XIII.2.4 - Principle of separability of the arbitration clause

(a) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement ("Kompetenz-Kompetenz").

(b) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.

(c) The invalidity of the main contract does not automatically extend to the arbitration clause contained therein unless it is proven that the arbitration agreement itself is vitiated by fraud, or initial lack of consent (Principle of Separability).

Commentary:

1 It is generally acknowledged today that an international arbitral tribunal, just like any other tribunal, is authorized to decide on its own competence once constituted. This authority is based on the principle of Kompetenz-Kompetenz. According to this principle every tribunal which is called upon to decide a dispute, immaterial of whether its authority is based on a statute (domestic court), public international law (International Court of Justice) or an agreement of the parties (arbitral tribunal), is authorized to decide not only on the substantive questions presented to it but also on the preliminary issue of its own competence as the conditio sine qua non of its decision-making.

2 The application of the principle of Kompetenz-Kompetenz in international arbitration means that the arbitrators must have the authority to rule on the validity of the arbitration agreement from which they derive their authority to decide the dispute. It is neither illogical nor unlawful if a tribunal ultimately decides that the arbitration agreement on which its decision-making power is based is invalid. Rather, this result is a natural consequence of the strict application of the general principle of Kompetenz-Kompetenz in international commercial arbitration.

3 If the arbitral tribunal thinks that the contract which contains the arbitration clause is invalid, it can still rule on its own jurisdiction and has the authority to confirm or reject its competence to decide the dispute under the invalid contract. This follows from the notion of the "separability" of the arbitration agreement from the main contract. Art. 16 (1) UNCITRAL Model Law expresses this principle in clear words and provides that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The decision by the arbitral tribunal that the contract is null and void shall not entail ipso iure the invalidity of the arbitration clause". This principle is also manifested in s. 1040 (1) German Arbitration Act, which is based on Art. 16 (1) UNCITRAL Model Law. Any challenge to the main agreement does not affect the arbitration agreement: the tribunal can still decide on the validity of the main contract. The doctrine of separability thus further strengthens the jurisdiction of the arbitrators.

4 An exception to subsection (c) applies when the main contract is void ab initio, e.g. due to missing public permission, exertion of coercive powers or lack of authority to represent. It must be clear in such cases that there has never existed a valid contract between the parties.