GHENT UNIVERSITY

FACULTY OF LAW AND CRIMINOLOGY

Faculty of Law and Criminology
Academic Year 2018-2019
Exam Session [2]

The Impact of Fraud in International Arbitration: a Question of Admissibility, Jurisdiction or Merits?

LLM Paper

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ABSTRACT

International Arbitration is becoming more and more preferable in dispute resolution mechanisms every day and inevitably, this popularity brings new questions to the doctrine for law societies to debate on. This thesis will focus on one of these contemporary questions, the impact of fraud. More specifically, it will take fraud and divide into three different concepts – admissibility, jurisdiction and merits - to see how each of these concepts are dealing with fraud on their own while constituting one procedure altogether. In every step of the arbitral procedure, fraud will appear as a fence to jump over to continue the procedure and grant an award, but the important question is how to take fraud and how to handle it step by step. Thus, this thesis will elaborate the questions that derive from fraud and analyze how fraud impact every cornerstone. It will also rely upon jurisprudence to show how each question deals with it in its own way and try to give the reader an idea about the timeline and the order of importance of these questions. There will be numerous issues to solve when there is a fraudulent event but all in all, the most important one will be where to put fraud as a concept and thus deal with it in terms of admissibility, jurisdiction or merits.

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LIST OF ABBREVIATIONS

CIETAC	China International Economic and Trade Arbitration Commission
CPIL	Centre for Public Interest Litigation
ECICA	European Convention on International Commercial Arbitration
FAA	Federal Arbitration Act
HKIAC	Hong Kong International Arbitration Centre
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Congress and Convention Association
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
LCIA	London Court of International Arbitration
PILA	Swiss Code on Private International Law
QB	Queen's Bench Division as a division of the High Court of England
RICO	Racketeering Influenced and Corrupt Organizations Act
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law
US/U.S.	United States
U.S.C.	United States Code

1 INTRODUCTION

1.1 Definition of the Problem

Since ancient times, settling disputes in a peaceful way has always been preferred and in this regard, it is possible to say that arbitration as a concept, is the oldest method for settling disputes.[1] Although there have been enormous developments in the world of arbitration since those times and even with the development of the Geneva Protocol (1923), the Geneva Convention (1927), the New York Convention (1958), ECICA (1961), ICSID Convention (1965) and the UNCITRAL Arbitration Rules (1976, revised in 2010 and 2013) etc. in our recent history, there are still some uncertainties on several topics. One of them is the impact of fraud in arbitration.

Fraud in the formation or performance of the contract has always been an important matter to discuss. Like in any other field of law, "fraud" and the "impact of fraud" in arbitration is also debatable in the matter of its consequences with regard to its placement. Its impact over international arbitration raises serious concerns since matters of fraud are becoming prevalent in these days and international arbitration is becoming a more preferred mechanism of dispute resolution.[2] All in all, *"[t]he presence of fraud … in international arbitration – whether in the proceedings itself or in the underlying transaction – poses challenges to parties, arbitral tribunals and courts tasked with enforcing arbitral awards."*[3]

As can be seen below, the international arbitration procedure is based on the parties' consent and arbitration clause which is contained by an international contract and is mostly severable. If there is consent to arbitrate over a dispute arising between contracting parties, it seems quite clear that it is possible to have an arbitral proceeding. However, despite all the developments and conventions, what tribunals or parties do when a fraudulent event occurs in the formation of a contract is still a contemporary issue.

While examining the impact of fraud in arbitration, it is possible to see that it begins with one simple issue: the fate of the arbitration clause. Fraud in the formation of a contract can affect

[1] A.M. Stuyt, (Ed.), *Survey of International Arbitrations 1794-1989*, Martinus Nijhoff Publishers, 1990

[2] Simon Bushell, Arish Bharucha, et al., *'Chapter IV: Crime and Arbitration: Bringing Fraud Claims under an Arbitration Agreement – Does the Arbitral Process Pack Enough Punch?*', in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration 2012*, Volume 2012 at 326

[3] Susan D. Franck, James Freda, et al., *'International Arbitration: Demographics, Precision and Justice*', in Albert Jan Van den Berg (ed), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 at 92

all of the proceeding since it needs clarification as to whether the fraud is affecting the arbitration clause itself, causing the arbitration clause to become void, voidable or not. Therefore, an allegation of fraud will raise its first concern about the fate of the arbitration clause, but it will not stay limited within this. It will still continue to show its affect over the proceedings when referring the case and claims to the arbitral tribunal, proving the fraudulent event and even enforcing the award.

As will be discussed in detail below, all of these steps belong to different concepts in international arbitration, even if these concepts constitute only one proceeding. However, it is not clear how to classify fraud in terms of these concepts, namely admissibility, jurisdiction or merits and how to approach it. Even if a fraudulent act will inevitably affect the entire proceeding from start to end, the impact of such an act in international arbitration will vary by one concept to another. Therefore, in order to approach fraud one must first answer the question: Which concept of law should deal with fraud and how will it do so under international arbitration rules?

1.2 Structure

Following a brief introduction, the second chapter will deal with legal concepts and firstly provide a general overview of the concept of international arbitration, arbitration clause and separability doctrine - to understand the impact of fraud. Furthermore, this part will describe "fraud" to connect both concepts with each other and finally, the validity and separability of the arbitration clause will be discussed when there is an allegation of fraud.

The next chapters will deal with the concepts of jurisdiction, admissibility and merits respectively. The chapter of jurisdiction will include the separability doctrine again, discuss whether or not the arbitral tribunal has jurisdiction over a case which includes a fraudulent act and also focus on the arbitrability of fraud. The following chapter will focus on admissibility and discuss it is even possible for parties' claims to be even heard by the tribunal. The last chapter eventually will argue merits, how to prove an allegation of fraud in front of the tribunal and how to deal with such allegations as an arbitral tribunal.

All the aforementioned chapters will also include relevant case-law and discuss these cases comparatively. The aim of this case law analysis is to explain the reader that fraud can be a concern for all of these three concepts and the impact of fraud will differ one case to the other.

2 LEGAL CONCEPTS

2.1 International Arbitration as a Concept

The commonly accepted definition of arbitration, in both common law and civil law systems, is that "*it is a mode of resolving disputes, pursuant to the parties' voluntary agreement, by one or more third persons who are non-governmental decision makers (arbitrators) who also derive their powers from agreement of the parties and whose decision is binding upon them.*"[4]

The core aspect of international arbitration and its process is definitely an international arbitration agreement since without an agreement, there are no legal grounds for parties to arbitrate any dispute.[5] It is possible to see international arbitration agreement in various forms. It can be a provision in a commercial contract stating parties' intent to arbitrate of any future disputes arising out of or relating to the contract, it can be a separate agreement for particular transactions[6] or it can be an agreement with a requirement to arbitrate for an existing dispute – simply the fact that parties agree to submit that dispute to arbitration – which is called a "submission agreement".[7] Since this thesis aims to analyze the impact of fraud to a contract which includes an arbitration agreement itself, which is called the arbitration clause, other types of agreement will not be discussed in detail. Moreover, there is no debate on whether the clause will be separable or not when it comes to submission agreements, as they are concluded differently and not a part of the underlying contract.

The reason why parties from different states choose international arbitration for their dispute settlement system is because of the mere fact that national legal systems differ from each other and parties seek to ensure that in the event of a dispute, that dispute is resolved in a forum that is most favorable to their interest.[8] Moreover, parties who draft commercial contracts, regardless as to what is their subject, usually identify international arbitration as procedurally flexible[9], highly subject to their control in a single forum - centralized[10],

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[4] Henry P. deVries, "*International Commercial Arbitration: A Contractual Substitute for National Courts*", 57 Tul. L. Rev., 1982 at 43; Gary B. Born, *International Commercial Arbitration*, 2nd edition, Kluwer Law International 2014 at 73

[5] Gary B. Born, *International Commercial Arbitration*, 2nd edition, Kluwer Law International 2014 at 225

[6] *Ibid.* at 225-226

[7] Paul D. Friedland, *Arbitration Clauses for International Contracts*, 2d ed. Yonkers (N.Y.): Juris publishing, 2007 at 112-114

[8] *Supra* note 5 at 71

[9] David D. Caron, Lee M. Caplan and Matti Pellonpää, *The Uncitral Arbitration Rules: A Commentary.* Oxford University Press, 2006 at 30

[10] *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 13-14 (1972)

neutral[11], confidential, speedy and expertized dispute resolution process, also with internationally enforceable decisions and awards.[12]

Since it is important for parties to settle their disputes in a neutral, confidential and centralized environment with the opportunity to select their arbitral seat, nearly every state in the world, both developed and less-developed, have drafted legislations dealing with international arbitration[13] regardless of how their national laws differ from each other. However, the most important legislative instrument to mention here is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (UNCITRAL Model Law) since it "*is the single most important legislative instrument in the field of international commercial arbitration.*"[14] Over the years, legislation based on the Model Law has been adopted in 80 States in a total of 111 jurisdictions.[15] However, it should also be noted that there are also countries who have not adopted the UNCITRAL Model Law yet at the same time are some of the leading arbitration centers in the world like Switzerland or France. Even if they did not adopt the UNCITRAL Model Law, they have legislation supporting international arbitration which makes them leading centers in the world. Such developments and legislation show us that countries respect and support parties when it comes to selecting their own way of dispute resolution and their agreements to arbitrate.

Although the essential element to arbitrate is an agreement, arbitration is also *"a creature that owes its existence to the will of the parties alone.*"[16] This means that parties have to agree to arbitrate. Also, according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), if parties agreed to arbitrate over a dispute unless the arbitration agreement is null and void, inoperative or incapable of being performed, courts of the Contracting States must refer parties to international arbitration.[17] Simply put, none of the aforementioned elements about arbitration would be effective, if the international

[11] Pierre Lalive, "*On the Neutrality of the Arbitrator and of the Place of Arbitration.*" Revue de l'arbitrage, 1970 at 24
[12] Christopher R. Drahozal, "*Why Arbitrate? Substantive versus Procedural Theories of Private Judging"*, 22 American Review of International Arbitration (2011) at 163-186
[13] William W. Park, "*National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration"*, 63 Tulane L. Rev. (1989) at 647, 680
[14] *Supra* note 5 at 134
[15] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html *(last checked: 26.03.2019)*
[16] *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34, at para. 51.
[17] Art. II (3) of the New York Convention,

arbitration agreement or arbitration clause is not valid and enforceable in national courts with the application of rules of national and international laws.[18]

2.2 International Arbitration Agreements and the Separability Doctrine

All the legal regimes that the world of arbitration consists of can only be applicable if there is an arbitration agreement, meaning; *"if the parties have made an agreement to arbitrate"* as opposed to another alternative dispute resolution of litigation.[19] Article II(1) of the New York Convention also defines an agreement to arbitrate as "*an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not."*[20] The term "defined relationship" is a limitation and also can be found in UNCITRAL and some other national arbitration legislations[21] and stands as a requirement that must be fulfilled. This is however, not the only requirement one can see in arbitration. There are also other requirements in both international and national instruments such as limitations arising out of or relating to "commercial" relationships[22] and in an "international" context[23] - meaning the arbitration agreement cannot be formed in domestic agreements. When it comes to requirements to be fulfilled in order for an arbitration agreement to be valid,[24] probably the most important and universally accepted[25] one is the "in writing" requirement since Article II of the New York Convention, the UNCITRAL Model Law and other national arbitration legislations impose "writing" requirements even if they do not have the exact same wording.

Regardless of the fulfillments imposed by both international and national instruments, once the requirements are fulfilled, the arbitration agreement is treated as "separable" or "autonomous" from the underlying contract[26] due to the legal doctrines known as the "separability doctrine" or "separability presumption."[27] Over the years, this doctrine was

[18] *Supra* note 5 at 229
[19] *Supra* note 5 at 240
[20] Art. II (1) of the New York Convention
[21] Art. 7(1) UNCITRAL Model Law, *see* also Swedish Arbitration Act §1; French Code of Civil Procedure, Art. 1442(2); Italian Code of Civil Procedure, Arts. 807-808
[22] Art. I (3) of the New York Convention; Art I (a) of the European Convention; Art. 1 of the Inter-American Convention; Art. 1(1) UNCITRAL Model Law; Canadian Commercial Arbitration Act Art. 1
[23] This is also is the case under the New York Convention, the Inter-American Convention, the European Convention.
[24] *See, e.g.*, Art. 7(1) UNCITRAL Model Law; Art. 178(1) Swiss Law on Private International Law
[25] *Supra* note 5 at 657
[26] *Supra* note 5 at 349
[27] *Supra* note 5 at 350-353; Pierre Mayer, *'The Limits of Severability of the Arbitration Clause'*, in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the*

defined various times in cases, however, it is possible to give a broad definition by saying *"[c]haracteristics of an arbitration agreement ... are in one sense independent of the underlying or substantive contract [and] often led to the characterization of an arbitration agreement, as ... a "separate" contract."*[28] With the combination of different definitions, one can reach a conclusion simply by saying an arbitration clause should be treated as severable from the contract in which it appears[29] since the clause puts the party's will and intention to arbitrate over a dispute into effect which is concluded separately than the underlying contract and the underlying contract's actual subject.

2.2.1 The Separability Doctrine under the Conventions

The separability directs attention to the role of the parties' intentions about forming a "separate" arbitration agreement in a contractual matter, different than what they aimed to achieve with the underlying contract, which is the foundation for separability presumption.[30] Even if they did not expressly provide separability for arbitration clause, treaty provisions are indeed confirming "*that arbitration agreements are presumptively separable from the underlying contract."*[31] If one looks at the first modern international arbitration conventions, namely the Geneva Convention and the Geneva Protocol they are both similar to each other and their provisions treated arbitration agreements differently than other contracts.[32] With the same historical heritage, the New York Convention also assumes that arbitration agreements are separable from the underlying contract without imposing or requiring it with Article II and Article V(1)(a). While Article II(1) defines an arbitration agreement as *"an agreement in writing under which the parties undertake to submit to arbitration all or any differences"*[33] arising between the parties, Article II(2) defines it as *"an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams."*[34] Similar to these provisions, Article V(1)(a) of the Convention also assumes the

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New York Convention, ICCA Congress Series, Volume 9, ICCA & Kluwer Law International, 1999 at 261 – 267; Tanya Monestier, *"Nothing Comes of Nothing" ...Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration"*, 12 Am. Rev. Int'l Arb. (2001) at 1

[28] *Westacre Invs. Inc. v. Jugoimport-SDRP Holdings Co.* [1998] 4 All ER 570 (QB) (English High Ct.)

[29] *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 2847, 2857 (U.S. S.Ct. 2010) and *Ets Raymond Gosset v. Carapelli*, 7 May 1963, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1e); *Nat'l Power Corp. v. Westinghouse*, *2 September 1993*, DFT 119 II 380, 384 (Swiss Federal Tribunal) as referred to in *Supra* note 5 at 350

[30] *Supra* note 5 at 353; J. Gillis Wetter, *"Book Review - International Arbitration: Three Salient Problems"*, Journal of International Arbitration, Volume 3 Issue 3, Kluwer Law International 1987) at 165

[31] *Supra* note 5 at 354

[32] Arts. III, IV (1) Geneva Protocol; Art. I(a) Geneva Convention

[33] Art. II (1) of the New York Convention

[34] Art. II (2) of the New York Convention

separability of the agreement by providing an exception to the enforceability of arbitral awards by stating *"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".*[35] This provision shows there is another application of a national law to the arbitration agreement itself, distinct from the underlying contract. Consequently, by analyzing the provision and also according to Gary Born, it is logically true to say that Article V (1) indicates that the arbitration agreements are presumptively separate from the underlying contract because of the possibility of being subject to different national laws than the contract itself.[36] In any case, given the fact that an arbitration agreement and the underlying contract which the arbitration agreement is attached to are being subjected to different national laws proves that they have separate treatments and therefore, they are separate as agreements as well. As an example to prove this point, an arbitration agreement and thus the arbitration proceeding can be subjected to Swiss law while the underlying contract is subjected to Turkish law, which shows that they are separate agreements as they are subjected to different laws.

This premise can be verified by looking to the doctrine since according to scholars, even if the Convention does not contain clear and accurate provisions concerning the separability of the arbitral clause, because of Article V(1)(a), it implies the separability of the clause since the article provides for conflicts rules for determining the law applicable to the arbitration agreement.[37] Above all, the phrase "arbitration agreement" itself is enough to see the separate entity of the clause since if needs be, it can be distinguished from the underlying agreement. [38] As a conclusion, even if the New York Convention does not adopt or impose the doctrine, the articles named above "*rest on the premise that arbitration agreement can … be separate agreements and … will often be treated differently from … the parties' underlying contracts."*[39] The situation is not different when it comes to both the European Convention and ICSID. Article I(2)(a) of the European Convention clearly presumes that the arbitration clause is separate from the underlying contract[40] along with Articles V – VI, whereas ICSID

[35] Art. V (1) of the New York Convention
[36] *Supra* note 5 at 354
[37] Albert Jan Van den Berg, *The New York Arbitration Convention of 1958: towards a uniform judicial interpretation,* Kluwer Law and Taxation, 1981 at 146 as referred to in *Supra* note 5 at 356
[38] Stephen M. Schwebel, *International Arbitration: Three Salient Problems,* Vol. 4., Cambridge University Press, 1987 at 3-6 as referred to in *Supra* note 5 at 356
[39] *Supra* note 5 at 357
[40] Art. I(2)(a) of the European Convention ("The term: 'arbitration agreement' shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties,

Additional Facility Rules states *"an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included."*[41]

On the other hand, UNCITRAL Model Law also recognizes the separability by saying "*[a]n arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement*" in Article 7(1)[42] and *"[f]or 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"* in Article 16(1)[43]. In regard to the wording of the provisions, it is possible to say that Article 16 of the Model Law recognizes the separability presumption more explicitly than the New York Convention or the European Convention since it refers to the separability presumption in the context of the arbitral tribunal's competence-competence.[44] Finally, without any fundamental changes, the ICC also maintained its approach about recognizing separability doctrine with Article 6(9) of the 2012 ICC[45] as it was one of the first international arbitration institution to recognize the doctrine in 1955[46].

As one can see, the separability presumption is indeed recognized by various conventions and treaties throughout the world and provides that the arbitration agreement attached to the underlying contract is to be treated separately. Even if these treaties stated above do not have the same wording, they all reach a consensus that the arbitration agreement will have a different treatment. Treating the arbitration agreement differently and independently means that it has different requirements to fulfill and therefore, even if there are exceptions, which will be discussed below, its existence and validity will also be treated differently. Stating the arbitration agreement is different, independent, separate or its capacity to be subjected to a different national law than the underlying contract itself consequently entails that the arbitration agreement itself is separate than the underlying contract.

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or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws.").

[41] Rule 45(1) ICSID Additional Facility Rules

[42] Art. 7(1) UNCITRAL Model Law

[43] Art. 16(1) UNCITRAL Model Law

[44] *Supra* note 5 at 405

[45] Art. 6(9) 2012 ICC Arbitration Rules

[46] Art. 13(4) 1955 ICC Arbitration Rules

2.2.2 The Separability Doctrine under National Laws

The separability doctrine has also been adopted by national laws throughout the world by many countries. Germany adopted the doctrine in 1890's with two landmark judgments[47] and treated the arbitration clause as a separate entity and continued with the adaptation of UNCITRAL Model Law in 1998; Switzerland adopted the separability of an arbitration agreement in 20th century with a judgment, stating *"the invalidity of underlying contract by reason of mistake of* ***fraud*** *does not invalidate separable arbitration clause*" (emphasis added).[48] Even years after with the adaptation of Swiss Law on Private International law of December 18, 1987 the approach is codified by stating *"[t]he validity of an arbitration agreement may not be contested on the grounds that the principal contract is invalid or that the arbitration agreement concerns a dispute which has not yet arisen."*[49] The same situation goes with France as well since one can see that in Article 1447 of the revised French Code of Civil Procedure, it is stated that *"[a]n arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void"*[50]. However, it should also be noted that the French Cour de Cassation already adopted the separability presumption in 1963 with *Gosset v. Carapelli*[51] but argued that the separability doctrine would not invariably apply since there can be *"exceptional circumstances"* like the parties' intention of an arbitration agreement to be inseparable from the underlying contract.

The doctrine was also adopted by United States Federal Arbitration Act Sections 2-4; and it is possible to see that US Courts have consistently applied separability doctrine in their cases, e.g. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.,*[52] *Prima Paint Corp. v. Conklin Mfg Co.*[53], or more recently, *Rent-A-Center West, Inc. v. Jackson*[54] cases. Among all of them, Prima Paint was probably the one which was relied upon to the greatest extent, in which it stated that:

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[47] *Judgment of 12 December 1918*, 1919 Leipziger Zeitschrift für Deutsches Recht 501, 501 (Oberlandesgericht Marienwerder) and *Judgment of 30 April 1890*, 1890 JW 202, 203 (German Reichsgericht) as referred to in *Supra* note 5 at 362

[48] *Judgment of 27 April 1931*, 1931 Entscheidungen des Appellationsgerichts des Kantons Basel-Stadt 13 (Basel-Stadt Appellationsgericht) as referred to in *Supra* note 5 at 365

[49] Art. 178(2), (3) CPIL

[50] French Code of Civil Procedure, Art. 1447.

[51] *Ets Raymond Gosset v. Carapelli*, 7 May 1963, JCP G 1963, II, 13, ¶405 (French Cour de cassation civ. 1e) as referred to in *Supra* note 5 at 373

[52] *Robert Lawrence Co. v. Devonshire Fabrics, Inc*., 271 F.2d 402, 411 (2d Cir. 1959)

[53] *Prima Paint Corp. v. Flood & Conklin Mfg Co.*, 388 U.S. 395 (U.S. S.Ct. 1967)

[54] *Rent-A-Ctr, W., Inc. v. Jackson*, 130 S.Ct. 2772 (U.S. S.Ct. 2010)

"*except where the parties otherwise intend - arbitration clauses, as a matter of federal law, are "separable" from the contracts in which they are embedded, and that, where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud."*[55]

It should also be noted that in the US, there is only a presumption of separability since parties are free to agree that the arbitration agreement is not separable from their actual contract as it was stated in Prima Paint.[56]

Finally, as well as Germany, Switzerland, France and US, England also recognized the separability doctrine through its case law, stating the arbitration agreement would still remain valid even if the underlying contract had to be terminated like in *Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp. Ltd.*[57] The judgment argued that *"[t]he arbitration clause constitutes a self-contained contract collateral or ancillary to the shipbuilding agreement itself."*[58] Even further, in 2007 with the judgment of *Fiona Trust & Holding Corp. v. Privalov*[59], the House of Lord's explicitly stated that *"[t]he arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement"*[60] and *"[t]he doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside."*[61] Even if it is clear that England has adopted the separability doctrine through its case law, it is also clear from Section 7 of the English Arbitration Act that the doctrine is codified.[62] Overall, since the arbitration agreement contains duties which cannot be classified as either primary or secondary obligations, *"its discharge by breach is treated separately from that of the primary obligations of the contract*."[63]

The separability doctrine has been adopted in various countries across the world as stated above. It would not be possible to analyze all of them, however, nearly all jurisdictions

[55] *Supra* note 53 at 403
[56] *Ibid.*
[57] *Bremer Vulkan Schiffbau und Maschinenfabrik v. S. India Shipping Corp. Ltd* [1981] AC 909
[58] *Ibid*. at 980
[59] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40
[60] *Ibid*. at para. 17
[61] *Ibid*. at para. 35
[62] Arbitration Act 1996 Section 7
[63] Adam Samuel, "*Separability in English Law: Should an Arbitration Clause Be Regarded as An Agreement Separate and Collateral to A Contract in Which It Is Contained"*, 3(3) J. Int'l Arb. (1986) at 109

starting from China[64] to Ireland[65], Turkey[66] to Belgium[67] or Brazil[68] have adopted the doctrine as a part of a pro-arbitration approach.

2.2.3 Importance and Conclusion

This doctrine and its adoption is important because the arbitration agreement should have an independent existence since otherwise any party could seek avoidance of arbitration alleging the invalidity of the contract in which the arbitration agreement itself is contained.[69] Invalidation of the contract can also mean invalidation of the arbitration clause and this is where the separability doctrine stands up by simply saying the validity of the arbitration clause does not depend on the validity of the contract as a whole.[70] Mainly, the arbitration agreement can "come of nothing"[71] since an arbitration provision can be valid even if the underlying contract never legally came into force.

As one can also see, even if there are different wordings in different national laws or treaties, the consensus throughout the world is that an arbitration agreement is to be treated differently due to the intention of the parties to solve their dispute in a way that needs a separate agreement. Therefore, when there is an issue regarding the validity of the underlying contract, the arbitration agreement will be separated and treated as a different agreement.

The separability doctrine will be discussed below in greater detail in conjunction with the concept of fraud.

2.3 Fraud in the Underlying Contract and Its Consequences

Every legal system, statute, definition and application vary from one another. However, there are some basic definitions that are accepted worldwide and one of them is fraud. Fraud, in its broadest definition, is a knowing misrepresentation of the truth or concealment of a material

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[64] Weixia Gu, *"China's Search for Complete Separability of the Arbitral Agreement"*, Asian International Arbitration Journal, Singapore International Arbitration Centre (in co-operation with Kluwer Law International) 2007, Volume 3 Issue 2 at 171-172

[65] Irish Arbitration Act, 2010, Art. 16(1).

[66] Turkish International Arbitration Law, Art. 4(4)

[67] Belgian Judicial Code, Art. 1690(1)

[68] Brazilian Arbitration Law, Art. 8

[69] ITC "*Powers, duties and jurisdiction of the arbitral tribunal*", in *Arbitration and Alternative Dispute Resolution: How to Settle International Business Disputes*, UN, New York, 2001 at 338

[70] See, e.g., Art. 23 UNCITRAL Rules; Art. 6(9) ICC Rules; Art. 23 LCIA Rules; Art. 1 ICDR Rules; Art. 16(1) UNCITRAL Model Law; Art. 5(4) CIETAC Rules; Art. 19(2) HKIAC Rules; English Arbitration Act 1996

[71] Tanya Monestier, *"Nothing Comes of Nothing" …Or Does It? A Critical Re-Examination of the Doctrine of Separability in American Arbitration"*, 12 Am. Rev. Int'l Arb. (2001), at 1

fact to induce another to act to his or her detriment.[72] In general, parties have a mutual willingness to enter upon and to be bound by a contract. Simply put, *"there is no contract unless the parties so assent to the same thing and in the same sense."*[73] If one uses the term "fraud" as a name, it means that a false representation of a material fact made by one who knew that it was false. It also means a positive statement made by one who knew that it is not true but still made the other party believe in the truth of that statement with intent to deceive the other party.[74] This aspect of fraud also differs it from mistake, misrepresentation and non-disclosure since in order to mention fraud. The one who is making the false statement is aware that such statement is wrong.

Fraud can be found at any stage, both in the formation of the underlying contract and the execution of said contract. During the formation of a contract, fraudulent intent can be seen under different names and different acts. Fraudulent inducement is one of them, and also a claim, which is probably the best to begin with. Fraud in the inducement of a contract exists *"where the defrauded party understand the identity of the adversary party, the consideration, the subject-matter, and the terms of the contract; and he is willing to enter into the contract in question; but his willingness so to enter is caused by a fraudulent misrepresentation of the adversary party as to a material fact."*[75] The consequences of fraud in the inducement are different than the consequences of mistake; fraud in the inducement does not make the contract void from the beginning[76], however, it renders the contract voidable.[77] The fact that fraud in the inducement makes it possible for a contract to be voidable rarely effects the fate of the arbitration clause. As will be discussed below, it is different to non-existence of the underlying contract and therefore limits the arguments which can be raised. Fraud in the factum on the other hand, is something different but can be seen at the formation again and can be defined as a type of fraud where misrepresentation causes one to enter a transaction without accurately realizing the risks, duties, or obligation incurred.[78] It causes the contract to be void because there is no meeting of the minds about essential terms.[79] Even if the two

[72] Bryan Garner, ed., *Black's Law Dictionary. 8th Ed. (2004)*, s.v., "fraud."
[73] Charles E. Chadman, Editor. *Cyclopedia of Law*. Chicago, De Bower-Elliott, 1912 at 10
[74] William H. Page, *Law of Contracts*. Cincinnati, W.H. Anderson Co. 1905 at 321
[75] *Ibid*. at 147
[76] Fraud in Contract Law, 4 LAW COACH 136 (1924). at 137
[77] See, *Adams v. Suozzi*, 433 F.3d 220, 227 (2d Cir. 2005); *Denney v. BDO Seidman, L.L.P.*, 412 F.3d 58, 67-68 (2d Cir.2005)
[78] *Black's Law Dictionary*, 2nd Pocket ed. 2001 at 293.
[79] *Adams v. Suozzi*, 433 F.3d 220, 227 (2d Cir. 2005)

definitions are different because of their contents and consequences, intent to deceive[80] another party to enter into a contract can be seen in both, therefore it is possible in these instances to say that a fraud comes into existence.

As stated above, fraudulent intent can be seen under different acts and certainly in relation to the law, there is no single offence of fraud[81]; defrauding or fraud-related activities are numerous. Forgery is also one of the techniques of fraud which is considered as fraud in the execution. Historically, forgery was defined as *"the false making, with the intent to defraud, of a document which is not what it purports to be, as distinct from a document which is genuine but nevertheless contains a term or representation known to be false.*"[82] A forgery, a fraud in the execution makes a contract null and void. It is different to a contract which is voidable as in fraud in the inducement, because in this case, neither party can enforce it. Again, as will be discussed below, the allegations of bribery are also relevant with the topic because contracts won though bribery invariably involve fraud.[83] Bribery can be defined as "*the asking, giving, accepting, or promising or undertaking to give anything of value or advantage … with the corrupt intent to influence unlawfully the person to whom it is given in his action …"*[84]. Bribery, without any doubt is an illegal act and causes the contract to be void like forgery or fraud in the factum. When it comes to analyzing bribery under arbitration law, allegations of bribery also will not have any a different treatment to fraud or illegality of the underlying contract.[85]

As can be seen, fraud, whether it is fraud in the inducement, fraud in the factum, bribery or forgery causes the underlying contract to be either null and void or voidable. It can obviously affect the arbitration clause in the underlying contract in some cases if it is directed to the arbitration agreement, however the outcome for the underlying contract is the same.

[80] *Supra* note 74 at 186
[81] Alan Doig, *Fraud.* Willan publishing, 2005 at 20
[82] United States v. Price, 655 F.2d 958, 960 (9th Cir. 1981) at para. 5
[83] *Supra* note 81 at 114
[84] Charles H. Fairall, *Criminal Law and Procedure of California including the Penal Code of California*, Los Angeles, Chas. W. Palm Co., 1902 at 97
[85] Nicholas Pengelley, *Separability Revisited: Arbitration Clauses and Bribery – Fiona Trust & Holding Corp v. Privalov*, 24 J. Int'l Arb. 5 (2007) at 451

2.4 Is an Arbitration Clause Severable When It Comes to Fraud?

It is possible to say that a contract containing a provision for arbitration can be divided into two parts[86]; the first part is the contract which includes the subject matter and the actual reason why parties have entered into a contract. The second part is the contract to submit the disputes arising between the parties to arbitration.[87] The second contract, i.e. the arbitration agreement, which is the contract to submit the disputes to arbitration, as stated above, is subject to separability presumption which is a general principle of international arbitration law.[88] The separability presumption of the second contract, the arbitration clause, also concerns the existence and validity of the agreement to arbitrate.[89] There are many consequences of the separability presumption, however, one of the consequences which is important to analyze in conjunction with fraud is the fact that the fate of the arbitration clause is not fully dependent to the non-existence, ineffectiveness, invalidity, illegality or termination of the underlying contract.[90] In this regard, one should note that the UNCITRAL ICC, ICDR and LCIA Rules are all similarly[91] have a consensus which provides that the validity of the arbitration clause is not necessarily affected by the invalidity of the underlying contract, as a consequence of the separability presumption.

In this instance, there are also numerous judicial decisions considering whether the fate of the parties' underlying contract affects the arbitration clause which is constituted in the said contract from UNCITRAL Model Law jurisdictions, such as the United States, England and other countries. Some of the selected cases consistently held that fraud related grounds do not entail the non-existence, invalidity, illegality or termination of the arbitration agreement even if the underlying contract is faced with these consequences[92] and became void in the end. For example, the judgment *Capital Trust Inv. Ltd. v. Radio Design*[93] stated *"that claim that underlying contract was voidable for misrepresentation did not affect validity of arbitration clause"*[94]*;* the judgment *New World Expedition Yachts LLC. v. P.R. Yacht Builders Ltd*[95] stated *"[e]ven if a contract is vitiated by fraud, the arbitration clause within it is not*

[86] Richard K. Parsell, *'Arbitration of Fraud in the Inducement of a Contract*' 12 CORNELL L Q (1926-1927) at 354
[87] *Ibid.*
[88] *Supra* note 5 at 400
[89] *Ibid.*
[90] *Ibid.* at 401
[91] Art. 23(1) UNCITRAL Rules; Art. 6(9) ICC Rules; Art. 15(2) ICDR Rules; Art. 23(1) LCIA Rules
[92] *Supra* note 5 at 406
[93] *Capital Trust Inv. Ltd v. Radio Design AB* [2002] 1 All ER 514 (English Ct. App.)
[94] *Supra* note 5 at 406
[95] *New World Expedition Yachts LLC v. P.R. Yacht Builders Ltd*, [2010] BCSC 1496 (B.C. S.Ct.)

necessarily invalid"[96] adopting the judgment in *James v. Thow* which gave an accurate explanation stating;

"an allegation of fraud does not put the matter outside an arbitration agreement if the allegation does not directly impeach the arbitration agreement itself. The doctrine of separability requires that the arbitration clause be analyzed as a separate contract. That being the case, the allegation of fraud must relate directly and specifically to the arbitration agreement rather than to the contract as a whole."[97]

Similarly, judgments *Commandate Marine Corp. v. Pan Australia Shipping Pty. Ltd.*[98], *Ferris v. Plaister*[99] and one of the most cited cases, *Fiona Trust*,[100] all stated that fraud in the underlying contract does not have an impeachable effect of the arbitration clause. Even if there was a time when a view existed that arbitrators could never have jurisdiction to decide whether a contract was valid[101], this approach is not accepted anymore and even if it sounds like the allegations may affect the validity of the main agreement, *"they do not undermine the validity of the arbitration agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside."*[102]

It is also possible to see similar judgments under US Federal Arbitration Act regarding fraud and its impact over the arbitration clause. One of the most cited decision on this subject, *Prima Paint*,[103] which firstly dealt with fraud in the inducement of a contract containing an arbitration clause[104], states that the arbitration clauses are separable from the underlying contract except where the parties intend otherwise.[105] The federal court may continue to proceedings if the claim is the inducement, i.e. "making" of the arbitration clause itself, however, fraud in the inducement of the contract in general does not permit the court to consider claims.[106] This reasoning was also followed in *Buckeye Check Cashing*[107], stating that a challenge directed specifically to the arbitration agreement would be subject to judicial

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[96] *Ibid.* at para. 13
[97] *James v. Thow*, 2005 BCSC 809 (CanLII) at para. 92
[98] *Commandate Marine Corp. v. Pan Australia Shipping Pty Ltd*, [2006] FCAFC 192 (Australian Fed. Ct.)
[99] *Ferris v. Plaister*, (1994) 34 NSWLR 474 (N.S.W. Ct. App.)
[100] *Supra* note 59
[101] *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd*, [1988] 2 Lloyd's Rep at 63
[102] *Supra* note 59 at para. 35
[103] *Supra* note 53
[104] Nancy R. Kornegay, "*Prima Paint to First Options: The Supreme Court's Procrustean Approach to the Federal Arbitration Act and Fraud"*, 38 Hous. L. Rev. 2001. at 337
[105] *Supra* note 53 at 403
[106] *Supra* note 53 at 404-405
[107] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)

resolution while a general challenge directed to the underlying contract would be referred to arbitration.[108]

In nearly all of the selected cases above, especially *James v. Thow*[109], *Fiona Trust*[110] and *Prima Paint*[111], there is one commonly-held fact which is if the allegation of fraud is not directed specifically to the arbitration agreement and thus directed to the underlying contract – its validity, illegality or ineffectiveness – the case should be referred to arbitration because of the doctrine of separability. It is also clear from the judgments that because the arbitration agreement is a separate contract and because it has a separate intention, even if the contract is challenging with the allegations of fraud, the arbitration agreement would not be affected by these allegations. In the judgment *Nagrampa v. MailCoups, Inc*.[112] it is possible to see that the cases mentioned above also had their effect felt over lower courts since the judgment mentions that when there is a claim of fraud which is not specifically directed at the arbitration agreement, the question about the validity of the contract should be considered by an arbitrator.[113] All of these reasonings are clear ways of saying that the arbitration clause in the underlying contract is enforceable apart from the remainder of the contract.[114]

2.4.1 Situation in the United States under FAA

There is still a need for further clarification when it comes to the allegation directed specifically to the arbitration agreement/clause and of course, an allegation directed to the underlying contracts' existence in the first place, especially for cases under FAA, even if the selected cases above proves that the arbitration agreement is enforceable regardless of the fate of the underlying contract.

The Supreme Court in Buckeye[115] made it clear with their wording that if a party specifically challenges the arbitration clause, that should be a matter for judicial resolution[116] but did not give any clarification on what is required to challenge an arbitration clause specifically.[117] However, in Buckeye, the Court rejected a number of state court decisions which give

[108] *Ibid.* at 449
[109] *Supra* note 97
[110] *Supra* note 59
[111] *Supra* note 53
[112] *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, (9th Cir. 2006).
[113] *Ibid.*
[114] *Supra* note 5 at 414; *Supra* note 107 at 446.
[115] *Supra* note 107
[116] *Ibid.* at 449
[117] *Supra* note 5 at 420

importance to the difference between a void and a voidable contract[118] and thus, making this judgment a landmark case. Even if the Buckeye Court did not give clarification, there are judgments[119] stating if one fails to identify any misrepresentations particular to the arbitration agreement separate from the contract as a whole, then it would not be possible to invalidate the arbitration clause for fraud[120], even if the underlying contract is void due to fraud in the factum.[121] Simply put, without challenging the arbitration clause specifically, thus without any identification, the arbitration clause will be enforceable in a void contract. Furthermore, a challenge which can be classified as specifically challenging the arbitration agreement which also has the capacity to invalidate the arbitration clause should *"satisfactorily alleges that the arbitration agreement itself is invalid, even if the grounds for that claim are also simultaneously applicable to the underlying contract."*[122], i.e. if a party claims that both the arbitration agreement and the underlying contract are unacceptably one-sided[123], fundamentally unfair[124], if there is a fundamental change in circumstances[125], of if there is a fraud allegation concerning identity issues.[126] Therefore, in the case of a challenge directed specifically to the arbitration agreement with the fulfillments stated herein, it is possible that the arbitration agreement may be held invalid[127] by the arbitral tribunal. This is related to the arbitral tribunal's jurisdiction, in which they may decide that they do or do not have jurisdiction over the case since the arbitration agreement is invalid, which consequently causes a referral the case to a judicial resolution mechanism or stay in the proceedings.

At this point, it should be noted that allegations made to the underlying contract in a similar or an identical way is irrelevant.[128] As a result of the analysis made in the aforementioned paragraphs and arguments as well as the decisions given by courts, it is possible to reach a conclusion by saying because of the different characters[129] of the underlying contract and the

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[118] See, *Supra* note 79 at 227 ("If a contract is 'void,' a party wishing to avoid arbitration does not have to challenge the arbitration clause specifically; if a contract is 'voidable,' the party must show that the arbitration clause itself is unenforceable."); *Sphere Drake Ins. Ltd v. Clarendon Nat'l Ins. Co.*,263 F.3d 26 (2d Cir. 2001) at 32 ("If a party alleges that a contract is void and provides some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void…")
[119] *Moran v. Svete*, 366 F.Appx. 624, 631 (6th Cir. 2010); *Fox Int'l Relations v. Fiserv Sec., Inc*., 418 F.Supp.2d 718, 724 (E.D. Pa. 2006)
[120] *Moran v. Svete*, 366 F.Appx. 624, 631 (6th Cir. 2010)
[121] *Fox Int'l Relations v. Fiserv Sec., Inc*., 418 F.Supp.2d 724 (E.D. Pa. 2006)
[122] *Supra* note 5 at 433
[123] *Ibid.* at 434
[124] *Ibid*.
[125] *Ibid.*
[126] *Ibid* at 435
[127] *Ibid.*
[128] *Ibid.*
[129] *Ibid.* at 434

arbitration agreement, especially different objectives, the concept of fraud will rarely have an effect on the validity of the arbitration agreement, recalling the separability doctrine. Of course, if *"an arbitration clause that has been fraudulently induced, or that is procured by fraud, is undoubtedly invalid or null and void*."[130] It will be a matter for courts since *"fraud in the procurement of an arbitration contract* **...** *makes it void and unenforceable and ... this question of fraud is a judicial one, which must be determined by a court."*[131]

2.4.2 Challenging the Existence of the Contract under FAA

The situation differs when it comes to challenging the existence or formation of the underlying contract because of fraud since it is different than challenging the arbitration agreement specifically. Challenging the existence or formation of the underlying contract harbors the logic of stating the non-existence of the underlying contract will affect the arbitration clause's status of existence. It should be noted here that since R*ent-A-Center*[132] judgment, there is a clear distinction under the FAA between the agreement's validity and existence[133] because the underlying contract's validity status or status of existence will have different consequences in terms of the arbitration agreement. After *Rent-A-Center* and its follow up case *Granite Rock,*[134] it was confirmed that any issue about the formation of the underlying contract was for the courts to handle.[135] Because of the aforementioned judgments, local courts also have a tendency to see US authorities competent to decide on the matter, mainly because it is purely related with law. As an example, in *Chastain v. Robinson-Humphrey*[136], the court held that even if *"the Prima Paint doctrine has been extended to require arbitration panels to decide many issues regarding the validity of a contract ... including allegations that such contracts are voidable ... Prima Paint has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract never existed at all."*[137] General consensus among the lower courts in the US is that the authority to make a decision about the existence of a contract should be

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[130] *Ibid.* at 846
[131] *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963) at 172 as referred to in Stephen H. Kupperman and George C. III Freeman, *'Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorneys' Fees and Costs'* 65 TUL L REV (1990-1991) at 1565
[132] *Supra* note *54*
[133] *Ibid.* at 2778
[134] *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 2847, 2855-56 (U.S. S.Ct. 2010*)*
[135] *Ibid.*
[136] *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992)
[137] *Ibid.* at para. 15-16

specific to courts since it also necessarily affects the existence of the arbitration agreement.[138] In this author's opinion, this consensus among the lower courts is not going further than trying to justify the court's approach to arbitration, mainly trying to maintain capacity of being able to deal with law related issues in the court's hands.

There is also at least one judgment[139] related to forgery which states "*challenges claiming that – as a whole – a contract is illegal, is a void as a matter of law, contains forged signatures, or was induced by* ***fraud*** *will generally not serve to defeat an arbitration clause (*emphasis added*)"*[140] with the application of Prima Paint. The decisions in the US lower courts also differ from one another on whether the non-existence of an underlying contract affects the arbitration agreement. There are decisions[141] stating there is no arbitration agreement because of the mere fact that there was never any underlying contract as well as the decisions[142] stating the arbitration clause survives even if the underlying contract has never come into existence if the parties agreed to arbitrate.

The legal grounds for these two different outcomes are coming from the reasonings that firstly it is not possible to sever something from something that never existed and secondly the agreement to arbitrate is separate by nature from the agreement to i.e. buy and sell books. That being said and as also discussed above, something indeed can come from nothing and therefore the idea of an arbitration agreement to be non-existence because the underlying contract never came into existence cannot be accepted, thus it is possible to sever it. Following the latter logic, in *Republic of Nicaragua v. Standard Fruit Co.,*[143] the court stated that regardless of where the arbitration clause is found, in this case an unfinalized set of agreements, it is binding and must be enforced[144] because of the agreement to arbitrate notwithstanding the non-existence of their underlying contracts.[145] That being said, it should also be noted that – remembering the distinction of validity and existence – it is not quite easy to say that "*an arbitration clause in an underlying contract that is "void", "voidable" ...* -

[138] *Supra* note 5 at 425
[139] *Supra* note 5 at 428
[140] A*lexander v. U.S. Credit Mgt,* 384 F.Supp.2d 1007 (N.D. Tex. 2005)
[141] See, *Sandvik AB v. Advent Int'l Corp*., 220 F.3d 99, 108 (3d Cir. 2000); *Kyung In Lee v. Pac. Bullion (N.Y.) Inc*., 788 F.Supp. 155, 157 (E.D.N.Y. 1992)
[142] See, *Sphere Drake Ins. Ltd v. All Am. Ins. Co*., 256 F.3d 587, 591-92 (7th Cir. 2001); *Colfax Envelope Corp. v. Local No. 458-3M, Chicago Graphic Commc'ns Int'l Union*, 20 F.3d 750, 754-55 (7th Cir. 1994)
[143] *Repub. of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991).
[144] *Ibid.* at para. 33
[145] *Supra* note 5 at 430

because of fraud … - necessarily exist[s], but an arbitration clause in any underlying contract that is "nonexistent" … necessarily does not exist."[146]

This analysis cannot give a definite result because of the mentioned distinction. However, it would not be wrong to say that in terms of invalidity, fraudulent inducement of the underlying contract will not impeach the arbitration agreement because the underlying contract will not be relevant to the separable arbitration agreement, like in Prima Paint[147]; but non-existence of the underlying contract will impeach the arbitration agreement in it because the grounds such as the absence of consent or capacity will affect the formation of the arbitration agreement.[148] In this regard, given the fact that fraudulent inducement causes a contract to be voidable and fraud in the factum causes a contract to be void[149] instead of non-existent, it is possible to reach a conclusion for fraud and say that arbitration clause is separable. All in all, arbitration clause will be separated from the underlying contract no matter what is the important distinction is under FAA, because fraud does not lead a contract to be non-existent.

2.4.3 English Case-Law

Moving on from the cases and theoretical explanations under FAA, it is accurate to say that English courts have a consistent approach. Although English decisions recognized the separability presumption; there were judgments[150] stating non-existence, voidness or illegality of the underlying contract affects the validity of arbitration clause. However this is not the current case since the English courts embraced the separability doctrine[151] with *Harbour Assurance v. Kansa General International Insurance,*[152] where the court held that the arbitration clause was separate regardless of the illegality of the underlying contract[153] and continued with this logic in the English Arbitration Act in 1996. As also stated above, Section 7 provides that *"an arbitration agreement which forms … part of another agreement … 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*

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[146] *Supra* note 5 at 435
[147] See, Pierre H. Bergeron, '*At the Crossroads of Federalism and Arbitration: The Application of Prima Paint to Purportedly Void Contracts'*, 93 KY. L.J. (2004), at 423
[148] *Supra* note 5 at 437
[149] *Supra* note 147 at 441
[150] See, *Ashville Inv. Ltd v. Elmer Contractors Ltd* [1988] 3 WLR 867, 873 (English Ct. App.); *Heyman v. Darwins Ltd* [1942] AC 356, 366 *et seq.* (House of Lords) (Viscount Simon, L.C.)
[151] *Supra* note 5 at 441
[152] *Harbour Assurance Co. Ltd. V. Kansa General International Insurance Co. Ltd*., 1 Lloyd's L.Rep. [1992] at 81
[153] *Ibid.* at 81, 92-93

be treated as a distinct agreement."[154] As one can see, this section in the English Arbitration Act provides separability of the arbitration agreement in contracts with Article 16 of the Model Law[155] and also gives specific reference to the substantive validity of the arbitration agreement. In this regard, Section 7 stated that the arbitration agreement cannot be classified as invalid, nonexistent or ineffective just because the underlying contract is invalid, nonexistent or ineffective.

It is possible to see this rationale and effect of Section 7's statement about the separability presumption in case law, especially in one of the most-cited cases, Fiona Trust. As also stated above, according to the Fiona Trust judgment, the allegations should be directed at the arbitration agreement specifically before it can be set aside.[156] In this case the underlying contract was procured by fraud, specifically bribery, but it did not affect the alleged contract's arbitration clause since the fraud was not directed specifically at the arbitration agreement[157] and consequently the case was referred to arbitration. According to the Court of Appeal, allegations of bribery cannot be subject to different treatment than fraud or illegality, unless there was bribery in the making of the arbitration agreement itself.[158] This judgment also adopted a similar analysis to that in Buckeye[159], stating that the challenges to the existence of the underlying contract may occasionally impeach the arbitration clause in it.[160] For example:

"if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement,' was forged."[161]

In the judgment, it is possible to see that Fiona Trust provided a clearer analysis than the US courts about how and why some challenges to the existence of the underlying contract may also involve the arbitration agreement. More importantly, after the analysis above, it is possible to see that the English Courts adopted the separability doctrine in a way that was not

[154] English Arbitration Act, 1996, §7.
[155] As stated above, Article 16 of the Model Law deals with separability in the context of competence-competence.
[156] *Supra* note 59 at para. 35
[157] *Supra* note 85 at 450 - 454
[158] *Ibid* at 448
[159] *Supra* note 107
[160] *Supra* note 59 at para. 17
[161] *Ibid.*

allowing fraud, forgery or bribery to affect the arbitration clause if it is not directed specifically to it. The same situation in the English Courts also goes for duress as well. In another case, *El Nasharty v. Sainsbury plc.*[162] which was a case involving duress, the court applied Fiona Trust again and stated that the arbitration clause can only be invalidated if that clause itself resulted from duress.[163] The court held that even if there was evidence that the underlying contract was a product of duress, "*duress did not prevent [the party from] exercising his own free will in relation to [the] dispute resolution machinery*."[164]

2.4.4 Analysis and Conclusion

In all of the judgments, *Fiona Trust*[165] and *Harbour v. Kansa*[166] from English law and *Prima Paint*[167] and *Ferris v. Plaister*[168] from the US law, the party who claimed that the arbitration clause should also be unenforceable had one common argument; one would never have entered a contract, or the arbitration clause it included, if they had known the fate of the underlying contract. These arguments were rejected in each of those cases regardless whether they are subjected to different legal systems because the arbitration agreement or clause is indeed separate from the contract and it survives whatever fate the underlying contract has. Simply put, the arbitration clause survives the death of that contract "*in order to validate the appointment of the arbitration who will determine matters that need to be determined*."[169]

There is a consensus worldwide that regardless of whether there is a fraud in the inducement, fraud in the factum, bribery, forgery or duress causing the underlying contract to be void or voidable (even if the distinction does not matter), these acts will not impeach or affect the associated arbitration agreement and the arbitration agreement will exist and be substantively valid.[170] Thus, the arbitration clause is indeed severable when it comes to fraud.

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[162] El Nasharty v J. Sainsbury Plc [2007] EWHC 2618 (Comm) (English High Ct.).
[163] *Ibid.* at para 31
[164] *Ibid*.; *Supra* note 5 at 393
[165] *Supra* note 59
[166] *Supra* note 152
[167] *Supra* note 53
[168] *Supra* note 99
[169] *Supra* note 85 at 451
[170] *Supra* note 5 at 457

3 JURISDICTION

3.1 What is Jurisdiction?

Jurisdiction, in terms of international arbitration, can be defined as the power of the tribunal in accordance with its constitutive instrument to entertain the dispute brought by the parties. It differentiates itself from admissibility in this way. As will be discussed below, admissibility refers to whether a claim should be heard at all, whilst jurisdiction refers to whether the tribunal is competent to hear the claim.[171] The tribunal gains its jurisdiction from the arbitration agreement because the arbitration agreement concluded between the parties established the jurisdiction of the arbitral tribunal. Mainly, the arbitration agreement *"vests the arbitrators with the necessary power to resolve those disputes that the parties agreed to entrust to the arbitral tribunal"*[172] and it is the only source for the tribunal to derive their jurisdiction. The important concept and widely accepted doctrine (competence-competence doctrine[173]) here is that the arbitral tribunal has the authority to consider and decide over its own jurisdiction.[174] This doctrine provides jurisdiction to decide on jurisdiction to arbitral tribunals, meaning that the arbitral tribunal has *"the power to consider and decide disputes concerning their own jurisdiction."*[175] It has ben also stated in ICC Case No. 1526 that *"[i]t is a rule admitted in international arbitration matters that in the absence of a contrary decision of State procedural law, the arbitrator is judge of his own jurisdiction."*[176] Even if the doctrine is universally accepted,[177] in different countries, the circumstances vary from one to another. UNCITRAL Model Law, United States, England and Sweden all adopt various middle grounds[178] when it comes to the tribunal's jurisdiction to examine its own jurisdiction, however, it is also known that the final decision of the arbitral tribunal over its jurisdiction is

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[171] Jan Paulsson, *Jurisdiction and Admissibility (November 11, 2010).* Global Reflections on International Law, Commerce and Dispute Resolution, pp. 601-617, ICC Publishing, 2005; University of Miami Legal Studies Research Paper No. 2010-30. Available at SSRN: https://ssrn.com/abstract=1707490; *Supra* note 5 at 1046 – 1252; Sam Blay and Yanming Huang, *'Admissibility and Jurisdiction in Commercial Arbitration: The Case of CIETAC'* 4 CANBERRA L REV (1997-1998) at 247

[172] Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives*, Third Edition, Kluwer Law International; Schulthess Juristische Medien AG 2016, at 64

[173] Nadja Erk-Kubat, *Parallel Proceedings in International Arbitration: A Comparative European Perspective*, International Arbitration Law Library, Volume 30, Kluwer Law International 2014, at 25 - 70

[174] *Supra* note 5 at 1047

[175] *Ibid.*

[176] *Award in ICC Case No. 1526*, 101 J.D.I. (Clunet) 915, 915 (1974)

[177] *Supra* note 5 at 1051; *See* also, *Award in Case of the Betsey of 13 April 1797*, cited in John B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been A Party*, Volume IV, Washington Printing Office (1898) at 327

[178] *Supra* note 5 at 1049

reviewable by the controlling authority.[179] The important question to ask here is whether or not an arbitral tribunal appointed by the parties in the arbitration agreement will have jurisdiction to decide over a dispute which includes an allegation of fraud and whether an allegation of fraud will have an impact on the arbitral tribunal's jurisdiction which is related with the concept of arbitrability of claims.

As it is stated above, the arbitration agreement is the only source for arbitral tribunals to derive their jurisdiction. Therefore, if the arbitration agreement is null and void, it would be impossible for an arbitral tribunal to have jurisdiction to hear the dispute. This concept also interlocks with the concept of arbitrability of claims since arbitrability involves *"the simple question of what types of issues can and cannot be submitted to arbitration."*[180] This means that if there is an arbitration agreement regarding subject matter that is not capable to be resolved by arbitration[181], the arbitration agreement will be null and void per se, consequently affecting the arbitral tribunal's jurisdiction to hear the dispute because of the mere fact that the subject matter is not arbitrable. As a result, it is important to ascertain whether "fraud" is arbitrable in the first place and consequently, whether the arbitral tribunal will have jurisdiction to hear the case including an allegation of fraud.

3.2 Arbitrability of Fraud

It is already clear that the arbitration clause attached to the underlying contract is separable in case of a fraudulent event, bribery or forgery. Thus, one cannot set forth that the arbitration agreement is invalid or non-existent just because the underlying contract is invalid or non-existent as a consequence of fraud. All of these acts will not be able to impeach the arbitration agreement and therefore, the arbitration agreement will stay valid,[182] regarding disputes that are related to the validity of the contract, i.e. fraud is arbitrable *"if fraud is not alleged in the making of the clause."*[183] However, all these aspects about the separability presumption are

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[179] Jan Paulsson, *Jurisdiction and Admissibility (November 11, 2010).* Global Reflections on International Law, Commerce and Dispute Resolution, pp. 601-617, ICC Publishing, 2005; University of Miami Legal Studies Research Paper No. 2010-30. Available at SSRN: https://ssrn.com/abstract=1707490

[180] Loukas A. Mistelis, *'Part I Fundamental Observations and Applicable Law, Chapter 1 - Arbitrability – International and Comparative Perspectives'*, in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives,* International Arbitration Law Library, Volume 19 (Kluwer Law International 2009) at 4

[181] Sofia Elena Cozac, *'Arbitrability of Disputes and Jurisdiction of Arbitrators'* (2018) 2018 REV STIINTE JURIDICE at 231

[182] *See* Chapter 2 Section 4

[183] Alison Brooke Overby, *Arbitrability of Disputes under the Federal Arbitration Act*, 71 Iowa L. Rev. 1137 (1986) at 1145

different than the question of arbitrability of fraud. Even if it is clear that the arbitration agreement will survive the death of the underlying contract, pursuing an arbitral procedure related to fraud will be different. Thus, the evaluation will also be different when it comes to arbitrability of the claim raised by parties because it is in the same box as the fraudulent event.

It has been stated that arbitrability is a dilemma as it is *"the authority as to the decision as to the authority to make the decision."*[184] It is also a check on autonomy of the parties[185], however, generally it refers to *"whether the specific claims raised are of a subject matter of settlement by arbitration"*[186] and whether an arbitrator can decide over it.[187] Indeed, there are subject matters which cannot be submitted to arbitration because of either arbitration legislation or judicial decisions. They provide that some particular categories of disputes are not capable of settlement by arbitration, namely "non-arbitrable."[188] This doctrine has also been widely accepted in international arbitration conventions such as the Geneva Protocol[189] and the New York Convention.[190] However, the doctrine of non-arbitrability which was mentioned in those conventions should not be confused with substantive invalidity of the arbitration agreement.[191] Non-arbitrability and substantive validity of the arbitration agreement arise from different types of legal sources. The latter *"are defined by generally-applicable contract law principles, i.e. fraud … while issues of non-arbitrability are defined by legislation directed specifically at application of the arbitration agreement to particular types of disputes i.e. criminal legislation without regard to the terms of the parties' agreement."*[192]

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[184] *Perry v. Hyundai Motor Am. Inc.*, So. 2d 859, 866 n.5 (Ala. 1999) as referred to in Michelle St Germain, *'The Arbitrability of Arbitrability'* 2005 J DISP RESOL at 524

[185] Janhavi Sindhu, *"Fraud, Corruption and Bribery-Dissecting the Jurisdictional Tussle between Indian Courts and Arbitral Tribunals.*" Indian J. Arb. L. 3 (2014) at 23; *See also*, *Supra* note 180

[186] Laurence Shore, *'Part I Fundamental Observations and Applicable Law, Chapter 4 - The United States' Perspective on "Arbitrability*'", in Loukas A. Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives,* International Arbitration Law Library, Volume 19 (Kluwer Law International 2009) at 70

[187] Michelle St Germain, *'The Arbitrability of Arbitrability'* (2005) 2005 J DISP RESOL at 524

[188] See, Homayoon Arfazadeh, *Arbitrability Under the New York Convention: The Lex Fori Revisited*, 17 Arb. Int'l 73 (2001); Anthony G. Buzbee, *When Arbitrable Claims Are Mixed With Nonarbitrable Ones: What's A Court to Do*, 39 S. Tex. L. Rev. 663 (1998); Rau, *The Arbitrator &* "*Mandatory Rules of Law*", 18 Am. Rev. Int'l Arb. 51 (2007); *Supra* note 5 at 944

[189] Article 1 of the Geneva Protocol

[190] Article II (1) and Article V(2)(A)

[191] *Supra* note 5 at 948

[192] *Ibid.*

Consequently, one can say that fraud, because of its nature, is not subject to non-arbitrability. There are also misconceived judgments which stated that all claims of fraud are non-arbitrable such as the judgment of *The Hub Power Co. v. Pakistan*[193] where Pakistan reached a decision contrary to its commitments under the New York Convention according to Gary Born.[194] However, apart from these few examples, after the arbitration agreement was found to be valid and the court decided in favor of arbitration in Fiona Trust, the majority of the jurisdictions recognized that issues of fraud (as well as corruption, bribery or forgery) are arbitrable.[195] Of course, the arbitrability of fraud will also be depend on *"a subjective assessment of the degree of illegality involved."*[196]

Arbitrability of fraud is also related to public policy grounds because public interest "*makes such issues incapable of reference to a private settlement process*."[197] In the Law and Practice of International Arbitration, Alan Redfern and Martin Hunter wrote: "*The concept of arbitrability is in effect a public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations, which matters may be settled by arbitration and which may not."*[198] It is possible to see that some countries, such as Australia or New Zealand, have enacted their own versions of the UNCITRAL Model Law in a way that "*the public policy grounds of enforcement and setting aside of awards includes the case where ―the making of the award was induced or affected by fraud or corruption."*[199] Similarly, in Singapore, the Arbitration Act stated that if the making of the award itself was induced or affected by fraud, the award of the arbitral tribunal can be set aside by the High Court.[200] Indeed this is an issue which can

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[193] *The Hub Power Co. v. Pakistan WAPDA*, 16 Arb. Int'l 439 (Pakistan S.Ct. 2000)
[194] *Supra* note 5 at 1034
[195] *Supra* note 5 at 804-805; See also, Kristine Karsten and Andrew Berkeley, *Arbitration, Money Laundering, Corruption and Fraud*, Dossiers- ICC Institute of World Business Law (September 2003) at 115-117; Michael Hwang and Kevin Lim, *'Corruption in Arbitration - Law and Reality'*, Asian International Arbitration Journal; (Kluwer Law International Volume 8 Issue 1, 2012) at. 1 - 119
[196] Alexis Mourre, *'Part II Substantive Rules on Arbitrability, Chapter 11 - Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal'*, as in Loukas A. Mistelis and Stavros Brekoulakis (eds), Arbitrability: International and Comparative Perspectives, International Arbitration Law Library, Volume 19 (Kluwer Law International 2009) at 212
[197] See, James D. Fry, *Désordre Public International Under the New York Convention: Wither Truly International Public Policy*, CHINESE J. INT'L L., 2009 at 81; Michael Hwang and Kevin Lim, *'Corruption in Arbitration - Law and Reality'*, Asian International Arbitration Journal; (Kluwer Law International Volume 8 Issue 1, 2012) at 1-119
[198] Alan Redfern, Martin Hunter *"Law and Practice of International Commercial Arbitration*", Sweet and Maxwell 1986, at 105
[199] ILA Report (Public Policy) at 24-25 as cited in Michael Hwang and Kevin Lim, *'Corruption in Arbitration - Law and Reality'*, Asian International Arbitration Journal; (Kluwer Law International Volume 8 Issue 1, 2012) at 50
[200] Singapore Arbitration Act 2001 as amended Article 48(1)(a)(vi)

come up after forming the arbitration award since it is related with setting the award aside, however that can lead the arbitral tribunals to decide on lack of jurisdiction. Therefore, if it is not stated explicitly like in these examples or if the allegation is not directed to the arbitration agreement itself like stated above, the issues of fraud are indeed arbitrable[201] and the arbitral tribunal will be entitled to adjudicate the parties' disputes.[202] Moreover, there are also judgments stating arbitrators have the authority to apply principles and rules arising from international public policy and it is possible for arbitrators to apply these rules as appropriately as the courts.[203] For example, Court of Appeal of Paris in one of its judgments stated that:

"arbitrators decide on their jurisdiction in relation to arbitrability with regard to international public policy and have the authority to apply principles and rules arising from the latter, as well as to sanction their eventual violation; arbitrability is not excluded solely because public policy regulation is applicable to the legal relationship subject of the dispute."[204]

Arbitrability is the *"ability and appropriateness of the arbitral tribunal to rule on certain issues and disputes"* and thus is a question of jurisdiction[205]. Arbitrability issues are brought up before courts by challenging parties to challenge the arbitral tribunal's jurisdiction[206] and therefore aim to avoid the arbitration process. When a challenge is brought up before the court because of a fraudulent act, the question is usually formed as whether the dispute should be arbitrated rather than litigated. İn other words, this means whether or not fraud can be arbitrated, and the tribunal will have jurisdiction over it. This was also the question in Fiona Trust and the Court answered this question in terms of the arbitration clause and separability doctrine. The answer to this question gives the answers to arbitrability and jurisdiction questions because of the interdependency between them.

In the judgment, Lord Hoffman stated that:

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[201] *Supra* note 183
[202] Michael Hwang and Kevin Lim, *'Corruption in Arbitration - Law and Reality*', Asian International Arbitration Journal; (Kluwer Law International Volume 8 Issue 1, 2012) at 64
[203] *Judgment of 9 November 1990, Condominiums Mont Saint-Sauveur Inc. v. Constrs. Serge Sauvé Ltée*, [1990] R.J.Q. 2783, 2789 (Québec Cour d'appel) as referred to in *Supra* note 5 at 952
[204] *Judgment of 20 March 2008, Jacquetin v. SA Intercaves*, 2008 Rev. arb. 341, 341 (Paris Cour d'appel) as referred to in *Supra* note 5 at 952
[205] Janhavi Sindhu, *"Fraud, Corruption and Bribery-Dissecting the Jurisdictional Tussle between Indian Courts and Arbitral Tribunals.*" Indian J. Arb. L. 3 (2014) at 23-24
[206] *Ibid.*

"*[i]n my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal…unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction*."[207]

It has been argued that the case was based on the issue of separability[208], however, arbitrability and validity are relevant to each other because in the judgment, the question was framed as *"whether the issue of invalidity of a contract or arbitration agreement on grounds for fraud should be decided by the arbitrator"*[209] since parties sought to void the agreement by relying on fraud. Therefore, by answering the question with the application of separability doctrine and reaching the arbitration agreement being valid means that the dispute of fraud is arbitrable. It has been submitted that, in Fiona Trust, arbitrability of fraud appeared in the main question which was framed and by applying the doctrine of separability, the court reached that it should be decided by the arbitrator because the issue was arbitrable and therefore satisfied the question of jurisdiction.

Moreover, the decisions which found that fraud is arbitrable are consistent with Article II (1) of the New York Convention since the article provides recognition of agreement to arbitrate about disputes by saying *"whether contractual or not"*, a statement encompassing fraud claims.[210]

As discussed above, the cases where there are overriding public policy reasons[211] involved and the allegation of fraud is directed at the arbitration agreement itself, the consequences will be different in terms of arbitrability. The main reason is because these concepts may trigger judicial resolution systems, which means that the dispute cannot be settled by arbitration. However, excluding these scenarios and given the fact that an allegation of fraud is an attack to the validity of the contract itself and the issues based on the validity of the contract are indeed arbitrable, it is quite clear that fraud is also arbitrable simply because an allegation of fraud challenges the validity of the contract. Also, since arbitrability is a question of

[207] *Supra* note 59 at para. 13
[208] *Supra* note 205 at 30
[209] *Ibid.*
[210] *Supra* note 5 at 1034
[211] *Supra* note 183 at 1138

jurisdiction, arbitrability of fraud will also be a question for jurisdiction and the answer to this question will determine the arbitral tribunal's competency to hear the dispute.

3.3 Case-Law

As discussed *supra,* fraud is arbitrable and capable of settlement by arbitration as well as fraudulent inducement and intentional misrepresentation in theory. There are also numerous judgments supporting the theory.[212] At this point, one should also remember that the arbitral tribunal's jurisdiction to hear the case is what matters, not the decision given by the arbitral tribunal. Indeed, the arbitral tribunal can give its award i.e. on the contract being unenforceable, but the important aspect is the fact that the arbitral tribunal can decide over the dispute. For example, arbitrators are allowed to rule on illegality for bribery in the recent case law.[213]

Despite the fact that fraud is accepted as an arbitrable matter, this idea evolved over time and there was a time when fraud, bribery or corruption were seen as non-arbitrable. For example, a 1963 ICC Award authored by Judge Lagergren[214], a case about bribery, stated that the arbitrator does not have jurisdiction related to the matter since contracts which violate moral welfare or international public policy are unenforceable and cannot be heard by arbitrators.[215] Curiously enough, he did decide over the case informally, even if he declined jurisdiction, which he could *"have come to the exact same result by taking jurisdiction."*[216] In another case in India, it has been held that all claims of fraud are non-arbitrable and *"must be tried in court and the arbitrator could not be competent to deal with such matters which involved … fraud."*[217] Of course over the years, thanks to the doctrine of separability, international and national competent authorities started to accept that these allegations *"[do] not itself deprive the arbitration of jurisdiction over the dispute."*[218] In Fiona, the reasoning behind this approach was set forth as "*if arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract has been*

[212] *Supra* note 5 at 1034
[213] *Supra* note 202 at 10
[214] *ICC Award No. 1110 of 1963 by Gunnar Lagergren*, YCA 1996, at 47 et seq. (also published in: Arb.Int'l 1994, at 282 et seq.)
[215] *Supra* note 202 at 10
[216] Allan Philip, *'Chapter 8. Arbitration, Corruption, Money Laundering and Fraud: The Role of the Tribunals'*, in Kristine Karsten and Andrew Berkeley (eds), *Arbitration: Money Laundering, Corruption and Fraud,* Dossiers of the ICC Institute of World Business Law, Volume 1 (International Chamber of Commerce (ICC) 2003) at 152
[217] *Radhkrishnan v. M/S Maestro Eng'rs*, Civil Appeal No. 7019 of 2009, ¶6 (Indian S.Ct. 2009)
[218] *Supra* note 202 at 10

procured by bribery, just as much as they can decide whether a contract has been procured by misrepresentation or non-disclosure."[219] It should also be noted herein that as one can see, there is no divergence about an arbitrator's capacity to decide over what is arbitrable and what is non-arbitrable.

However, the issue of whether an arbitrator can or cannot decide over what is arbitrable is not clear as of right now in the United States under FAA because of recent judgments. *Fox v. Tanner*[220] is an example case where the main question framed as who will be the one to decide over a dispute's arbitrability or non-arbitrability[221]; an arbitrator or the court. In this judgment, it is possible to see the US state court's attempt to reconcile the US Supreme Court's rulings in Prima Paint because the District Court held that it is for a court to decide whether the Tanners fraudulently induced the contracts, not for an arbitrator.[222] The Supreme Court of Wyoming also affirmed this judgment stating when there is an issue of fraud, invoking an arbitration clause would not make sense unless there is clear consent to arbitrate that issue.[223] Therefore, the Supreme Court ruled that the issue is not arbitrable and it is not for arbitrators to decide on whether the issue is arbitrable or not, nor do they have jurisdiction over to do so. As one can see, it is a deviation from the famous Prima Paint judgment. At this point, one should also acknowledge the judgment of First Options[224] where *"there is a presumption in favor of arbitration if the question is whether the dispute is arbitrable but no presumption when the question is who should decide arbitrability."*[225] The Court in First Options held that if there is an unmistakable fact that the parties have decided to submit the issue to arbitration, the arbitrator can decide whether the dispute is arbitrable or not, therefore the arbitrator will derive its jurisdiction. As one can see, there is a tension between Prima Paint and First Options judgments and as of now, courts are applying various approaches.[226] If one also looks at the commentaries made by scholars, it is possible to see the different ideas and approaches. For example, Reuben opines that First Options shows the new trend in the

[219] *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 at para. 29
[220] *Fox v. Tanner* 101 P.3d 939 (2004)
[221] *Supra* note 187 at 523
[222] *Supra* note 220 at 940
[223] *Ibid.* at 947.
[224] *First Options*, 514 U.S. 938, 938 (1995).
[225] *Supra* note 187 at 528; See also, *Supra* note 224 at 944-945
[226] *Supra* note 187 at 530

US Supreme Courts in terms of who will decide arbitrability[227] while Rau states First Options is a result of a misunderstanding of Prima Paint. [228]

Even if the issue is not quite clear when it comes to who will decide arbitrability, thus who will have jurisdiction to do so; the majority of the legal authorities in the world agree that fraud is arbitrable and thus the arbitral tribunal will have jurisdiction over it[229]. Again, the matter here is not the award itself. İt is purely about if the arbitral tribunal will have jurisdiction to hear the claim in terms of arbitrability, which is also consistent with Article II of the New York Convention.

3.4 Consequences

The arbitration clause is separable from the underlying contract as it forms a separate agreement from the underlying contract. Thus, any idea that supports the theory that an underlying contract never came into existence because of a fraudulent event and thus the arbitration clause also never came into existence, cannot be accepted. Submitting a dispute to arbitration is a completely separate intention from the subject matter of the underlying contract. Moreover, even if it is not quite clear in the US courts, most countries do accept that fraud is an arbitrable topic and the arbitral tribunal will have a valid jurisdiction when it comes to a claim of fraud, not to mention who will decide about arbitrability of fraud claims.[230]

The fact that fraud is classified as an arbitrable claim and arbitrability is a question of jurisdiction means that it is possible to reach a conclusion that fraud is a question of jurisdiction. However, it should not be forgotten that fraud is also related with admissibility or merits because a claim of fraud will affect the entire process. Furthermore, even if jurisdiction, admissibility and merits will have different meanings in terms of an arbitral process; since arbitral process is a whole in its own and it is not possible to draw distinct lines between these concepts, classifying fraud as only a question of jurisdiction and narrowing it down would not be accurate. All in all, since these concepts also interlock with each other a

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[227] Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions,* 56 SMU L. Rev. (2003) at 883

[228] Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions,* 14 AM. REV. INT'L ARB. (2003) at 257

[229] See, i.e. Westacre Inv. Inc. v. *Jugoimport-Spdr Holding Co.* [1999] 3 All ER 864 (English Ct. App.); *Judgment of 8 July 2010, La Société Doga v. HTC Sweden AB, Case No. 09-67013 (French Cour de cassation) (Tort claims under mandatory French law held arbitrable)* as referred to in *Supra* note 5 at 1034

[230] *Supra* note 59

claim of fraud will affect all of them together even if the proportions of these affections are different.

Eventually, when there is an arbitral process and a valid arbitration agreement, the first concept to be taken into account will be the arbitrability of the claim, whether the claim falls into the scope of the arbitration agreement and thus whether the arbitral tribunal will have jurisdiction over it. Fraud will firstly appear as a question of jurisdiction and the tribunal will decide about their jurisdiction with the claim of fraud to be taken into consideration. At this point, it should not be forgotten that in the event of overriding public policy rules or a claim of fraud directed at the arbitration agreement itself, the arbitral tribunal might not have the jurisdiction over the case which also supports the thesis of fraud being a question of jurisdiction.

3.5 Benefits and Drawbacks

Classifying fraud as a question of jurisdiction comes from the question of fraud being arbitrable or not. It is not a secret that there is an urgent need to strengthen the rules in case of an allegation of fraud, however, approaching fraud as a question of jurisdiction might help to prevent possible upcoming challenges. The reason behind this idea is that the doctrine of separability of the arbitration clause leads to the result that the arbitral tribunals do have jurisdiction and also an obligation to decide the merits of the case,[231] which is also the dominant view. As one can see, naming fraud as a question of jurisdiction is more of a necessity because of the pace of life rather than a matter of preferences. Normally, the majority of the scholars in favor of not declining jurisdiction in case of a fraudulent event but *"rather refusing to grant any claims [especially in criminal cases] … where a party had been defrauded. Taking jurisdiction is, of course, not tantamount to accepting any claims."*[232]

There is an obvious need to discuss fraud in terms of admissibility and merits but benefit of classifying fraud as a question of jurisdiction in the first instance gives the power to the arbitral tribunal to entertain the dispute and therefore the only way to move forward in terms of merits of the case and admissibility objections interrelation with jurisdiction.

[231] *Supra* note 216 at 149
[232] *Ibid.* at 152

4 ADMISSIBILITY

4.1 What is Admissibility?

Defining admissibility is not an easy task on its own since there is no clear distinction between admissibility and jurisdiction, or, admissibility and competence. Raising an objection against any of them sometimes covers the others and all three objections generally precludes an examination of the claim on merits.[233] Moreover, admissibility slightly differentiates between international commercial arbitration and investment treaty arbitration. According to investment arbitration, the definition for admissibility can be given as *"the power of the tribunal to examine a case at a given point in time"*[234] and also objections to admissibility of a claim is a plea that *"the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits."*[235] However, generally in the context of international arbitration, the question of admissibility determines the competence of the arbitral tribunal. It refers to whether the claimant or the respondent have capacity to be a party and thus, whether they are indeed parties to the arbitration agreement. [236] Even if the concept of admissibility also differentiates from one jurisdiction to another, as one can see, admissibility *"generally refers to preliminary aspects of the substantive merits of a claim"*[237] which distinguishes admissibility from the jurisdiction of a tribunal. In this regard, at the admissibility stage, the arbitral tribunal questions whether the particular claim raised by parties should be heard at all in the first place, rather than questioning whether that claim can be brought before a certain forum.[238] A certain forum here also needs explanation because it is related with the constitution of the tribunal. Therefore it is possible to say that admissibility refers to whether a claim can be properly brought before a certain tribunal in accordance with its constitution.[239]

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[233] Veijo Heiskanen, *II. 58 Admissibility in International Arbitration*. In *Elgar Encyclopedia of International Economic Law*, Edward Elgar Publishing, (2017) at 319-321

[234] Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility (January 31, 2014).* University of Cambridge Faculty of Law Research Paper No. 9/2014 at 5 Available at SSRN: https://ssrn.com/abstract=2391789 or http://dx.doi.org/10.2139/ssrn.2391789

[235] Peyman Ghaffari, *Jurisdiction & Admissibility in International Investment Arbitration,* Doctoral thesis, Anglia Ruskin University, (2012) at 86.
Available at: https://arro.anglia.ac.uk/297161/1/Ghaffari%20PhD%20Thesis.pdf

[236] *Supra* note 5 at 726

[237] *Supra* note 5 at 936

[238] *Supra* note 179; Marie Louise Seelig, *The Notion of Transnational Public Policy and its Impact on Jurisdiction, Arbitrability and Admissibility*, Анали Правног факултета у Београду, 57(3) (2009) at 116-134.

[239] Sam Blay and Yanming Huang, *'Admissibility and Jurisdiction in Commercial Arbitration: The Case of CIETAC'* (1997-1998) 4 CANBERRA L REV at 248

There are a couple of different issues which admissibility may concern. The first is the issue of substance and essential elements of the procedure.[240] In this case, the dispute between parties which is brought before the tribunal can be questioned as to whether it is a substantive dispute or not in accordance with the arbitration agreement in the underlying contract. If the dispute brought before a tribunal does not actually constitute any "dispute", this will then lead to inadmissibility because of the substance of the disagreement. Therefore, it is possible to say that admissibility questions are closely linked to the merits of the case.[241] Secondly, there can be procedural aspects which the issue of admissibility may concern which we call pre-arbitration procedural requirements[242]. The constitution where arbitral proceedings will take place or the tribunal itself can specify different requirements in order to lodge an arbitral process and disobedience with these requirements may also lead to inadmissibility.[243] However, even if scholars mention these pre-arbitral procedural requirements, recent cases sometimes say otherwise.

For example in *Catleiva SL v. Herseca Inmobiliaria SL*,[244] the court stated that noncompliance with pre-arbitration procedures will not invalidate the arbitration and that is why the court did not annul the arbitral award.[245] At this point, the difference between mandatory and non-mandatory pre-arbitration requirements stand forward and the parties' intention gains importance since classifying requirements as mandatory or non-mandatory is up to parties' intention which will set forth with the arbitration clause.[246] For example, in ICC Case No. 12739 the tribunal dismissed the arbitration because the pre-arbitral steps were mandatory and the claimant failed to complete the steps he had to. [247] All in all, it is safe to say that *"only in cases involving unequivocal language, should a pre-arbitration negotiation provision be regarded as a mandatory requirement"*[248] which is named as a "condition precedent" to arbitration. Indeed, violation of a "condition precedent" which is not the same concept with noncompliance with a contractual obligation, results in "*either a jurisdictional*

[240] *Ibid.*
[241] *Supra* note 233
[242] *Supra* note 5 at 940
[243] *Supra* note 239 at 249
[244] Catleiva SL v. Herseca Inmobiliaria SL, Judgment (8 May 2012) STSJ CV 3915/2012 (Valencia Community Tribunal Superior de Justicia) as referred to in David D. Caron, Stephan W. Schill, Abby Cohen Smutny, & Epaminontas E. Triantafilou (Eds.) *Practising virtue: inside international arbitration*. Oxford University Press, 2015 at 236
[245] David D. Caron, Stephan W. Schill, Abby Cohen Smutny, & Epaminontas E. Triantafilou (Eds.) *Practising virtue: inside international arbitration*. Oxford University Press, 2015 at 236
[246] *Supra* note 5 at 925
[247] Award in ICC Case No. 12739 as referred to in Michael W. Bühler & Tom Webster, *Handbook of ICC Arbitration: commentary, precedents, materials*, Sweet&Maxwell, 2008 at 67
[248] *Supra* note 5 at 927

or substantive bar to a party's claim."[249] As an example, in *HIM Portland, LLC v. DeVito Builders, Inc* the court stated that *"[u]nder the plain language of the contract, the arbitration provision is not triggered until of the parties requested mediation."*[250] In this regard, it should also be noted that the classification of pre-arbitral procedural requirements as admissibility or jurisdictional requirements also varies from jurisdiction to jurisdiction.[251]

Another point that deserves mention is that the burden of proof is not on the applicant when it comes to questioning admissibility. It is for the respondent to prove inadmissibility when he/she tries to dislodge the application.[252] All in all, admissibility concerns *"the propriety of entertaining a particular matter before a tribunal*"[253] and whether the tribunal has the competence for determining questions of admissibility and objections to admissibility relates to the claim itself. Since it relates to the claim, consequently it is linked to the merits of the case rather than jurisdiction. As a result of this linkage, admissibility objections *"are often examined after the examination of objections to jurisdiction and may also be joined to the merits.*"[254]

4.2 Objections to the Admissibility of the Claims

Objections to the admissibility of a claim can result in inadmissibility if the tribunal satisfies with the objection and leads the tribunal to dismiss the arbitral proceedings. However, the first important point here is that in order to be satisfied with the objections, the tribunal has to be satisfied that the objection is attacking to admissibility and not to jurisdiction. To determine whether an objection is attacking admissibility rather than jurisdiction, the tribunal has to check if it is attacking the tribunal itself or the claim.

Simply put, if an objection is directed at the tribunal, it is an objection to jurisdiction. On the other hand, if an objection is directed at the claim, it is an objection to admissibility. [255] So, the important issue to determine here is that when an objecting party assert an objection because of fraud is whether it is directed at the tribunal or the claim. At this point, it is also

[249] *Ibid.*
[250] *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 42 (1st Cir. 2003).
[251] *Supra* note 5 at 938-941
[252] *Supra* note 239 at 249
[253] *Ibid.*
[254] *Supra* note 233
[255] Michael Hwang and Si Cheng Lim, *'Chapter 16: The Chimera of Admissibility in International Arbitration'*, in Neil Kaplan and Michael J. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, (Kluwer Law International 2018) at 266

important to state that the objections to admissibility are often examined *"after the examination of objections to jurisdiction and may also be joined to the merits."*[256]

If a challenge made by one of the parties is attacking the claim, *"the tribunal must go on to determine if the claim is admissible on the facts."*[257] It should be noted that both findings of lack of jurisdiction and inadmissibility of claims leads to the same result, *"which is that the tribunal withholds itself from examining the merits of the claim."*[258] However, according to some supporters of the concept, even if they are leading to the same result, the concepts are different because if a tribunal finds a lack of jurisdiction, they are obliged to dismiss the case while in case of a inadmissibility of claims, they are permitted to stay at the proceedings,[259] simply because the dismissal of a claim will not mean the arbitral tribunal should dismiss the case altogether. All in all, in practice, a decision about admissibility can be given as: *"one such decision on the procedure of the arbitration taken by the tribunal in the exercise of its discretion over the procedure of the arbitration."*[260]

In order to understand whether fraud can be a question of admissibility, it is important to understand whether the challenge made by one of the parties means that the particular claim is inadmissible because of fraud. It should be noted that issues of admissibility (and also merits) are determined by the applicable law and thus, a challenge about the claim being inadmissible because of fraud can only be determined by the applicable law selected by choice of law analysis.[261] Therefore, the *"primary consideration in the commercial arbitration context is the law governing the substance and procedure of the dispute."*[262] Also, the substantive rights of the claimant at issue normally derives from the contractual obligations specified between the parties and therefore, unlike in investment treaty arbitration, this contract concluded between parties may be invalidated in case of a fraudulent act. [263]

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[256] *Supra* note 233 at 319
[257] *Supra* note 255
[258] *Ibid.*
[259] Fabio Santacroce, '*Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterisation of Preliminary Issues in International Arbitration*' Arbitration international Vol 33 Issue 4, 2017 as also referred to in *Ibid.*
[260] *Ibid.* at 267
[261] *Supra* note 202 at 44
[262] Carolyn B. Lamm, Hansel T. Pham, et al., *'Fraud and Corruption in International Arbitration'*, in Miguel Angel Fernandez-Ballester and David Arias (eds), Liber Amicorum Bernardo Cremades, (© Wolters Kluwer España; La Ley 2010) at 728
[263] *Ibid.*

Despite the fact that substantive rights at issue derives from the contract, in order to see the effect of fraud in the process, applicable law must be considered because admissibility of claims tainted by fraud will depend on the applicable law chosen by the parties.[264] That being said, if there is a rule in the domestic law which will apply to the merits of the case which states a similar principle like the clean hands doctrine[265] *"that principle will likely serve to bar any claims by claimants that have engaged in fraud … in relation to the subject matter of the dispute."*[266] So all in all, the element that matters about inadmissibility of a claim because of fraud will be the applicable law. Of course, since admissibility refers to *"whether the subject matter of a litigation is of a nature which can be properly brought before the tribunal in accordance with its constitution"*[267], issues of substance and essential elements are also important as is also stated above. Thus, where the submitted issue does not constitute a dispute, then the claim will be inadmissible as well.

In the context of admissibility, transnational public policy should also be taken into consideration. Because in most cases, the arbitral tribunals often rely on transnational public policy alongside the applicable law,[268] *"to ensure that an enforceable award is rendered."*[269] Even if the cases are not consistent, there are arbitral tribunals which have decided the inadmissibility of the claims *"under a contract tainted by fraud … as an extension of the transnational public policy against fraud."*[270] Here, one should recall that the cases where public policy is the reason for arbitral tribunals to refuse their jurisdiction.[271]

For example, in *World Duty Free v. Kenya*[272] the claimant's claim was found inadmissible since the claimant is not legally entitled to bring his claims because of transnational public policy and public policy under the contract's applicable law.[273]

Also in another case, even if there is a challenge to the arbitral tribunal's jurisdiction because of overriding public policy interest in the first place, the tribunal found that they indeed had jurisdiction over the case and stated that fraud is not an issue to be determined in the context

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[264] *Ibid.*
[265] An equitable defense when the defendant argues that the plaintiff cannot be entitled to obtain an equitable remedy because of his unethical acts contrary to good faith with respect to the subject of the complaint.
[266] *Supra* note 262
[267] *Supra* note 239 at 248
[268] *Supra* note 262 at 729
[269] *Ibid.* at 731
[270] *Ibid.* at 729
[271] See Chapter 3 Section 2
[272] World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7
[273] *Ibid.* at para. 179

of jurisdiction. Even the objections to arbitrability issues also rejected by the tribunal because there was in complete compliance with the governing Swiss Law and the question of admissibility assessed by the tribunal under the applicable procedural and substantive law,[274] eventually finding some of the claims as admissible and some of them as inadmissible. Likewise in another ICC Case, the tribunal concluded that *"the contract for an illicit commission was violative of French and Iranian international public policy ... [and] declared the contract void and rejected the claimant's claims"*[275] because the claimant's activity was influencing public officials.

As one can see, these cases are examples where the arbitral tribunals considered both applicable national law and transnational public policy, eventually leading the arbitral tribunals to either reject or accept the claims because of the claim's admissibility status. Even if the applicable law is the primary element to consider, the "*well-established transnational public policy against fraud*"[276] must also be considered while deciding this status.

It is important here to remind that in terms of admissibility, it does not matter whether the tribunal rejects the claimant's claims on the merits because of fraud; what is important here is that the claim itself is not allowed to be bringing in by the claimant because it is inadmissible. Otherwise as is also possible, the tribunal can accept the claims as admissible and then examine the case under the applicable law. This timeline does not relate with accepting or rejecting the claim on the basis of merits of the case.

4.3 Case-Law

As discussed in the previous chapter, there are different elements which have to be taken into account in order to decide admissibility or inadmissibility of a claim. This decision also varies from one tribunal to another as well as one jurisdiction to another. However, the cases which will be analyzed below can give the reader an idea about on what grounds can a tribunal decide on inadmissibility or admissibility of a claim related with fraud by checking the applicable law.

[274] *ICC Case n.° 6474 of 1992,* in *XXV Y.B Comm. Arb. 278* (A.J. Van DenBerg ed. 2000) as referred to in *Supra* note 262 at 728
[275] *Supra* note 262 at 730
[276] *Ibid.* at 731

4.3.1 ICC Case No. 16394/GZ/MHM, 2 July 2013[277]

Here in this case *"the Claimant claim[ed] that the Respondent has acted in default of the contract and in bad faith and has committed multiple violations of the Contract"*[278] while the Respondent requested the postponement of arbitration due to the institution of criminal proceedings against the Claimant's subcontractor company. The Respondent stated that the officers in this subcontractor company had allegedly committed fraud *"during the contracting and executing of the Contract."*[279] Moreover, the Respondent also submitted that the arbitration clause was invalid and thus, there was a lack of jurisdiction of the arbitral tribunal to remedy the dispute because in its brief, the Respondent stated that since the contract is "*invalid or otherwise can be invalidated, … due to fraud (as per articles 147 and 154 of the Civil Code)."*[280]

Regarding jurisdiction, the arbitral tribunal decided that it indeed has jurisdiction to adjudicate the dispute and rejected all claims regarding lack of jurisdiction by applying the separability doctrine since even if the Contract was invalid, this would not justify invalidity of the independent arbitration clause. However, the fact that the Respondent also claimed that *"the contested contract is invalid or otherwise can be invalidated … due to fraud (as per articles 147 and 154 of the Civil Code) and to the provisions of articles 174, 178 and 179 of the Civil Code,"*[281] the arbitral tribunal found these claims admissible and examined the claims under these provisions. Even if the arbitral tribunal found that *"the actual events necessary to substantiate the claim of invalidity of the Contract per Articles 178, 179 and 174 of the Civil Code are not proven"*[282] and *"the related claims of the Respondent are groundless in law and do not meet the facts of articles 147 and 149 of the Civil Code,"*[283] the important part here is that the arbitral tribunal applied the relevant national law to the subject to reach its decision.

4.3.2 ICC Case No. 6320, 1992[284]

Here in this case, *"the [C]laimant sought an award of damages based on any one or a combination of the following legal grounds: dolo (fraud) … and violation of the United States*

[277] 'Science Applications International Corp. v. Greece (Final Decision), ICC Case No. 16394/GZ/MHM, 2 July 2013', Arbitrator Intelligence Materials
[278] *Ibid.* at para. 003
[279] *Ibid.* at para. 006(f)(1)
[280] *Ibid*. at para. 029(a)
[281] *Ibid.*
[282] *Ibid.* at para. 113
[283] *Ibid.* at para. 114
[284] 'Owner v Contractor, Final Award, ICC Case No. 6320, 1992', in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 1995 - Volume XX, Yearbook Commercial Arbitration, Volume 20 at 62-109

"Racketeering Influenced and Corrupt Organizations Act", 18 U.S.C. 1961 (RICO)"[285] and also again, the Claimant submitted that the Protocol concluded between parties has been induced by fraud and therefore is not valid. The arbitral tribunal stated that even if it is not easy to prove, the party which is claiming damages on this ground must prove its allegations in a *"clear and conclusive"*[286] way. In its decision, the arbitral tribunal stated that: *"findings concerning the limitations on defendant's liability from the Protocol and the Contract lead to the conclusion that all of claimant's possible claims are excluded, with the exception of the following: (i) any dolo claims … admissible."*[287] Nevertheless, the tribunal also stated in its decision that the "*claimant had not been able to prove its allegation of fraud in the inducement of either the Protocol or the Contract."*[288] Therefore, it is possible to see that the claim regarding fraud in this case is indeed admissible and the fact that the arbitral tribunal's decision regarding the claimant's failure to prove this allegation does not change that the claim is admissible.

Also in this case, the Claimant requested damages because of the fraudulent act by the Defendant, along with the future costs on his side because he will have to modify the existing system. In this regard, the arbitral tribunal decided that these claims are inadmissible under fraud with the application of *"[the Contractor's Liability article] of the [relevant] Civil Code."*[289] Again, it is possible to see that when it comes to fraud and its impact over arbitration, applicable law gains importance. As one can see in this case, applicable law is the reason that the arbitral tribunal finds the claim of damages because of fraud inadmissible. The same situation also happened in terms of the Claimant's RICO claim which the arbitral tribunal found that the claim is inadmissible. This time the reason behind this finding is because RICO[290] was not an applicable law to the case both because the alleged RICO activity happened in another country than the United States[291] and the choice of law clause in the underlying contract.[292]

[285] *Ibid.* at 64
[286] *Ibid.* at 65
[287] *Ibid.* at 82
[288] *Ibid.* at 78
[289] *Ibid.* at 88
[290] Under RICO Act, the meaning of racketeering activity includes fraud which is also covered under the Federal Criminal Code.
[291] *Supra* note 284 at 101
[292] *Ibid.* at 103

4.3.3 ICC Case No. 6474, 1992[293]

Here in this case, a European Supplier entered into a number of contracts, including an arbitration clause with the Republic of X. The applicable law to the dispute was Swiss law and after unsuccessful negotiations, supplier started an ICC arbitration in Zurich. Republic of X firstly challenged to the jurisdiction of the arbitral tribunal due to overriding transnational public policy interests because the Republic of X was not recognized as a state by the international community.[294] The arbitral tribunal found that they indeed have jurisdiction over the case simply because accepting lack of jurisdiction would be a denial of justice.

In the proceedings, the Republic of X alleged that the contract was induced by fraud and also objected to the arbitrability of the bills of exchange. The tribunal decided that fraud is not an issue to determine under the context of jurisdiction[295] and also dismissed the objections to the arbitrability since those *"bills of exchange were issued in compliance with contracts and arbitration clauses governed by Swiss law."*[296] Later on, the arbitral tribunal stated that the allegations about the contract which were tainted by fraud *"must be considered in the light of Swiss law"*[297] and found that according to Art. 177(1) PILA[298] the dispute is arbitrable and also the arbitration clause is undoubtedly separable.[299] The tribunal also stated that it was impossible to form any opinion regarding the existence or non-existence of fraud[300] and there can be any decision relating to the merits of the case. However, with the application of Article 178(3) of PILA, the arbitral tribunal examined the objection of the Defendant about validity of the arbitration agreement and stated that:

"The Arbitral Tribunal is unable to find that either a 'prima facie case' of bribery or fraud has been made or shown, or that, in such a hypothesis, it would have affected an arbitration clause, which is perfectly valid under the relevant Swiss law (Art. 178 PILA)."[301]

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[293] Supplier v Republic of X, Partial Award on Jurisdiction and Admissibility, ICC Case No. 6474, 1992', in Albert Jan Van den Berg (ed), Yearbook Commercial Arbitration 2000 - Volume XXV, Yearbook Commercial Arbitration, Volume 25 (ICCA & Kluwer Law International 2000) at 279-311
[294] *Ibid.* at 280
[295] *Ibid.*
[296] *Ibid.*
[297] *Ibid.* at 304
[298] See Article 177(1) of Swiss Federal Act on Private International Law
[299] *Supra* note 293 at 308
[300] *Ibid.* at 307
[301] *Ibid.* at 308

Also, given the fact that the defendant did not establish the case in a way that stated the arbitration clause was affected by invalidity or illegality, the arbitral tribunal dismissed the objection[302] and found that the claims are admissible.[303]

4.4 Consequences

As one can see from the case-law analysis above, just because an arbitral tribunal has jurisdiction does not mean that it will accept all the claims and also finding a claim inadmissible does not mean that the arbitral tribunal will dismiss the case altogether. Indeed an arbitral tribunal is responsible for settling the dispute which has arisen between the parties but there will be a number of claims along the way. Fraud is one of those claims that will affect the admissibility of that particular claim and therefore the dispute but will not inevitably cause a complete dismissal of the case.

A question of admissibility relates to whether that particular fraud claim raised by one of the parties should even be heard at all. After all, *"an issue is admissible if there are no reasons why the arbitrators should not proceed to render a binding decision on the merits."*[304] In order to answer this question, arbitral tribunals check a number of requirements which can be listed as validity of the arbitration agreement, capacity of the parties, legal interest,[305] compliance with pre-arbitration steps as well as transnational public policy and applicable law. All in all, objections to the admissibility of a claim is related to the subject matter of the said claim and if the claim is tainted by international illegality or contrary to transnational public policy, it might be considered as inadmissible.[306]

At this point, it is important to remember that *"an arbitration clause that has been fraudulently induced or that is procured by fraud, is undoubtedly invalid or null and void"*[307], therefore rendering it impossible to start an arbitration proceeding. Also, claims that *"an arbitration agreement is invalid by reason of fraud or fraudulent inducement are seldom successfully asserted*"[308] and therefore the majority of the claims arguing that the arbitration

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[302] *Ibid.*
[303] *Ibid.* at 311
[304] Yas Banifatemi, *'Chapter 1: The Impact of Corruption on "Gateway Issues" of Arbitrability, Jurisdiction, Admissibility and Procedural Issues'*, in Domitille Baizeau and Richard Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, Dossiers of the ICC Institute of World Business Law, Volume 13 (Kluwer Law International; International Chamber of Commerce (ICC) 2015) at 19
[305] *Supra* note 172 at 291
[306] *Supra* note 233 at 320
[307] *Supra* note 5 at 846
[308] *Ibid.*

agreement is invalid because of fraud will be inadmissible. However, "*the admissibility of claims tainted by fraud … will depend on the contents of the particular law that applies."*[309] Consequently, the arbitral tribunal ought to check the applicable law and consider it in determining *"the effect attributed to a finding that a party before a commercial arbitration tribunal has engaged in fraud"*[310] and then decide whether that particular claim is admissible or not. While doing so the arbitral tribunal often relies on transnational principles alongside the applicable law.[311] In this case, it has been stated that in "*a breach of the transnational public policy against fraud … a tribunal will most likely find that the claimant's claims are inadmissible."*[312]

All in all, as stated before it is not easy to draw a distinct line between jurisdiction, admissibility and merits since an allegation of fraud will affect the entire process and thus all of these concepts. Analyzing an allegation of fraud to be admissible or not under the applicable law proves this premises and thus, fraud will also be a question of admissibility with the limitation of applicable law and the transnational public policy.

4.5 Benefits and Drawbacks

Accepting fraud as a question of admissibility might seem to some a strained interpretation however, the necessity of this interpretation comes to the fore at the eventual enforcement of the award. It is known beyond doubt that the arbitral tribunal "*has an obligation to make every effort to make sure the award is enforceable at law"*[313] and thus, arbitrators have to account for the transnational public policy as well as the applicable law since otherwise the award may be not enforced. It is possible for *"a domestic court to refuse to recognize or enforce"*[314] the arbitral award if there is a breach of public policy under Article V(2)(b) of the New York Convention.[315] Given the fact that a fraudulent act which will conceal illegal

[309] *Supra* note 262 at 728
[310] *Ibid.*
[311] *Ibid.* at 729
[312] *Ibid.* at 731
[313] Bernardo M. Cremades Sanz- Pastor and David J. A. Cairns, *'Chapter 5. Trans-national Public Policy in International Arbitral Decision making: The Cases of Bribery, Money Laundering and Fraud'*, in Kristine Karsten and Andrew Berkeley (eds), *Arbitration: Money Laundering, Corruption and Fraud*, Dossiers of the ICC Institute of World Business Law, Volume 1 International Chamber of Commerce (ICC) 2003 at 67
[314] *Ibid.*
[315] *Ibid.*

activities *"are without doubt prescribed by international public policy",*[316] it is the arbitral tribunal's duty to examine it and then decide over admissibility or inadmissibility of a claim.

The benefit of classifying fraud as a question of admissibility allows it to prevent the possible issues in the enforcement stages. One cannot say it is a drawback but since there is not a clear distinction between the concepts in arbitration, sometimes arbitral tribunals decide there is a lack of jurisdiction instead of inadmissibility of the claim like in the ICC Award authored by Judge Lagergren.[317] He denied the jurisdiction of the tribunal because of the effect of corruption, however it is clear that an arbitral tribunal has a duty to examine any allegations including fraud, *"even if the parties do not wish it to do so."*[318] So, it is possible to say that the benefit of asking a question of admissibility assists the arbitral tribunal to pursue the process in a more secure way.

In sum, *"[t]he position today is that the international arbitrator has a clear duty to address issues of ... serious fraud whenever they arise in the arbitration and whatever the wishes of the parties and to record its legal and factual conclusions in its award. This is the only course available to protect the enforceability of the award and the integrity of the institution of international commercial arbitration."*[319]

5 MERITS

5.1 What is Merits?

The concept of merits in international arbitration is *"largely unproblematic*"[320] and in legal dictionaries, it is defined as *"a legal term, refers to the strict legal rights of the parties... The substance, elements, or grounds, of a cause of action and defense."*[321] In short, this term is being used to describe "*what a legal case is in substance all about."*[322] Even if the term merits is a well-known concept, the fact that there are two aspects of this term is not that well-known. It has been stated that the two aspects of this concept are firstly the *"aspect that relates to the merits of the claim brought by the claimant"* and secondly the *"aspect that*

[316] *Ibid.*
[317] *Supra* note 214
[318] *Supra* note 313 at 82
[319] *Ibid* at 86
[320] Veijo Heiskanen, *Dealing with Pandora: The Concept of 'Merits' in International Commercial Arbitration.* 22(4) *Arbitration International* 2006 at 597
[321] *Black's Law Dictionary*, 6th ed., at 989–990
[322] *Supra* note 320

reflects the subject matter (or substance) of the dispute between the parties"[323] Of course, it is not possible to say that these two concepts are completely different from each other as they are closely related. It has also been stated that while the first definition *"is largely dependent on how the claimant chooses to argue its claims,"* the second one which is the subject matter of the dispute is "*defined by the respondent when drawing its principal line of defense."*[324] For the latter, the respondent can choose to challenge the merits of the claimant's claims as well as he can choose to focus on i.e. jurisdictional issue where he draws his principal line of defense "*on a substantive issue that is not directly related to the merits of the claimant's claims in terms of fact or law"*[325] and this is where it differentiates.

As it was stated throughout this thesis, an allegation of fraud will appear in every step and affect the whole process. It can be a challenge to the arbitral tribunal's jurisdiction as well as a challenge to admissibility of the claim. However, usually an allegation of fraud will arise *"in defending claims against a party that has engaged in fraud … in relation to the subject matter of the dispute."*[326]

After the landmark judgment Fiona Trust,[327] there is no doubt left that an allegation of fraud can be dealt by arbitral tribunals since their ability to decide about their *"own ability to deal with fraud claims under the well-established doctrine of kompetenz-kompetenz."*[328] Since the doctrine of separability leads the arbitral tribunals to decide that they do have jurisdiction over a dispute which includes an allegation of fraud, the arbitral tribunals have to decide the merits of the case – only if the claim is admissible of course. At this point, one should remember that the objections to admissibility may also be examined in conjunction with the merits of the case. All in all, after the arbitral tribunal's decision regarding jurisdiction, the arbitral tribunal will be obliged to examine and decide the merits of the case "*and take any illegality resulting from the criminal activity into consideration"*[329] while they are doing so.

There are different views about examining a case tainted by fraud. As will be discussed below, there are some essential procedural and enforcement powers only given to the courts and primary in resolving fraudulent claims which the arbitral tribunal lacks.[330] Due to both the

[323] *Ibid.* at 599
[324] *Ibid.* at 601
[325] *Ibid.*
[326] *Supra* note 262 at 699
[327] *Supra* note 59
[328] *Supra* note 2 at 328
[329] *Supra* note 216 at 150
[330] *Supra* note 2 at 343

subject matter being more complicated than expected and the arbitral tribunal's lack of some procedural and enforcement powers, when examining a case which includes fraud, the arbitral tribunals can choose to take jurisdiction and *"decide such issues as are not tainted by illegality and either refuse to deal with the other issues or decide them on the basis that the claim of defense is illegal."*[331]

No matter which path an arbitral tribunal chooses to take when dealing with fraud, it is clear that it is their duty to examine the merits of the case. Due to an undeniable increase of cases with matters of fraud in international arbitration, it is clear that the arbitral tribunals have to be more careful than before while dealing with such issues and the steps which has to be taken by the arbitral tribunals should be taken more precisely. It does not matter how fraud is alleged i.e. illegality in the formation and performance of a contract, forged or falsified documents, forged signatures or *"conducting arbitration proceedings on the basis of wrongful factual allegation and forged documents"*[332] the arbitral tribunals should consider various issues to form an enforceable award. For this initial sake; whether the arbitral tribunal is entitled to take into account fraud[333] or not, matters of evidence, interim remedies and the criminal side of fraudulent acts should be dealt with utmost importance since *"fraud claims are particularly onerous to prove and difficult to manage efficiently.*"[334]

5.2 Proving Fraud and Enforcing the Award

When an arbitral tribunal deals with a case involving fraud, it is faced with two different sides of the case which are the civil law side and the criminal law side which will be discussed in a separate section below. There is no doubt that cases involving the civil law side, such as the validity of contracts, can be decided by arbitral tribunals.[335] Even if there are two sides to the case, the fact that they have to settle the claim *"without the aid of coercive techniques, such as subpoena power*"[336] is common. Since an arbitral tribunal does not have this kind of authority, party cooperation gains importance for the procedure when it comes to proving the allegation of fraud.

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[331] *Supra* note 216 at 150
[332] Florian Kremslehner and Julia Mair, *'Chapter IV: Crime and Arbitration: Arbitration and (Austrian) Criminal Law – Guidelines for Arbitrators and Counsels'*, in Christian Klausegger, Peter Klein, et al. (eds), Austrian Yearbook on International Arbitration 2012, *Austrian Yearbook on International Arbitration* 2012 Volume 2012 at 305
[333] *Supra* note 216 at 150
[334] *Supra* note 2 at 328
[335] *Supra* note 216 at 151
[336] *Supra* note 262 at 700

International arbitration by nature is mainly based on party autonomy and thus, parties can agree on procedural rules[337] however, sometimes it is also possible to see that an arbitral tribunal "*step[s] in and make orders, stipulating the time for compliance*"[338] if parties do not agree on the so-called procedural rules. Indeed, ICC Rules of Arbitration[339], the UNCITRAL[340] or Swiss Arbitration Rules[341] also give the arbitral tribunal the right to take initiative in this issue, but still there is a need for parties' input.[342] Of course, it will not be easy as it seems to ensure both parties to cooperate when an allegation of fraud is at stake as when there is fraud, the party who committed fraud might be a *"reluctant participant in the process.*"[343] However, the fact that the arbitral tribunal has to carry out a fair procedure has led to the arbitral tribunal using *"unconventional techniques to ensure the tribunal has reliable facts"*[344] because no matter what, an arbitral tribunal *"has no legally effective powers to enforce orders, directions, decisions or awards."*[345]

Considering the applicable law as well, there are different powers that an arbitral tribunal can trigger when a party fails to comply with the procedural rules. For example, under English law, when a party fails to comply with the procedural order decided by the arbitral tribunal without any valid cause, the 1996 Act gives the arbitral tribunal to power to "*make a peremptory order"*[346] by fixing a final time for compliance. In an event of breach of a peremptory order too, then there will be remedies which will come to sight.[347] However, like also stated before, the scope of these powers also lack the sufficient compulsory effect. Again, under English Law it is possible for courts to rule on imprisonment or fines when a party is allegedly in contempt of court, however there is no such deterrent penalty in an arbitration proceeding.[348] Of course, it is important to state here that English Courts do *"provide support to tribunals by assisting with the enforcement of peremptory orders … to make an order requiring compliance with a peremptory order of the tribunal. If the order is made, any further breach by the defaulting party will result in that party being in contempt of court,*

[337] *Supra* note 5 at 2132
[338] *Supra* note 2 at 328
[339] Art. 24(3) ICC Rules
[340] Art. 17(2) UNCITRAL Rules
[341] Swiss Arbitration Rules Art. 15(3)
[342] *Supra* note 2 at 328
[343] *Ibid.*
[344] *Supra* note 262 at 700
[345] *Supra* note 2 at 328
[346] *Ibid.* at 329
[347] *Ibid.;* section 41(7) of the 1996 Act
[348] *Supra* note 2 at 330

facing all the attendant consequences."[349] However, this is not the case for all legal systems and thus, burden of proof is probably the most important element when it comes to alleging fraud, especially presenting evidence related to the allegation.

5.2.1 Burden of Proof

The first important question is to be considered in every international arbitration is which party bears the burden of proof when proving a particular issue,[350] the same as in a process of litigation. However, according to commentators arbitration rules and the decisions of arbitral tribunals are silent about the standard of proof[351] and provide almost no guidance on the topic.[352] However, it is possible for one to take the UNCITRAL Rules as a guide since it provides that *"[e]ach party shall have the burden of proving the facts relied on to support its claim or defense"*[353] which is also consistent with commentaries and most awards.

Standard of proof varies from one case to another. There might be cases where a lower standard of proof is required while in another case the standard will be higher.[354] However in general, *"the burden of proof appears to be (or assumed to be) a "balance of probabilities" or "more likely than not" standard."*[355] It has been also stated that it is better for arbitral tribunals to *"develop specialized rules in the light of the applicable substantive law and the arbitral procedures relevant to a particular issue in a particular arbitral setting"*[356] rather than applying any burden of proof rules from a particular legal system. Therefore it can be said that instead of applying a specific set of rules, burden of proof rules should also reflect the fundamental nature of international arbitration and therefore should be particular to the case at stake. The applicable law of course cannot be ignored if a particular applicable law is chosen. However, the arbitral tribunal, in certain cases, can give effect *"to rules of law of another country than ... the law of which is otherwise applicable … i.e. if those rules are internationally mandatory and thus are part of the international public policy of the country."*[357]

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[349] *Ibid.*
[350] *Supra* note 5 at 2668
[351] Michael J. Bond, *The Standard of Proof in International Commercial Arbitration*, 77 Arb. (2011) at 351; Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int'l (2006) 373, 374, 379; *Supra* note 5 at 2313
[352] *Supra* note 5 at. 2313
[353] Art. 27(1) UNCITRAL Rules
[354] David D. Caron, and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 2d ed. 2013 at 559; See also, Art. 25(6) UNCITRAL Rules; Art. 9.1. IBA Rules of Evidence etc.
[355] *Supra* note 5 at 2314
[356] *Supra* note 5 at 2668
[357] *Supra* note 216 at 156

Generally, the burden of proof is on the party who is making the allegation. This general rule is also applicable to fraud cases, meaning, when a party is making an allegation of fraud, that particular party bears the burden of proving such fraud. It is not a secret that obtaining direct evidence of fraud is more difficult than any usual claim. This is why, as also stated above, when it comes to burden of proof in cases where a party alleges fraud, it is possible for an arbitral tribunal to use certain techniques. It is possible to shift the burden *"once prima facie evidence is presented … to account for the fact that not all the evidence may be available to them."*[358] This approach is an attempt to *"balance the rights of the two parties involved."*[359] As an example, in ICC Case No. 6497 (1999), the arbitral tribunal stated that:

"The 'alleging Party' may bring some relevant evidence for its allegations, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome."[360]

In this award, it is possible to see how the arbitral tribunal created a certain flexibility about burden of proof. [361] The arbitral tribunal here states that the alleging party can bring evidence to support its allegations even if these pieces of evidence are not completely conclusive and rarely available. Even if this case was completely about bribery, this approach can easily be applied to cases where an allegation of fraud was made because the rationale behind this approach is to create a balance between parties and fraud, by its nature, includes an intent to deceive and therefore hard to prove.

5.2.2 Adverse Interference and Other Tools

It is not a surprise that a party who is engaged with fraud may continue its intent to conceal evidence which might be relevant to the allegation of fraud even during the arbitral proceedings. This is where the notion of adverse interference can appear because it is possible for an arbitral tribunal to interpret the presented document in question in an unfavorable way to that party who refuses to comply with the orders given by the tribunals.[362] Adverse interference can also be used as a possible sanction for an uncooperative party in the

[358] *Supra* note 262 at 700
[359] *Ibid.*
[360] *ICC Award n.° 6497*, Final Award of 1994, XXIVa Ybk Comm. Arb. (Albert Jan Van Den Berg ed., 1999) at 71, 73
[361] *Supra* note 2 at 329; See also, *Supra* note 332 at 319
[362] Craig, Park & Paulsson, *International Chamber of Commerce Arbitration*, Oceana Publications (3d ed. 1998); *Supra* note 262 at 703; Art. 9 IBA Rules of Evidence; Art. 19.2 UNCITRAL Model Law etc.

production of evidence[363] and thus, it is an important tool to assess the evidence. Also, it is an illustration of balance of probabilities[364] since this tool is supporting the "more likely than not" standard instead of "beyond any doubt" standard.

Another impact of fraud in arbitration in terms of merits of the case is the possibility of interim remedies as also provided by some institutional rules.[365] In a case tainted by fraud, the particular desire for a claimant will be the preservation and/or freezing of assets.[366] The most illustrative example of an interim remedy to this extent can be seen under English law. Because of the judgment *Kastner* v. *Jason*,[367] it is clear now that granting an interim remedy to this extent is only possible if the parties *"confer upon a tribunal the power to award interim freezing injunctions by express agreement."* [368] However, even if an arbitral tribunal grant such interim remedy, "*it would lack the coercive ability to enforce such an injunction against third parties, such as banks where funds material to a fraud claim are held*."[369] The fact that these third parties are not bound with the arbitration agreement should not be forgotten.

5.2.3 Enforcing the award

Recognition of an award is the general presumption under the New York Convention and many national arbitration statues.[370] Fraud, is not listed as a reason for denying recognition of an award, according to the New York Convention Article V.

However, it might be the case when Article V (2)'s public policy exception is triggered because *"most authorities would permit the inclusion of fraud"*[371] to the other reasons for denying and *"resisting recognition and enforcement under Article V(2)(b)."*[372]As also discussed in the previous chapters, public policy will also affect the entire process from jurisdiction to admissibility and merits of the case and if not approached diligently, it will be a basis for non-recognition. However, the grounds for non-recognition of an award based on

[363] Vera Van Houtte - Van Poppel, *'Chapter 5. Adverse Inferences in International Arbitration'*, in Teresa Giovannini and Alexis Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossiers of the ICC Institute of World Business Law, Volume 6, Kluwer Law International; International Chamber of Commerce (ICC) 2009 at 199
[364] *Ibid.* at 209
[365] Art. 23 ICC Rules; Art. 26 UNCITRAL Rules; Art. 25(1)(c) LCIA Rules
[366] *Supra* note 2 at 331
[367] *Kastner* v. *Jason* (2004) EWHC 592 (Ch).
[368] *Supra* note 2 at 331
[369] *Ibid.* at 332
[370] *Supra* note 5 at 3444
[371] *Supra* note 5 at 3704
[372] *Ibid.*

public policy here is not an international public policy but *"the public policy of the forum where enforcement is requested."*[373]

In general, *"fraud as a basis for non-recognition requires deliberate falsity with regard to facts that were material to the tribunal's decision."*[374] This should not be understood as meaning that an annulment is highly likely in every case and it is not related to an allegation of fraud during the proceedings. For seeking an annulment in this context, fraud should affect the award which is a completely different concept than what this thesis aims to handle. In order to seek an annulment because of fraud, there should be a clear fraud which affected the drafting procedure without being possible to discover during the arbitration proceedings.

Therefore, if handled prudently, awards which include decisions regarding fraud claims are indeed enforceable and will be recognized under the New York Convention. This generally *"depends on how the specific award decides the issue.*"[375] However, the impact of fraud in terms of enforceability will be minor as an allegation of fraud is a subject that mainly effects the procedure.

5.3 Case-Law

Both in international arbitration and national litigation, each and every case is different at its core and has to be treated differently. It is not possible or expectable to approach cases like they are the same even if the main dispute is similar. That is why, as it is the basic principle, all allegations in a case should also be treated differently, especially allegations of fraud because no intent will be similar to the other. At this point, *"arbitrators hold a unique position in international commerce."*[376] They will be the individuals who will deal with such allegations, manage the case efficiently, use the appropriate tools, decide the case on the merits and form the award in an enforceable and recognizable way.

The selected case in this section is a way of showing the reader how an arbitral tribunal deals with an allegation fraud. In the end, fraud will inevitably affect the procedure while examining merits since the allegation will in the center of attention.

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[373] *Supra* note 216 at 156
[374] *Supra* note 5 at 3705
[375] *Supra* note 216 at 156
[376] Karen Gordon Mills, *'Corruption and Other Illegality in the Formation and Performance Of Contracts and in the Conduct of Arbitration Relating Thereto'*, in Albert Jan Van den Berg (ed), *International Commercial Arbitration: Important Contemporary Questions, ICCA Congress Series*, Volume 11 (ICCA & Kluwer Law International 2003) at 299

5.3.1 ICC Case No. 18724/VRO/AGF, 7 March 2014[377]

In 2010, Essar Minerals Inc ("EMI"), which is a wholly owned subsidiary of EGFL (Essar Global Fund Ltd.) purchased shares in Trinity Parent Corporation from Travis (Travis Coal Restructured Holdings LLC) pursuant to the SPA.[378] At the same year, as a consideration for the Trinity Purchase, EMI issued $203 million "Notes" in favor of Travis and EGFL guaranteed EMI's full payment under the Notes through the Guarantee agreement concluded between parties where the claimant is the seller and the respondent is the guarantor.[379] However, following the acquisition, EMI did not fulfil the payment obligation, and thus, Travis claimed the payment from EGFL pursuant to its guarantee position. EGFL also refused to pay the amount due under the Notes.[380] Eventually the Claimant started the arbitration proceedings by relying on the arbitration clause in Section 7.7 of the Guarantee.

While the Claimant seeks for recovery under the Guarantee, the Respondent claimed that *"the Guarantee and EMI's underlying obligations stemming from the acquisition of Trinity are void and unenforceable due to Claimant's fraudulent misrepresentation."*[381] Mainly EGFL refused to make any payments by claiming there was a fraudulent act by Travis.

The arbitral tribunal firstly decided over jurisdiction and continued the proceedings. Later on, the Claimant submitted a summary judgment[382] where the Respondent opposed [383] by stating they *"should be allowed to complete discovery and have a full and fair opportunity to present its case at the hearing,"*[384] mainly being their allegations of fraud. In essence, the Respondent admitted *"the failure by either EMI or Respondent to pay the outstanding amount due under the Notes"*[385] however, it still alleged that the Claimant fraudulently induced them to enter into the Guarantee.[386] At this point, the arbitral tribunal stated that these allegations *"would require information exchange and a comprehensive evidentiary hearing on the merits."*[387]

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[377] 'Travis Coal Restructured Holdings LLC v. Essar Global Ltd. (Final Award), ICC Case No. 18724/VRO/AGF, 7 March 2014', Arbitrator Intelligence Materials (Kluwer Law International)
[378] *Ibid.* at para. 11
[379] *Ibid.* at para 10, 12
[380] *Ibid.* at para 13
[381] *Ibid.* at para. 15
[382] *Ibid.* at para. 32
[383] *Ibid.* at para. 33
[384] *Ibid.* at para. 325
[385] *Ibid.* at para. 404
[386] *Ibid.* at para. 429
[387] *Ibid.* at para. 434

The Respondent argued that *"because Trinity's capital needs were within Claimant's peculiar knowledge Claimant had a duty to disclose such needs to Respondent."*[388] In return, the Claimant stated that the *"potential future capital needs is not "peculiar knowledge" because it is not a fact"*[389] moreover the Claimant argued that under the applicable law *"a fraud claim must be based upon a misrepresentation of an existing fact rather than upon an expression of future expectations."*[390]

In riposte to these allegations, the arbitral tribunal concluded that the Respondent had *"failed to carry its evidentiary burden of proving that any statements or non-disclosures by Claimant came within the "peculiar knowledge" ... the Guarantee must be enforced"*[391] since the *"evidence presented by Respondent fails to prove Respondent's position."*[392]

Simply put, the arbitral tribunal in this case decided in favor of their jurisdiction, found the claims as admissible and started examining the case on its merits. The case does not include any injunctions simply because the Claimant did not seek for such remedy. The important matter here is how the arbitral tribunal dealt with the allegations of fraud. These allegations lead the arbitral tribunal to examine and evaluate the evidences represented by both parties in depth by also checking the applicable New York Law (especially about peculiar knowledge exceptions) before granting the award. It is possible to see the impact of fraud in merits as how the arbitral tribunal handled the case in an effective manner.

5.4 Consequences

The impact of fraud in merits will not be a debatable issue as it was in jurisdiction and admissibility. It is clear that the arbitral tribunal has a duty to examine the case appointed to them and after they decide over their jurisdiction and find the claims admissible, the arbitral tribunal will indeed hear the case. For example, if a party raises a defense on the merits, claiming that a particular claim is unjustified because of fraudulent behavior[393] the arbitral tribunal will consider it.

[388] *Ibid.* at para. 333
[389] *Ibid.* at para. 295
[390] *Ibid.*
[391] *Ibid.* at para. 406
[392] *Ibid.* at para. 436
[393] *Supra* note 216 at 153

The impact of an allegation of fraud will appear when it comes to evidence, remedies and specific tools that an arbitral tribunal can use.[394] Consequently, there will be no debate over a question of if an arbitral tribunal can or cannot examine the case in its merits after a consensus that they have jurisdiction and the claims are admissible. The impact of fraud in arbitration therefore will also be a question of merits, however, fraud will affect the examination process rather than the possibility of hearing the case as it was in jurisdiction and admissibility.

Therefore, classifying fraud as a question of merits will be not the same classification as it was in jurisdiction and admissibility. Fraud, as it was stated before, will indeed affect the process since it is the allegation which needs to be dealt by the arbitral tribunal, however, the question will change to "how to deal with the allegation of fraud" rather than "is it possible to deal with such an allegation."

5.5 Benefits and Drawbacks

Even if the question is different, an allegation of fraud will be a question of merits when the party who is exposed to a fraudulent act looks to prosecute a claim in international arbitration. The impact of fraud will appear especially in the contexts of evidence, interim remedies,[395] how domestic courts support the arbitral tribunal[396] and how to evaluate the tool options carefully. It is not possible to deny the fact that fraud has an impact over the merits of the case, and it would not be realistic if one can say that an allegation of fraud is just the same as any other claim. Therefore, an allegation of fraud will determine the arbitral tribunal's approach to the case, proving that the impact of fraud will be considered.

Placing fraud as a question of merits will serve the main aim of any arbitral tribunal; duty to address the issues, examine the case diligently and *"make every effort to make sure the award is enforceable at law."*[397] This would not be possible by turning a blind eye to the impact of fraud.

[394] See, *Supra* note 2 and *Supra* note 216
[395] *Supra* note 2 at 330
[396] *Ibid.* at 343
[397] *Supra* note 313 at 67

CONCLUSION

Each and every day, boundaries between countries are getting closer to losing their significance in terms of business relations whilst legal systems are remaining in the countries to which they belong. It is undeniable that in our decade, there is a boom in cross-border trades and cross-border contracts which contain arbitration agreements.[398] Although these complex contracts and claims regarding said contracts have been emerging recently, arbitration is not a newly recognized concept. If one decides to go centuries back from now, it is possible to see the concept even in ancient Rome. Indeed, it has been stated that:

"Roman law allowed citizens to opt out of the legal process by what they called compromissum. This was an arrangement to refer a matter to an arbiter, as he was called, and at the same time the parties bound themselves to pay a penalty if the arbitrator's award was disobeyed."[399]

As centuries pass by, the concept of arbitration evolved and today, it has come to a point where the claims raised by parties are more complex than ever before and it is expected today that parties will face fraud as a part of complex claims.[400] Consequently, fraud will be in the center of the proceedings since an allegation of fraud will affect every single step that an arbitral tribunal will take. It will appear as an important element to consider in every minor decision that has to be taken.

As it was stated before, the impact of fraud will show itself firstly on the separability of the arbitration clause. There is a consensus worldwide that the arbitration clause is indeed separable if the arbitration agreement itself is not a result of a fraudulent act because the arbitration clause contains a separate agreement with a separate intention.[401] It is also clear that fraud is arbitrable and the arbitral tribunal will have jurisdiction over the case. Thus, fraud will appear as a question of jurisdiction in order for an arbitral tribunal to decide whether or not they have jurisdiction by checking the arbitrability of fraud. All in all, it is necessary to consider fraud while determining whether or not the arbitral tribunal has jurisdiction over the case because asking a question of jurisdiction will give the arbitral tribunal its right to entertain the dispute.

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[398] *Supra* note 2 at 326
[399] Stein, *Arbitration Under Roman Law*, 41 Arb. (1974) at 203-204 as cited to in *Supra* note 5 at 27
[400] *Supra* note 2 at 326
[401] *Supra* note 59, *Supra* note 53, *Supra* note 5 at 354; See, e.g., Art. 23 UNCITRAL Rules; Art. 6(9) ICC Rules; Art. 23 LCIA Rules; Art. 1 ICDR Rules; Art. 16(1) UNCITRAL Model Law; Art. 5(4) CIETAC Rules

Fraud will also be a question of admissibility since it will appear as an objection. The arbitral tribunal has to consider fraud as a question of admissibility in order to hear the dispute in the first place. It is clear that the arbitral tribunal has an obligation to make sure that the award is enforceable[402] and the first way to do that is by checking the admissibility of claims under the applicable law also by resting the transnational public policy. This question will determine whether or not the arbitral tribunal should even take into consideration of the said claim. Fraud will have its impact over arbitration in a negative way if the claim is tainted by international illegality or contrary to transnational public policy. Asking the question of admissibility might not carry the same importance as asking a question of jurisdiction, but eventually it is a must in order to make sure that the award is enforceable and recognizable. [403]

It is not even possible to think that fraud is not a question of merits since the allegation of fraud will be the most important element and claim that parties will try to prove in a proceeding. However in the concept of merits, fraud will not appear as the same issue as it was in jurisdiction and admissibility. The arbitral tribunal will discuss whether or not they have the capacity to rule over the case and whether or not the parties have any right to bring a claim for jurisdiction and admissibility while in merits, the arbitral tribunal will consider fraud in terms of evidence, interim remedies, adverse interference and other tools. Despite the fact that the aim of the question is different than jurisdiction and admissibility, it is not possible to say that fraud is not a question of merits.

All in all, fraud will be appearing in every single step and it is not possible to place "fraud" in just one context while excluding the others because all of these concepts will constitute one single process. However, if there should be a straight line in a timely manner, it is possible to say that fraud will appear first and foremost as a question of jurisdiction, then admissibility and then in the end, merits.

[402] *Supra* note 313 at 67
[403] *Ibid*. at 86

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