The principle of the Arbitration Agreement independence from the original contract, And its application in international trade disputes -A contractive study-

مبدأ إستقلال إتفاق التحكيم عن العقد الأصلي ، و تطبيقاته في منازعات التجارة الدولية - دراسة تحليلية مقارنة -

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abstract:

The arbitration agreement represents the entire constitution of the arbitration process, which determines the principle of arbitration and determines the conduct of its procedures. The arbitration agreement may be under a contract concluded after the dispute between the parties, without the agreement mentioned in a document independent of the original contract, which represents the legal relationship between the parties after the outbreak of the dispute, and the arbitration agreement may be made under a clause placed in the original contract whereby the dispute is resolved. Which may subsequently arise between the parties through arbitration.

Once the legal requirements for the validity of the arbitration agreement are met, the question is often raised about the extent to which agreement relates to the original contract and its impact on it in terms of the relevance of the arbitration agreement in terms of the existence and non-existence of the original contract. There is no doubt that it is the close relationship between the arbitration agreement and the original contract in the settlement of the resulting international trade disputes that may lead one of the parties to the dispute to uphold the nullity of the agreement.

Based on the above, an important legal principle has been established in the field of international trade, represented in the principle of the independence of the arbitration agreement from the original contract, which

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has become a stable principle in international commercial arbitration, which would achieve the effectiveness of the arbitration agreement within the framework of the settlement of international trade disputes and make it immune. For every infection that may be caused by the nullity of the original contract, which the arbitration agreement is contained in one of its clauses.

Keywords: international commercial arbitration, The arbitration agreement, original contract, international trade.

ملخص:

يمثل إتفاق التحكيم دستور العملية التحكيمية برمتها ، فهو الذي يقرر مبدأ اللجوء إلى التحكيم ، و يحدد سير إجراءاته . و قد يكون إتفاق التحكيم بموجب عقد يتم إبرامه بعد نشوب النزاع بين الأطراف ، فيدون الإتفاق المذكور في وثيقة مستقلة عن العقد الأصلي الذي يمثل العلاقة القانونية التي تربط الأطراف بعد نشوب النزاع ، و قد يتم إتفاق التحكيم بموجب شرط يوضع في العقد الأصلي يصار بمقتضاه إلى حسم النزاع الذي قد ينشأ فيما بعد بين الأطراف عن طريق التحكيم.

فمتى توافرت الشروط القانونية اللازمة لصحة إتفاق التحكيم ، فإنه غالبا ما يطرح الإشكال حول حدود إرتباط هذا الإتفاق بالعقد الأصلي الذي تضمنه و مدى تأثره به من حيث إرتباط مصير إتفاق التحكيم وجودا و عدما بمصير العقد الأصلي. فلاشك أن العلاقة الوثيقة التي تربط إتفاق التحكيم بالعقد الأصلي في تسوية منازعات التجارة الدولية الناشئة عنه ، هي التي قد تدفع أحد أطراف النزاع إلى التمسك ببطلان الإتفاق .

و تأسيسا على ما سبق ، فقد تقرر مبدأ قانوني هام في حقل التجارة الدولية ، يتمثل في مبدأ إستقلالية إتفاق التحكيم عن العقد الأصلي ، الذي أضحى من المبادئ المستقرة في التحكيم التجاري الدولي الذي من شأنه أن يحقق فعالية إتفاق التحكيم في إطار تسوية منازعات التجارة الدولية و يجعله بمنأى عن كل عدوى قد تلحقه من جراء بطلان العقد الأصلي الذي ورد إتفاق التحكيم ضمن أحد بنوده.

الكلمات المفتاحية: التحكيم التجاري الدولي ، إتفاق التحكيم ، العقد الأصلي ، التجارة الدولية .

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Introduction:

At present, the international commercial arbitration system has become the most important means by which economic operators settle their disputes arising from their transactions, rather than the national jurisdiction of the States with general jurisdiction over disputes, given the flexibility and speed of this system In addition to the vast freedom having by the parties under this system, which is not achieved under the national jurisdiction.

The arbitration agreement is the starting point and the cornerstone of the arbitration process; is a contract made by the parties to the dispute, which is a manifestation of their authority. It is also the constitution of arbitration, the source of the arbitrators' authorities, Which prevents the jurisdiction of the national courts to deal with the dispute in arbitration' issue, provided that it is arbitral and incompatible with public order[1], where the dispute parties have to achieve a certain legal effect, This effect is to stop them presenting their dispute to the national judiciary, and to present it to special arbitral tribunal for adjudication. Accordingly, the arbitration agreement establishes the principle of recourse to arbitration and specifies its procedures.

Generally, the arbitration agreement means the agreement of the parties to resort to arbitration to settle disputes that arose or could arise between them in connection with a specific legal relationship, whether contractual or non-contractual, to be decided by a final and obligatory judgment, away from the originally competent court to consider Dispute[2].

In case, the arbitration agreement based on all conditions so, is it possible that it may be affected after the outbreak of the original contract Incoming and associated with it?

The issue of the arbitration agreement is related to the original contract often arises; the contract agreed to settle the dispute in which the arbitration is raised may be voided or annulled. Does this affect the validity of the arbitration agreement? What is its fate? Is the fate of the arbitration agreement linked directly with the fate of the original contract? In other words, if the original contract is annulled, will the arbitration clause in the contract be nullified? And if the original contract is annulled, does the arbitration clause retire with it? Contrary, if the arbitration agreement is void, does this affect the validity of the original contract?

The strong relationship that binds the arbitration agreement to the original contract in settling the arising disputes is leads one of the parties to the dispute to adhere to the agreement's nullity in this case, and if the

nullity decided there is no dispute that the arbitration agreement will lose all its effectiveness, even though it was originally stated correctly[3].

And for that, an important juridical Principe acquired by the international arbitration agreement has been decided, and it has become one of the established principles in international commercial arbitration, which is considered as immunity that saves it from crisis as a result of contract's nullity or failing , this principle is "Principle of separability of the arbitration clause from the initial contract", it considered the cornerstone and the basis for achieving full effectiveness of arbitration spending. In order to clarify this principle more, the study based on comparative analytical method, since the research topic needs to define the relevant concepts by analyzing the various jurisprudential opinions and legal texts. It is related to international trade transactions; it has a great attention of national and international legislations.

This study depends on studying and analysis; it consists of two main points and other sub-points:

First: What is the Principle of separability of the arbitration clause from the initial contract?

Secondly: The position of jurisprudence, the judiciary, comparative national legislation, and international agreements on this principle.

The First Topic

What is the Principle of separability of the arbitration clause from the initial contract?

The Principle of separability of the arbitration clause from the initial contract is one of the principles currently established in the framework of the legislation governing international commercial arbitration, as this independence is derived from the different subject matter of each of the two contracts: the original contract and the arbitration agreement. The arbitration agreement is a contract that responds to the procedures, and does not aim to define the rights and Obligations of the parties' subject matter. Rather, it focused on settling disputes arising from the substantive conditions contained in the original contract. As a result , the agreement on arbitration is not just a condition contained in the original contract, but rather is another contract of a different nature from the original contract, it is a second contract even if is financially incorporated into the original contract[4].

The First Requirement
The conceptual framework of the Principle of separability of the arbitration clause from the initial contract.

The Principle of separability of the arbitration clause from the initial contract means the fate of arbitration agreement is not linked to the fate of original contract's contents whether the contract was void or null, which remains independent contract that has special aspects[5].

Some jurisprudence[6] has defined it as: «The ability of this agreement to be separated and independent from the original contract, which means that the fate of the arbitration agreement is not related to the original contract, So it does not affect by nullity. The arbitration agreement independence from the original contract means looking at the arbitration agreement as a stand-alone contract even though it is only part of this contract or one of its clauses».

The recognized independence of the arbitration agreement from the original contract is considered as a mutual independence[7], may the original contract be valid, while the arbitration agreement is void due to a self-defect in it, so the contract remains valid[8].

First: The emergence of the principle of the independence of the arbitration agreement from the original contract.

The Dutch judiciary is the first who decide the principle of the independence of the international arbitration agreement from the original contract, when the Dutch court on December 27th , 1935 issued a ruling stating that in case of a dispute by the parties about the validity or nullity of the contract, this does not prevent the arbitrator's jurisdiction to settle the dispute, Despite the possibility that the contract contained in the arbitration clause is not valid. Then, the judicial rulings issued in this regard in various countries. On 05/14/1952, the German judiciary issued a ruling stating that the fate of the arbitration clause is completely separate from the fate of the contract contents, and this is what the Italian judiciary decided in the judgment issued by the Italian Court of Cassation. On: 01/12/1959[9].

The French judiciary was affected by these provisions, so it also issued a ruling requiring the independence of the arbitration clause from the original contract on 07/05/1963, in a famous case known as GOSSET[10], was an issuance of an arbitration ruling in Italy requiring a French importer called GOSSET to pay compensation in favor of an Italian exporter, the French party had contracted with him to import a quantity of seeds, and he did not implement his contractual obligations. And upon requesting the implementation of the arbitration award in France, the French party pushed

to reject the execution order based on the nullity of the arbitration clause contained in the contract, since the original contract that included the arbitration clause was absolutely null and void for its violation of the peremptory rules in French law that regulate export and import operations. However, the French Court of Cassation rejected this argument, and issued a ruling that establishes the principle of the independence of the arbitration agreement from the original contract, as it was stated in the ruling: "In the field of international arbitration, the arbitration agreement, whether concluded separately from the legal disposition, or including it, always represents - except Exceptional cases - complete legal independence, which excludes the possibility that it will be affected by the possible invalidity of this behavior[11].

The principle of the independence of the arbitration agreement from the original contract spreads later in many judicial rulings, until it became a global stable principle stipulated in most comparative national legislations.

Second: The importance of the principle of the independence of the arbitration agreement from the original contract.

The importance of adopting the principle of the independence of the arbitration agreement from the original contract - in particular - appears when considering a lawsuit for the nullity of the arbitration Judgment. In case, one of the parties argued before the arbitration tribunal that it lacked its competence in looking into the dispute due to the arbitration's cancellation, because the original contract had been cancelled. The arbitral tribunal will decide to reply, due to the independence of the arbitration agreement, even if the original contract is canceled, and then the arbitration Judgment will not be void on the pretext of nullifying the arbitration clause[12].

Third: The legal basis for the principle of the independence of the arbitration agreement from the original contract.

The principle of the independence of the arbitration agreement from the original contract can be based on some legal foundations, which are summarized as follows:

1. The idea of the principle of the independence of the arbitration agreement from the original contract can be based on a general rule in civil law, which is the "The Incomplete Act Theory", it assumes that the original contract is not completely void, but rather in part, so the void part is removed and the correct[13] part remains. According to this theory, if the original contract that included the arbitration clause is void, it remains valid

if their conditions are available; it represents an independent agreement. On the contrary, if the arbitration clause is void and the original contract is valid, then the original contract remains and only the arbitration clause is null without affecting the original contract[14].

2. The arbitration agreement differs from the original contract in terms of the cause and subject, so the reason for the arbitration agreement is the desire of the parties to take away the jurisdiction to consider the dispute from the state's national judiciary and grant it to the arbitration award, and its subject matter is the settlement of the dispute between the parties. As for the reason for the original contract is the contracting motivation and its subject is the regulation of the rights and legal positions of the parties[15].

3. Additionally, there is a practical consideration represented in the desire to achieve speed and gain time in the course of the procedures by implementing the principle of the independence of the arbitration agreement from the original contract, so that the arbitral tribunal can settle the dispute without stopping the progress of the arbitration case until the national judiciary is dismissed. In the validity of the original contract.

The Second Requirement
Conditions for implementing the principle of the independence of the arbitration agreement from the original contract, and their consequences.

National and international legislations, in addition to contemporary international jurisprudence, specifies a set of conditions that must be met in order to be able to implement the principle of the independence of the arbitration agreement from the original contract, including what belongs to the arbitration agreement itself, and some of it belongs to its parties.

In addition, the implementation of this principle entails many important consequences according to which the fate of both the arbitration agreement and the original contract contained in it is determined in the event that one of them is null.

First: Conditions for implementing the principle of the independence of the arbitration agreement from the original contract.

The independence of the arbitration agreement from the original contract has two basic conditions:

The first: the arbitration agreement should be concluded correctly, includes all the existence elements, the validity conditions, satisfaction, eligibility, place and reason, otherwise there is no reason for the application of the principle of independence[16], because the goal of implementing the principle of independence is to protect the existence of the Correct arbitration agreement, and make it free from any defect that may be attached to the original contract. Therefore, it is not intended to make the invalid arbitration agreement independent until it becomes valid[17].

The Second: the parties have not agreed that the arbitration agreement is an integral part of the original contract. In case of the agreement existence, the desire of the parties must be respected, and then the principle of the independence of the arbitration agreement from the original contract must not be applied[18].

Second: The consequences of implementing the principle of the independence of the arbitration agreement from the original contract.

The implementation of the principle of the independence of the arbitration agreement from the original contract has two important consequences that flow directly, and due to logical considerations: first: the fate of the arbitration agreement is not related to the fate of the original contract. The second: the possibility that the arbitration agreement may undergo to other law but not the one which underwent the original contract.

In addition to these two direct results, the implementation of this principle entails another indirect result, which is the principle of the arbitrator's independence by deciding on the issue of jurisdiction, which is known as the principle of specialization. The results will be discussed later.

I. That the fate of the arbitration agreement is not related to the fate of the original contract.

One of the most important and first direct consequences of implementing the principle of the independence of the arbitration agreement from the original contract is that their fates are not related. The arbitration agreement, as a contract within another contract, has independent and distinct character from the original contract that makes it free from being affected by the defects that may befall the original contract that may lead to its nullity[19], the termination or its expiration, meaning that the existence, validity of the arbitration agreement does not depend on or affected by the fate of the original contract. The claim that the original contract was not concluded properly or was void or canceled does not

apply to the arbitration agreement as long as the latter was true[20], because the principle of independence makes it safe from the effects of nullity or annulment that may affect the original contract, as long as, the agreement had not affected by any defect in the original contract. Therefore, the nullity of the original contract or the arbitration agreement does not affect the validity or the invalidity of the other contract[21].

II.The possibility of that the arbitration agreement undergoes to other law than the original contract is undergoing.

The implementation of the principle of the independence of the arbitration agreement from the original contract leads to refuse the same legal rules that govern the original contract, Therefore; the parties may submit the arbitration agreement to a different legal rule that govern the original contract, because the arbitration agreement is an independent part of the original contract[22].

The parties according to the arbitration agreement can oblige the arbitral tribunal to apply the procedural law stipulated in the agreement, especially in the form of the arbitration clause included in international contracts regarding certain disputes, even if the national law prohibits the arbitration clause regarding these Disputes[23].

The French judiciary has presented many examples that confirm the validity and logic of this result of the principle of independence, which stipulates that the arbitration agreement is not governed by the same law that governs the original contract:

The Paris Court of Appeal went to the judiciary that: «The implementation of the arbitration agreement is not necessarily subject to the law to which the original contract is subject, in which the arbitration agreement exists»[24].

It decided on: 21/10/1983 rejecting the invalidity of the arbitration award based on the fact that the arbitration tribunal did not apply the jurisdiction's separation, the law governing the original contract[25].

The English judiciary confirmed this result in 1987, when the London Court of Appeal refused to argue that the arbitration agreement was invalid as it was contrary to the law chosen by the parties to rule the contract, and the court decided that the arbitration is an independent contract of the original one, and not necessarily subject to the same applicable law, as a result another law was applicated; it considered the country in which the arbitration agreement was issued[26].

III. The principle of the arbitrator's independence of the specialization issue (the principle of specialization).

The implementation of the principle of the independence of the arbitration agreement from the original contract gives the arbitrator the authority to consider their specialization**,** which is known as " **the principle of specialization** ", it grants the arbitration board the authority to decide on the separation of specialization to consider the presented dispute, so to decide whether or not it is specialized according to the dispute presented by one of the parties to the arbitration agreement[27].

Thus, the arbitrator continues the arbitration procedures and he is the one who decides whether or not they are specialized according to the dispute presented, even if the validity of the original contract is appealed before the courts, or the validity of the arbitration agreement is contested, the issue consideration by the courts do not impede the arbitration procedures before the jury[28].

The specialization's principle has become one of the basic rules established in arbitration laws, and one of the principles of arbitration agreement from the original contract. it is the first and basic building part that allows the arbitrator to decide on the issue of specialization, it eliminates any direct influence on the arbitration agreement, and thus on the arbitrator's specialization to consider the dispute[29].

This principle finds an application in the Arbitration Rules of the International Chamber of Commerce that gives the arbitrator the authority to make a decision on the specialization determination to judge the dispute[30].

The second Topic
The position of jurisprudence, the judiciary, comparative national laws, and international agreements from the arbitration independence agreement principle from the original contract.

The principle of the independence of the arbitration agreement from the original contract was studied and analyzed according to the position of jurisprudence, the judiciary, comparative national laws, and international agreements.

The first requirement
The position of jurisprudence and comparative judiciary

<u>First:</u> the position of jurisprudence.

The issue of the independence of the arbitration agreement from the original contract raised a major jurisprudential controversy before the stabilization of national legislation and international agreements on this principle. The jurisprudence's views on this issue varied between supporters and opponents of this principle:

• A group of jurisprudence[31] disagree the idea of the arbitration agreement being independent from the original contract, considering that the arbitration agreement is null when one of the litigants insists on the nullity of the contract included in the arbitration clause. Also, the arbitrator does not authorize the authority to consider the nullity or annulment of the contract, but rather suspended the arbitration proceedings, until a court ruling is issued by the competent judicial courts determining the validity or invalidity of the original contract[32].

The Professor Schmitthoff said: «The arbitration clause – in case of nullity of the original contract - is like a part of it, so the nullity withdraws to it, as well as the arbitrator's lack of jurisdiction to decide the issue, because he derives his authority from the arbitration clause that is part of the contract that it included«[33].

• In the other hand, another aspect of jurisprudence[34] consents the necessity of the arbitration agreement being independent from the original contract, despite the provision of arbitration in it, as it is an independent legal act even if it is included in this contract. The arbitration panel is also competent to examine the issue of validity or invalidity of the original contract.

• In the other hand, another aspect of jurisprudence[35] consents the necessity of the arbitration agreement being independent from the original contract should applied in case of the original contract nullity, as a result of abuse and unfairness ; the defects lead to nullify the arbitration agreement by dependency, such as coercion, the arbitration agreement is nullified because of this defect, and it also results in the nullity of the original contract, because coercion is placed on the person of the contracting party.

The principle of independence of the arbitration agreement is applied in case, there is a mistake on the document of original contract or the value of the thing contracted, because the subject matter of the arbitration agreement differs from the place of the original contract. But if the defect of the mistake is contained in the contracting person in the original contract or on his characteristic of his characteristics, then the error here extends its effect to the arbitration agreement, and this may take him out of the principle of the independence of the arbitration agreement.

This jurisprudential debate has ceased due to the development of legal thought and the stability of most national legislation, international treaties and arbitration regulations to implement the principle of the independence of the arbitration agreement from the original contract and use it in text.

Second: The position of the comparative judiciary.

The national judiciary - in various countries - took the lead in determining the principle of the independence of the arbitration agreement from the original contract[36], until it was confirmed by many recent judicial rulings, which had a prominent role in developing this principle, especially in the area of international commercial relations.

I. The position of the French judiciary:

The French judiciary established the principle of the independence of the arbitration agreement from the original contract according to the judgment issued by the French Court of Cassation on 07/05/1963, in the famous case known as the "GOSSET" mentioned before, in which the court confirmed the independence of the arbitration agreement from the original contract that contained it. Independently, it prevents this agreement from being affected by the incorrectness of the contract. After that, the rulings issued by the French judiciary in this regard, confirming this principle in several judgments:

• In the judgment issued on 17/05/1971 in the IMPEX[37] case, the French Court of Cassation went on to affirm the principle of the independence of the arbitration agreement without any restrictions, as the court decided to uphold the judgment issued by the trial judge regarding the consideration of the arbitration agreement as an independent agreement legally according to the French private international law[38].

• The Toulouse Court of Appeal also decided a judgment issued on26/10/ 1982, the principle of the independence of the arbitration agreement from the original contract, and indicated that is the direction of the modern judiciary[39].

• The judgment issued by the Paris Court of Appeal on 17/12/1991, it decided that the principle of independence of the arbitration agreement has a general application as an international material rule that guarantees the validity of the agreement apart from the conflict of laws system.

• The judgment issued on 20/12/1993 in the case known as the DALICO, the French Court of Cassation agrees that the principle of the independence of the arbitration agreement from the original contract means estimating the existence and effectiveness of the agreement according to the mutual resolve of the parties, without it being necessary to refer to any Country law[40].

II.The position of the English judiciary:

After the English judiciary had decided to subordinate the arbitration agreement to the original contract, it recently settled on the principle of the

independence of the arbitration agreement from the original contract, as the judiciary in England settled on: «The necessity of distinguishing between what is known as the basic obligations that fall on the parties, and the legal obligations related to the basic obligations And that the breach of the contract results in the termination of the parties 'basic obligations. However, this does not result in the termination of the legal obligations, including the arbitration clause, then the arbitration clause remains valid and effective, and is used to determine the violations and estimate the necessary compensation»[41].

III.The position of the Egyptian judiciary:

The Egyptian judiciary initially approved the principle of the independence of the arbitration agreement from the original contract, but it did not explicitly use the phrase "the independence of the arbitration agreement from the original contract," but it endorsed the principle implicitly, as the Egyptian Court of Cassation ruled the validity of the arbitration clause despite not naming the arbitrators. Contrary to what was required by Article 502 of pleadings before its cancellation, it was necessary to appoint the names of the arbitrators[42].

In a remarkable development of the Egyptian judiciary's position on the principle, the Egyptian Court of Cassation explicitly approved this principle in judgment issued on 23/01/1995, saying: "the arbitration agreement, whether it is separate in an arbitration stipulation or in a clause in the original contract, it has a legal independence, so it becomes free from any defects that may befall the original agreement that would result in its cancellation or nullity, considering the implementation of the provisions stipulated in the conditions as long as it is true[43].

Then the Egyptian courts explicitly approved this principle, such as : the judgment issued by the Cairo Appeals Court, district 91, in Case No. 87 of 2003 in the session of 29/04/2003, where the judgment stated: «Whereas, regarding the defense of the nullity of the arbitration judgment because it breaking the Articles of Association ... so is not acceptable because of the established independence of the arbitration clause from the terms of the agreement contract ..... »[44].

The second requirement
The position of comparative national legislation and international agreements.

<u>First:</u> the position of comparative national laws.

The vast majority of modern national laws relating to arbitration explicitly stipulate the principle of the independence of the arbitration

agreement from the original contract[45], including French law, Egyptian law and Algerian law.

I. The position of French law.

The French legislator emphasized the independent nature of the arbitration agreement in relation to the rest of the original contract clauses, as Article 1447 of Decree No. 48 of 2011 stipulated that the arbitration agreement is independent of the contract associated with it, so it is not affected by the nullity or the ineffectiveness of this contract, even if the effectiveness has arisen from the absence, nullity, termination or annulment of the original contract[46], which is what the French judiciary settled on in light of the ancient texts.

The main objective of the French legislator's report on this principle is to ensure the greatest effectiveness of the arbitration agreement[47].

II.The position of Egyptian law.

The Egyptian legislator affirmed the principle of the independence of the arbitration agreement from the original contract in the Article 23 of the Egyptian Arbitration Law No. 27 of 1994, stating: "The arbitration clause is an agreement independent from the other terms of the contract, and the nullity, termination or termination of the contract shall have no effect On the arbitration clause that it contains if this condition is true ". Thus, the Egyptian legislator has explicitly affirmed the independence of the arbitration agreement, which means that this agreement is considered stand-alone despite it being one of the terms of the original contract[48].

It is noticeable that this text tackled about the independence of the arbitration clause from the original contract in the case of the nullity of the original contract, the survival of the arbitration clause valid, and it did not talk about the independence of the arbitration clause in the case of the nullity of the arbitration clause itself, and the extent of this impact on the original contract[49].

III.The position of Algerian law.

The Algerian legislator followed various national laws related to arbitration, as it emphasized the principle of the independence of the international commercial arbitration agreement from the original contract, in the beginning of legislative decree 93/09, when the last paragraph of Article 458 bis 1 stipulated that: "It is not possible to argue that the Arbitration agreement is incorrect because the basic contract may be invalid.

The Algerian legislator has talked about the case of the nullity of the original contract, and the validity of the arbitration agreement, without

dealing with the contradictory case in which the original contract is valid and the arbitration agreement is canceled, and the extent to which this affects the original contract.

It tackled also touched the issue of the independence of the arbitration agreement in the field of international commercial arbitration, but not the internal arbitration field, as no text was mentioned in the Law 09/08 indicating the adoption of this principle in the field of internal arbitration.

Therefore, the Algerian legislator must intervene to take a decisive decision towards the principle of the independence of the arbitration agreement from the original contract in the field of internal arbitration, as long as it differentiates between internal arbitration and international arbitration.

Second: The position of international agreements.

I.The position of the New York Convention of 1958.

The New York Convention did not tackle about the Recognition and Implementation of Foreign Arbitration judgments of 1958 ; did not include any text explicitly referring to the principle of the independence of the arbitration agreement from the original contract, but some jurisprudence[50] said: this agreement has adopted this principle implicitly, based on the text of Article two of the agreement in its third paragraph[51], which requires member states to recognize the written arbitration agreement, and to prevent their courts from examining disputes in which the parties have agreed to resort to arbitration, and brought them to the arbitration judiciary for adjudication. According to this jurisprudence, Article Two of the New York Convention of 1958, even if it has not explicitly been exposed to the principle of independence of the arbitration agreement and the various legal consequences of this principle, but it has given it a new power, since the international obligatory recognition of this agreement in the form of a unified organization, so it is possible to consider the principle that was originally established in the French judiciary, which is the principle of the independence of the arbitration agreement, correct international rule[52].

However, this jurisprudential trend has been severely criticized by some jurisprudence, as they categorically refuse to consider Article 2 of the New York Convention of 1958 as a legal basis for this principle, and they consider the interpretation of this article in this logic to be an exaggerated interpretation, which makes it unreal, and makes more pressure on the text, since this agreement did not contain any statement regarding the issue of the independence of the arbitration agreement from the original contract,

and it was not affected by what might be attached to the latter of the reasons for nullity or annulment[53].

Another aspect of jurisprudence[54] said: the principle can be extracted from the text of Article 5/1-A of the New York Convention[55], since the latter recognizes the possibility of subjecting the arbitration agreement to another law that differs from the law that applies to the original contract, so the agreement would have implicitly accepted the recognition of the arbitration agreement's autonomy and the independence from the original contract, and thus it is an acceptance of the principle of the independence of the arbitration agreement[56].

However, this opinion was criticized , as the interpretation of the text of Article 5 of the New York Convention as previously stated, is an unconvincing explanation, as this text relates to cases of refusing to recognize or implement the arbitration judgment ; if it has been exposed to the issue of law The duty to apply to the arbitration agreement is a natural issue, because the arbitration agreement represents the essence of the arbitration process, therefore the basis of the arbitration judgment, except it did not include any statement regarding the law governing the original contract, so it can be said that the New York Convention has approved the principle of the independence of the arbitration agreement from The original contract[57].

Despite these criticisms to jurisprudential trend; the New York Convention of 1958 implicitly adopted the principle of the independence of the arbitration agreement from the original contract, in Article 5 of the agreement, even though the agreement did not explicitly state this principle. However, citing any indication of its acceptance of this principle is of great importance in determining the agreement's position on the principle of the independence of the arbitration agreement, especially since this principle is consistent with the goal for which this agreement was concluded and does not contradict it.

II.Position of the European Convention on International Commercial Arbitration of 1961.

The European Convention did not include the International Commercial Arbitration of 1961 also any text that explicitly states the principle of the independence of the arbitration agreement from the original contract, but it explicitly approved the most important consequences of this principle, which is the issue of the arbitrators 'competence to decide on their jurisdiction, as Article 5/3 From this agreement[58], the arbitrator has the authority to decide to his specialty regarding the existence or validity of

the arbitration agreement, or the contract that the arbitration agreement is part of, which some jurisprudence consider an explicit reference from the agreement to the principle of the arbitrator's specialty to decide on his jurisdiction (the principle of specialization).Accordingly, this agreement has enshrined the principle of the independence of the arbitration agreement explicitly and not implicitly[59], by stating that the arbitrator has the authority to decide the existence or validity of the arbitration agreement or the included contract , which means that the existence or validity of both of them is assessed on Towards independent.

III.Position of the Model Law on International Commercial Arbitration of 1985.

Contrary to the aforementioned agreements, the Model Law of International Commercial Arbitration of 1985 has explicitly stipulated the principle of the independence of the arbitration agreement from the original contract, it was stipulated in 16/1 that: «The arbitration committee may broadcast in its jurisdiction, including Broadcasting any objections related to the existence or validity of the arbitration agreement, and for this purpose the arbitration clause that forms part of the contract is viewed as if it was an agreement independent of the other terms of the contract, and any decision issued by the arbitration panel to invalidate the contract does not result in the nullity of the arbitration clause».

Finally, it should be noted that the 1965 Washington Convention on settlement of Investment disputes did not contain any provision expressly or implicitly recognizing the principle of the independence of the arbitration agreement from the original contract.

Third: The principle of the independence of the arbitration agreement from the original contract in the international commercial arbitration tribunal should be enshrined.

I. The establishing of the principle of the independence of the arbitration agreement in the regulations of international arbitration centers.

Arbitration is often agreed by the parties to the dispute in accordance with the rules of a permanent international arbitration center, in accordance with the principle of the power of will. But even if the parties are referred under the will to these international regimes, there is still a margin for the parties to modify those regimes. If the law applicable to arbitration does not distinguish between the arbitration agreement and the original contract, the power of will remains able to differentiate between them[60].

Among the permanent arbitration centers that enshrine the principle of the independence of the arbitration agreement from the original contract are:

- The Arbitration Center of the International Chamber of Commerce (ICC) in Paris, where the system of reconciliation and arbitration in the Chamber of Commerce in force from January 1st , 1988, provided that:« unless otherwise agreed. The claim that the contract is invalid or that it is not null and void shall not result in the arbitrator's failure to exercise jurisdiction if the arbitration agreement is deemed to be valid. The arbitrator shall not remain competent, even in the absence of the contract itself or its invalidity, to determine the rights of the parties and to determine their claims and requests. Neither the invalidity of the original contract nor the absence of the arbitrators' jurisdiction nor the invalidity or absence of an arbitration agreement »[61].
- The rules governing the Cairo Regional Center for International Commercial Arbitration in article 21/2 provide for the principle of the independence of the arbitration agreement, which reads as follows:«....the arbitration clause which is part of the contract shall be treated as an agreement separate from the other terms of the contract. Any award made by the arbitral tribunal for the invalidity of the contract does not, by law, invalidity of the arbitration clause»[62].

II. Application of the principle of the independence of the arbitration agreement in the jurisdiction of international arbitral tribunals.

Many of the arbitration provisions of international arbitral tribunals adopted the principle of the independence of the arbitration agreement from the original contract[63] as a general principle, without the need to rely on this recognition of any particular national law, which has contributed greatly to the international enshrining of this principle.

- These include the three judgments of the arbitral tribunals that have considered disputes between the Libyan government and some foreign petroleum companies that have contracted it on oil contracts[64], following the adoption of nationalization measures by the Libyan government. These arbitral tribunals applied the principle of the independence of the arbitration agreement in the three cases, considering that the arbitration agreement remains independent and in force, despite the Libyan

government's termination of concession contracts concluded between them and between these companies through nationalization vn,, that included a arbitration clause[65].

- The principle is also embodied in the arbitral award of the dispute between a foreign company and the Algerian company Sonatrach. The facts of the case are as follows:

On 12 April 1974, Sonatrach entered into a four-year contract with a foreign company on the exploitation of fuels, which included an arbitration clause, article 24 of which stipulates that :« in the event of disagreement in the execution of the contract and in the absence of a friendly settlement. The parties are obliged to submit the dispute to arbitration at the Chamber of Commerce of Zurich». The original contract was subject to several modifications under supplements concluded respectively:

Annex I, 16/04/1974.

Annex II, 06/01/1975.

Annex III, 03/09/1975.

Annex IV, 13/10/1976.

And annex V, 25/06/1978 The first article of this article stipulates that:« according to this supplement, Sonatrach and the foreign company have agreed in a friendly and friendly way to suspend the original contract of 12/04/1974 and all its related supplements." Article 2 of this annex stipulates that:« We also agree that neither side will follow each other because of article 1, in connection with any protest, whatever its form is punitive or non-contractual."

However, on 02/06/1986, the foreign company filed an arbitration action against Sonatrach to the arbitral tribunal referred to in the original contract, thereby violating the provisions of Annex V, in particular Article II. From him, supporting her claim by:

1. Based on the original contract, it is argued that the arbitration clause contained therein is entirely independant of it, and thus its consensual dissolution does not lead to the termination of this clause.

The response of the Algerian side in its defense is as follows:

1. The jurisdiction of the arbitral tribunal is incompetent, since the original contract has been terminated by consent, and since the arbitration clause is a contract clause, it is not the absence of the contract contained in it[66].

2. In reserve, the request for arbitration should not be accepted, as the parties have an obligation, in accordance with the text of article II of Annex V, not to follow up either party to the other, whatever the reason.
The arbitral tribunal issued a preliminary ruling in 1988, declaring its jurisdiction in the consideration of the dispute. It then addressed the question of the law applicable to the subject, and decided to apply Algerian law as the law chosen by the parties.
The arbitration authority was based on the text of article 111/1 of the Algerian Civil Code, which stipulates that**:« if the terms of the contract are clear, they should not be deviated from by their interpretation to recognize the will of the contractors**».
The arbitral tribunal also relied on the ambiguity of article 1 of annex V, allowing arbitrators to interpret it and to state that article 1 had put an end to the original contract, but without denying the arbitration agreement contained in article 24, which should be adapted as separate from the original contract[67].

It appears that the arbitral tribunal has interpreted the principle of the independence of the arbitration agreement so widely as to be arbitrary, the aim of which was to protect the interests of the foreign company, and how does it explain the filing of arbitral proceedings eight years after the dissolution of the original contract?[68] The arbitral tribunal had to rule that it had no jurisdiction. Even if its jurisdiction is judged, it must respect the will of the parties by sentencing the contract to be terminated and executing all its effects - including the arbitration clause - in accordance with Annex V of the original contract.

Conclusion.

Finally, it must be found that the principle of the independence of an arbitration agreement from the original contract has become a well-established principle in international commercial arbitration, enshrined in various comparative national legislation, international treaties, and the regulations of international arbitration centers. We do not lose sight of the close link between the principle of the independence of the arbitration agreement from the original contract and the principle of the control of the parties in the field of international trade, since the principle of the independence of the arbitration agreement aims at providing legal protection for the arbitration agreement in its existence and enhancing its effectiveness. This makes it a good tool to suit the evolving needs of international trade.

The Algerian legislature has followed various national arbitration laws, explicitly emphasizing the principle of the independence of the international commercial arbitration agreement from the original contract, beginning with Legislative Decree 93/09, after which the Algerian legislature enshrines this principle in the text of article 1040/4 of Law 08/09 which contains the Civil and Administrative procedures Act. However, the understanding of the Algerian legislature addressed the question of the independence of the arbitration agreement in the field of international commercial arbitration, without addressing it in the field of internal arbitration, as there was no provision in the areas of internal arbitration under law 08/09 which referred to the adoption of this principle in the field of internal arbitration. It is our view that the application of this principle should be generalized to d

Bibliography:

[1] See:

أحمد خليل ، قواعد التحكيم ، منشورات الحلبي الحقوقية ، بيروت ، 2003 ، ص 27 .

[2] See:

أحمد محمد عبد الصادق ، المرجع في التحكيم المصري و العربي و الدولي ، الطبعة السادسة ، دار القانون للإصدارات القانونية ، مصر ، 2014 ، ص 35.

[3] See:

عبد الباسط محمد عبد الواسع ، شرط التحكيم في عقد البيع التجاري الدولي، دراسة مقارنة ، دار الجامعة الجديدة للنشر و الوزيع ، الإسكندرية ، 2014 ، ص 331.

[4] See:

حفيظة السيد الحداد ، الموجز في النظرية العامة في التحكيم التجاري الدولي ، الطبعة الأولى ، منشورات الحلبي الحقوقية ، 2004 ، ص 119.

[5] See:

عز الدين عبد الله ، تنازع القوانين في مسائل التحكيم الدولي في مواد القانون الخاص ، مجلة العدالة ، السنة السادسة ، العدد التاسع عشر ، أبريل 1989، ص 79.

[6] See:

محمد مختار أحمد بريري ، التحكيم التجاري الدولي ، دار النهضة العربية ، القاهرة ، 1995 ، ص 68.

[7] See:

أحمد عبد الكريم سلامة ، قانون التحكيم التجاري الدولي و الداخلي ، تنظير و تطبيق مقارن ، دار النهضة العربية ، 2004 ، ص 493.

[8] See:

حفيظة السيد الحداد ، المرجع السابق ، ص 120.

[9] See in detail:

أحمد مخلوف ، إتفاق التحكيم كأسلوب لتسوية عقود التجارة الدولية (دراسة تحليلية تأصيلية) ، الطبعة الثانية ، دار النهضة العربية ، 2005 ، ص 118.

[10] Prior to that date, the French courts had considered the arbitration clause invalid if it appeared in a null and void contract.

[11] The provision reads as follows: « In the case of international arbitration, an arbitration agreement, whether concluded separately or included in the legal act to which it relates, shall, except in exceptional circumstances, always have complete legal autonomy, exclude that he may be affected by a possible invalidity of this act».

Court de cass, 7 May 1963, Gosset-JCP 1963, note Goldman Rev.Crit.Dip 1963, page 615.

Referred to in a book:

أحمد مخلوف ، المرجع السابق ، ص 119.

[12] See:

خالد ممدوح إبراهيم ، التحكيم الإلكتروني في عقود التجارة الدولية ، دار الفكر الجامعي ، 2008 ، ص 285.

[13] For more details on the contract detraction theory, see:

عبد الرزاق أحمد السنهوري ، الوسيط في شرح القانون المدني ، الجزء الأول ، مصادر الإلتزام ، الطبعة الثالثة ، دار النهضة العربية ، 1981 ، ص 658.

[14] See:

فوزي محمد سامي ، التحكيم التجاري الدولي ، دراسة مقارنة لأحكام التحكيم التجاري الدولي ، دار الثقافة للنشر و التوزيع ، 2010 ، ص 200.

[15].See:

أحمد إبراهيم عبد التواب ، إتفاق التحكيم و الدفوع المتعلقة به ، دار الجامعة الجديدة للنشر و التوزيع ، الإسكندرية ، 2009 ، ص 256-255.

See also:

أحمد عبد الكريم سلامة ، قانون التحكيم التجاري الدولي و الداخلي ، المرجع السابق ، ص 471.

[16] See:

أحمد إبراهيم عبد التواب ، إتفاق التحكيم و الدفوع المتعلقة به ، المرجع السابق ، ص 261.

[17] See:

محمد ماهر أبو العينين و عاطف محمد عبد اللطيف ، قضاء التحكيم ، دراسة تحليلية لاتجاهات الفقه و أحكام المحكمة الدستورية العليا و محكمة النقض و المحكمة الإدارية العليا و محكمة القضاء الإداري و محاكم الإستئناف في خصوص التحكيم الدولي و الداخلي ، الكتاب الأول ، بدون دار نشر ، 2010 ، ص 516.

[18] See:

باسمة لطفي دباس ، شرط إتفاق التحكيم و آثاره ، دار النهضة العربية ، القاهرة ، 2006 ، ص 295.

[19] See:

باسمة لطفي دباس ، نفس المرجع السابق ، ص 317.

[20] See:

حفيظة السيد الحداد ، الموجز في النظرية العامة في التحكيم التجاري الدولي ، مرجع سابق ، ص 143.

[21] Although the rule of non-association of the fate of the arbitration agreement with the original contract is clear, the scope of application of this rule has given rise to a wide-ranging, broad-based argument about the effect of the absence of the original contract on the arbitration agreement, and the extent to which the principle of independence of the arbitration agreement can be upheld and not affected by the fate of the original contract in the absence of the

Part of the jurisprudence was that if the arbitration agreement was not affected by the invalidity of the original contract, it would nevertheless be affected by the fate of that original contract if it did not. Thus, the principle of the independence of the arbitration agreement from the original contract can only be invoked if the latter is invalidated rather than absent, since the absence of the original contract assumes the total absence of consent of the parties, and this dissatisfaction includes both the arbitration agreement and the original contract· The lack of will leads to the absence of the original contract, at the same time the absence of an arbitration agreement, and the situation is, of course, different if the original contract is defective and causes its invalidity. The invalidity of the original contract does not necessarily affect the invalidity of the arbitration agreement. In this regard, Professor Eric Loquin :« it is established that the absence of the original agreement (contract) assumes a complete absence of satisfaction for the parties, and this dissatisfaction includes both the agreement on arbitration and the original contract. "We are not in a position to do so," he said.

While another aspect of the doctrine went on to say that this distinction between the invalidity of the original contract and its absence was unwarranted, because both invalidity and lack of justice were indistinguishing. Such a distinction would also open the door to the exclusion of the application of the principle of independence.

See:

أحمد مخلوف ، مرجع سابق ، ص 122 . و حفيظة السيد الحداد ، نفس المرجع السابق ، ص 146-147 ، و باسمة لطفي دباس ، مرجع سابق ، ص 322.

[22] See:

ناريمان عبد القادر ، إتفاق التحكيم ، دار النهضة العربية ، القاهرة ، 1996 ، ص 330.

[23] For example, the French law, which, as we have seen before, prohibited the requirement of arbitration in mixed works and civil works. It is what the International Chamber of Commerce confirmed in its 1986 decision that the parties to the arbitration agreement should state their desire to apply the law of their choice once to the original contract and to the arbitration clause, which may also be the case for arbitration proceedings.

See in this:

حمد الله محمد حمد الله ، النظام القانوني لشرط التحكيم في المنازعات التجارية ، دراسة مقارنة، دار النهضة العربية ، القاهرة ، 2002 ، ص 114.

[24] Court of Appeal of Paris, 24 January 1972, Rev.Arb, 1973, page 158, note: Ph.Fouchard.

[25] Court of Appeal of Paris, 21 October 1983, Rev.Arb, 1983, page 84, note: A.Chapelle.

[26] See: Alan Redfern , Martin Hunter , Law and Practice of international commercial Arbitration , Second edition , 1999, p 65.

[27] See:

أنور علي أحمد الطشي ، مبدأ الإختصاص بالإختصاص في مجال التحكيم ، دار النهضة العربية ، القاهرة ، 2009 ص 26.

[28] See:

فوزي محمد سامي ، المرجع السابق ، ص 200.

[29] See:

Emmanuel Gaillard : les manœuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international, Rev.Arb, 1990, page 759 ets.

[30] See: article 8/3 of the Arbitration Rules of the International Chamber of Commerce of Paris.

[31] See:

أحمد أبو الوفا ، التحكيم الإختياري و الإجباري ، منشأة المعارف ، الإسكندرية ، ص 31 و ما بعدها.

And beyond In this context, see : Samia Rashed's comment on the opinions of some Western scholars who rejected the idea of the independence of the arbitration agreement, in its author:

التحكيم في العلاقات الدولية الخاصة ، الكتاب الأول: إتفاق التحكيم ، منشأة المعارف ، الإسكندرية ، 1984 ، ص 103.

[32] See:

عبد الباسط محمد عبد الواسع ، مرجع سابق ، ص 350.

[33] The opinion of the professor Schmitthoff , referred to in:

سامية راشد، المرجع السابق، ص 104.

[34] See:

فتحي والي ، الوسيط في قانون القضاء المدني ، دار النهضة العربية ، القاهرة ، 2001 ، ص 927. إبراهيم أحمد إبراهيم ، التحكيم الدولي الخاص ، الطبعة الأولى ، دار النهضة العربية ، القاهرة ، 1986 ، ص 94. سامية راشد ، المرجع السابق ، ص 115.

[35] See:

مصطفى محمد الجمال و عكاشة محمد عبد العال ، التحكيم في العلاقات الخاصة الدولية ، الطبعة الأولى ، منشورات الحلبي الحقوقية ، بيروت ، 1998 ، ص 406 و ما بعدها.

[36] The Dutch court was the first to explicitly decide on the principle of the independence of the international commercial arbitration agreement from the original contract, when the Dutch court ruled on 27/12/1935 that, in the event of the parties' dispute over the validity or invalidity of the contract, it does not preclude the arbitrator's jurisdiction to adjudicate the dispute. Despite the possibility that the contract provided for in the arbitration clause might not be valid. The German judiciary then ruled on 14/05/1952 that the fate of the arbitration agreement was completely separate from the fate of the contract contained therein. It was decided by the Italian judiciary in the judgment of the Italian Court of Cassation of 12/01/1959. The French judiciary has been affected by these provisions, which in turn ruled in May 1963 provided for the independence of the arbitration agreement from the original contract in the famous case known as the Gosset case, referred to above.

For more details, see:

أحمد مخلوف ، مرجع سابق ، ص 118-119.

[37] The facts of the case of IMEX are the conclusion of a contract for the export of grain to Italy, which was portrayed as a sale to and from Portugal and Switzerland to Italy to take advantage of the rules and benefits established within the European Community, with the aim of exporting to other countries outside the market. French customs authorities have refused export licenses because of fraud. In raising the issue of invalidity of contracts because of the illegality of the cause, and the extent to which the arbitration agreement was affected by this invalidity, the French judiciary terminated the original contracts because of the illegality of the reason for fraud that did not affect the validity of the arbitration agreement, in application of the principle of independence enjoyed by this agreement from the original contract.
See the case details in the book:

حفيظة السيد الحداد ، الإتجاهات المعاصرة بشأن إتفاق التحكيم ، دار الفكر الجامعي ، 1996 ، ص 23 و ما يليها.

[38] Court of Cass, 17 May 1971, Rev.Crit, 1972, page 124, note: Mezger, clunet 1972, page 62, note: Oppetit.

[39] The judgment stated: «The autonomy of the arbitration clause, being observed that the most recent jurisprudence does not only place this autonomy in relation to the other stipulations of the contract, but also in relation to any law and state».
Toulouse Cour d'App, 26 Oct 1982, J.D.I 1984, page 603, note: H.synvel.

[40] The judgment stated:« By virtue of a material rule of international arbitration law, the arbitration clause is legally independent of the main contract which contains it directly or by reference, and its existence and effectiveness are assessed according to the common will of the parties, without the need to refer to a state law».
Court of cass, 20 December 1993, Rev.Arb 1994, page 116, note: Gaudemet -Tallon.

[41] See: S.R.Shackleton: The applicable law in international arbitration under the new English arbitration act 1996, Arbitration international, vol 13,1997, p 96.

[42] Appeal N 1259 of 49 CE, 31/1983 Coll.Technical Office 34, Part 2, p. 1416, referred to in the letter of:

أحمد نبيل سليمان طبوشة ، النظام القانوني لاتفاق التحكيم ، دراسة مقارنة ، رسالة دكتوراه ، قسم القانون المدني ، كلية حقوق جامعة عين شمس ، 2011، ص 283.

[43] Appeal N 650 of the year 57, 23/01/1995, referred to in the letter of:

عاطف شهاب ، الإختصاص بالتحكيم في عقود التجارة الدولية ، رسالة دكتوراه ، كلية الحقوق ، جامعة عين شمس ،2001 ، ص 209.

[44] See:

أحمد نبيل سليمان طبوشة ، مرجع سابق ، ص 284.

[45] For example, the Swiss Arbitration Act of 18 December 1987 in article 178/1 stipulates that: « the award contract cannot be claimed to be untrue as a result of the incorrectness of the underlying contract itself or because the arbitration contract relates to a dispute that has not yet been established ». The new Irish Arbitration Act of 1988, article 1053 of which stipulates that: « the arbitration agreement is considered an independent agreement, and the arbitral tribunal has the power to adjudicate the validity of the original contract to which the arbitration agreement is part or related». The new Spanish Arbitration Act No. 36 of 1988; Article 8 stipulates that:« the invalidity of a contract does not by force of law void the arbitration agreement in respect of it». the

English Arbitration Act of 1996, in article 7 stipulates that:« Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement». The Belgian Arbitration Act of 19/05/1998 in article 1697/2:« the award of invalidity of the contract does not by law invalidity the arbitration clause contained therein ». Dutch Law, Article 1053 of the Law on Acquiums: « the arbitration clause is a separate clause from the contract».
See: International Group of Lawyers and Legal consultations (IGLC)
http://www.eastlaws.com
The Yemeni Arbitration Act N° 22 of 1992, in article 16, stipulates the principle of the independence of the arbitration agreement. The Bahraini Arbitration Act N° 09 of 1994, in article 16. The Omani Arbitration Act N° 47 of 1997, in article 23.

[46] Art 1447/1 of the D.P.C.F:« The arbitration agreement is independent of the contract to which it relates. It is not affected by the inefficiency of it».

[47] See:
Emmanuel Gaillard: le nouveau droit Français de l'arbitrage interne et international, Recueil Dalloz , 2011 , page 178.

[48] See:

أحمد عبد الكريم سلامة ، قانون التحكيم التجاري الدولي و الداخلي ، مرجع سابق ، ص 367.

[49] See:

عبد الباسط محمد عبد الواسع ، مرجع سابق ، ص 361.

He also criticized some Egyptian jurisprudence, led by Professor Ahmed Abdel Karim Salamah, the text of article 23, as it did not refer to the arbitration agreement. However, some of the jurisprudence has responded to these criticisms that the provision includes the arbitration clause as well, since the term "separate agreement" is broader than the term "arbitration clause", so that the requirement will not deviate from the spirit and the premises of the text, and recognition of the autonomy of the arbitration agreement is a condition and a requirement.
See in this:

عبد الباسط محمد عبد الواسع ، نفس المرجع السابق ، ص 361.

[50] See:

سامية راشد ، التحكيم في العلاقات الدولية الخاصة ، إتفاق التحكيم ، منشأة المعارف ، الإسكندرية ، 1984 ، ص 146.

[51] Article 2/3 of the 1958 New York Convention states that: «The Court of the Contracting State before which a dispute is brought on the subject of an agreement by the parties within the meaning of this article shall refer the liabilities at the request of one of them to arbitration. This is unless the Court finds that this Agreement is invalid, ineffective or inapplicable».

[52] see:

سامية راشد ، نفس المرجع السابق ، ص 164.

[53] See:

سراج حسين أبو زيد ، التحكيم في عقود البترول ، دار النهضة العربية ، القاهرة ، 2010 ، ص 194.

[54] See:

حفيظة السيد الحداد ، الإتجاهات المعاصرة بشأن إتفاق التحكيم ، مرجع سابق ، ص 27.

[55] Article 5/1-a of the 1958 New York Convention states that:« No recognition and enforcement of the sentence may be refused upon the application of the deductible to which the judgment is invoked unless the adversary provides the competent authority of the country to which it is requested to recognize and implement evidence that the said agreement is not valid according to the law which it is subject He has the parties, or when he does not provide for it in accordance with the law of the country in which the judgment was issued».

[56] See:

عبد الباسط محمد عبد الواسع ، مرجع سابق ، ص 359.

[57] See:

عبد الحميد علي الزيادة ، إتفاق التحكيم التجاري الدولي (دراسة مقارنة بالشريعة الإسلامية و القانونين المصري و الليبي) ، دار المطبوعات الجامعية ، الإسكندرية ، 2014.

[58] Article 5/3 of the European Convention on International Commercial Arbitration provides that: « if it is distributed within the jurisdiction of the arbitrator, it shall not give up the consideration of the case, but shall have the power to decide on the matter of its jurisdiction, and in the presence of an arbitration agreement or contract of which that agreement is part».

[59] See:

أحمد عبد الكريم سلامة ، قانون التحكيم التجاري الدولي و الداخلي ، مرجع سابق ، ص 479.

[60] See:

أحمد محمد عبد الصادق ، المرجع السابق ، ص 170.

[61] See: Texts of the Conciliation and Arbitration System of the International Chamber of Commerce in Paris, published in Arabic, Supplement No. 5, with a book:

أحمد السيد الصاوي ، الوجيز في التحكيم طبقا للقانون رقم 27 لسنة 1994 على ضوء أحكام القضاء و أنظمة التحكيم الدولية ، الطبعة الثالثة ، بدون دار نشر ، 2010 ، ص 607-609.

[62] In the same sense, the London Court of International Arbitration Rules of 1985 set forth in article 14/1 the principle of the independence of the arbitration agreement. And the American Arbitration Association Regulation of 1992 (article 15/2). In addition to the Arbitration Rules of the Gulf Cooperation Council (GCC) Commercial Arbitration Center for 1994 (art. 18).

For more details, see: Mark Saville , The origin of the new English arbitration international , vol 13 , 1997 , p 86.

[63] Among these provisions are: The 1930 arbitral award against the Government of the Soviet Union in the Goldfields Lena case. The principle was also enforced in the Losinger v. the Yugoslav Government in 1936.

In addition to the numerous judgments of the International Chamber of Commerce of Paris, in which the principle of the independence of the arbitration agreement was applied, the judgment in case No. 1526 of 1968, in the case between an African country and a Belgian national. The arbitration award was also issued in case No. 1508 in 1970 on the occasion of a contract between a German company and a South East Asian

country. The decision was made in case No. 2476 in 1976 in the case between a Swiss company and an Italian company.
For more details on the above issues, see:

سراج حسين أبو زيد ، مرجع سابق ، ص 210 و ما بعدها.

[64] These provisions concern: Liamco, Texaco and BP with the Libyan government.
For more details on these issues, see:

محمد ماهر أبو العينين و عاطف محمد عبد اللطيف ، مرجع سابق، ص 524 و ما بعدها.

[65] The sole arbitrator Dupuy in the famous Texaco case issued a preliminary ruling against Libya on his jurisdiction on 27/11/1975, rejecting the view held by the Libyan Government that the nationalization procedures would end the same concession contracts between the two companies. This effect must extend to the arbitration clauses contained in these contracts, where the arbitrator dupuy is based on the principle of the independence of the arbitration agreement from the contract contained therein.
In addition, the sole arbitrator, Sobhi Mahmassani, in the LIAMCO case, stated in his judgment of 12/04/1977 that:« it is generally recognized in international law that the arbitration clause remains after the dissolution of the State by its sole will of the contract it contains. This condition remains in force even after this disintegration».
The BP arbitrator also implicitly adopted the principle of the independence of the arbitration agreement in his arbitration judgment of 10/10/1973, when he went in response to the company's claim that the nationalization law had no effect on the termination of the concession contract, The law of nationalization of BP has put an end to the concession contract granted to this company, except that this contract constitutes the basis for the jurisdiction of this court.
For more details, see:

سراج حسين أبو زيد ، مرجع سابق ، ص 213-214.

[66] This shows the Algerian party's insistence on the non-independence of the arbitration clause from the original contract, unlike the foreign party.
[67] For more details on the merits of this case, see:

محمد كولا ، تطور التحكيم التجاري الدولي في القانون الجزائري ، منشورات بغدادي ، 2008 ، ص 113-114.

[68] Terki Noureddine: International Commercial Arbitration in Algeria, O.P.U, 1999 page 42.