LIQUIDATING SEPARABILITY: *PEACE RIVER V PETROWEST* AND THE MEANING OF SEPARABILITY IN CANADIAN ARBITRATION LAW

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I. INTRODUCTION

The separability doctrine is one of arbitration's quintessential principles. Its purpose is to uncouple the arbitration agreement's validity from the underlying contract's validity, thereby safeguarding arbitral authority and reinforcing party autonomy as expressed in the parties' original agreement to arbitrate. When it applies, [1] the separability doctrine presumes that parties who have agreed to a contract that includes an arbitration clause have actually agreed to two contracts: the main "container" contract and the arbitration contract. Recently, the British Columbia Court of Appeal (BCCA), in *Peace River Hydro Partners, et al v Petrowest Corporation*, applied a contrary—and unrestrained—approach to separability. [2] The Court appears to have misunderstood separability's function as a presumption, imposing a rule that arbitration clauses are *always* independent of their container contracts. Interpreting separability this way departs from a correct approach to the doctrine, as followed in Canadian common law jurisdictions and leading international jurisdictions. The BCCA's approach, which one other Canadian

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[1] The main purpose of this essay is to explain why the separability doctrine should not always apply.

[2] *Petrowest Corporation v Peace River Hydro Partners*, 2020 BCCA 339 [*Petrowest*].

court has already cited favourably,[3] should be rejected. It opens the door to unintended consequences, and raises specific concerns about how receivers may "pick and choose" whether to enforce existing liability provisions, like arbitration clauses, that are housed in executed contracts.[4] A further drawback to the BCCA's approach is that it leaves contract debtors uncertain about the enforceability of arbitration agreements contained in their contracts.

This essay first reviews what led to the *Petrowest* dispute and the legal questions on which Peace River Hydro has been granted leave to appeal to Canada's Supreme Court (SCC). It then provides some background on the separability doctrine and shows how Canada's domestic and international arbitration laws reflect the historical and correct approach to separability—to treat it as a presumption. It then contrasts these approaches to the one the BCCA adopted in *Petrowest*. Finally, it addresses Justice Côté's approach to separability in her dissenting opinion in *Uber Technologies Inc v Heller*,[5] mainly because the BCCA relied on her opinion.

II. PETROWEST – A BRIEF BACKGROUND ON THE ARBITRATION ISSUES

At its most basic, *Petrowest* is about debt collection, and the debtors' insistence on invoking the arbitration agreements found in the same contracts from which their debts originate. Petrowest's appointed receiver in bankruptcy initiated litigation in court to recover debts owed to it, and the debtors sought a stay of the receiver's court action in favour of arbitration.

Petrowest, a corporation involved with its affiliates in building an $8.8 billion dam project, agreed to be placed into receivership. Pursuant to section 243(1) of the *Bankruptcy and*

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[3] *Yukon (Government of) v Yukon Zinc Corporation*, 2021 YKCA 2 [*Yukon Zinc*].

[4] This point is expanded on below in Section V.

[5] *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber*].

Insolvency Act (BIA),[6] and section 13(2) of the *Judicature Act*,[7] the Alberta Court[8] appointed Ernst & Young as the receiver. Ernst & Young then commenced a civil claim against Peace River Hydro (and its partners in the dam project) in British Columbia's Supreme Court (BCSC).[9] It sought recovery from Peace River of amounts allegedly owing under, among other things, a general partnership agreement and purchase orders. These instruments included mandatory dispute resolution clauses that called for arbitration to resolve any disputes. Peace River Hydro, relying on these dispute resolution clauses found in these instruments, applied to have the receiver's court claim stayed in favour of arbitration.

The BCSC denied the stay application.[10] Although Justice Iyer held that the receiver was party to the arbitration agreements, she also held that the Court enjoyed inherent discretion to refuse the stay under the *BIA*. Justice Iyer exercised that discretion and refused the stay.

Peace River appealed Justice Iyer's decision to the BCCA. Although the BCCA also declined to stay the court proceedings, it did so for different reasons.

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[6] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3, s 243(1) [*BIA*].

[7] *Judicature Act*, RSA 2000, c J-2, s 13(2).

[8] Under s 243(5) of the *BIA*, the application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor, which in this case is Calgary.

[9] *Petrowest Corporation v Peace River Hydro Partners*, 2019 BCSC 2221 [*Petrowest-BCSC*].

[10] For a thorough overview of the case, visit Daniel Urbas's comprehensive database of arbitration cases in Canada and particularly his case summary and analysis of the *Petrowest* dispute: Daniel Urbas, "B.C. – court asserts inherent jurisdiction under insolvency legislation to override arbitration clauses - #254", online (blog): *Urbas Arbitral* <urbas.ca/?p=1827>; and Daniel Urbas, "B.C. – doctrine of separability allows receiver to disclaim agreement to arbitrate while litigating main contract - #399", online (blog): *Urbas Arbitral* <urbas.ca/?p=2820>.

Instead of inherent jurisdiction under the *BIA*, the BCCA focused on the separability of the arbitration clause. It held that receivers are entitled to disclaim arbitration agreements found in contracts and thus sue in court to enforce the contracts.[11] In doing so, the BCCA held that "the receiver acts not as agent of the debtor (Petrowest), who has been legally paralyzed from acting, but rather acts in fulfilment of its own court-authorized and fiduciary duties, owed to all stakeholders." [12] Thus, a receiver is not a "party" to an insolvent's contracts and hence not bound to the arbitration agreements contained in them.[13]

This essay will not tackle the question of whether a receiver is party to an insolvent's contracts. Instead, it tackles how the BCCA went on to jumble arbitration theory and its interactions with the role and status of receivers. The Court, although correctly explaining the exceptional right of a receiver to disclaim a debtor's executory contractual obligations, [14] misstated the separability doctrine to mean "arbitration clauses have long been recognized as forming not simply a term of the contract, but an independent agreement." [15] The BCCA's misunderstanding of the separability doctrine, its belief that arbitration clauses are *always and necessarily* separate from the contracts in which they are contained, led it to make an unwise decision.

By treating the arbitration agreement as an independent contract, the BCCA allowed the receiver to disclaim it because the arbitration "obligation" had not yet been performed and thus, this "independent arbitration contract" was still executory.[16] Since receivers may disclaim executory contracts,

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[11] *Petrowest*, *supra* note 2.

[12] *Ibid* at para 44.

[13] *Ibid* at para 45.

[14] *Ibid* at para 46.

[15] *Ibid* at para 47.

[16] *Ibid* at paras 46—49.

the receiver could disclaim the arbitration obligations while adopting and seeking to enforce the outstanding debts owed under the main contracts. Such a casuistic approach, though beyond the scope of this essay, further confuses the separability doctrine.

The BCCA acknowledged that its approach does not mean that a receiver is free to "pick and choose among the terms of a contract the receiver seeks to enforce."[17] Yet the BCCA's mangled approach to separability allowed the receiver to do just that: to disclaim the arbitration clause and still move forward with the container contract. As explained below, separability does not mean that arbitration clauses found in contracts are *ab initio* separate agreements independent in every way from the contracts in which they are housed.

Peace River applied for leave to appeal the BCCA's decision to the Supreme Court of Canada, which the court granted.[18] Peace River seeks a decision on two main questions:

- The first, which this essay does not address, asks whether receivers who step into the shoes of a party or parties to contracts that contain arbitration clauses are bound to those arbitration agreements.

- The second, on which this essay focuses, seeks clarity on the doctrine of separability. In particular, Peace River asks whether a receiver may simultaneously disclaim a valid arbitration agreement contained in a contract but still pursue the substantive rights in that contract.

This second question offers Canada's highest court the opportunity to weigh in on the role separability plays in arbitrations, at least those taking place in Canada. It should

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[17] *Ibid* at para 46.

[18] See *Peace River Hydro Partners, et al v Petrowest Corporation, et al,* 2021 CarswellBC 1850.

make for an interesting discussion amongst the justices. In her dissent, Justice Côté offered some intriguing views on separability. While acknowledging the traditional view that separability plays a crucial role in safeguarding arbitral jurisdiction [19] and making the process efficient, her opinion strayed by suggesting that separability means that arbitration clauses are always and entirely independent from their main contracts.[20] The BCCA relied on Justice Coté's broad approach to separability to bolster its own decision.[21]

III. ONE OR TWO CONTRACTS?

This section begins by explaining why separability is a presumption. It then provides the historical context confirming its core purpose: to safeguard a tribunal's jurisdiction. Finally, this section examines the wording of Canada's common law arbitration statutes, which confirm separability is a presumption and not an invariable rule. It also looks to a provision in Quebec's civil code, which may appear to contemplate a more extensive role for separability, but in the end supports separability as a presumption. This provision of Quebec law may explain Justice Côté's approach to the topic.[22]

The separability doctrine, broken down to a simple heuristic, is easy to remember and easy to misconstrue. When it applies, separability separates an arbitration clause from the contract in which it is contained. Once separated, the arbitration clause is treated as a separate or autonomous contract, such that the parties have agreed to not one but two contracts. The consequences are stark but often essential. Although the arbitration clause appears inextricably linked to the container contract in which it is housed, separability permits the

[19] *Uber*, *supra* note 5 at para 224.

[20] *Ibid* at para 221.

[21] *Petrowest, supra* note 2 at para 51.

[22] This point is expanded on below in Section IV.

arbitration clause to survive the container contract's invalidity.[23] If it were not for separability, any challenge to the validity of the container contract would bring the arbitration agreement into question and shunt any dispute to the courts. Thus, separability safeguards the arbitral tribunal's jurisdiction and bolsters the competence-competence principle, which dictates that arbitral tribunals have the jurisdiction to determine their own jurisdiction.[24]

Separability is one of the first lessons taught to arbitration students. The doctrine is often jarring to newcomers. Still, it quickly imprints itself onto the recruits' psyches to form an essential part of their knowledge base. It tends to distinguish those familiar with arbitration from those who are not.

The doctrine emerged as a tool to safeguard an arbitral tribunal's jurisdiction when the latter faced a possibly invalid contract housing the arbitration clause.[25] In light of this history, most authorities call the doctrine the separability *presumption*.[26] The term "presumption" is intended to signal that separability is not absolute. Instead, arbitration agreements

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[23] Anthony Daimsis & Marina Pavlović, "An Introduction to Commercial Arbitration" in Marvin J Huberman, ed, *A Practitioner's Guide to Commercial Arbitration*, (Toronto: Irwin Law, 2017) 3 at 15.

[24] Unsurprisingly, competence-competence played an important role for the entire Court in *Uber*. *Uber*, *supra* note 5 at para 15 *et seq* (majority opinion), at para 120 *et seq* (concurring opinion), and at para 194 *et seq* (dissenting opinion).

[25] See e.g. Entscheidung des Appellationsgerichts des Kantons Basel-Stadt 13, *Judgement of 27 April 1931* (Switzerland); *Prima Paint Corp v Flood & Conklin Mfg Co,* 338 US at 395, 400 (1967) [*Prima Paint*]; Cass civ 1 e, 7 May 1963, *Ets Raymond Gosset c Carapelli*, [1963] JCP G II 13; *Heyman v Darwins Ltd* [1942] AC 356 at 366 (HL (Eng)); *Harbour Assur Co (UK) Ltd v Kansa Gen Int'l Ins Co Ltd* [1992] 1 Lloyd's Rep 81(QB) at 92—93, aff'd, [1993] 3 All ER 897 (CA). More recently, *Sul America v Enesa Engenharia* [2012] EWCA Civ 638 at para 9 (confirming separability as a presumption).

[26] Gary B Born, *International Commercial Arbitration,* 3rd ed (Netherlands: Kluwer Law International, 2020) at 379.

are presumed separate from their container contracts when necessary to invoke the doctrine to safeguard jurisdiction for arbitrators. Because separability is not absolute,[27] arbitration clauses found in contracts are not always in need of separation. Yet, both the BCCA's decision in *Petrowest* and Justice Côté's opinion in *Uber* seem to treat separability as an absolute. This is a mistake.

1. Why the doctrine emerged

The separability doctrine did not always exist. However, it has become indispensable for arbitration to function effectively. For example, regarding a tribunal's jurisdiction, a party could launch a potentially devastating attack in the following terms: Our main argument is that the container contract is invalid. Should we prevail, then by necessity, any arbitral tribunal set up pursuant to an arbitration clause inside an invalid contract has no jurisdiction.

The argument is powerful. If accepted, it would allow a party to circumvent the arbitral process merely by raising doubts about the validity of the container contract. Imagining arbitration clauses in contracts as separable from the contracts in which they were contained solved the issue. It also supported the parties' agreement that an arbitral tribunal would resolve disputes between the parties, including issues of the validity or existence of the main contract.

Therefore, the doctrine serves as a sentry against the tactic of circumventing an arbitration clause by challenging the validity of the contract containing it. English law refers to it as the separation doctrine or doctrine of separability, whereas US

[27] Indeed, parties may alter it or eliminate it entirely. For example, in Canada, arbitration acts based on the Uniform Conference of Canada's Model Arbitration Act allow parties to alter the provision housing the separability rule. Arbitration rules of procedure, like art 6 of the International Chamber of Commerce (ICC) Rules of Arbitration, are to the same effect.

law describes the same idea as "severability". Canada adopts the English terminology.

Separability has allowed Canadian courts to conclude that terminating a commercial contract does not automatically terminate an arbitration agreement contained in it, so that any dispute arising from termination must be decided by an arbitral tribunal.[28] More than 50 years ago, the US Supreme Court equally recognized that separability's main purpose is to preserve the arbitral tribunal's jurisdiction, holding that to escape arbitration, a party to an arbitration agreement must demonstrate that the grounds that rendered the container contract invalid also apply separately to the arbitration agreement.[29] The better our courts understand how fundamental arbitration principles like separability and competence-competence operate, the less likely parties will clog our courts with specious objections to arbitral jurisdiction, thereby freeing the courts to address pressing non-commercial matters.

2. Canadian Statutes

Canadian statutes based on the 1990 Uniform Law Conference of Canada's (ULCC) Model Arbitration Act have all adopted the same separability rule. This rule creates a *presumption* of separability. It allows an arbitral tribunal to rule on its jurisdiction despite the chance that the main contract is (or might be) found invalid. From the perspective of enforcing promises, this rule has a major consequence: parties may not shirk their arbitration commitments merely by attacking the contract that houses these commitments. Furthermore, an essential effect of this rule is to make it possible for arbitral tribunals to pronounce on their own jurisdiction (competence-competence).

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[28] *Harper v Kvaerner Fjellstrand Shipping AS*, [1991] BCJ, No 2654.

[29] *Prima Paint*, *supra* note 25.

For example, Section 17(2) of Ontario's *Arbitration Act*, which replicates the ULCC provision, reads:

> *Independent agreement*
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> 17(2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.[30]

The British Columbia *Arbitration Act* ("*the Act*") in play in the *Petrowest* dispute contains no equivalent to Section 17. [31] Indeed, *the Act* appears silent on the separability doctrine. This might explain why Justice Grauer, writing for the BCCA, relied on what he termed a "long history in the jurisprudence" regarding the separability doctrine, and proceeded to cite five decisions, in addition to Justice Côté's dissenting opinion in *Uber*, to support his understanding of separability.[32]

Recall that in *Petrowest*, the Court allowed the receiver to disclaim the arbitration agreement and yet retain the main contract. This required treating the arbitration clause within the container contract as an independent and executory contract. Yet the BCCA never questioned the validity of the container contract, which is the linchpin of the doctrine.

Justice Grauer cited a slew of cases, [33] but, as explained below, these cases (except *Uber*) hardly support his view of separability. Instead, they apply separability when parties

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[30] *Arbitration Act*, 1991, c 17, s 17(2).

[31] *Arbitration Act*, RSBC 1996, c 55 [*the act*].

[32] *Supra* note 2 at para 50.

[33] *Harbour Assurance Co (UK) v Kansa General Assurance Co,* [1993] 1 Lloyd's Rep 455, [1993] 3 WLR 42 (CA); *James v Thow et al*, 2005 BCSC 809; *Strata Plan BCS 3165 v 1100 Georgia Partnership*, 2013 BCSC 1708; *New World Expedition Yachts, LLC v FC Yachts Ltd,* 2011 BCSC 78; *Tylon Steepe Homes Ltd v Pont,* 2009 BCSC 103.

challenge the validity of container contracts—in other words, as a presumption. To describe separability as a rule of law that arbitration clauses are *always* independent of their container contracts misses the point and leaves the doctrine with no role to play, as arbitration agreements suddenly become detached from the contracts in which they are housed.

- In *James v Thow*, the BCSC provided an excellent overview of domestic and international case law addressing the separability doctrine, then concluded, "In essence, the doctrine is this: Where a commercial contract contains a clause requiring the parties to arbitrate any difference or dispute under the contract, that arbitration clause remains operative **even where the validity or existence of the contract itself is challenged**."[34] This view is correct: the presumption that one may separate the arbitration clause from the main contract for the purpose of maintaining arbitral jurisdiction when the main contract is under attack.
- In *Strata Plan BCS 3165 v 1100 Georgia Partnership*, the BCSC explained that it could not automatically declare an arbitration agreement void or inoperative just because the underlying contract may be invalid.[35] Again, this is the correct view: that separability is a presumption that may apply when the larger container contract is attacked, and the attacking party seeks to use its own attack to invalidate the arbitration agreement.

[34] *James v Thow et al*, 2005 BCSC 809 at para 82 [emphasis added].

[35] *Strata Plan BCS 3165 v 1100 Georgia Partnership*, 2013 BCSC 1708 at para 120.

- In *New World Expedition Yachts, LLC v FC Yachts Ltd*, the BCSC wrote, "Even if a contract is vitiated by fraud, the arbitration clause within it is not necessarily invalid."[36]
- And finally, in *Tylon Steepe Homes Ltd v Pont*, the BCSC cited approvingly to *James v Thow* and explained that "On the issue of whether the allegation of fraudulent misconduct impugned the agreement to arbitrate, Wedge J. applied the severability doctrine to sever the agreements from the remainder of the contract in deciding that the allegations did not impugn the arbitration clause within the agreement."[37]

To further support his view that arbitration agreements are always independent from their contracts, Justice Grauer also cited an older English case, *EJR Lovelock Ltd v Exportles*,[38] to make the point that an invalid arbitration agreement is independent and separable from an otherwise valid main contract. In short, Justice Grauer uses this case to confirm that separability can work in both directions. However, *Exportles* does not serve such a proposition. That case dealt with an ostensible arbitration agreement that never came into existence owing to its ambiguous and ultimately meaningless phrasing (calling for arbitration simultaneously in London and Moscow). Thus, for all intents and purposes, the main contract included *no* arbitration agreement from which to separate. While this result supports the view that an invalid arbitration agreement does not affect its container contract, to believe it confirms that separability *requires* arbitration agreements and container contracts to be separate, as Justice Grauer does, is to confuse the effect with the cause. The cause of the doctrine is to safeguard arbitral jurisdiction. One of the doctrine's effects is to disentangle the validity of the arbitration clause from the

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[36] *New World Expedition Yachts, LLC v FC Yachts Ltd,* 2011 BCSC 78 at para 13.

[37] *Tylon Steepe Homes Ltd v Pont,* 2009 BCSC 103 at para 33.

[38] *EJR Lovelock Ltd v Exportles*, [1968] 1 Lloyd's Rep 163, [1967] 10 WLUK 79.

validity of the container contract. Thus, holding an arbitration clause invalid has nothing to do with separability. As explained later, Justice Côté committed the same misstep when she invoked the separability doctrine in her dissenting opinion in *Uber*.[39]

3. Separability under the Applicable BC Legislation

It is worth pointing out that the *Arbitration Act*[40] in play in *Petrowest* would not have required Justice Grauer to canvass cases from other jurisdictions, or even his own, to import a rule of separability. *The Act* already contains an implicit rule of separability.

Section 22(1) of *the Act* provides a method to fill gaps on questions of arbitral procedure, which can include a rule of separability. It does this by supplementing *the Act* with arbitration rules.[41] *The Act* either confirms the parties' selection of arbitration rules or automatically implants the arbitration rules of the British Columbia International Commercial Arbitration Centre (BCICAC), which, as of 2020, is now called the Vancouver International Arbitration Centre (VanIAC).[42] Section 22 reads:

> International Commercial Arbitration Centre rules
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> 22(1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.

[39] *Supra* note 5.

[40] *Supra* note 31.

[41] *Seidel v TELUS Communications Inc*, 2011 SCC 15 at paras 28, 111.

[42] For more information on VanIAC, visit https://vaniac.org/.

Some of the claims in need of resolution in *Petrowest* were spread over many contracts. Of relevance here are four agreements that called for dispute resolution via arbitration. Two called for arbitration under the ICC Rules of Arbitration,[43] and two called for arbitration using the BCICAC Rules of Arbitration.[44] Both the ICC Rules and the BCICAC Rules include a rule on separability similar to the rule reflected in Section 17 of the ULCC Arbitration Act, as adopted throughout Canada.

[43] *Supra* note 9 at para 54. The ICC (International Chamber of Commerce), headquartered in Paris, France, was founded in 1919. For more information, visit iccwbo.org.

[44] *Supra* note 9 at para 54.

Ontario *Arbitration Act*	**ICC Rules of Arbitration Art 6**	**BCICAC Domestic Rules of Arbitration Rule 22**
17(2) Independent Agreement If the arbitration agreement forms part of another agreement, **it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.** [45]	6(9) Effect of the Arbitration Agreement Unless otherwise agreed, **the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement**. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas **even though the contract itself may be non-existent or null and void**.[46]	22. Jurisdiction (1) The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement (2) **A decision by the arbitration tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause** unless specifically found to be so by the arbitration tribunal…[47]

[45] *Supra* note 30 [emphasis added].

[46] "2021 Arbitration Rules" (entered into force on 1 January 2021), online: *International Chamber of Commerce* <iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> [emphasis added].

[47] "Domestic Rules of Arbitration" (as revised 15 September 2016), online: *British Columbia International Commercial Arbitration Centre* <bcicac.com/arbitration/rules-of-procedure/revised-domestic-commercial-arbitration-rules-of-procedure/> [emphasis added].

What this means is that Justice Grauer had a separability rule available to him to guide his decision and did not have to venture beyond the *Act* or the rules to which the parties had agreed.[48] As each rule reveals, separability becomes relevant when the main contract is called into question. None of these rules speaks of separability as an absolute rule of independence.

4. The UNCITRAL Model Law Also Embraces Separability as a Presumption

For completeness, it is worth reviewing what Canadian statutes on international commercial arbitration have to say about separability, especially because receiverships and bankruptcy also impact international disputes implicating Canadian parties. The UNCITRAL Model Law on International Commercial Arbitration[49] ("Model Law"), adopted throughout Canada,[50] recognizes the separability presumption in its article 16(1) by explaining:

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[48] *Supra* note 31. It could be argued that s 22(1) speaks only to an arbitral tribunal but in the absence of a rule of separability in *the Act*, it would be odd and most inconsistent for a court to use a rule of separability different from a rule the arbitrators are bound to. This could lead to diverging decisions, not based on any error.

[49] *Model Law on International Commercial Arbitration*, UNCITRAL, Annex 1, UN Doc A/40/17 (1985) [*Model Law*].

[50] All ten Canadian provinces and the federal government have adopted the *Model Law*, but have done so in a variety of ways. Most Canadian provinces annexed the *Model Law* to their international commercial arbitration statues. These statutes' opening sections explain where a given jurisdiction has altered the *Model Law*. Quebec's code of civil procedure and its civil code have integrated portions of the *Model Law*. See Bill 91, *An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration*, Quebec 1986 (assented to 11 November 1986), SQ 1986, c 73. It remains an open question whether *Model Law*, art 16 supersedes art 2642 CCQ, given that recourse to the *Model Law* Analytical Commentary is not automatic. On this point, see Anthony Daimsis, "Quebec's Arbitration Law: Still A Unified Approach?" (2014) 23:1 Can Arb & Mediation J. Canada's Federal Arbitration statute also annexes the *Model Law* but has removed the international definition, replacing it with a scope-of-application provision.

> The arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement. ***For that purpose*** an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ***ipso jure*** the invalidity of the arbitration clause.[51]

The Model Law's wording captures separability's purpose and implicit boundaries. When an arbitration agreement's existence or validity is called into question, the tribunal may "for that purpose" separate an arbitration agreement from the contract's other terms. When this happens, the arbitration clause is treated as an independent agreement and thus is analyzed separately.

This tells us that if a party argues that the main contract is invalid and therefore that an otherwise enforceable arbitration clause within it is derivatively invalid, a decision-maker may separate the arbitration clause from the main contract and thereby preserve the arbitral tribunal's jurisdiction. Thus, a party wishing to avoid arbitration must also argue that the arbitration clause is "independently" invalid. Finally, Model Law Art. 16(1) explains that a finding that the main contract is invalid does not "entail *ipso jure*" that the arbitration agreement is also invalid. [52] Thus, the Model Law recognizes that circumstances may exist where the arbitration agreement does follow the same fate as the main contract; it is simply not *ipso jure*.[53] A classic example is where a party successfully argues

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[51] *Supra* note 50 [emphasis added].

[52] *Supra* note 50.

[53] *Supra* note 24 at 438.

that it never consented to the container contract should also be held not to have consented to the arbitration agreement.

5. Further reasons why separability is properly understood as a presumption

Correctly applying the separability doctrine avoids important difficulties and supplies important benefits. It is consistent with the choice of law processes for determining the law applicable to arbitration clauses within container contracts, preserves the usefulness of the validation principle, supports businesspersons' expectations when they enter contracts containing arbitration clauses, and explains the differential treatment of dispute resolution clauses and other contractual provisions that set out the consequences of breaching contracts, such as exclusion clauses.

IV. THE LAW APPLICABLE TO ARBITRATION CLAUSES

If an arbitration agreement is "always" separate from the contract in which it is contained, then, properly, it should always have its own applicable law. And unless parties include a choice of law specific to their arbitration agreement, a decision-maker should apply conflicts of law [54] analysis to determine the applicable law, as it would to any contract in need of an applicable law.

In practice, decision-makers use one of three methods to determine what law applies to an arbitration agreement, none of which is the same as that followed to identify the law applicable to an independent contract. The three methods used are: (a) applying the law that governs the container contract, (b) using conflict rules by analogy, or adopting (c) the "validation" principle. A brief walk through these three methods reveals a distinct approach to "finding" the applicable law to an arbitration agreement. This lends further support that

[54] Or in the civil law vernacular, "rules of private international law".

arbitration clauses found inside container contracts are not always and entirely independent contracts.

Civil law jurisdictions like Quebec,[55] and decisions from comparator common law jurisdictions,[56] take a pragmatic view of the problem. In essence, this approach understands that business parties who enter contracts, which may include arbitration clauses, intend to have their entire contract governed by one law, unless they indicate otherwise. Under this view, to the extent that it is necessary to determine what law governs the arbitration agreement, a rebuttable presumption exists that the same law governing the main contract also governs the arbitration agreement. The presumption is rebutted either when the parties agree otherwise, or in some cases, when the law of the main contract invalidates the arbitration agreement. In the latter case, to safeguard arbitral jurisdiction, a court may apply a law that does not invalidate the arbitration agreement.

Under Quebec arbitration law, the steps are similar except that the order of the analysis is different: in the absence of a specific designation by the parties, the law of the main contract applies unless that law invalidates the agreement, in which case the law of the juridical seat of arbitration governs the arbitration agreement.[57]

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[55] Art 3121 CCQ (1980) ("In the absence of a designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the State where arbitration takes place").

[56] *Sul America v Enesa Engenharia* [2012] EWCA Civ 638 at para 11; Most recently, the English Supreme Court has revisited the question in *Enka Insaat Ve Sanayi AS (Respondent) v OOO Insurance Company Chubb(Appellant)* [2020] UKSC 38 at para 60, in which it confirmed the correct view that separability is a presumption.

[57] The importance of the juridical seat (also known as lex arbitri) is another essential aspect of arbitration theory. See John Kleefeld et al, *Dispute*

The second approach to determining the law applicable to arbitration agreements adopts a choice of law rule by analogy to the enforcement provisions of the New York Convention (Art. V)[58] and the Model Law (Arts. 34 and 36). The analogy to New York Convention Article V(1)(a) leads to the law of the seat as the law governing the arbitration agreement.[59]

New York Convention Article V(1)(a) reads:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or **the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made**.[60]

In international arbitration, an award is deemed made in the seat of arbitration.[61] Consequently, the analogy to the rule in Art. V(1)(a) goes something like this: since we have a rule under

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Resolution: Readings and Case Studies, 4th ed (Toronto: Emond Publishing, 2016) at 522.

[58] *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959, 24 signatories, 166 parties) [*New York Convention*].

[59] *Ibid*, art V(1)(a). This isn't the only reason for a rule that prefers the law of the seat by default. Under the pre-*Enka v Chubb* English precedents, the law of the seat applied by default because it was seen as the law most closely connected to the arbitration (as opposed to most closely connected to the contract).

[60] *Ibid* [emphasis added].

[61] See *Model Law*, art 31(3).

the New York Convention to tell us what law to look to when determining an arbitration agreement's validity, we should use this same rule to determine what law governs the arbitration agreement.

The third method, suggested by authors like Gary Born[62] and expressly adopted in jurisdictions like Switzerland,[63] is the validation principle. This principle is based on the assumption that parties would never intend to choose a law that would invalidate their arbitration agreement. Thus, when parties do not expressly state the law applicable to their arbitration agreements, decision-makers should support the parties' intention and apply any reasonably relevant law that validates the arbitration agreement. This could be, for example, the law of a party's home state, of the place of arbitration, or of the likely enforcement jurisdiction. The idea is that decision-makers should not allow the vagaries of choice of law to defeat the parties' intention to arbitrate.

In sum, the approaches actually used to determine the law applicable to arbitration agreements contained within commercial contracts do not follow the usual choice of law approaches. Instead, courts and arbitral tribunals have developed distinct approaches suitable for the distinctive character of arbitration clauses. If arbitration agreements were always separate and independent contracts from the contracts in which they are contained, then jurisdictions could simply resort to their domestic rules (conflicts or otherwise) that apply to contracts where parties have not named an applicable law. However, as this section has shown, jurisdictions do not do this.

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[62] See generally Born, *supra* note 26 at 507—674.

[63] *Federal Act on Private International Law,* art 178(2) (Switzerland).

1. *Businesspersons' expectations*

As explained by some courts and implicit in some legislation,[64] when businesspeople sign contracts that include dispute resolution clauses, they likely do not expect to have their contracts governed by multiple laws. Instead, when businesspeople sign a contract that names, say, English law as the contract's governing law, they expect English law to apply to their contract in its entirety. To believe otherwise is counterintuitive and contradicts expectations. Treating separability as a presumption that applies *exceptionally* when the main container contract is under attack supports businesspersons' expectations and freedom of contract.

2. *Arbitration clauses contrasted with other contractual clauses*

Arbitration clauses share some DNA with other types of clauses like exclusion clauses, mediation clauses, and mandatory negotiation clauses.[65] Although these clauses serve different interests, what they share is that they set out what should happen when a contract's primary obligations are not respected. If a party breaches a primary obligation, an exclusion clause sets out what each party will pay and receive. Similarly, dispute resolution clauses allow parties to know what comes next. Both types of clauses seek to avoid recourse to court. Although exclusion clauses are often defined as secondary obligations while dispute resolution clauses are perhaps more aptly described as tertiary clauses (as they may still apply when

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[64] *Sul America v Enesa Engenharia* [2012] EWCA Civ 638 at para 11; *GreCon Dimter inc v JR Normand inc*, 2005 SCC 46, [2005] 2 SCR 401 [*GreCon*]. *GreCon* cites art 3121 CCQ, which reads: "[i]n the absence of a designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the State where arbitration takes place. 1991, c. 64, a. 3121; I.N. 2014-05-01."

[65] See Anthony Daimsis, "Like a Poor Marksman, ONCA Keeps Missing the Missing the Arbitration Target: Discussing *Disney v Reinsurance*, *Heller v. Uber* (ONCA), and *Hualan v. Marty*" (2020) 1:1 Can J Comm Arb at 129.

secondary obligations are not respected), both categories of clauses raise important questions of enforcement. Enforcing an exclusion clause may dictate the amount of compensation owed and owing. Enforcing a dispute resolution clause dictates who will determine the appropriate remedy, if any, and under what procedures.

Given that exclusion and dispute resolution clauses share a fundamental similarity, why segregate arbitration clauses from these other contractual clauses by endorsing their separation? Why not, as a rule, separate *all* of these species of clauses from the contracts in which they sit? The better approach is to ask whether separating contractual clauses from their underlying contracts undermines their nature and the parties' expectations in including them in their contracts.

In the case of an exclusion clause, where the breaching party has limited its liability for any breach arising from or in connection with the contract, separating this clause from the main contract and treating the two independently may very well support the exclusion clause's purpose. Even if a decision-maker holds the underlying contract invalid, the innocent party may still have damages sounding in restitution or in tort, which exceed the cap imposed by the exclusion clause. If the decision-maker finds that the exclusion clause covers this eventuality, then allowing it to persist despite the main contract's invalidity and thereby treating it necessarily separable, supports the clause's purpose and the parties' agreement.

Significantly, contracts containing exclusion clauses (but not dispute resolution clauses) are assessed by the same decision-maker whether the assessment is about the clause alone or the entire contract. This is consistent with what parties expect. There is no risk, therefore, that the same decision-maker will fail to "see" the exclusion clause or will assess it under a different law than the parties intended. In short, arguing that a contract is invalid and derivatively arguing that the exclusion clause is invalid creates no *jurisdictional* mischief.

The same is not true, however, for arbitration clauses. If a party argues that the main contract is invalid, this would call into question all the contract's provisions, including the one that seeks to remove the case from the court system. This is the paradoxical loophole that the separability presumption seeks to close and, when properly applied, accomplishes. Put succinctly, a party may not evade its arbitration promise (and return to the courts) simply by attacking the main contract. The nature of a dispute resolution clause, which is to remove the case from the default national court, is preserved.

V. THE DOVETAILING OF *UBER* AND *PETROWEST*

As noted earlier, in *Petrowest*, the BCCA has seemingly suggested that arbitration clauses in contracts are *always* separable and independent from the contracts in which they are contained. According to this view, separability means two contracts are formed whenever a contract contains an arbitration clause. The decision also suggests that separability works in both directions: it allows a court to sever an invalid arbitration clause from its main contract, in addition to allowing an arbitration clause to survive the invalidity of the main contract. However, if separability means that arbitration agreements are always separate from their container contracts, then the doctrine's purpose is lost, and numerous courts, tribunals, and authorities have needlessly spilt much ink explaining separability's particular application. Most significantly, treating separability this way conflates separability, a specialized doctrine specific to arbitration agreements, with the common law rule that allows a court to sever an invalid clause from an otherwise valid contract.[66]

The BCCA's approach to separability is not without support (deliberate or not) in Canada, even in the Supreme Court. In

[66] Indeed, this was the effect of the majority decision in *Uber*. The Court declared the dispute resolution clause unconscionable. It did not declare the entire contract between Uber and Mr. Heller, unconscionable. *Uber*, *supra* note 5 at para 98.

Uber, Justice Côté, writing in dissent, expressed the view that the arbitration agreement in Uber's contract "should be considered to be an independent agreement which is separate from the Service Agreement." [67] Justice Côté's approach is surprising because the validity of the container contract in *Uber* was never contested. In other words, the "main" contract was not invalid, which calls into question why separability was even discussed. Equally perplexing is Justice Côté's reliance on learned authorities who do not describe separability as she characterizes it.[68] For example, at paragraph 221 of her opinion, Justice Côté cites to a commentary, which is actually citing to an arbitration award, the former of which is cited to by Gary Born. Justice Côté writes:

> Put another way, an arbitration clause should be considered "autonomous and juridically independent from the main contract in which it is contained": A. J. van den Berg, ed., Yearbook Commercial Arbitration 1999 (1999), vol. XXIVa, at p. 176, as quoted in Born, vol. I, at p. 350.[69]

Justice Côté's reliance on this quote is problematic, both incomplete and stripped of its context. Here is the complete quote, which comes from an award issued by an ICC tribunal:

> **In virtue of the independent rule of international arbitration law, embodied in Art. 8(4) of the Rules**, the arbitral clause is autonomous and juridically independent from the main contract in which it is contained either

[67] *Uber*, *supra* note 5 at para 225. In fairness, Justice Côté's discussion of separability related to treating the arbitration agreement separately from the choice of law clause found within the arbitration agreement.

[68] *Ibid* at para 221.

[69] *Ibid*, citing AJ van den Berg, ed, *Yearbook Commercial Arbitration 1999*, vol XXIVa (Netherlands: Kluwer Law International, 1999) at 176, as quoted in Born at 350.

> directly or by reference, and its existence and validity are to be ascertained, taking into account the mandatory rules of national law and international public policy, in the light of the common intention of the parties, without necessarily referring to a state law.[70]

Now for the context. As the quoted passage makes clear, the tribunal was applying Article 8(4) of the 1988 ICC Rules of Arbitration, which perfectly reflects the separability *presumption*:

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

In short, under ICC Rules Art. 8(4) *if* the container contract's validity is called into question, the arbitral tribunal's jurisdiction remains intact unless and until it finds that the arbitration agreement was separately invalid.

Justice Côté further conflates the separability doctrine with competence-competence. In paragraph 224 of her opinion, she explains that "one aspect" of the separability doctrine is that it allows an arbitral tribunal to rule on its jurisdiction:

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[70] *Exclusive Agent v Manufacturer* (1996), ICC Case No 8938 (International Chamber of Commerce) (Final Award); AJ van den Berg, ed, *Yearbook Commercial Arbitration 1999*, vol XXIVa (Netherlands: Kluwer Law International, 1999) at 176 [emphasis added].

> The Arbitration Act and the UNCITRAL Model Law codify one aspect of the doctrine, that is, the preservation of an arbitral tribunal's jurisdiction to rule on the validity of the underlying contract on the basis that the arbitration agreement is to be treated as a separate and independent contract for such purposes. However, the separability doctrine has wider significance.

But competence-competence is not "one aspect" of separability. It is a distinct principle and does not rely on the separability doctrine to exist. As Gary Born (on whom Justice Côté and the majority opinion in *Uber* rely quite heavily) puts it, any analysis that conflates competence-competence with separability "is mistaken". Born continues:

> [T]he separability presumption does not in fact explain the competence-competence doctrine. Although the competence-competence doctrine arises from the same basic objectives as the separability presumption (e.g., enhancing the efficacy of international arbitration as a means of dispute resolution), it is not logically dependent upon, nor explicable by reference to, the separability presumption.[71]

Justice Côté's choice to raise separability, when no one contested the main contract, is at odds with the correct approach. More concerning is how Justice Grauer relies on Justice Côté's dissent to support his own appreciation of separability.[72] And perhaps even more concerning is the recent Yukon Court of Appeal decision [73] citing *Petrowest* for the proposition that "the Court relied on the doctrine of separability to hold that the arbitration clause was an independent

[71] Born, *supra* note 26 at 503.

[72] *Petrowest, supra* note 2 at para 51.

[73] *Yukon Zinc, supra* note 3.

agreement which could be separately disclaimed."[74] In short, we may be witnessing the early stages of our courts entrenching an incorrect understanding of separability into our common law.

The effect of Justice Grauer and Justice Côté's views on separability is startling. Under their views, a contract containing an arbitration agreement is never simply one contract but instead is always two contracts. The first contract sets down all the promises made between the parties, while the second contract is an independent (and reciprocal) promise to arbitrate disputes arising from the first contract.

The doctrine of separability was never intended to mean that the parties have, upon signing one contract containing an arbitration clause, entered two contracts. As a heuristic—an intellectual shortcut—thinking about separability this way does help a decision-maker apply the doctrine. But the doctrine's purpose has never been to treat contracts containing arbitration agreements as two contracts for all purposes, but rather to protect the integrity of the arbitration process and the parties' choice to arbitrate rather than litigate disputes arising from their contractual relationship.

Party autonomy has always played a critical role in arbitration. Indeed, the very right to use arbitration implies that parties may exercise their autonomy to opt out of the default national court system. In the specific context of separability, party autonomy has always allowed parties to decide whether they even wish to separate their arbitration agreements from their main contracts. [75] It also permits parties to modify separability's consequences by, for example, choosing one law to govern the whole contract, including the arbitration

[74] *Petrowest, supra* note 2 at para 106.

[75] See e.g. *Prima Paint*, *supra* note 25, in which the US Supreme Court made clear that the rule was subject to party agreement.

agreement contained within it. The approach advocated by Justices Grauer and Côté curbs party autonomy.

VI. WHEN IN DOUBT, BLAME THE FRENCH?[76]

France has had an asymmetrically strong influence on arbitration, notably international arbitration. It should come as no surprise, therefore, that the French approach on important arbitration concepts, like separability, has tunnelled its way into jurisdictions around the world, including Canada. In particular, French law has heavily influenced—and continues to influence—Quebec law. This might explain why impressions of arbitration from Quebec jurists, like Justice Côté, are imbued with a discernibly French flavour.

French law and scholars influenced by French law often discuss the topic of separability under the broader heading *autonomie de la clause compromissoire* (or *compromis*).[77] With this phrasing, it becomes easy to understand why some consider arbitration agreements to be inherently "autonomous" or entirely "independent" from the contracts in which they may sit. This broad wording has caused confusion.

When French law—and any jurisdiction adopting similar wording— speaks of "autonomy", they could mean, as Professor George Bermann has explained, no fewer than six separate categories that all describe some sense in which an arbitration is an autonomous dispute resolution process. For example, under French law, autonomy is used to describe:

- how the arbitration process is *autonomous* from national law

[76] A tongue-in-cheek reference to "Canning's law", explained well by The Economist in "Why Everyone Loves to Blame France" (2 January 2021), online: *The Economist* <www.economist.com/europe/2021/01/02/why-everyone-loves-to-blame-france>.

[77] Born, *supra* note 26 at 378.

- how arbitration is a function of party *autonomy*
- how the law that can apply to an arbitration agreement is *autonomous* from the law that applies to the main contract, and
- the separability presumption[78]

While French law appears to emphasize the "autonomy" of the arbitration agreement and English and US law emphasize its "separateness", the purpose of the separability rule is the same: to safeguard an arbitral tribunal's jurisdiction by presumptively enforcing agreements to arbitrate when a container contract is alleged to be invalid. It operates the same way in France[79] and Quebec[80] as it does in Canada's common law jurisdictions.

Without a clear understanding of what French law and jurists mean by *autonomie*, it is easy to miss the fact that, under the French approach, separability is a subset of a comprehensive understanding of arbitration, in particular international arbitration, as an autonomous means for parties to resolve their disputes. In other words, it is easy to misunderstand separability as requiring that arbitration clauses are fully "autonomous" from their container contracts.

This conflation has, perhaps, even found its way into Quebec's Civil Code.[81] And this might even explain why Justice Côté, a practicing lawyer in Quebec before being named to the

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[78] *Ibid* at 225—229.

[79] The classic case from France is Cass civ 1 e, 7 May 1963, *Ets Raymond Gosset c Carapelli*, [1963] JCP G II 13. Art 1447 C proc civ (updated in 2011) supports the separability presumption by explaining "[t]he arbitration agreement is independent from the contract to which it relates. It shall not be affected if such contract is void."

[80] *Imprimerie Régionale ARL Ltée c Ghanotakis*, 2004 CanLII 23270 (QC CS) (The unenforceability of a container contract because of a liquidation does not affect the enforceability of an arbitration clause within it, owing to art 2642 CCQ).

[81] *Civil Code of Québec*, CQLR c CCQ-1991.

SCC,[82] expanded separability as she did in *Uber*. The following provision from Quebec's Civil Code codifies Quebec's separability rule:

> **2642.** An arbitration agreement contained in a contract **is considered to be an agreement separate from the other clauses of the contract** ***and*** where the arbitrators find the contract to be null, the arbitration agreement is not for that reason rendered null. 1991, c. 64, a. 2642; I.N. 2014-05-01.[83]

While it is beyond this essay to delve deeply into this provision's history,[84] it is worth noting that the placement of the conjunction 'and' within Article 2642 allows for ambiguity. Is the word 'and' intended to separate the two clauses, or is it intended to coordinate them? Put differently, does this provision speak of a single separability principle or two distinct principles, a general principle that "An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract", and a specific principle that, "where the arbitrators find the contract to be null, the arbitration agreement is not for that reason rendered null." If Article 2642 is interpreted to create two independent principles, perhaps Quebec has adopted a distorted view of separability.

In this writer's view, although Article 2642 does not perfectly mirror the ULCC phrasing, the better approach is to

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[82] Justice Côté was appointed directly from Quebec private law practice, December 1, 2014. See "The Honourable Suzanne Côté at" (4 March 2015), online: *Supreme Court of Canada* <www.scc-csc.ca/judges-juges/bio-eng.aspx?id=suzanne-cote>.

[83] Art 2642 CCQ [emphasis added].

[84] On the drafting history of this provision, see Quebec, Ministère de la justice, *Commentaires du ministre de la justice: Le Code civil du Québec*, vol II (Quebec: Publications du Québec, 1993) at 1651. See also *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at paras 148, 174.

read it as reflecting the presumption of separability set out by the ULCC and in the UNCITRAL Model Law. The second half of Article 2642 speaks of "arbitrators", who, if they find that the main contract is null, should not assume that this leads inexorably to a finding that the arbitration agreement null. This formulation closely tracks separability as a presumption and not a rule creating two distinct contracts. Indeed, Quebec courts that have interpreted this provision have treated separability as a presumption.[85]

Regardless, even if we accept that Quebec deliberately adopted a view different from the correct approach to separability, [86] Quebec law did not apply in either *Uber* or *Petrowest*. While a province may draft its legislation any way it chooses, decision-makers may not graft idiosyncratic views of separability onto a legal framework that does not adopt such a view.

What is more, and with the utmost respect to both Justice Grauer and Justice Côté, given that they relied on sources that adopt the correct separability rule (that of a presumption), if they did intend to adopt a different approach to separability, they ought to have made it clear that they were moving away from the approach advocated by the very sources on which they relied. More likely, in this writer's opinion, Justice Grauer and Justice Côté did not intend to introduce a new rule. They simply misunderstood the separability doctrine.

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[85] *Imprimerie Régionale ARL Ltée c Ghanotakis*, 2004 CanLII 23270 (QC CS), *supra* note 55; *9101-0983 Québec inc c 9051-4076 Québec inc*, 2012 QCCS 724 (art 2642 CCQ establishes that the arbitration agreement is distinct from the container contract, and it does not matter whether the container contract has ended. The jurisdiction to decide remains subject to the arbitration mechanism provided for in the arbitration clause).

[86] Which it is well within its constitutional right to do, see *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92(13)—(14).

VII. CONCLUSION

The separability doctrine serves an essential purpose in arbitration. To function properly, it requires precise and consistent application. Unfortunately, the *Petrowest* decision accomplishes neither precision nor consistency. Instead, by treating separability as a rule rather than a presumption, it risks upsetting years of jurisprudence, party expectations, and a uniform approach to arbitration both domestically and internationally. Now that the Supreme Court of Canada has granted leave to appeal, it should prevent these mistaken conceptions of separability from further infiltrating our jurisprudence.