arbitrators can have competence even if the main agreement is invalid or non-existent.

The above mentioned functions and aims of the arbitration clause also seem to be presumed by the parties when deciding to opt for arbitration. However, the will of the parties is not optimal as a source for the justification of the doctrine of separability and is better suited for the actual interpretation of the arbitration clause. As shown in chapter 2.2, the aim of the parties is to effectively solve all the disputes regarding the main agreement by arbitration and not to explicitly apply the doctrine of separability. As a consequence, it is difficult to justify the applicability of the doctrine of separability with the aim of the parties as has been done in Sweden. The presumed aim to solve all the disputes efficiently by arbitration is instead better taken into consideration in the actual separate assessment and interpretation of the arbitration clause which is enabled by the doctrine of separability.

⁴³⁸ The aim of the parties is regarded as an intent to solve all disputes concerning the agreement by arbitration if the opposite is not shown.

⁴³⁹ Lindfelt 2011, p. 208.

5.4.2 The Actual Assessment of the Arbitration Clause

In the actual evaluation of the arbitration clause, the aim of the parties is the leading principle of interpretation. The doctrine of separability only enables the interpretation of the arbitration clause in accordance with the intent of the parties. Consequently, the intent of the parties and not the doctrine of separability determines the fate of the arbitration clause.

Since it is not always possible to find the common intent of the parties, certain presumptions should be made regarding the will of the parties. These presumptions are closely linked to the aim of the arbitration clause, which is to give the parties an effective method of solving all their disputes related to the main agreement. For instance, it can be presumed that the parties intend to solve also disputes regarding the termination and invalidity of the main agreement by arbitration and that they intend to transfer the arbitration clause in connection with the transfer of the main agreement since otherwise the arbitration clause would lose its function. In addition, general contract law rules are applied to the assessment of the arbitration clause.

5.4.3 A Practical Approach to the General Rules

The theory explains well the classic situations of invalidity, expiration and non-existence of the main agreement. If the arbitration clause would not be evaluated separately, the tribunal would lose its competence when ruling the main agreement invalid, non-existent or expired. In these situations, it is accepted that the arbitration clause shall be assessed separately but in accordance with general contract law rules. These rules enable both the invalidity of the arbitration clause and the main agreement on the same invalidity ground after separate assessments, and the validity of one of the agreements regardless of the validity of the other agreement.

When it comes to the choice of law, the doctrine of separability enables the respecting of the intent of the parties by an equal assessment of *lex arbitri* and *lex contractus* as possible applicable laws. Without the doctrine of separability, *lex contractus* would be applied if no explicit choice of law for the arbitration clause is concluded by the parties. With the doctrine of separability, the law applicable to the arbitration clause is assessed separately and in the actual assessment of the applicable law, the intention of the parties is the leading interpretive principle followed by the principle of the closest connection.

Also the interpretation and adjustment of the arbitration clause and the main agreement has to be made separately. Otherwise the court or the tribunal mixes the material and procedural parts of the proceeding. In addition, an adjustment of the main agreement leading to the agreement being declared terminated would eliminate the competence of the tribunal if the arbitration clause would not be considered as a separate agreement. However, in the actual interpretation of the arbitration clause, the main agreement shall be considered as a source for the interpretation as expressing the intention of the parties. Also, when adjusting the arbitration clause, the main agreement can be considered in accordance with the Contracts Act, section 36.⁴⁴⁰

When it comes to the assignment of the main agreement, a separate assessment of the assignment of the arbitration clause has to be made since there could be different formal requirements for the transfer of the main agreement and the arbitration clause. When assessing the transfer separately, it should be presumed that the intention of the parties is to also transfer the arbitration clause, because the parties should have been aware of the arbitration clause included in the main agreement and its implications.

Lastly, the doctrine can also be used to explain if a boilerplate clause included in the main agreement also reaches to the arbitration clause. Even if boilerplate clauses are a part of the main agreement, a separate assessment has to be done to consider if they are also a part of the arbitration clause. In the separate assessment, it has to be evaluated if the parties have intended the clauses to be a part of the arbitration clause.

5.5 Conclusions

There seems to be no general rules applicable to the doctrine of separability in Finland. The most probable reason for this is that no comprehensive research regarding the doctrine has been made in Finland. In Sweden, where the doctrine of separability is stronger, there are at least some academic opinions that could be used to assess the scope of the doctrine. Also, Born's and Mayer's thoughts regarding the scope of the doctrine are of value.

In Finland, there is a need for more research regarding the subject. Koulu has completed some research about the strength of the doctrine, but there is a need for more comprehensive

⁴⁴⁰ Another question is if it is justified to use the main agreement as a tool for adjusting the arbitration clause or if the court/tribunal exceeds its competence as a consequence of the adjustment.

research since Koulu has only briefly assessed the scope of the doctrine. However, Koulu's theory is a good starting point for further research.

In Sweden, where the doctrine of separability has been studied more thoroughly, the starting point is that the doctrine is applied to all interaction between the main agreement and the arbitration clause. The scope of the doctrine seems to be narrowed by the aim of the doctrine and the intention of the parties since the doctrine cannot be applied in a way opposing these foundations of the doctrine. This kind of construction has also been used in international arbitration. However, Hobér and Magnusson have in their article applied a broad doctrine of separability and only assessed the presumed aim of the parties in the separate assessment and interpretation of the arbitration clause. The possibility to apply these theories in Finland is unsure. The doctrine seems to be stronger in Sweden, which also seems to be a reason for adapting theories assessing the scope and applicability of the doctrine.⁴⁴¹ On the other hand, the theories are logical and the Finnish and Swedish contract laws are closely connected.

I suggest that because of the doctrine of separability, the arbitration clause shall be assessed separately from the main agreement in all situations. The arbitration clause is a procedural agreement auxiliary to the subjective main agreement and thus has certain tasks and features that have to be protected by evaluating the arbitration clause as a separate agreement. The doctrine of separability is only a tool for contractual construction, which enables the courts and tribunals to give proper effect to the arbitration clause and the intent of the parties. The doctrine does in no other way prevent the interaction between the main agreement and the arbitration clause. When separately assessing and interpreting the arbitration clause, the general contract law rules determine the outcome of the assessment without any impact of the doctrine of separability.

⁴⁴¹ See however Lindskog, who is of the opinion that the legal state regarding the doctrine of separability is similar in Finland and Sweden, Lindskog 2012, p. 289.

6. Conclusions

6.1 The Core of the Doctrine of Separability

The first research question concerned the core of the doctrine of separability. How is the core of the doctrine of separability defined in Finland and how broad is the scope of the core? Regarding the strength of the core of the doctrine of separability, the effects of the doctrine has to be assessed in four different scenarios; an allegedly invalid main agreement, an allegedly invalid arbitration clause, a terminated main agreement and an allegedly non-existent main agreement. When it comes to the alleged invalidity of the main agreement, it is clear that the doctrine of separability applies both in Finland and internationally. The interesting question regards on which basis the arbitration clause can be considered invalid. Based on Finnish doctrine, it seems that the invalidity grounds applied to the determination of the validity of the arbitration clause are similar to those used in general contract law, regardless of the doctrine of separability. In addition, the European Convention on Human Rights and the case law of the European Court of Human Rights forces the member states of the Convention to make sure that arbitration clauses are only valid if the formation of the intent to arbitrate is made by free will.

There seems to be a broad acceptance regarding the applicability of the doctrine of separability to conflicts concerning expired main agreements. The question is more complex when it comes to agreements alleged to be non-existent. There are situations where a valid arbitration clause could have been concluded even if the main agreement has not been signed. The case law regarding draft agreements shows that there is a need for the doctrine of separability to be applied to such situations. Otherwise, the court would not have competence to rule the arbitration clause of a draft agreement valid and the main agreement non-existent. In Finland, there is no consensus regarding the applicability of the doctrine to allegedly non-existent main agreements, but it is based on the aforementioned example and Nordic and international doctrine justifiable, to claim that the doctrine should be applied.

When it comes to measures for solving the occurred problems, the coming amendment of the Arbitration Act seems to be a good opportunity to clarify the legal state. I am only concerned about the applicability of the doctrine of separability to allegedly non-existent main agreements. When it comes to the invalidity and expiration of the main agreement and the invalidity of the arbitration clause, the legal state seems to be settled. The coming amendment of the Arbitration Act could include a new section defining the doctrine and stating

that the invalidity, expiration or non-existence of the main agreement does not *ipso jure* make the arbitration clause invalid.⁴⁴² Thus, a separate assessment of the validity of the arbitration clause would also be done when it is alleged that the main agreement is non-existent.

6.2 Choice of Law and the Doctrine of Separability

The second research question regarded choice of law clauses in the main agreement. Does the doctrine of separability prevent choice of law clauses in the main agreement from being applied to the arbitration clause? The applicability of the doctrine of separability to the choice of law seems to be quite settled in Finland. Today, it seems that there is a general consensus both internationally and in Finland that because of the doctrine of separability, the choice of law of the arbitration clause shall be assessed separately from the choice of law of the main agreement. The doctrine enables the applicability of different laws to the main agreement and the arbitration clause, but the doctrine does not restrain from the possibility to apply *lex contractus* to the arbitration clause nor favour the applicability of *lex arbitri*. Without the doctrine, the choice of law made for the main agreement would automatically be applied to the arbitration clause, if it is not explicitly agreed on the applicable law in the arbitration clause.

The application of the doctrine of separability to the choice of law could be criticized even if the legal state is settled. The aim of the doctrine and the intention of the parties do not support the applicability of the doctrine to the choice of law and the applicability has not been comprehensively explained in Finland, Sweden or internationally. However, as shown in chapter 5.4, by applying the doctrine of separability to the choice of law in order to enable the respecting of the actual intent of the parties and an equal assessment of *lex arbitri* and *lex contractus*, the doctrine should be justified. The application of the doctrine of separability enables a separate assessment of the laws applicable to the main agreement and the arbitration clause. The separate assessment enables an evaluation of the choice of law in a way respecting the benefits of both *lex contractus* and *lex arbitri*, the intention of the parties and the closest connection between the law and the arbitration clause.

⁴⁴² The doctrine of separability is already defined in the Swedish, Norwegian and Danish arbitration acts.

6.3 Interpretation and Adjustment of Arbitration Clauses

The third research question regarded the interpretation and adjustment of arbitration clauses. How does the main agreement affect the interpretation and adjustment of the arbitration clause? General contract law rules are applied to the interpretation of the arbitration clause and to the adjustment of the arbitration clause under section 36 of the Contracts Act. It seems quite clear that the doctrine of separability does not extend to the interpretation and adjustment of the arbitration clause. However, when adjusting the main agreement, the doctrine of separability should at least be applied to avoid the losing of competence of the tribunal. Without the doctrine, the arbitration clause would automatically be terminated if the main agreement is terminated as unfair. The standpoint regarding adjustment can also in general be criticized. As the adjustment of an arbitration clause can be considered as a procedural matter, the taking into consideration of the main agreement is not appropriate. This can lead to a court/tribunal exceeding its competence or increasing costs when unnecessarily evaluating the substantial matter.

As I have argued in chapter 5.4, the doctrine of separability should in theory reach to both the adjustment and interpretation of the arbitration clause, at least so that the tribunal/court does not exceed its competence. In practice, this means that the interpretation and adjustment of the arbitration clause shall be made separately from the interpretation and adjustment of the main agreement, as the situation in Finland seems to be.⁴⁴³ In the actual interpretation and adjustment of the arbitration clause, it is possible and justifiable to consider the main agreement as a source, in accordance with the case law and legal doctrine. This is necessary for finding the intent of the parties and factors affecting the fairness of the arbitration clause.

6.4 General Rules on the Applicability of the Doctrine of Separability

Finally, the fourth research question aimed to find general rules for assessing the scope and applicability of the doctrine of separability. When it comes to general rules regarding the doctrine, there are some different possibilities offered in legal doctrine. Firstly, in the only research made in Finland, Koulu suggests that the doctrine has different strengths in different usage situations. The strength of the theory is that it is flexible and takes into consideration

⁴⁴³ In Sweden, contrary to the Finnish approach, the adjustment is made as a single overall evaluation of the main agreement and the arbitration clause. This could be regarded as a consequence of the non-applicability of the doctrine of separability.

both the intention of the parties and the aim of the doctrine. Koulu only presents his ideas without extensive reasoning which makes the evaluation of the theory difficult.

Secondly, in Sweden it has been suggested that the doctrine of separability cannot be applied in contradiction to its aims of giving competence to the tribunal and of making the proceeding more efficient or against the intention of the parties. The strength of the theory is that it is anchored in the aims behind the doctrine and the applicability test is easy to complete by using the different interests behind the doctrine of separability. However, there is also support for an application of a broad doctrine, only taking into consideration the intent of the parties in the separate assessment of the arbitration clause.

Thirdly, because of specific situations where the application of the doctrine of separability would lead to unwanted results, for instance regarding the transferability of the arbitration clause in connection to the transfer of the main agreement, the applicability has been denied by claiming that the intent of the parties has not been to apply the doctrine in the specific situation.⁴⁴⁴ The situation has alternatively been solved by applying the doctrine of separability, but by a separate assessment of the arbitration clause conclude that the presumed intent of the parties has been to also assign the arbitration clause. The latter solution is close to general contract law rules of contractual interpretation.

I suggest that the doctrine of separability should be applied to all situations where the main agreement and the arbitration clause interconnects. The arbitration clause is a procedural agreement that is auxiliary to the substantive main agreement and thus has certain tasks and features that have to be protected by evaluating the arbitration clause separately. The doctrine of separability is a tool for contractual construction, which enables the courts and tribunals to give proper effect to the arbitration clause and the will of the parties. It does in no other way prevent the interaction between the agreements. When separately assessing and interpreting the arbitration clause, the general contract law rules determine the outcome of the assessment without any impact of the doctrine of separability.

Concludently, there is no consensus on how broad the doctrine of separability is and how the general rules of the doctrine shall be formed and applied. There is a need for more research regarding the subject to clarify the legal state. The doctrine needs a clear general basis, since it is not sustainable to evaluate secluded situations of applicability without any

⁴⁴⁴ Alternatively, that the applicability would be in contradiction with the aim of the doctrine.

general rules. With general rules, the scope, applicability and strength of the doctrine of separability could better be concluded and procedural conflicts could be avoided.