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COLLECTION OF SEVERAL INTERNATIONAL LEGAL ARTICLES ON JURISDICTION OF THE ARBITRAL TRIBUNAL

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TỔNG HỢP MỘT SỐ BÀI BÁO PHÁP LÝ QUỐC TẾ VỀ THẨM QUYỀN CỦA TRỌNG TÀI THƯƠNG MẠI

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THE JURISDICTION OF THE ARBITRAL TRIBUNAL: A TRANSNATIONAL ANALYSIS OF THE NEGATIVE EFFECT OF COMPETENCE

O SUSLER *

The issue of jurisdiction of the arbitral tribunal raises questions such as, who decides whether the arbitral tribunal can determine its own jurisdiction and at what stage of the arbitral process should judicial intervention, if any, occur? There are divergent approaches taken by courts to these questions. This article offers a comparative analysis of jurisdictional approaches to providing priority to the arbitral tribunal to rule on its own jurisdiction.

This article identifies the French approach as the best practice and it is argued that it provides the optimum balance between providing priority to the parties' agreement to arbitrate and simultaneously ensuring there is access to courts if one of the parties presents a genuine challenge to the jurisdiction of the tribunal.

I INTRODUCTION

Every judge is judge of his own jurisdiction. Jurisdiction to decide jurisdiction is one of the illustrations of this natural necessity. Even in the absence of a text of law in this sense, it is generally recognised that every judge is judge of his jurisdiction.[1]

The doctrine of *separability* and the principle of *competence-competence* are two of the most widely recognised concepts in international commercial arbitration. Both aim to prevent premature judicial intervention from obstructing the arbitration process. They also serve to eliminate loopholes for parties who intend to delay the

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1 Gerard Cornu and Jean. Foyer *Procedure Civile*, Paris, Presses Universitaires de France (1958) *138*.

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arbitral process. Although they tackle it differently, they both speak to the same question, 'Who decides the jurisdiction of the tribunal?'[2]

The principle of *competence-competence* empowers the tribunal to determine its own jurisdiction, where it has been contested by one of the parties to the arbitration. There are however, divergent approaches taken by courts to the question of who decides the jurisdiction of the tribunal.

There are further differences concerning the stage at which the jurisdiction question should be deferred to the courts and what standards, if any, should be employed by the courts to refer the parties to arbitration. There are also distinctions between national arbitration laws concerning the judiciary's role in determining the existence and validity of the arbitration agreement.[3]

Courts in some jurisdictions take the presumptive approach that the existence and validity of the arbitration agreement are for the courts to determine.[4] The alternative position is that the tribunal is provided the first opportunity to determine the existence and validity of the arbitration agreement. Courts who take the alternative position usually limit their examination to a *prima facie* review of the arbitration agreement.[5] A *prima facie* review only requires an examination to verify that a valid arbitration agreement exists. It does not entail a full examination as to the existence and validity of the arbitration agreement.

Parts II and III of this paper will briefly introduce the contractual character of arbitration agreements and the doctrine of *separability*. Part IV onwards focuses on the principle of *Competence-competence* and provides a comparative analysis of jurisdictional approaches to the negative effect of the principle of *competence-competence*. Part XI concludes with suggestions on finding a balance to achieve best practice.

While the paper is mainly concerned with common law jurisdictions, for comparative purposes this paper also considers the French approach. Throughout this paper the term "award" denotes the written judgment issued by the arbitral tribunal and the term "tribunal" denotes the arbitral tribunal.

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2 John J Barcelo III, 'Who Decides the arbitrators' jurisdiction? Separability and Competence- Competence in Transnational Perspective' (2003) *Vanderbilt Journal of Transnational Law* 1115, 1116.

3 Emmanuel Gaillard, '*Prima facie* Review of Existence, Validity of Arbitration Agreement' (2005) *New York Law Journal* 3, 3.

4 An example of such a court decision is *First Options of Chicago Inc v Kaplan* 514 U.S. 938 (1995).

5 A court conducting a *prima facie* review will not refer the matter to the tribunal if an exception applies, such as, if the arbitration agreement is manifestly null or inoperable. An example of a *prima facie* review decision is *American Bureau of Shipping v. Copropriété Maritime Jules Verne* (2003) Revue de l'arbitrage.

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II AGREEMENTS TO ARBITRATE IN INTERNATIONAL COMMERCIAL CONTRACTS

An arbitration agreement is an agreement where the parties consent to have disputes arising from or related to their contract submitted to arbitration. Arbitration agreements are thus contractual in character. On the proviso that the agreement to arbitrate is sufficiently clear and valid, numerous international conventions and national laws recognise and enforce arbitration agreements between parties to an international commercial contract.[6]

In the international commercial context, arbitration is often preferred to litigation largely owing to the limited jurisdiction and enforceability of court judgments. Moreover, problems with enforceability of arbitration awards constitute a significant factor as to why a majority of parties will select a jurisdiction which is a contracting State to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* when nominating the procedural law applicable to the arbitration.[7] Accordingly an award issued in a state which has ratified the *NYC*, must be enforced by the courts of other contracting States.

The *NYC* remains silent on the question of any limitations or guidelines to be imposed on the court's determination of the issues of existence, validity or scope of the arbitration agreement.[8] Rather, it leaves the matter to the discretion of national legal systems. This has resulted in a divergence of approaches and created opportunity for unwelcome judicial review in some jurisdictions.

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6 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, (entered into force 7 June 1959). It is often referred to as the 'New York Convention'. Hereinafter referred to in-text as the '*NYC*'. It was instigated by the International Chamber of Commerce (ICC) and supported by the United Nations. By July 2008, there were 144 contracting states rendering it one of the most successful agreements concluded in the history of the United Nations. www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html Accessed 20 April 2009. National legislation such as the *International Arbitration Act* 1974 (Cth) and the *International Arbitration Act 1996 (UK)* are some examples of national arbitration statutes.

7 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

8 Emmanuel Gaillard, Yas Banifatemi, '*Negative Effect of Competence-competence: The Rule of Priority in Favour of the Arbitrators*' in Emmanuel Gaillard, Domenico di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 257, 257.

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III THE DOCTRINE OF SEPARABILITY

Separability has been defined as the arbitration clause/agreement in a contract that is deemed to be separate from the main contract, of which it forms part and as such, survives the termination of that contract.[9] It follows that the arbitration agreement is capable of surviving the nullity, termination, repudiation or novation of the main contract.

The principle of *separability*[10] did not initially gain significant recognition in the national arbitration laws of the Western world.[11] For example during the development of the common law, arbitration regressed at the hands of English courts until the enactment of the *Arbitration Act 1889* (UK)[12] Common law scholars had historically been disinclined to accept it and have referred to it as the doctrine of '*separability*' or 'severability'.[13]

In current international arbitration practice, *separability* is recognised as a means of providing autonomy to the parties to the contract.[14] Its widespread acceptance is primarily attributed to a number of factors such as being recognised in the world's leading institutional arbitration rules, its virtually unanimous acceptance in arbitration legislation, its recognition in arbitration case law globally and its espousal in contemporary decisions of international courts.[15]

Notably, if the substantive contract is deemed to be null, void or even terminated, this does not automatically extend to affect the validity of the arbitration clause, because in a manner similar to a jurisdiction agreement, an arbitration clause confers authority on the tribunal to determine the state of the substantive contract and its implications.[16]

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9 Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed, 1999) 154.

10 Separability is often referred to as the 'principle of autonomy' in the United States.

11 Jean François Poudret et al. C*omparative Law of International Arbitration (*2nd ed, 2007) [168].

12 Arthur Gemmell, *Western and Chinese Arbitration- The Arbitral Chain* (2008) 87.

13 Emmanuel Gaillard, John Savage (eds), *Fouchard, Gaillard, Goldman On International Commercial Arbitration (*2nd ed 1999), [198].

14 This principle is known in France as '*l-autonomie de la clause compromissoire'*. In the U.S. it is also referred to as 'severability' or 'autonomy' of the arbitration clause.

15 Emmanuel Gaillard, John Savage, above n 13, [199]. For international law, UNCITRAL Model Law on International Commercial Arbitration Art. 16. For national legislation on separability see for instance, *International Arbitration Act 1974* (Cth) Sch.2 Article 16(1).

16 Jean François Poudret et al, above n 11, [164].

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The *separability* doctrine does not distinguish between an arbitration agreement found in the substantive contract and one which is separate to the substantive contract, since the arbitration agreement is considered as a distinct agreement that is not subject to the substantive contract.[17] The threshold requirement for a tribunal to determine the validity of the substantive contract is to have a valid arbitration agreement.[18]

Separability also provides the efficiency of a single decision making process[19] which is underpinned by the logical commercial presumption that the parties did not intend the inconvenience of having disputes arising from their transaction being heard in different fora. This approach was supported in *Comandate Marine Corp v Pan Australian Shipping Pty Ltd* by Allsop J, delivering the majority judgment. His Honour stated that such an approach is particularly applicable when the parties originate from different countries and legal systems because it provides party autonomy.[20]

Despite numerous institutions and national legislatures drafting their rules concerning *separability* to maintain the validity of arbitration clauses which form part of 'non-existent' contracts, this non-existence cannot denote 'never existed' but must denote 'ceased to exist'.[21] Accordingly, if a contract no longer exists by the time of the arbitration, the tribunal still retains the platform on which it may stand. Conversely, if the contract never existed, then an arbitration agreement never existed.[22] However the latter situation is seldom confronted in reality.[23]

It follows therefore, that *separability* is applicable provided a contract existed at some point in time. International *Model Law*s such as the United Nations Commission on International Trade Law Model Law on International Commercial

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17 See for example *International Arbitration Act 1996 (UK)* section 7 which is based on the Model Law and the *Federal Code on Private International Law 1987* (Switzerland), Art.178(3).

18 See *Albon (trading as N A Carriage Co.) v Naza Motor Trading SDN BHD [2007] All ER (D) 501* Lightman J presiding over the case used a two part threshold test : firstly, that there must be a concluded arbitration agreement and secondly that the matter must be within the scope of that arbitration agreement. If the case fails this test then the matter should not be granted a stay of court proceedings in accordance with s.9 of the *International Arbitration Act 1996* (UK).

19 Alan S. Rau, 'Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions' (2003) 14(1) *American Review of International Arbitration* 11.

20 [2006] FCAFC 192, 165.

21 Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th ed, 2004) [543-544]. See *All-Union Foreign Trade Association "Sojuznefteexport" (USSR) v Joc Oil Ltd (Bermuda)* Case No. 109/1980 Foreign Trade Arbitration Commission at the USSR Chamber of Commerce and Industry

22 Ibid [543-544].

23 Emmanuel Gaillard, John Savage, above n 13, [411].

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Arbitration recognises *separability*.[24] Numerous national arbitration laws and institutional arbitration rules have incorporated *separability* by enacting the *Model Law* or otherwise using it as the basis of their arbitration legislation.

In particular, Article 16(1) of the *Model Law* enshrines *separability* by stipulating that:

> For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms within 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.

Article 8(1) of the *Model Law* goes a step further and provides the circumstances in which an arbitration agreement should not be referred to a tribunal by stipulating that:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative and incapable of being performed.[25]

It is noted that the above provision of the *Model Law* does not mention the term "non-existent" which may imply by omission that if challenges are mounted concerning the existence or validity of the arbitration agreement, for example that the arbitration agreement did not exist, it is within the ambit of the tribunal to rule upon it, unless the court determines the arbitration agreement to be *prima facie* invalid. In such circumstances, the court should refuse to grant a stay of court proceedings.[26]

There are competing demands on the legal order to safeguard arbitration from dilatory tactics on one hand and to permit genuine disputes concerning the tribunal's jurisdiction to be determined by a court on the other. It is at this juncture

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[24] Hereinafter referred to in-text as the '*Model Law'*. (Adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985). The Model Law is completely incorporated in the *International Arbitration Act 1974 (Cth) Sch 2*. There is also the UNCITRAL Arbitration Rules 1976 which is a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings.

[25] A similar provision can be found in the Australian *International Arbitration Act 1974* (Cth) s7 (5).

[26] *Albon (trading as N A Carriage Co.) v Naza Motor Trading SDN BHD* [2007] All ER (D) 501. See also *Downing v Al Tameer Establishment [2002]* EWCA Civ. 721 where the court referred the matter to the arbitral tribunal upon finding an arbitration agreement which was not *prima facie* invalid*:*

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of policy tension that *separability* and *competence-competence* have some overlap.[27]

IV THE PRINCIPLE OF COMPETENCE COMPETENCE

Competence-competence is defined as the conferral of inherent power on the tribunal to determine whether it has jurisdiction to hear the dispute and subsequently on the existence of the main contract.[28] This principle goes to the heart of the arbitral process.

There are two effects of the principle of *competence-competence*. The positive effect is defined in the above paragraph. The negative effect on the other hand, restricts the function of the court so as to provide the tribunal with the first opportunity to determine its own jurisdiction and the validity of the arbitration agreement. The empowerment of the tribunal to determine its own jurisdiction in the first instance is tempered by granting the tribunal's ruling a provisional status, which is reviewable by the court.[29] Courts reserve the power to conduct a complete review once an award is issued, to either set the award aside or enforce it.

The question of jurisdiction is typically a preliminary matter for the arbitral tribunal to determine.[30] Whether a dispute ought to be determined by a tribunal rather than a court is subject to questions such as whether an arbitration agreement exists, whether it is valid and whether the dispute lies within the scope of the arbitration agreement.[31]

Particularly in the United States, collectively these questions are often referred to as the 'arbitrability' question.[32] There, the term has been used to decide whether as a matter of construction of the arbitration agreement, a tribunal possesses the jurisdiction to hear a dispute.[33] This includes whether the tribunal may hear a dispute which has previously been determined in a different forum. This is the sense in which the term 'arbitrability' will be used in this paper.[34].

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[27] The principle is also known as '*Kompetenz-Kompetenz*' in German or '*Competence sur la Competence*' in French.

[28] Jean François Poudret, above n 11, [162].

[29] Doug Jones, Competence-Competence (2009) 75(1) *Arbitration: The Journal by the Chartered Institute of Arbitrators* 56, 57.

[30] *Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte GmbH* [1954] 1 Q.B. 12, 13 (Devlin J).

[31] Tibor Varady, John J Barcelo III and Arthur T von Mehren *International Commercial Arbitration- A Transnational Perspective* (3rd ed. 2006) 87.

[32] See *AT & T Technologies Inc v Communications Workers,* 475 US 643 (1986); *First Options of Chicago Inc v Kaplan,* 514 US 938 (1995).

[33] Ilias Bantekas, *Australian Year Book of International Law* Volume 27 (2008) 193. See *US Fire Insurance Co v National Gypsum Co,* 101 F 3d 813 (2nd Cir 1996).

[34] In other jurisdictions 'arbitrability' may be referred to as 'jurisdictional issues'.

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The *competence-competence* principle enables the tribunal to rule that an arbitration agreement is invalid and to issue an award that it lacks jurisdiction without contradicting itself. [35] Thus a question may arise as to how a tribunal exclusively relying on the arbitration agreement is able to determine that very agreement to be void.

The answer lies at the foundation of the principle of *competence-competence*. This principle is not premised in the arbitration agreement, but rather in the arbitration laws of the state where the arbitration is heard (known as *lex arbitri* or *the seat)* in addition to the arbitration laws of any jurisdiction in which the agreement will be enforced.[36]

Where national arbitration laws confer authority on the tribunal, courts in those states are obligated to enforce an award issued by the tribunal relating to their own jurisdiction, on the proviso that *competence-competence* is recognised in their national arbitration laws.[37]

There are numerous dissimilarities in standards and tests applied to determine questions pertaining to the existence and validity of the arbitration agreement. What may be inferred from the analyses of jurisdictional approaches to *competence-competence* is that, disparities arise in the interpretation of the *NYC* and the *Model Law* between the courts of the contracting states.

The differences in the approaches of the national courts to the negative effect are also attributable to the respective national policy rationales. One approach to *competence-competence* is underpinned by the policy of preventing dilatory strategies used by parties to delay arbitration. Another approach is underpinned by the policy of achieving centralisation of judicial review of disputes relating to arbitration.[38]

V THE NEGATIVE EFFECT OF COMPETENCE COMPETENCE IN INTERNATIONAL AND NATIONAL LAW

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[35] Examples of national laws which enshrine *Competence-Competence* are the *Arbitration Act 1996* (UK) s.30, *International Arbitration Act 1974* (Cth) Sch. 2. Art. 16(1). In the Model Law, *competence-competence* is also enshrined in Article 16(1).

[36] Emmanuel Gaillard, John Savage above n 13, [658].

[37] In the NYC, Article II (3) states: 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement, within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'.

[38] Emmanuel Gaillard, John Savage, above n 13, [682].

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The negative effect principle of *competence-competence*[39] provides that the courts cannot rule on the existence of a valid arbitration agreement prior to the issue of an award by the tribunal determining its jurisdiction.[40] Thus a priority is provided to the tribunal to determine the validity of the arbitration agreement and its jurisdiction concerning the matter in dispute. Providing the tribunal with a priority to determine jurisdiction does not however, mean that a tribunal is to make a final and binding decision concerning jurisdiction.

Contrary to some arguments postulated by critics of *competence-competence*, the discretion of a tribunal to decide on its own jurisdiction does not necessarily oust the right of the court to review such a determination per se.[41] Thus, far from being absolute *competence-competence* may be qualified to be merely relative.[42]

There is relative consensus concerning the positive effect of *competence-competence* which authorises a tribunal to determine its own jurisdiction, eliminating the need for a tribunal to stay its proceedings in order to seek a court ruling on the matter. By contrast, the negative effect principle of *competence-competence* evidences more variation in approach between jurisdictions and has generated more debate internationally.

Two controversial questions relevant to the negative effect are the circumstances in which a tribunal possesses the power to determine its own jurisdiction and the circumstances under which the court may determine the question of jurisdiction.

To ascertain the degree to which the negative effect has been adopted by various jurisdictions, a relevant question to be postulated is 'at what stage during the arbitral process may the courts review the question of jurisdiction?'[43] Different jurisdictions adopt divergent positions on this question.

The contrasts between the different positions adopted, generates some benefits and risks with it. For instance, a position which permits judicial review of jurisdiction only subsequent to the issue of the tribunal's award, may reduce intervention by the judiciary, however it may also result in inequity by squandering the parties' finances and time in the event that the tribunal never had jurisdiction.

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39 Hereinafter referred to in-text as the 'negative effect'.

40 Emmanuel Gaillard, John Savage, above n 13, [2].

41 Alan Redfern, Martin Hunter, above n 21, [5-39]. For critics see Stephen H Ware, 'Arbitration Law's Separability Doctrine after *Buckeye Check Cashing, Inc. v Cardegna'* (2007) 8 *Nevada Law Journal* 107. See also Ware's proposal to abolish the separability doctrine of the *Federal Arbitration Act* U.S. (1925) s.4 in Edward Brunet., et al *Arbitration Law in America A Critical Assessment* (2006) 258.

42 Jean François Poudret, above n 11, [457]. See for examples when an arbitral jurisdiction ruling may become final.

43 Doug Jones, above n 31, 57.

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Conversely, if judicial intervention were permitted during the early stages of the arbitral process with a view to minimise unnecessary waste of the parties' time and money, it may negate the efficiency of arbitration as an effective dispute resolution tool. This may incidentally create an opportunity for parties to abuse the process, by using dilatory tactics to stall the arbitration.[44]

Proponents of a *prima facie* review by courts contend that the authority of a tribunal to determine its own jurisdiction is undermined by a court ruling upon the same matter simultaneously, with the same level of scrutiny. Thus they argue that the limitation of courts to a *prima facie* review is a criterion of the principle of *competence-competence*.[45]

Notwithstanding whether it were heard by the court before or following the appointment of the arbitrators, if the tribunal had to stay its ruling concerning its own jurisdiction to permit the court to determine the issue, it is contended that this would negate the substance of the arbitral procedure and diminish the efficacy of *competence-competence*.[46]

VI THE MODEL LAW APPROACH

The *Model Law* has been widely utilized as a paradigm for national laws since its adoption by the United Nations Commission on International Trade Law.[47]

The language adopted by the *Model Law* places a firm prohibition on court intervention which exceeds the provisions although it is argued that the *Model Law* position does not apply *competence-competence* as strictly as the French approach.[48] The *Model Law* takes a middle road between permitting application to the judiciary concerning the question of jurisdiction in the early stages of the arbitral process and deferring it until the award has been issued.[49] Articles 8(1), 8(2), 16(1) and 16(3) in particular are relevant to *competence-competence*.

Article 8(1) addresses the role of the court concerning a valid arbitration agreement by providing that:

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44 Doug Jones, above n 31, 59.

45 Doug Jones, above n 31, 62.

46 Emmanuel Gaillard, Yas Banifatemi, above n 8, 260.

47 John J Barcelo III, above n 2, 1116. The Model Law has also come under criticism for being too general, using minimal standards and covering an insufficient number of problems. See for example: A S Reid., 'The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?' (2004) 21 *Journal of International Arbitration* 227, 237.

48 The Model Law, Article 5 provides: 'in matters governed by this Law, no court shall intervene except where so provided in this Law'. See discussion under subheading titled 'The French Approach'.

49 Doug Jones, above n 31, 59.

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> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[50]

The phrase 'unless it finds that the agreement is null and void, inoperative or incapable of being performed' may be construed as tacit permission for a full court review concerning the existence and scope of the arbitration agreement.[51] However, no guideline is provided regarding the standard which may be utilized for a determination.

The Working Group on the *Model Law* declined to amend the wording of Article 8(1) to incorporate the term 'manifestly' prior to the words 'null and void'. If the amendment had been made, it would have restricted the court to a *prima facie* determination that the arbitration agreement was valid. A *prima facie* review of the validity of the arbitration agreement was definitively refuted by the drafters of the *Model Law*.[52]

The rationale behind the language used in Article 8(1) of the *Model Law* was that the court ought to fully resolve the question of existence and scope of the arbitration agreement prior to referring the parties to arbitration.[53] Moreover, Article 8(1) closely follows the language used in Article II (3) of the NYC which includes the same phrase in the provision 'unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed'.

It has been argued that the pro-arbitration nature of the NYC ought to encourage courts to provide a narrow reading to Article II (3).[54] That is, to rule that the arbitration agreement is invalid only in 'manifest cases'.[55] This narrow reading has been adopted *inter alia* by French and Swiss jurisdictions.[56] In particular, Article

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50 The Model Law, Art 8(1) uses the same language as the NYC Art II (3) concerning the validity of the arbitration agreement.

51 John J Barcelo III, above n 2, 1128.

52 Howard M Holtzmann, Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 303.

53 Ibid.

54 See above n 39.

55 Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 269.

56 See the *Nouveau Code de Procedure Civile 1996* (France) Article 1458. Commonly referred to in English as the *French Civil Code of Procedure 1996.* See also the *Federal Code on Private International Law 1987* (Switzerland) Articles 7 and 186. The Swiss Federal Tribunal has clearly acknowledged the requirement to safeguard the arbitrator's power to determine its own jurisdiction

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7(b) of Switzerland's *Federal Statute on Private International Law* expressly relates to the existence and validity of the arbitration agreement.

It provides that:

> If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless:
>
> b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed...

The provision therefore only stipulates a low threshold requirement for finding that a *prima facie* agreement to arbitrate exists.

Article 8(2) of the *Model Law* extends the negative effect a little further by providing that '… an action [in] arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court'.

It has been suggested that if, as per Article 8(2), judicial review of the tribunal's jurisdiction occurs whilst the tribunal is permitted to continue its proceedings, this could lead the court to defer the entire matter to the tribunal, or to provide a *prima facie* review of the arbitration agreement.[57] If the court defers the entire matter to the tribunal, it may place the parties' interests at risk. Although Article 8(2) does not clearly establish a priority for tribunals to determine *competence-competence*, it is contended that it attempts to provide some weight to the negative effect.

Article 16(1) relates to the positive effect of *competence-competence* by providing that '[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'.

Article 16(3) of the *Model Law* qualifies the jurisdiction of the tribunal further by stipulating that:

> The arbitral tribunal may rule on a plea (regarding the jurisdiction of the tribunal) either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a

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by barring courts from intervening with such power and delaying the courts' review until the tribunal has made a ruling. See the judgment of *Fondation M. v Banque X.*, Swiss Federal Tribunal, (1996), ATF 122 III 139.

[57] John J Barcelo III, above n 2, 1129.

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> request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

It has been suggested that Article 16(3) promotes the negative effect by supporting tribunals to determine their own jurisdiction as a preliminary question with the provision for expedited, unappealable judicial review of the tribunal's ruling.[58]

The above view of Article 16(3) has received support by some jurisdictions which have adopted the *Model Law* and their respective courts have interpreted the negative effect into this Article.[59] In conclusion, Article 16(3) may be interpreted as a compromise between the more extreme positions concerning when judicial review is authorized during the arbitral process.[60]

VII THE FRENCH APPROACH

From an international comparative perspective, the French legal position clearly takes a non-interventionist, *prima facie* approach to the jurisdiction of the tribunal. Article 1458 of the *French Code of Civil Procedure* enshrines the negative effect by providing inter alia that courts must delay any action if the merits are currently before a tribunal.[61] The positive effect of Article 1458 unambiguously asserts that the arbitrators must be the first judges of their own jurisdiction, thereby enforcing the priority of the tribunal.

Further, the negative effect encapsulated in Article 1458 provides that French courts only possess the power to review jurisdictional issues after the issue of the award, which may then be set aside or enforced by the court. Therefore once a tribunal has been appointed, jurisdictional interference is limited to cases whereupon a *prima facie* review verifies that the arbitration agreement is clearly unenforceable. This does not bar the parties from challenging the award of the tribunal, on the grounds of jurisdictional matters once the award has been issued.

The language of Article 1458 effectively provides a chronological priority to tribunals on the issue of jurisdiction, unless the exception of being 'manifestly null

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[58] John J Barcelo III, above n 2, 1129.

[59] See for example *Pacific International Lines Ltd v. Tsinlien Metals & Minerals Co.*, (1992) 18 Yearbook of International Arbitration 180, 185-188 (Supreme Court of Hong Kong). See also *Rio Algom Ltd v. Sammi Steel Co.*, (1991) 18 Yearbook of International Arbitration 166, 170-171 (Ontario Court of Justice).

[60] Doug Jones, above n 31, 60.

[61] French Code of Civil Procedure, *(1981)* Book IV, Title V, Article 1458. Hereinafter referred to in-text as the '*French Code*'. Article 1458 provides that: 'If a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State court, it shall declare itself incompetent. If the dispute is not yet before an arbitral tribunal, the State court shall also declare itself incompetent, unless the arbitration agreement is manifestly null and void. In neither case may the State court declare itself incompetent at its own motion'.

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and void' applies to the arbitration agreement. The underlying policy reason for such a provision may be that once a tribunal delivers its award, the parties are less inclined to challenge the jurisdiction of a tribunal in bad faith.[62]

In *Copradag v Dame Bohin* the *Cour de Cassation* applied a rigorous interpretation of the negative effect, granting the tribunal full confidence to determine the issue of validity of the arbitration agreement pursuant to Article 1458.[63]

The court of first instance in *Copradag* ruled that an arbitration agreement was void and the arbitral tribunal should not be constituted, notwithstanding that one party had filed arbitral proceedings. The Court of Appeals upheld this decision however the *Cour de Cassation* reversed it holding that:

> The President of the Tribunal of First Instance cannot declare that the arbitrators should not be appointed on the basis that the arbitration agreement is clearly void unless there is a problem involving the constitution of the arbitral tribunal; the arbitral tribunal alone has jurisdiction to rule on the validity or limits of its appointment, on the proviso that the issue has been brought before it. [64]

This was an unambiguous victory for the negative effect, which has been consistently upheld in the French jurisdiction. Article 1458 provides credence to the priority of the tribunal, which does not negate the right of review the court reserves if the arbitration award is appealed on valid grounds. Subsequently, in the case of *Renault v. V2000* without reference to the exceptional grounds to find the arbitration agreement be found manifestly void, the *Cour de Cassation* held that the arbitrators must implement the arbitration clause subject to future judicial review.[65]

An express reference to the negative effect was made more recently by the *Cour de Cassation* in the case of *American Bureau of Shipping v. Copropriété Maritime Jules Verne*, where an appeal against a judgment by the Paris Court of Appeal was permitted on the grounds that it had failed to consider the negative effect.

The *Cour de Cassation* found the manifest nullity of the arbitration agreement to be 'the only barrier to the [*competence-competence* principle] that establishes priority

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62 Doug Jones, above n 31, 61. In 'bad faith' means with the intention of delaying the arbitral process.

63 (1995) Revue de l'arbitrage. 617. Hereinafter referred to in-text as '*Copradag*'. See *also American Bureau of Shipping (ABS) v. Copropriété Maritime Jules Verne*, (2001) Cour de cassation Chambres Civiles. The Cour de Cassation is the highest court in the French judiciary.

64 *Coprodag v. Dame Bohin*, (1995). Revue de l'arbitrage. 617 cited in Emmanuel Gaillard, John Savage, above n 13, [672].

65 (1997) Revue de l'arbitrage 537.

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of arbitral competence to rule on the existence, the validity and the scope of the arbitration agreement'.[66]

Given that most arbitration legislation and rules of international arbitral institutions regulate the arbitrators to provide a preliminary award concerning jurisdiction, in the majority of instances a preliminary award will be expeditiously issued. This will subsequently permit a party to the dispute to apply for judicial review of the matter. In France an annulment review will be conducted *de novo* in accordance with Article 1052 of the *French Code*, which provides the court with opportunity for a full verification of the award.[67]

Article 1458 is capable of serving as a model in other jurisdictions, where the negative effect is construed more widely. The French position provides higher priority to ensuring the arbitral process proceeds without intervention.[68] Further, in the majority of cases, it is in the interests of efficiency for a tribunal to have a chronological priority over a court to rule on questions concerning the validity and existence of a contract. The priority of the tribunal to rule on its jurisdiction should at a minimum, be granted until an award on jurisdiction has been issued.

The only risk presented by the approach of French courts is that it may compel parties to submit to arbitration against their will. However this must be balanced against the dilatory tactics used by parties to stall arbitral proceedings. Essentially, the French position is most likely to hold parties to their bargains and facilitate a rapid recourse to arbitration.

VIII THE ENGLISH APPROACH

The English position on the negative effect is premised on the *Model Law*. This is evidenced in section 30 of the *Arbitration Act (1996)* UK [69] which permits a challenge to jurisdiction during the preliminary proceedings or following the award.[70] The procedures within Part I of the *English Act* concerning bringing jurisdictional objection before the tribunal or the court, are aimed at limiting a party's entitlement to recourse to the court in order to determine the jurisdiction of the tribunal.

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66 *American Bureau of Shipping (ABS) v. Copropriété Maritime Jules Verne, (*2001) Cour de Cassation Chambres Civiles. Hereinafter referred to in-text as '*ABS*'. See also Emmanuel Gaillard, Yas Banifatemi, above n 8, *260*

67 See John J Barcelo III, above n 2, 1125.

68 Doug Jones, above n 31, 61.

69 Hereinafter referred to in-text as the '*English Act*'. Although it is referred to in-text as the '*English Act*' its applicability is not limited to England. See *Arbitration Act (1996)* UK pt 1, s 2.

70 Doug Jones, above n 31, 60.

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When compared to Article 5 of the *Model Law*, the equivalent section 1(c) of the *English Act* provides that 'in matters governed by this Part the court should not intervene except as provided by this Part'. The term 'should' has been argued to be a weaker limitation on court intervention than the word 'shall' in the *Model Law*. It has thus been suggested by some that the English courts maintain their inherent jurisdiction, by declaration and injunction, to rule on the jurisdiction of a tribunal at any time.[71] In particular, section 9(4) of the *English Act* mirrors the language of Article II (3) of the *NYC* and to a large extent, the language in Article 8(1) of the *Model Law*. Section 9(4) provides that 'On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'.[72]

The standard of the negative effect in Section 9(4) turns on whether the phrase 'unless satisfied' consists of merely a *prima facie* judicial review. It has been suggested that the phrase 'unless satisfied' is more proximate to 'unless it is manifest' than is the *Model Law* language which states 'unless it finds' in Article 8(1).[73]

The preferable approach to section 9 of the *English Act* was enunciated by the House of Lords in the recent pro-arbitration decision of *Premium Nafta Products Ltd v Fili Shipping Co Ltd* where it was held that:

> …to determine on the evidence before the court that [an arbitration agreement] does exist in which case (if the disputes fall within the terms of that agreement) a stay must be granted, in the light of the mandatory 'shall' in section 9(4). It is this mandatory provision which is the statutory enactment of the relevant article of the *NYC*, to which the United Kingdom is a party. [74]

This judgment placed significance on the responsibilities of the United Kingdom as a signatory to the *NYC* thereby reinforcing it as a jurisdiction favourable to

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[71] Peter Aeberli, 'Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map' (2005) 21(3) *Arbitration International* 253, 276. See *Vale de Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep. 1 where the court held that the limitation on court intervention in s.1 (c) of the *Arbitration Act 1996* (UK) was different to Art 5 of the *Model Law*, stated as an absolute prohibition.

[72] Section 30 of the *Arbitration Act 1996* (UK) provides the positive competence-competence of the tribunal.

[73] John J Barcelo III, above n 2, 1130.

[74] [2007] UKHL 40, Paragraph 37. Hereinafter referred to in-text as '*Premium Nafta*'. This case previously came before the English Commercial Court under the name of *Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20. It subsequently changed name to *Premium Nafta* when it came before the House of Lords.

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upholding agreements to arbitrate and providing priority for tribunals to determine their jurisdiction.[75] The House of Lords held:

> If in a case where an arbitrator does have jurisdiction to decide a particular dispute, he is to be restrained from so doing and no stay of court proceedings is to be granted, there is likely to be a potential breach of the United Kingdom's international obligations in relation to commercial arbitrations under the *NYC*...as enshrined in the 1996 Act. [76]

Moreover concerning the stay of court proceedings, the House of Lords in *Premium Nafta* held that:

> ...it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute…[77]

This decision asserted the doctrine of *separability* and the principal of *competence-competence*.[78] The risk that a tribunal may take advantage of its discretion and deny issuing a preliminary award, thereby postponing what should be expedited judicial review has also been addressed in section 31(5) of the *English Act.*[79]

Section 31(5) aims to overcome this potential problem by providing that '[t]he tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32'.

Given that the party objecting to arbitration would not be against a stay of the arbitral process in order to have judicial review of jurisdiction, the party in support of arbitration would effectively determine whether to request a preliminary ruling from the tribunal regarding jurisdiction. Such a ruling would then be subject to an expedited judicial review.[80]

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75 The term 'United Kingdom' is defined as the 'United Kingdom of Great Britain and Northern Ireland' in the status document for ratification of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

76 *Premium Nafta Products Ltd. v Fili Shipping Co. Ltd* [2007] UKHL 40 (Hoffman LJ).

77 Ibid. The term 'Act' is in reference to the *Arbitration Act 1996* (UK).

78 Similar to the Model Law, sections 30(1) and 30(2) of the *Arbitration Act 1996* (UK) permit the arbitrators to determine questions on jurisdiction either in a preliminary award or in the final award.

79 Section 31(5) of the *Arbitration Act 1996* (UK) is in contrast to the Model Law.

80 John J Barcelo III, above n 2, 1130.

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The *English Act* proceeds with Section 32 which appears to safeguard the entitlements of parties concerning the jurisdiction of the tribunal[81] by providing that:

> (1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal….
> (2) An application under this section shall not be considered unless—
> (a) it is made with the agreement in writing of all the other parties to the proceedings, or
> (b) it is made with the permission of the tribunal and the court is satisfied—
> (i) that the determination of the question is likely to produce substantial savings in costs,
> (ii) that the application was made without delay, and
> (iii) that there is good reason why the matter should be decided by the court.
> (3) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending. [82]

There are concomitant risks to proceeding with arbitration in the presence of a forceful jurisdictional challenge. One risk is that if the pro-arbitration party loses, it will usually suffer the wasted costs of the tribunal proceeding in such circumstances. Section 32 would offer the benefit of permitting a pro-arbitration party who is concerned about the risk of wasted costs, to give consent to the anti-arbitration party and have the matter addressed beforehand by judicial intervention.[83]

Section 32 (2) (b) has been criticised for permitting the tribunal to request that the court address the question of jurisdiction at the outset of the arbitration, which has been viewed as inefficient. It has been recommended that the tribunal render a preliminary award on jurisdiction and only if it were required, then refer the matter for judicial review.[84]

This criticism of section 32 should be balanced against its aims to create a high threshold to be satisfied prior to judicial intervention thereby preserving the interests of both parties to the arbitral proceedings. In particular, if there is failure to effect mutual agreement between the disputing parties, then the tribunal must have legitimate reservations concerning the validity of the arbitration agreement before deferring the matter to judicial review.[85]

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[81] Doug Jones, above n 31, 60.
[82] Section 32 of the *Arbitration Act1996* (UK) does not have an equivalent in the Model Law.
[83] John J Barcelo III, above n 2, 1126.
[84] Emmanuel Gaillard, John Savage, above n 13, [682].
[85] Doug Jones, above n 31, 60.

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There is additional preservation of the parties' interests by the requirement that the court also have substantial grounds for intervening in the arbitral process. What should be conceded however is, despite such safeguards from judicial intervention and cases such as *Premium Nafta*, an anti-arbitration picture may emerge when some case law concerning the negative effect are examined. It has been suggested that in difficult cases, the court is inclined to rule on the issue of jurisdiction, prior to the tribunal.

A case in point is *Al-Naimi v Islamic Press Agency*[86] Notwithstanding section 30 of the *English Act* which permits the tribunal to determine the positive effect of *competence-competence*, it was held that:

> …the existence of the power [of *competence-competence*] does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal.[87]

In a subsequent case, Law Debenture Trust Corp Plc v Elektrim Finance BV an application was made to stay the court proceedings and permit the tribunal to determine the dispute. 88 The court refused a stay and held that '[t]here is no support for any suggestion that the court should inevitably allow the arbitral tribunal to decide the jurisdiction question and stay the court proceedings in the meanwhile'.[89]

Decisions such as *Al-Naimi* and *Law Debenture* could be construed as averse to the negative effect in particular and *competence-competence* in general. By interpreting the tribunal's authority to have first priority to rule on jurisdiction as non-compulsory, it may be deduced that the English courts construction of the negative effect restricts its efficacy.

Moreover, notwithstanding the provisions in the *English Act* concerning jurisdictional challenges, the court unambiguously maintains its power to rule upon matters of jurisdiction and has not construed all cases in a manner that is consistent with the negative effect.

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86 *[2000] 1 Lloyd's Rep. 522.* Hereinafter referred to in-text as '*Al Naimi'*.

87 *Al-Naimi v Islamic Press Agency [2000] 1 Lloyd's Rep. 522, 524.*

88 [2005] EWHC 1412 (Ch). Hereinafter referred to as '*Law Debenture'*. See also *Azov Shipping Co v Baltic Shipping Co.* [1999] 1 Lloyd's Rep 68 which favours the approach that the court should determine matters concerning the existence or the terms of the arbitration agreement. Otherwise there may be two hearings: one before the tribunal and one before the court on a challenge.

89 *Law Debenture Trust Corp Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch) [34].

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IX THE UNITED STATES APPROACH

Although the U.S. Supreme Court has been more inclined to favour arbitration of international commercial contracts, the general approach to review of the tribunal's jurisdiction, has been interventionist and presumptive. This is more so with review at the preliminary stage of the arbitral process, when the tribunal is asked to hear a dispute. [90] If the court proceedings relate to an international arbitration that is subject to the NYC, Chapter 2 of the United States *Federal Arbitration Act* 1925 is applicable.[91]

Pursuant to section 201 of the *FAA*, the question of who decides the jurisdiction of the tribunal is essentially subject to the construction of Article II (3) of the *NYC*, which is subsumed in the *FAA*.[92] Although it is argued that the language of Article II (3) invites a *prima facie* review of arbitration agreements, in practice the United States courts have not always taken such an approach.[93]

There are two relevant cases relating to the arbitrability question. One is *First Options of Chicago Inc v Kaplan.*[94] The other is *Howsam v Dean Witter Reynolds Inc.*[95] Both *First Options* and *Howsam* relate to an analysis of section 3 of the *FAA*, which concerns a stay of proceedings where the issue is referable to arbitration.

Section 3 stipulates that:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Despite such legislative provisions, the courts have not always been inclined to refer matters to arbitration, nor to provide first priority to the tribunal on the question of its own jurisdiction.

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90 John J. Barcelo III., above n 2, 1135.

91 Hereinafter referred to in-text as the '*FAA*'.

92 The Convention is incorporated into the *Federal Arbitration Act 1925* (U.S.) in 9 USC § 207 (2004).

93 Albert Jan van den Berg, above n 55, 169.

94 514 U.S. 938 (1995). Hereinafter referred to in-text as '*First Options*'.

95 537 U.S. 79 (2002). Hereinafter referred to in-text as '*Howsam*'.

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One of the issues in *First Options* was whether the courts or the tribunals have primary power to decide if the parties agreed to arbitrate.[96] The U.S. Supreme Court held that the district court and not the tribunal must determine arbitrability matters.[97]

The rule derived from this case was that if the dispute arises at the outset of the arbitration then questions such as the existence of the arbitration agreement and its validity are presumptively for the courts to determine. It follows that United States courts should not assume the parties consented to have arbitrability issues arbitrated, unless there exists clear and unmistakable evidence to support it.[98]

Although the presumption in First Options is a rebuttable one, such rebuttal will rarely be clear and unmistakable, thus the fallback position will be review by the courts. Moreover, by the First Options ruling that the court should determine the existence and validity of the arbitration agreement as de novo it may be inferred, that during the early stage of the arbitral process, the court will determine existence and validity questions prior to referring the matter to the tribunal.99

Essentially, the rule from *First Options* grants too much discretion for courts to determine the jurisdiction of the tribunal.[100] Unsurprisingly, this standard of review has received much criticism due to its onerous nature and that it may lead lower U.S. courts to presume that the arbitration agreement is invalid. It is feared that such an interventionist and presumptive approach by the courts could lead to the attrition of arbitration agreements.

Conversely, due to the ruling in *Howsam*, arbitrability issues arising at the outset of the dispute relating to procedural questions such as time limits on a claim are presumptively the preserve of arbitrators.[101] Because of this rule, issues concerning procedural arbitrability are subject to a less interventionist approach in the U.S.

Once an award on jurisdiction or a final award is issued, the U.S. courts will only conduct a deferential review of procedural arbitrability issues whereas French courts may conduct a *de novo* review of same.[102] This does not however alter the U.S position on the substantive issues concerning jurisdiction.

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96 Peter Aeberli, above n 73, 290.

97 *First Options of Chicago Inc v Kaplan* 514 U.S. 938,941 (1995).

98 Ibid.

99 John J Barcelo III, 1115, 1132-1133.

100 Leonardo D Graffi, 'Securing Harmonised Effects of Arbitration Agreements Under the New York Convention' (2006) 28(3) *Houston Journal of International Law* 664, 742.

101 *Howsam v Dean Witter Reynolds, Inc*, 537 U.S. 79, 84 (2002). In *Howsam* the U.S. Supreme Court held that the interpretation of a National Association of Security Dealers Code (NASD) regulation stipulating a six year time limitation for an arbitration was a matter presumptively for the tribunal rather than the court.

102 John J Barcelo III, above n 2, 1134.

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Although *First Options* and *Howsam* concerned domestic arbitrations, they have implications for international arbitrations in the United States and the negative effect.[103] An example of such a case is *China Minmetals Materials Import and Export Co. Ltd. v Chi Mei Corp*.[104]

The majority in *Minmetals* found that the District Court, acting under Chapter 2 of the *FAA*, should have autonomously ruled upon the validity of the arbitration agreement, at a minimum in cases where the arbitration agreement is alleged to be *void ab initio*, and where there is no waiver precluding such a defence.[105] This was an unequivocally interventionist approach.

The advantage of the American approach to review of the tribunal's jurisdiction is that when the parties' consent to arbitration is properly scrutinised, it should minimise the risk that parties who never agreed to arbitration are compelled to participate.[106] This advantage must however be weighed against the risk that recalcitrant parties to an arbitration, may object to the tribunal's jurisdiction as a dilatory tactic.

The current position in the United States concerning review of the tribunal's jurisdiction by courts may be characterised as interventionist and presumptive, especially if jurisdiction is challenged during the early stage of the arbitral process.[107] It has been suggested that the U.S. laws are long overdue for an overhaul in arbitration legislation to align them more closely with current developments in international arbitration laws including, by providing a greater priority for the tribunals to determine their own jurisdiction.[108]

X THE AUSTRALIAN APPROACH

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[103] Tibor Varady, John J. Barcelo III and Arthur T von Mehren, above n 31, 90.

[104] 334 F 3d 274 (3d Cir.2003). Hereinafter referred to in-text as '*Minmetals*'. This case related to the enforcement of a Chinese award in New Jersey, U.S.A. At paragraph 52 of the decision by the Court of Appeal, Third Circuit, it was stated that: 'We recognise that *First Options* is a domestic arbitration case, but the international nature of the present litigation does not affect the application of *First Options* principles'.

[105] David D Caron, Rebecca J Wright 'Justice Alito and Arbitration: His Opinion on *China Minmetals*' (2006) 20(1-2) *News and Notes from The Institute for Transnational Arbitration 1, 2*.

[106] Leonardo D Graffi, above n 102, 754.

[107] Ibid 744.

[108] Edward Brunet, et al *Arbitration Law in America A Critical Assessment* (2006) 208-09. See for example, Gabrielle Kaufman Kohler 'Global Implications of the U.S. Federal Arbitration Act: The Role of Legislation in International Arbitration'. *http://www.lk-k.com/data/document/global-implications-the-faa-the-role-legislation-international-arbitration.pdf*. Accessed 2 April 2009.

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Although Australian courts have not developed any case law concerning *competence-competence*, the position adopted by the Australian judiciary to provide efficacy to arbitration agreements has been generally less interventionist *vis-à-vis* the United States' position.[109] The *International Arbitration Act* 1974 (Cth) [110] is the applicable legislation for international arbitration which subsumes the *NYC* and the *Model Law*.

In particular, section 7(2) of the *IAA* includes the obligations of Australia in a stay of proceedings in accordance with the *NYC* by providing that:

> ….on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceeding or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

Section 7(2) differs from the *NYC* in that it provides the court with freedom to order a stay on one or more aspects of the arbitral proceedings and refuse a stay on others. Moreover, section 7(5) of the *IAA* provides that, the only exception to making an order to stay court proceedings in order to permit arbitration to proceed is where the arbitration agreement is null and void, inoperative or incapable of being performed, which is similar to the language in Article 8 of the *Model Law*.

This provision falls short of an unequivocal priority to the tribunal as evidenced in Article 1458 of the *French Code*. Thus the Australian approach lies somewhere between the positions adopted by the courts of France and the United States.

What could be considered a pro-arbitration judgment was *Origin Energy Resources v Benaris International NV*.[111] It related to proceedings brought before the Supreme Court of Tasmania by Origin. Benaris sought an order to stay proceedings pursuant to section 7 of the *IAA* on the grounds of an arbitration agreement between the parties.

The court held that section 7 applies to the arbitration agreement between the parties and refuted various arguments by the plaintiff against the stay, including a submission that since Benaris had not yet instigated arbitration proceedings, it had waived the entitlement to arbitrate. The court held that the proceedings brought by Origin against Benaris were covered by the arbitration clause and accordingly, court proceedings must be stayed.

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[109] Doug Jones, Bjorn Gehle 'Arbitration in Australia' (2009) *The Asia-Pacific Arbitration Review*. See also *Compagnie de Messageries Maritimes v Wilson* (1954) 94 CLR 589-591 where it was held that agreement to submit to arbitration will, in the absence of countervailing reasons, stay proceedings in the court.

[110] Hereinafter referred to in-text as the '*IAA*'.

[111] [2002] TASSC 50. See also *CTA International Pty Ltd v Sichuan Changhong Electric Co. Ltd* [2002] VSC 374.

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A recent New South Wales Supreme Court decision has further upheld agreements to arbitrate. In *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd*, the Supreme Court held that the *IAA* compelled the court to refer the parties to arbitration and enforce their original agreement. Accordingly, Eastcoast's cross-claim was stayed and the parties were referred to arbitration pursuant to section 7(2) of the *IAA.*[112]

More affirmation for enforcing arbitration agreements arrived in the judgment of the Victorian Supreme Court in *Ansett Australia Limited v Malaysian Airline System Berhad*.113 Hollingworth J, imposed a stay of court proceedings under section 7 of the IAA which signals that Australian courts will adopt a firm approach to matters concerning construction of the arbitration agreement and take necessary courses of action to enforce such an agreement. In this regard, Her Honour noted that

> as a matter of general principle, it is the duty of the court to give effect to the purpose which lies behind an arbitration agreement and to respect the intention of the parties as expressed in the agreement.[114]

In conclusion, because the *IAA* does not contain a provision similar in language to Article 1458 of the *French Code*, it would be advantageous if the current review of the *IAA* by the Federal Attorney General included an amendment which definitively endorsed and clarified the Australian approach to the negative effect, thereby ensuring that the legislation is in accordance with current international best practice. Such an amendment should incorporate a clear test which outlines the restrictions of the principle.[115]

XI STRIKING A BALANCE: ASSISTING THE ARBITRAL PROCEDURE WITHOUT UNDUE COURT INTERVENTION

The role of any legal order is to strike a balance between effectively assisting the arbitral procedure and providing intervention when parties' interests are at stake. This essentially consists of providing priority to the parties' agreement to arbitrate

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[112] [2008] NSWSC 894.

[113] [2008] VSC 109.

[114] Jonathan K Hoyle., *Stay While I Impose Some Conditions (or not, as the case may be)* (2008) http://www.mallesons.com/publications/2008/May/9457567w.htm. Accessed 2 April 2009. See *Transfield Philippines Inc v Luzon Hydro Corp* [2002] VSC 215.

[115] For a discussion of the submissions made in response to the Federal Attorney General's Discussion Paper concerning the proposed redrafting of the *International Arbitration Act 1974* (Cth) see 'International Arbitration Act Review- our eleven page report starts here'. (2009) 10/11 *The Australian ADR Reporter* 20. The reasons as to why Australia is not chosen as the 'seat' of many international arbitration agreements or is not a popular venue for international arbitrations is beyond the scope of this paper.

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but simultaneously ensuring there is access to courts if one of the parties presents a genuine challenge to the jurisdiction of the tribunal.

To absolutely prohibit judicial review of the tribunal's ruling on jurisdictional questions would be tantamount to refusing one of the essential entitlements found in any democratic legal system.[116] In striking a balance between assisting the tribunal and intervening where necessary to protect the interests of the parties, the overarching factors must be the interests of the parties and the avoidance of unnecessary delay or costs.[117]

Although there are broad international provisions, such as Article II (3) of the *NYC* and Article 8(1) of the *Model Law*, the standards applied by courts from different jurisdictions concerning the tribunal's priority to determine its own jurisdiction vary substantially.

In the event of an erroneous ruling on jurisdiction by the tribunal, the *Model Law* for instance aims to reduce the loss of time and incurring of costs for parties to the arbitration, by permitting the parties to have judicial review of the tribunal's preliminary ruling on *competence-competence*.

The disadvantage of the *Model Law* approach is that is indicates low confidence in the capability of the tribunal to render enforceable awards and also provides an opportunity for parties to abuse the system by employing dilatory methods, thereby squandering public and private resources.[118]

Although the *English Act* aims to provide more deference to the tribunal and prevent parties from using dilatory methods by adoption of a modified position of the *Model Law*, it is not as effective as may appear at first glance. This is primarily because the manner in which the courts construe the *English Act* as simply offering the choice of having the question of jurisdiction determined initially by the tribunal but, not interpreting it as compulsory. Such an interpretation reduces the efficacy of the negative effect.

As for the interventionist approach adopted by the United States, the standard of judicial review has been heavily criticised for the rule emanating from *First Options*, which grants too much discretion to courts to determine the jurisdiction of the tribunal. An overhaul of the *FAA* is necessary to align American arbitration law with current trends in international arbitration.[119]

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[116] See *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J). See also *Marbury v Madison* 5 US (1 CRANCH) 137, (1803).
[117] *Al-Naimi v Islamic Press Agency [2000] 1 Lloyd's Rep. 522, 524.*
[118] Doug Jones, above n 31, 62.
[119] John J Barcelo III, above n 2, 1136.

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The Australian approach to upholding international commercial arbitration has been an increasingly liberal one[120] although amendment of the *IAA* to make express reference to the negative effect would clarify the judicial position further. It is difficult to assert definitively what the Australian position is concerning the negative effect, as there has not been any case law which relates directly to this principle.

One proposal to the Federal Attorney General's Discussion Paper to review the *IAA*, has been to grant exclusive jurisdiction to the Federal Court to hear international arbitration matters and enact legislation to circumvent any potential constitutional or other legal obstacles.[121] The merits of this proposal should be seriously considered as part of the current review of the *IAA.*

One of the major aims of the French 1981 reform of international arbitration law was to simplify the method of challenging awards before the courts and it seems to have succeeded in achieving that goal.[122] The French approach to the principle of the negative effect, particularly Article 1458 of the *French Code* affords an express priority to the tribunal, unlike any other jurisdiction analysed.

By prohibiting the court from conducting judicial review of the jurisdictional question once a tribunal is constituted until an award is issued, Article 1458 ensures that parties who intend to engage in dilatory tactics to delay the arbitral proceedings are discouraged. Such a strict approach to upholding the jurisdiction of the tribunal should be commended and may serve as a model for other jurisdictions.

The contemporary interpretation of the *French Code* by the courts provides a better chance of reducing the misuse of resources for the parties and courts alike[123] thereby striking an optimum balance between assisting the tribunal and intervening in manifest cases of invalid arbitration agreements to preserve the parties' interests.

As Professor Reisman has stated:

> ….too much national judicial review will transfer real decision-making power from the arbitration tribunal, selected by the parties in order to be non-national and neutral, to a national court whose party neutrality may be considered less.[124]

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[120] See *Abigroup contractors Pty Ltd v Transfield Pty Ltd and Obayashi Corporation* [1998] VSC 103. Contra, *Eisenwerk v Australia Granites Ltd* [2001] 1 Qd R 461

[121] Michael Sanig, 'Exclusive Jurisdiction – A Matter of National Interest' (2009) 10/11 *The Australian ADR Reporter* 18, 21.

[122] Emmanuel Gaillard, John Savage, above n 13, [681].

[123] Doug Jones, above n 31, 63.

[124] Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (1992) 113.

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The principle of *competence-competence* is unambiguously a crucial factor in arbitration and entrenched in many jurisdictions in both national laws and in international conventions/treaties. Notwithstanding this broad recognition, the practices are far from unanimous concerning questions such as 'at what stage of the arbitral proceedings may the court intervene in the arbitral procedure?'[125]

This paper has examined various case law, highlighting that different jurisdictions adopt divergent approaches to the negative effect. These disparities have substantial ramifications for the private and public expenditure of resources and the utility of arbitration as a preferred method of resolving international commercial disputes.

Although the French legal system is different to the other jurisdictions which share a common law tradition examined in this paper, this does not present an obstacle to it being considered as best practice. The pro-arbitration approach taken by French courts facilitates the promotion of France as a centre for international arbitration. The proposed solution is to amend national arbitrations laws to reinforce *competence-competence* and encourage the judiciary to adopt an approach similar to the French position, by providing priority to the tribunal concerning its own jurisdiction.

Nguồn bài viết/Source: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546242

[125] Doug Jones, above n 31, 63.

JURISDICTION OF THE ARBITRAL TRIBUNAL

Current jurisprudence and problem areas under UNCITRAL Model Law

Report for the R.I.Z. / UNCITRAL / DIS - Conference
"Draft Digest on the UNCITRAL Model Law on International Arbitration"
on
March 3-4, 2005 in Cologne, Germany

Prof. Dr. Alan Uzelac

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I. INTRODUCTION

A. Outline

The subject of this paper are various issues connected to the jurisdiction of the arbitral tribunal, as defined in the cases collected on the issues of application of the MAL in various countries that have adopted UNCITRAL Model Law on International Commercial Arbitration. Of course, the source of the jurisdiction is the arbitration agreement. Yet, here we will not deal with the arbitration agreement in general, but primarily with the procedural issues of the determination of the jurisdiction (or lack of the jurisdiction) of the arbitral tribunal. To the extent that some substantive issues, such as the existence or scope of the arbitral jurisdiction were invoked as a ground substantiating jurisdictional pleas, these issues will also be taken into account. Further on, the consequences of the arbitral jurisdiction, such as its impact on the court proceedings regarding the same claims, will also be assessed. Finally, within the general topic of the jurisdiction of the arbitral tribunal, a separate subset of question that relate to the topical subject of the authority of the arbitrators to issue interim measures of protection will also be presented.

These issues regard the following provisions of the MAL:

- Art. 8 (Arbitration and substantive claim before court)
- Art. 16 (Competence of arbitral tribunal to rule on its jurisdiction)
- Art. 17 (Power of arbitral tribunal to order interim measures)
- Art. 34(2)(a)(i) (Application for setting aside due to lack of jurisdiction – incapacity of the parties or invalidity of the agreement)
- Art. 36(1)(a)(i) (Refusal of recognition and enforcement of the award due to lack of jurisdiction).

For the sake of clarity, the issues will be presented in a logical and not numerical order, thus starting with the competence of the tribunal to rule on jurisdictional issues (MAL 16), continue with the jurisdictional objections made in court proceedings in which the same substantive claim is raised (MAL 8), present the jurisdictional issues that may occur while the court decides on jurisdictional objections and reviews jurisdictional decisions made by the arbitrators in setting aside and recognition and enforcement proceedings (MAL 34 and 36), and end with the arbitral and court jurisdiction to order interim measures of protection (MAL 17).

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B. General remarks

As opposed to some other articles of the MAL where case-law is scarce, it seems that the Digest has collected a considerable number of cases on the issues of the arbitral jurisdiction, interim measures and the other related issues. Only in CLOUT database there are 35 reported decisions on MAL 8(1) – by far the largest number of reported cases on any of the provisions of the MAL. However, the proportion of decisions from various jurisdiction is rather different, and a number of MAL jurisdictions have still to be covered.

II. ARTICLE 16: COMPETENCE OF ARBITRAL TRIBUNAL

A. Jurisdiction of the tribunal – *Kompetenz Kompetenz*

Today, the right of the arbitrators to rule on their own jurisdiction is an almost fully uncontroversial part of the well-established doctrine and practice in international arbitration. The provision of Art. 16 MAL in its basic idea now really reflects the globally harmonized approach to the issue universally called *Kompetenz Kompetenz.* Practically all countries recognize the right of the tribunal to decide on their jurisdiction, subject to the subsequent court control. This is also demonstrated by some 20 cases collected in CLOUT that all, without exception, assert the right of arbitrators to rule on their own jurisdiction (Cases 13; 18; 20; 27; 101; 114; 127; 147; 148; 182; 357; 367; 369; 373; 382; 392; 403; 441; from various jurisdictions). Yet, in certain details the law is still different, even in the countries that have adopted the MAL (see further infra at E.).

As the Digest summarizes, we see now a "wide consensus that the arbitral tribunal has the power to rule on all aspects of its own jurisdiction". Reported decisions have showed that the courts recognize the right of the arbitral tribunal to determine:

- whether arbitration agreement exists between the parties (e.g. Case 127, Bermuda; Case 109, Hong Kong),
- whether the matter in dispute comes within the scope of the arbitration agreement (e.g. Cases 18, 32 and 357, Canada; Case 127, Bermuda);
- what is the proper interpretation of the arbitration agreement (Case 357, Canada);
- whether arbitration agreement is valid or was terminated (e.g. Case 127, Bermuda; Case 369, Canada).

B. Separability of the arbitration agreement from the main contract

The doctrine of separability (or severability), reflected in the last two sentences of Art. 16(1), is now also a part of the universal consensus among arbitration practitioners, accepted by most legal systems of the world. This is also reflected by the collected court decisions (see Cases 19; 20; 27; 32; 114; 349; 367; 368). Courts have widely recognized that arbitral agreement have a fate independent of the main contract, so that invalidity or termination of the main contract does not necessarily affect validity and binding force of the arbitration clause. E.g. it was recognized that arbitrators may find that the main contract is null and void *ab initio*, even due to fraudulent behavior of a party or the parties, but that arbitral clause contained in the contract continue to be operative, providing arbitrators with authority to decide on the consequences of the nullity of the main contract (Supreme Court NSW, Australia, 17 Aug 1994).

C. Procedure for determination of the arbitrators' jurisdiction

i. Time-limit for the pleas as to the lack of jurisdiction

Although arbitrators have authority to rule on their jurisdiction, they cannot do it on their own initiative. Plea as to the lack of jurisdiction has to be submitted by the respondent in due time – under Art. 16(2) not later than the statement of defense. Belated objections regularly cannot be taken into account, as the lack of objection has to be construed as the waiver of the right to object and conclusion of a valid arbitration agreement. Still, the arbitrators have the right to admit the plea if the delay in their submission is considered justified.

Under one reported case, it seems that the court held that the plea has to be sufficiently substantiated: an allegation that arbitration agreement does not exist because the party was not successor of the main contract was held to be a substantive defense that precluded later procedural objections as to the jurisdiction (Case 148, Russia).

ii. Effect of the lack of objection in the arbitral proceedings

The courts had opportunity to evaluate the effect of lack of objections as to the jurisdiction of the tribunal in the arbitral proceedings on subsequent setting aside proceedings. A German court held that the party regularly loses its right to raise the lack or invalidity of the arbitration agreement in the setting aside proceedings if there was no objection to jurisdiction in the arbitral proceedings (OLG Stuttgart, 1 Sch 16/01, 20 Dec 2001). As stated by the same court, failure to raise this objection amounts to conclusion of the new arbitration agreement by passive behavior of the party. This seems to be a generally accepted position, both under MAL Rules as under many national arbitration laws.

However, the courts in various jurisdictions had expressed diverging views as to the consequences of cases in which objection to jurisdiction was raised in the arbitral proceedings, but the preliminary decision of arbitrators was not attacked under MAL 16(3) before the competent court. In one Singapore case collected in the Digest, the court held that a party was not prevented from submitting an application for the setting aside of the award on the basis of lack of jurisdiction simply because the party did not challenge arbitral decision on jurisdiction under paragraph (3) before a competent court (Tan Poh Leng Stanely v. Tang Boon Jek Jeffrey, 30 Nov 2000). German courts, on the contrary, held that this was a necessary prerequisite for the successful raising of this ground in setting aside proceedings (BGH, III ZB 83/02, 27 March 2003).

iii. Ruling on the jurisdiction by arbitrators: preliminary decision or part of the final award

It seems that there were no controversies regarding the recognition of arbitrators' discretionary powers to decide whether they would rule on jurisdiction in a separate ruling, or in the final award. As to the consequences of such decision, one court held that decision to postpone the ruling on jurisdiction until the final award cannot be attacked, but that in such a case only setting aside proceedings could review whether the arbitrators erred in finding that they are competent to decide (Case 441, Germany).

If the arbitral tribunal decides on the issue of jurisdiction as a preliminary question, and concludes that it has jurisdiction, this ruling may be subject to challenge under MAL 16(3). Regularly, the competent authority will be a state court. However, in some jurisdictions that is

not necessarily so. E.g. in Croatia – whose Law on Arbitration departs slightly from the text of the MAL in respect of designation of authority from MAL 6 – parties may by their agreement transfer the authority to control separate decisions on jurisdiction to some other authority. Thus, in an unreported decision, a Croatian Commercial Court confirmed that the arbitration rules of an institutional arbitration institution may replace court control with some other controlling mechanism (in this case, with the decision of the President of the arbitral institution).

The time limit for the application to the court is 30 (thirty) days from the date when the party has received notice of the ruling of the arbitral tribunal. As to this time-limit, a German court held that an application was launched in due time if it was submitted to a court within the 30-days period, notwithstanding the fact that the court to which the application was filed was not competent (OLG Frankfurt, 3 Sch 02/00, 6 Sep 2001).

One, potentially controversial decision, dealt with the consequences of the form of the preliminary ruling by which arbitrators assert their jurisdiction. The MAL does not determine in which form should the arbitrators decide on jurisdiction as a preliminary issue. In procedural theory, it should be taken for granted that such a decision is of a procedural, and not substantive nature. From that, it would follow that the arbitrators may issue it only in the form of a procedural order. However, in some jurisdictions, such decisions are being taken in the form of arbitral awards, as well.

In the Digest, diverging judicial opinions as to the effect of designation of the decision on jurisdiction as "arbitral award on jurisdiction" are noted. High German juridical authorities, while noting strong and influential voices in the doctrine that such decisions cannot be regarded as arbitral awards, since there are no procedural arbitral awards (*Prozeßschiedssprüche*), have finally decided that such decisions can take the form of arbitral award, and even be attacked in setting aside proceedings (OLG Hamburg, 11 Sch 02/00; BGH III ZB 44/01, 6 June 2002). In these cases, however the German courts dealt only with the preliminary decision in which the arbitrators have declined their jurisdiction (see *infra at IV.A*).

The view that a decision made under MAL 16(3) can take form of the award was also taken by a Bermuda court (Court of Appeal of Bermuda, 6 Dec 2002), yet with even more far-reaching consequences. That court found that, if the preliminary decision on jurisdiction was issued in the form of an award, it may be challenged in a separate setting-aside proceedings, even if the party would successfully challenge the ruling in accordance with the procedure set in Art. 16(3). This particular decision open a number of issues, including those relating to duplication of work, possible diverging decisions, applicability of the grounds from Art. 34 MAL etc.

Another interesting opinion on possibility of reviewing arbitral decisions on jurisdiction was expressed in a recent Croatian case, where the Constitutional Court, changing its previous case-law, held that it can control of the arbitral ruling that declined jurisdiction on the basis of alleged breach of the right to access to efficient dispute-resolution mechanism (U-III-669-2003, Croatia, 27 Oct 2004). Again, the decision was controversial: it was issued with several dissenting opinions and criticized in the doctrine (*see also infra*, at *IV.A*).

III. ARTICLE 8: SUBMITTING THE SUBSTANTIVE CLAIM TO THE COURT AND OBJECTIONS THAT ARBITRATION WAS AGREED UPON

A.) Court procedure if a dispute in which arbitration was agreed was submitted to the court

i.) Objections in the court procedure; time-limit for requests for referral to arbitration

Just the same as the arbitrators regularly cannot rule on their jurisdiction unless an objection was raised by the respondent in the arbitral proceedings, the court to which a substantive claim for which arbitration was agreed upon cannot take this fact on its own initiative (High Commercial Court, Croatia, Pž-5168/01, 29 April 2001; Pž-7481/03, 27 April 2004). Plea as to the lack of jurisdiction in the court proceedings has to be submitted by the respondent in due time – under Art. 8(1) that corresponds to 16(2) in arbitral proceedings - not later than when submitting his first statement on substance of the dispute. Belated objections regularly cannot be taken into account, as the lack of objection has to be construed as the waiver of the right to request referral to arbitration (High Commercial Court, Croatia, Pž-7481/03, 27 April 2004). Moreover, the lack of timely objections in the court proceedings may be construed as termination of the arbitration agreement: regularly, by submitting the statement of claim to the court plaintiff expresses his wish to abandon the arbitration agreement; by submitting his statement of defense, the defendant accepts the offer to amend their dispute resolution mechanism by agreeing on court litigation instead of arbitration (High Commercial Court, Croatia, Pž-5168/2001, 29 April 2001).

B.) Who rules on its own jurisdiction? Courts or arbitrators?

i.) Situation 1: Leaving the issue of jurisdiction to be resolved by arbitrators

When a party submits a claim to the court, and the other party opposes on the ground that an arbitration agreement was concluded, there are two possible scenarios. Under MAL 8, the court is bound to refer the case to arbitration, “unless the agreement is null and void, inoperative or incapable of being performed”. Under MAL 16, the tribunal may rule on its own jurisdiction, including any objections regarding the existence or validity of the agreement. Thereby, the same objection (of the validity of the arbitration agreement) can be resolved either as a preliminary issue in court proceedings, upon motion to refer the dispute to arbitration, or in the arbitral proceedings in a separate decision or in the award on the merits.

Recognizing the right of the arbitrators to rule on their own jurisdiction, in some cases the courts were reluctant to enter into examination of the existence and validity of the arbitration agreement, holding that the arbitral tribunal alone was competent to decide on its jurisdiction (Case 182, Canada). In the same case, it was held that the arbitrators have jurisdiction to decide whether a party enjoys absolute immunity from judicial process (and/or arbitration) of any kind. The courts also left to the arbitrators the issues that regarded alleged invalidation of the arbitration agreement due to public law reasons (UN embargo, national legislations) – see Case 392, Canada. Moreover, in other cases the superior courts found that a court has no discretion, but is obliged to refer the matter to arbitration if an objection was raised (Case 70 and 179, Canada). As stated in one case, “once a reference to arbitration had been made, there was no residual discretion in the court to refuse to stay the proceedings between the parties to

arbitration even though there may be particular issues that are not subject to arbitration". The language of this decision would even imply the duty of the court to stay the proceedings on the matters that are clearly outside the scope of the arbitration agreement, if the arbitral jurisdiction in other connected issues was asserted. This, however, may be a mistaken conclusion, since an inference can be drawn from the line of other cases that, at best, the court has inherent discretionary authority to stay or not to stay the proceedings (Case 15, 31 and 33 - Canada), which can also be only partially granted, in respect to some of the parties (Case 17, 36 - Canada). Yet, in order to refuse to grant a stay, "strong reasons are required" (Case 34, Canada).

ii.) Situation 2.: Independent preliminary decision by the court on the issue of the existence, validity and/or practicability of the agreement

As MAL 8 authorizes the court to refuse the motion to refer the dispute to arbitration if it finds that the agreement is null and void, inoperative or incapable of being performed, in a number of cases the courts have decided to go the other way: they did, in a preliminary fashion, deal with the issues of existence, validity and practicality of the agreement.

B.) To refer or not to refer: arguments as to the arbitration agreement

i.) Interpretation

In a number of cases, wording of the arbitration clauses was broadly interpreted, so that the courts preferred arbitration and referred parties to it if substantive claim was made before court even in cases of some clauses when the other party invoked an arbitration clause that could have been, under circumstances, viewed as „pathological". E.g. a court interpreted words „may be submitted to arbitration" as „shall be submitted to arbitration", and the words "incompleteness of the contract" as "a failure to perform the contract" (Case 38, Hong Kong). Reference to "arbitration in 3rd country", under the rules of "International Commercial Arbitration Association" was also saved by interpretation – the court held that the arbitration clause sufficiently indicated the parties' intention to arbitrate (Case 57, Hong Kong; see also Case 373, Germany – the latter decided in setting aside proceedings). Yet, there are cases in which, e.g. ambiguity of the clause with regard to the competent arbitral institution was held to be sufficient to make this clause null and void (Germany, 4 Z SchH 13/99, 28 Feb 00, DIS web-site).

Faced with the motions to refer disputes to arbitration under Art. 8, in a number of reported cases the courts openly showed their tendency towards favoring arbitration, sometimes expressly quoting the legislative policy to foster arbitration (e.g. Cases 73, 324, 382, 387, all Canada). If in the parties' negotiations the option of changing the dispute resolution mechanism was deliberated in favor of court proceedings, clear and unambiguous proof of the intention to renounce arbitration was required. One court has characteristically stated that "whilst it was true that parties to an arbitration agreement could abandon it and proceed to Court, the decision to do so must be clearly evidenced" (Case 370, Zimbabwe).

ii.) Whether arbitration clause was null and void

1.) Arbitrability and existence of the agreement *ratione causae*

When arguing for court jurisdiction and disputing validity and existence of the agreement, one possible line of argument relates to the non-arbitrability of the dispute. This argument was, however, not always successful. The case law on the Arts. 8 and 16 demonstrates that the courts held that arbitration is not precluded in a wide area of matters. E.g., it was found that the fact that a claim is grounded in tort does not preclude arbitration (Case 35, Canada). It was also found that construction lien legislation did not prohibit arbitration but, on the contrary, contemplate it (Case 183, Canada, see also Cases 73 and 74). It has also been found that shareholders dispute and disputes regarding management of commercial companies are arbitrable, if the law does not expressly require court litigation (High Commercial Court, Croatia, Pž-195/04, 10 Feb 2003.)

Diverging opinions were, however, expressed by the court regarding the claims grounded on the allegations of fraud. In one, potentially controversial case, it was found that "conspiracy, deceit and fraud were not matters arising out of 'this agreement'" (Case 65, Canada). Similar arguments were reflected in a few other cases. In one of them (Case 383, Canada – criticized in doctrine), the judge refused to stay the proceedings even though an ICC tribunal was already seized of the jurisdictional issue, because the issues such as "damages for misrepresentation (fraudulent or otherwise), breach of contract, inherently defective equipment and negligent performance of contract were not covered by an arbitration clause". In other case (Case 350, Canada) it was also held that "the fraud claim was not subject to arbitration as it was not contractual in nature".

In contrast with these decisions, a plea that a UN embargo deprives the arbitral tribunal of the power to decide and resolve upon the dispute was rejected by the courts (Case 392, Canada). In such a case, the court affirmed the right of the arbitrators to decide such an issue, subject to a later review within the context of the recourse for recognition or avoidance of a final award.

2.) Parties to the agreement: agreement ratione personae

Another possible objection relates to the parties to the arbitration agreement. There is a number of cases in which some or all of the parties in a multy-party setting initiated court proceedings arguing that they were not parties to the arbitration agreement. Such an assertion, under one decision (Case 148, Russia) had to be clearly designated as the plea regarding the jurisdiction of the arbitral tribunal, because the mere statement that a party is not a legal successor regarding the main contract could not be taken into account.

iii.) Whether the arbitration clause was "inoperative or incapable of being performed"

As to the obligation of the court to refer parties to arbitration, one may even argue that some courts were even overly generous in interpreting the arbitration clauses *in favorem arbitratii.* In one case (Case 449, Hong Kong), the court referred parties to arbitration, stating that a clause that gave one party the right to opt for either litigation or arbitration should be construed as valid and binding, notwithstanding the fact that the party that had right to opt had opted for litigation („it would unduly stretch the wording of MAL 8(1) to deem such an agreement inoperative for the reason that the party with the right to elect to settle its dispute throught arbitration chose not to exercise that right" [!?]).

Yet, in other cases, courts were more sensitive to the fact that the parties had agreed on multiple dispute-resolution mechanisms, so that a court (Case 388, Canada) had refused to refer parties to arbitration because it found that a particular dispute was not covered by the

arbitration agreement, since the clause allowed "court proceedings for specifically listed default events" (such as the one submitted to the court), "while retaining arbitration for all other disputes". A similar conclusion was reached in another case, in which arbitration was agreed for all disputes, except of differences "involving a question of law" (Case 113, Canada). In all such cases courts found that arbitration agreement was in the particular case either inoperative or – for the particular dispute – non-existent.

In some reported cases, the courts have rejected the motions for referral to arbitration under MAL 8 because the arbitration agreement was found to be inoperative. One clause (Case 66, Canada) was, e.g. found to be inoperative on the ground that under the signed clause one of the parties to a dispute had to act in the role of arbitrator. The court held that a party cannot act as neutral and impartial arbitrator and thus held this clause to be "inoperative" (interestingly, the clause as such was not pronounced "null and void").

A relatively recent case invoked lively debates about the meaning of "inoperative agreements". A very senior German court found that an arbitration agreement may become inoperative due to the lack of funds on behalf of one party to pay costs of arbitration proceedings (Case 404, Germany). The court invoked the right of the party to due process of law, and argued that such a right cannot be excluded merely because a party caused its own inability to pay the arbitration expenses, unless the inability to pay was caused in bad faith.

C.) Procedural arguments

i.) Whether objection was made in a timely fashion

Under MAL 8, the objection that an action is brought in a matter which is the subject of an arbitration agreement shall be raised "not later than when submitting ... first statement on the substance of the dispute".

Consistently with this requirement, the courts have often dealt with the issue whether a party has requested referral to arbitration in due time (e.g. Case 17, 31, 181, 352 - all Canada). The same rules that apply to requests to refer claims to arbitration were found to be applicable to counterclaims (Case 355, Canada).

A party that invoked arbitration agreement was regularly "defendant" (or counter-defendant) in court proceedings (see e.g. Case 17, Canada); however, in one case (Case 33, Canada), the plaintiffs in court proceedings asked for the stay of the proceedings they had themselves instituted. This move, described by the court as "a very unusual step", was considered to be untimely (the court observed that "by no stretch of the imagination can such request be considered as having been made in a timely fashion"). This case, as also another one (Case 118, Canada, reversed on appeal), has also confirmed that "statement on the substance of the dispute" referred to in MAL 8 means pleadings in courts and not statements made to the arbitral tribunal.

It seems that there may be some disagreements by the courts regarding what exactly is meant by the phrase "not later than....". Two issues arose in this connection.

First, it had to be decided whether "not later" phrase is applicable when defendant failed to challenge the court jurisdiction and ask for referral to arbitration within the time limit set by

the court for the defense, if no statement of defense was launched. In one case, only upon appeal to the highest judicial authority it was found that reliance on the arbitration clause was timely, irrespective of the fact that it was made after expiry of the time limit for statement of defense, since the existence of the arbitration agreement was invoked before the oral hearing on the substance (Case 435, Germany).

Second issue that arose was the interpretation of the requests that were made simultaneously with the pleadings on the merits. In some jurisdictions, procedural objections made in the same pleading in which defense on the merits is made are not regarded as untimely, since they are not made "later" than such a statement. The contrary position was, however, outlined in one reported case (Case 119, Canada) in which request that was filed with the parties first statement on the substance of the dispute was regarded to be untimely. The court stated that the correct procedure would be "to apply for a stay of court proceedings, after receiving the statement of claim but before submitting a statement of defence".

In a crisp contrast to the preceding case, one court found that an objection to court jurisdiction was made in a timely fashion although the defendant invoked arbitration clause almost 4 years after initiation of the proceedings, after a series of procedural steps that included joint motions for particulars, a demand for a security for costs and discovery (Case 186, Canada – Quebec). In such a case the court has specifically argued that "given the general policy favouring arbitration .... the delay in invoking the arbitration clause and the steps undertaken in the judicial proceedings did not amount to renunciation of the arbitral procedure".

An interesting case is reported (Case 356, Canada) in which the court referred the parties to arbitration irrespective of the fact that it was indisputable that the defendant failed to raise the objection in due time. In this case, both parties initiated court actions in the courts of two different countries, while they had arbitration agreement referring to arbitration in the third country. In the second court proceedings, plaintiff successfully invoked arbitration clause, yet continued to pursue his own court action. In this other court proceedings, the court found that the entire matter has to be referred to arbitration irrespective of the belated objection, since plaintiff "was acting unfairly in both forcing [defendant] to arbitrate its claim while [he] pursued its court action". Dealing with the timeliness of the defendant's objection, the court took into account that the arbitration clause had been in a timely fashion invoked in prior proceedings by a party in this proceedings.

ii.) Whether there was a dispute

In several cases, faced with the request to refer the matter to arbitration, the courts had to deal with the issue whether there is at all a "dispute" that can be referred to any dispute resolution mechanism. It was generally regarded that MAL 8 procedure can be used only if there was an existing dispute between the parties.

The reported cases demonstrate divergent approaches to the issue of the existence of the dispute. On one hand, we have cases in which the courts refrained from entering into deeper examination.

One court held that it was not necessary to have evidence of a dispute initially, but that it suffices that this becomes evident in subsequent process (Case 322, Zimbabwe). In another case (Case 128, Hong Kong), the court found that it "is not concerned with investigating whether the Defendant has an arguable basis for disputing the claim". For the purposes of

MAL 8, it was held sufficient that defendant did not admit the claim. It was also held that a letter in which the defendant offered compensation to the plaintiff cannot be taken as an admission that would end the dispute (Case 61, Hong Kong). Only unequivocal settlement of the claim in its entirety may, under circumstances, be taken into account (Hong Kong, Hip Hing v. Holyrood, 25 Nov 99).

Some cases demonstrate different approach, setting higher thresholds for the existence of the dispute. In one of them (Case 383, Canada), the court accepted the plaintiffs argument that the defendant had no defense to a particular claim – it was held that there should be "a genuine dispute" between the parties. It was also held that, in a dispute about bank loan, defendant's objections to the interest payments and the right of the bank to charge interest on interest and commission, were not sufficient to establish the existence of a dispute (Case 324, Zimbabwe).

iii.) Premature requests

In one case (Case 386, Canada), the court found that under MAL 8 a decision referring the parties to arbitration cannot be made unless the same claim was made in court proceedings. In this case, the claimant asked the court to grant interim measures of protection under MAL 9, and requested the court to refer the parties to arbitration. The court dismissed the application as premature, because there was no action pending (and not even a notice of the wish to arbitrate). There is no right to ask for declaration that a certain dispute would be covered by the arbitration agreement and that such arbitration agreement was valid, operative and capable of being performed.

IV. ARTICLES 34 AND 36: COURT REVIEW OF THE DECISIONS ON THE JURISDICTION OF THE TRIBUNAL

A. Can court review the arbitral decisions declining jurisdiction?

MAL 16(3) provides for a separate procedure of reviewing positive decisions of the arbitral tribunal that were issued on the issue of jurisdiction as a preliminary question (see *supra at* II.C.iii). If the arbitral tribunal decides to rule on the plea as to the jurisdiction only in an award on the merits, such a decision may be challenged within the setting aside procedure (MAL 34(2)(a)(i)) or within the procedure of recognition and enforcement (36(1)(a)(i)).

In the collected case law, the question was posed whether a decision of the arbitral tribunal declining its jurisdiction can be challenged. The highest German court authority gave an interesting and somehow Pythian answer (BGH ZB 44/01 6 June 2002; see also 11 Sch 02/00, 30 Aug 2002; both Germany) that such a decision may be subject to setting aside procedure if it is made in the form of an award, but that none of the reasons for setting aside could be used to set aside an incorrect decision declining jurisdiction. The court held that impossibility to attack successfully the arbitral decision does not deprive parties of their right to legal protection (*Rechtsschutz*), as a negative decision by the arbitrators opens the way to legal action in court procedure.

A contrary conclusion was reached by one constitutional court that has recently annulled an arbitral decision declining jurisdiction on the ground of alleged violation of the right to access to justice (U-III-669-2003, Croatia, 27 Oct 2004). The court reversed its previous case law under which no arbitral decisions could not be challenged directly before the constitutional

court. It held that, since there is no legal remedy available against such a negative procedural decision (including setting aside application that was regarded as inadmissible) the Constitutional Court has to apply strict standards since such a decision may violate the constitutional right to a fair proceedings before an independent tribunal. In this case, the court annulled arbitral decisions, pointing in particular to its insufficient explanation, and sent the case back to arbitrators.

B. Reviewing decisions affirming jurisdiction in setting aside proceedings

If the arbitrators decided that they have jurisdiction, there are two ways of attacking their decision – one in the setting aside proceedings, and the other in proceedings for recognition and enforcement of the award. As the reasons in this respect are the same, the courts have generally followed the same line of reasoning. The draft Digest also does not distinguish sharply cases under MAL 34 and 36 in this respect, mixing sometimes decisions in one or the other type of proceedings. In CLOUT, only one case refers directly to the jurisdictional arguments in recognition proceedings (Case 443, Germany). Therefore, we deal here both with jurisdictional arguments in setting aside, and in the recognition and enforcement proceedings.

MAL 34(2)(a)(i) provides that a court should set aside an award if, *inter alia*, the arbitration agreement "is not valid under the law to which the parties have subjected it" or the *lex fori* of the setting aside court. The same reason is contained in MAL 36(1)(a)(i) in respect to refusal of recognition of the award. Lack of valid and binding arbitration agreement obviously also covers the cases when no arbitration agreement was concluded at all. Lack of an appropriate agreement in respect of the subject-matter of the dispute partly overlaps with the reasons for setting aside from MAL 34(2)(a)(iii) or MAL 36(1)(a)(iii), i.e. with the situations in which the award deals with a dispute "not contemplated by or not falling within the terms of the submissions to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".

This is demonstrated by different approaches in several court decisions: faced with the objection that a particular party was not party to the arbitration agreement, some of them referred to subparagraph (i) on lack of valid agreement (OLG Hamburg, 6 Sch 04/01, 8 Nov 2001, Germany), and some of them to subparagraph (iii) on decisions outside the scope of the agreement (Case 12, Canada).

In the setting aside proceedings, the court had to deal with the timeliness of the jurisdictional objections made in the arbitral proceedings. If an objection to the existence and validity of the agreement was not raised at the latest in the first statement of the defense on the merits, the courts held that the applying party was precluded from raising this objection (Case 148, Russia). It was also held that failure to raise this objection means conclusion of the new arbitration agreement by tacit consent of the party (OLG Stuttgart, 1 Sch 16/01, 20 Dec 2001), and that the defaulting party should be considered to have waived its right to object to jurisdiction (High Commercial Court, Pž-7481/03, Croatia). However, this was recognized only in the cases in which the party has actually participated in the arbitral proceedings, and was invited to submit a statement of defense (OLG Hamburg, 6 Sch 04/01, 8 Nov 2001).

The Digest reveals discrepancies in the courts' opinions as to whether the failure of a party to apply for court review of the arbitral tribunal's decisions under MAL 16(3) implies a waiver of the party's right to contest the jurisdiction. The opinion that a separate application is not

necessary because the right to court application was optional was expressed by a Singapore court (Tan Poh Leng Stanely v. Tang Boon Jek Jeffrey, 30 Nov 2000); on the other hand, a German court (OLG Oldenburg, 9 SchH 09/02, 15 Nov 2002) held that application for a review is a prerequisite for successful raising of the same ground in the setting aside proceedings.

V. ARTICLE 17: JURISDICTION OF THE TRIBUNAL TO ISSUE INTERIM MEASURES OF PROTECTION

A. Scarcity of reported case law

While the MAL 8 and 16 are among the provision of the UNCITRAL Model Law covered with the most extensive jurisprudence (MAL 16 alone is the provision that has absolutely the widest coverage in CLOUT database), the provision of MAL 17 is among the least well-covered: precisely there is only one case in the CLOUT database that would point to MAL 17 in the search engine of the UNCITRAL (Case 386 Canada). Even this only case mentioned interim measures of protection ordered by the tribunal only *obiter dicta*, asserting that, once arbitration would be commenced, the arbitral tribunal sitting in Switzerland could order interim measures that would be enforceable in Canada.

This lack of cases is apparently in a sharp contrast with the on-going interest of the UNCITRAL on the revision of Art. 17, and the work of its Working Group on Arbitration that was engaged in drafting of appropriate provisions in the past five years.

B. Interplay of MAL 9 and MAL 17: what has precedence?

In spite of the scarcity of reported cases, come ambiguities with regard to parallel jurisdiction of both the arbitrators and the court to order interim measures in the same matter have already surfaced. In one case connected with the application of MAL 9, a court had to resolve the issue whether interim measures of protection that could be taken by courts included the interim order granted in that case or whether such an order could be granted only by the arbitral tribunal dealing with the substance of the dispute. The court referred to *travaux preparatiore* regarding MAL 9 and quoted “dual principles that, first, a party does not waive its right to go to arbitration by requesting (or obtaining) interim measures of protection from a national court, and, second, that a national court is not prevented from granting such measures by the existence of an arbitration agreement”. However, another court decision (Case 386, Canada), without special reference to authorities and UNCITRAL documents, another court had seemingly come to the opposite conclusion, namely that, if arbitrators may order themselves interim measures that are enforceable in court, a direct application to the court for interim measures should be dismissed.

V. CONCLUSIONS: OPEN ISSUES AND PROBLEM AREAS

A. General remarks

After this general presentation of the court decisions on application of MAL provisions that deal with the jurisdiction of the arbitral tribunal, we will summarize the main problems that surfaced, directly or indirectly, from the collected case-law. We will focus only on most

important issues that may affect harmonization of the international arbitral law. Minor matters, but also important questions in which the practice demonstrated higher level of uniformity, are intentionally left out.

B. Individual problems

i. Dual jurisdiction regarding evaluation of validity of the arbitration agreement

First problem area arises from the dual jurisdiction with respect to determining whether arbitration agreement is valid and binding. Although there is no doubt that arbitrators are empowered to rule on their own jurisdiction upon timely objections raised in the arbitral proceedings, a virtually same authority is also given to the court if the claim is raised in a court action, and the other party objects on the ground that this claim was covered by an arbitration agreement. This parallel regime raises a number of questions regarding the division of labor between arbitrators and the courts; regarding potential duplication of work; regarding the possibility of incompatible decisions; regarding the effects of the arbitral and/or court's final determination etc.

In the reported case law, the courts had differently interpreted their authority to refuse referring the case to arbitration if the agreement is null and void, inoperative or incapable of being performed. Some courts apparently tried to escape this issue, pointing that the arbitrators have to determine it first; other courts were satisfied with *prima facie* evidence of the existence and validity of the arbitration agreement; some courts went into more details; and it seems that some might even be tempted to enter into substantive issues such as the validity of the main contract.

Under current rules of MAL, there are hardly any chances to escape these problems. In our view, the courts would have to exercise a prudent and reasonable approach, evaluating all circumstances of the case. Under MAL 8(1) the courts clearly have the right and duty to evaluate independently the validity and practicability of the arbitration agreement; however, it would be wise both for the courts and for the arbitrators to have an eye on the process conducted before the other tribunal, perhaps suspending the proceedings until the decision in the other process is being made – but only if this would not cause undue hardship to parties in the proceedings. If there are parallel proceedings in the court and before the arbitrators, it would also be wise to award certain precedence to the arbitrators' ruling (at least in the order of decision making, if possible), and to await the outcome of the challenge of jurisdiction there. A precondition would, however, be that the court is satisfied with *prima facie* existence of the agreement: party invoking the arbitration agreement before the court needs to have at least an arguable case. Otherwise, a way to abuses and undue delays would be opened.

ii. Form of the arbitral decision on jurisdiction as a preliminary question under MAL 16(3) and its effects

Another problem area deals with the form of the separate decision on jurisdiction in the arbitral process, if such a decision is done prior to the award on the merits, based on the discretionary right of arbitrators to resolve the jurisdictional challenge as a preliminary matter. Here, the MAL does not provide clear guidance, and basically leaves the determination to national procedural laws and/or practices. Apparently, there is a trend in international arbitration to expand the circle of decisions that are entitled "arbitral awards" from decisions on the substance of the dispute to procedural matters, usually those that end

the proceedings, but sometimes also to those that are regarded to be of any greater importance.

Proper or improper naming of decisions should, in our view, not affect the procedural fate of the decision – *falsa nominatio non nocet*. Yet, in reported cases, from various part of the globe, the courts also went into a different directions, drawing from the name "award on jurisdiction" inferences as to the admissibility of setting aside of such "awards". We think that this only contributes to confusion, as the original concept of the MAL 16(3) certainly did not envisage multiple (double or even triple) court proceedings controlling one and the same arbitral decision on jurisdiction as the main matter – one under Art. 16(3); the other, independent setting aside of the award on jurisdiction; and, eventually, another setting aside of the award on the merits for the reasons stated in Art. 34(2)(i). If such practice would develop, it could have a discouraging effect on the arbitrators that would like to resolve jurisdictional issues in their preliminary decisions.

iii. Availability of the remedies against negative arbitral decisions on jurisdiction

Another area of ambiguities is concerned with the availability of remedies in cases in which the arbitrators have issued decisions rejecting their jurisdiction. One, classic approach, would consider these decisions as irrefutable, *inter alia* because no one can force the arbitrators to arbitrate if they are convinced that they have no jurisdiction. However, as this is a final decision, the pressure of dissatisfied parties led to emergence of court decisions that expressed the opposite view – once relying on the formal reasons (form of the award, *see supra* at *ii.*), the other time relying on alleged procedural rights to seek court review at least in respect of the procedural correctness of the arbitral decision-making. In our opinion, although one can well understand dissatisfaction of the parties that were convinced that they had right to arbitrate their disputes, this additional controllability is not necessary, and may ultimately prolong and complicate the process, without bringing substantial benefits for the parties. If arbitrators pronounced that they are not competent to arbitrate, the most efficient and logical next step is to turn immediately to the second closest match – to another arbitration or to the competent state court. Arbitrators that were reluctant to rule on the substance of the dispute in the first round will, most likely, remain to be reluctant even if – for procedural reasons or otherwise – a court authority finds it necessary to strike down their decision.

iii. Scope of arbitral authority: do allegations of fraud fall within the scope of submission to arbitration

When the courts had to evaluate, in a preliminary fashion, the validity and scope of the arbitral agreement, they were usually expressing favorable views about the use of arbitration, and interpreted broadly the authority of arbitrators. One eminent exception in some jurisdictions relates to the cases in which one party accused the other of fraudulent behavior. Some courts alluded that conspiracy, deceit and fraud are not matters that can be covered by the arbitration agreement. Yet, in commercial reality, mutual allegations of immoral, illegal or fraudulent actions happen often, and excluding them from the scope of arbitral agreements may effectively cripple their effectiveness. Therefore, for the sake of harmonization of the global practice, it would be good to take a uniform position on such objections, and in our view there are no valid reasons why would the broad interpretation that is normally applied to other issues not be applicable to these situations as well.

iv. Meaning of "inoperative" agreements

Case law on MAL 8 demonstrates also certain divergences in the interpretation of the meaning of the "inoperative arbitration agreements". Differences go into both extremes. Some courts attempted to demonstrate such radical pro-arbitration agreement that they declared as operative agreements that were rightfully abandoned, e.g. by forcing a party to arbitrate, although that party had expressed the wish to use its right to opt for litigation provided in the dispute resolution clause. On the other hand, the position of the German BGH that lack of financial resources makes the arbitration agreement "inoperative" stretches this term in the opposite direction. In our opinion, if the position of the BGH would become a general rule, it would head the way to abuses, opening ample opportunities to evade the willfully chosen dispute resolution mechanism on the sheer ground of financial weakness.

v. What does "not later then" mean?

The moment when a party loses its right to object to arbitral jurisdiction was differently understood by courts in different jurisdictions – and even in the same jurisdictions. The strictest rule was applied by a Canadian court, that required a separate plea to the jurisdiction, prior to any statement on the substance. Other courts (also Canadian) were much more relaxed, accepting pleas raised several years after the initiation of the proceedings. In our view, the clause "not later than when submitting.... first statement on the substance" should be construed in the plain and simple meaning of these words: objection should be raised *before*, or *simultaneously* with the statement on substance of the dispute.

vi. Should court make substantive inquiries as to whether "a dispute" exists?

Requirement that only "disputes" can be referred to arbitration has also proven to be ambiguous. In our view, some courts have posed too high thresholds for the existence of disputes, especially taking into account that the evaluation of differences that exist between the parties should be left to arbitrators. The right approach is apparently taken by those courts that considered that a dispute should be presumed to exist in every case in which claimant's claims were not clearly and unequivocally admitted.

vii. Dual jurisdiction regarding interim measures

It may be indicative that already a very small statistical sample of court decisions discovered some opposing court views regarding the powers to order interim measures. At least one court held, in spite of the clear language of MAL 9, the provision of MAL 17 have precedence and enables the court to dismiss an application for interim measures. Such a position is, we believe, wrong: original ideas behind the MAL clearly envisaged dual jurisdiction regarding interim measures. Recent work of UNCITRAL on the revision of provisions on interim measures may, once it is completed, contribute to resolution of such issues by additions and clarifications.

v. Residual procedural differences between common and civil law countries

Finally, some discrepancies in court reasoning can be attributed to the procedural differences and even different procedural cultures in common law and civil law countries. Only one such difference should be noted in the context of arbitral jurisdiction: in common law jurisdictions, if a plea as to the lack of jurisdiction (due to existence of the arbitration agreement in the same matter) is successfully raised, the court will stay the proceedings. In civil law, the court

will not stay the proceedings, but dismiss the claims regarding which the arbitration was agreed upon as inadmissible. Such differences in approach may sometimes have far-reaching effect on the case law and even some substantive reasoning of the courts. As an illustration, a well-covered debate in Canadian courts regarding whether stay of proceedings should be mandatory, or should it be granted under residual discretion that is enjoyed by the courts is imaginable only in a common law jurisdiction. Only gradually, by slow approximation of laws and practices, can we expect that these differences will become milder, and only then can we fully expect that a sufficiently high level of harmonization in the application of the basic rules of international commercial arbitration will be achieved.

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JURISDICTION AND POWERS OF ARBITRAL TRIBUNALS: WHO DECIDES?

Babatunde Osadare*

ABSTRACT: *With the rapid growth of International Trade, parties are free to determine the terms of their business relationship. This is in accord with the contractual doctrine of party autonomy. To this extent, arbitration agreements are often inserted in their contracts as a method of dispute settlement rather than the traditional method of dispute resolution through the instrumentality of the courts. By referring their disputes to arbitration, parties are in essence agreeing to be bound with finality by the award of the arbitral tribunal. The binding nature of the award does not however mean that the courts do not have a role to play in arbitral proceedings. They often assist or interfere according to the boundaries of national laws. The line between assistance and interference is often blurred and depends on several factors. On the whole, there appears to be a puzzle as to who actually determines the powers and jurisdiction of the arbitral tribunal notwithstanding the expressed autonomy of the parties. Where does the tribunal derive its powers and jurisdiction and to what extent is it exercised in the face of the pervasive and 'supervisory' role of the courts? The aim of this paper is to determine who decides these questions. Arbitration laws and rules will serve as a guide alongside arbitral awards and decided cases. The paper will conclude that the answers depend on several factors including the national and international law in question.*

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ABBREVIATIONS

ARAMCO	Arabian American Oil Co. Ltd.
IBID.	Ibidem
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Disputes
LFN	Laws of the Federation of Nigeria
M. INT. ARB	Mealey's International Arbitration
NIOC	National Iranian Oil Company
NYC	New York Convention
QB	Queens Bench
S. CT.	Supreme Court
TDM	Transnational Dispute Management
UKHL	United Kingdom House of Lords
UNCITRAL	United Nations Commission on International Trade Law
WLR	Weekly Law Report
YBCA	Year Book of Commercial Arbitration

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1. INTRODUCTION

Arbitration is becoming an attractive dispute resolution mechanism due to its unique features. It is a specially designed tool established for the final and binding resolution of disputes.[1] International arbitration has some of the following characteristics: It is an alternative to the national courts and a private dispute resolution mechanism organized and controlled by the parties. The arbitral tribunal's award is final and binding on the parties and is not subject to appeal to the regular courts save some recognized setting aside procedure. As compared with national courts, arbitration has the unique feature of being flexible, private and confidential. It is suitable for international transactions as it transcends the boundaries of national courts.[2] National courts, as compared to arbitration are usually rigid and lack the expertise in some complex international transactions.

The freedom of the parties to choose the governing law and rules follows from the principle of party autonomy. This has become internationally recognized and most national laws and international conventions now give support to it.[3] It should be noted however that the rule of party autonomy is not without its limits. This is to prevent its being abused in respect of issues that are repugnant to public policy. The Rome Convention[4] for example forbids parties to choose in an agreement a foreign law that overrides the mandatory laws of a country that would have been applicable to the agreement under the conflict of law rules.

The aim of this paper is to determine who decides the jurisdictional issues and powers of arbitral tribunals. Part one of this paper will consider general introductory issues. Part two will deal with the powers of arbitral tribunals while jurisdictional issues will be discussed in part three. In part four, the role of the courts in arbitral proceedings will be examined and the paper will conclude in part five.

[1] Lew, J. et al, Comparative International Commercial Arbitration (The Hague, Kluwer Law, 2003) p.1
[2] ibid. p.5
[3] See Art. 17(1) ICC Arbitration Rules, Art. 33(1) UNCITRAL Arbitration rules.
[4] See Art. 3; see Suleimany v. Suleimany [1999] Q.B. 785

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2. Powers of the Tribunal

2.1 Background

Upon the appointment of arbitrators, the power to administer proceedings is deemed to have been conferred on the arbitrators having derived their powers from the consent of the parties as expressed in the arbitration agreement. Other than the agreement as the source of their powers, the arbitrators also derive powers as may be conferred by the applicable laws. It is said that power in arbitration proceeding is transferred gradually from the parties to the arbitrators.[5] This is because the parties at the beginning are firmly in charge of their affairs but gradually, power firmly devolves on the arbitrators as proceedings progresses.

2.2 Arbitral Powers: how conferred?

2.2.1 Express Powers

Parties may confer express powers on the tribunal like the power to determine the sufficiency of evidence. They may also confer indirect powers on the tribunal by providing for set arbitral rules in the case of adhoc arbitration and the automatic rules that follow under institutional proceedings. For example the UNCITRAL rules in adhoc arbitral proceedings confer wide discretionary powers on the arbitrators to conduct proceedings as they consider appropriate provided that the principles of fairness are adhered to.[6]

2.2.2 Operation of Law

Other than the express conferment of powers on the tribunal as explained above, powers may also devolve on the tribunal by operation of law. For instance the Nigerian Arbitration Act[7] confers on the arbitral tribunal powers to appoint an expert on issues relating to the proceedings.[8] Similar

[5] Redfern, A., and Hunter, M., Law and Practice of International Commercial Arbitration (London, Sweet and Maxwell, 2004), p.278.
[6] See Art. 15(1) of the UNCITRAL Arbitration Rules, see also Redfern, A., Ibid., p.279.
[7] Arbitration and Conciliation Act, CAP 19, LFN 1990.
[8] See generally Kent, R. et al., *Expert Witnesses in Arbitration and Litigation Proceedings*, TDM Vol. 4, Issue 3, June 2007 at www.transnational-dispute-management.com (last visited 29th April 2009).

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provisions are contained in the English Arbitration Act, 1996[9] which amongst other provisions give a tribunal power to administer oath to witnesses.

3. Jurisdictional Issues

Jurisdiction is the lifeblood of all legal proceedings. Where a court or tribunal lacks jurisdiction the entire proceedings would be a nullity no matter how well conducted. The legal principle that "you cannot put something on nothing and expect it to stand" remains trite and applicable to arbitral proceedings.[10] An arbitral tribunal must therefore operate within the powers and jurisdiction conferred upon it by the parties. In other words, the tribunal must remain within its terms of reference and not exceed it.[11] Failure to abide by it would render the final award liable to be set aside or not recognized and enforced.[12]

3.1 Challenge to jurisdiction

It is often the case that one of the parties who had submitted to arbitration, often the respondent, would object to the jurisdiction of the arbitral tribunal. These objections may be based on several heads. The respondent may allege that there was never an agreement to arbitrate disputes or that the arbitration agreement has become void. It may also be alleged that the person who signed the agreement had no authority or that the dispute is not arbitrable.[13] When a tribunal is faced with such objections albeit spurious, should it cower and hands off the matter completely to the helplessness of the claimant? The logical and most reasonable answer is in the negative. This is to prevent arbitration as an effective form of dispute resolution to be self defeating. To this end, it is widely recognized that an arbitral tribunal has jurisdiction to determine its own jurisdiction in the face of objections whether partial or total.

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[9] S. 38(5)
[10] See Lord Denning M.R. in Mcfoy v. UAC LTD. [1961] 3 WLR, p. 405 @409.
[11] See Redfern, A., supra, note 7, p.295.
[12] See e.g. Art. V(1)(c) of the Recognition and Enforcement of Foreign Arbitral Awards, 1958, (New York Convention)
[13] Jarvin, S., *Objections to Jurisdictions*, in Newman L. and Hill, R., (eds.), The Leading Arbitrators' Guide to International Arbitration, (2nd ed., Juris Publishing 2008), p.98.

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3.1.1 Competence - Competence

This is the principle that an arbitral tribunal has the jurisdiction to determine its own jurisdiction.[14] It is generally accepted in modern international arbitration practice. It is a method of overcoming the latent problem that would have occurred where a tribunal decides preliminary that the arbitration agreement for example is invalid. The resultant effect would have been that the arbitral tribunal itself lacks the authority to make that finding.[15] The principle gives the tribunal the legal standing to set proceedings in motion when faced with an objection raised by an uncooperative respondent.

There is the knotty issue as to whether it is the court that should have the primary role of deciding the existence of an arbitration agreement or whether the question should be left to the tribunal. The common approach however is that the arbitral tribunal should be given the first say subject to possible court review.[16]

Competence - competence principle has been incorporated into the laws of many countries[17] and international arbitral institutions. Article 36(6) of the Statute of International Court of Justice[18] confers on the ICJ powers to rule on its own jurisdiction. The ICSID Convention, UNCITRAL Model Law,[19] the English Arbitration Act,[20] and the ICC Arbitration rules[21] also contain similar provisions. The ICC rules however provide for a two-stage approach. First, the ICC Arbitration Court must first prima facie satisfy itself of the existence of the arbitration agreement.[22] If satisfied, it would refer the matter to the arbitral tribunal which would at the second stage, determine the issue of its jurisdiction.[23]

[14] See Redfern, A., supra, note 7, p.300.
[15] See Lew, J., et al. supra, note 1, p.332.
[16] Jarvin, S., supra, note 15, p.105.
[17] See s.30 of the English Arbitration Act 1996, s.2 Swedish Arbitration Act, 1999.
[18] Annexed to the Charter of the United Nations, 1945.
[19] Art. 41(1), ICSID Convention and Art., 21, UNCITRAL Arbitration Rules.
[20] S. 30.
[21] Art. 6(2)
[22] Ibid.
[23] Ibid.

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This principle has been recognized in several cases. In the case of **Saudi Arabia v. Arabian American Oil Co. Ltd (ARAMCO)**[24] the Government of Saudi Arabia challenged inter alia the jurisdictional competence of the adhoc tribunal on the ground that it could withdraw from the tribunal any act done by it in account of its sovereign powers. The tribunal rejected this contention and held that it has the competence to determine its jurisdiction.

The case of **Sojuznefteexport (SNE) v. Joc Oil Ltd**.[25] perhaps illustrates the point interestingly. The tribunal had to decide the validity of an arbitration agreement made under Soviet law and signed by only one official instead of two. The tribunal accepted that the contract was invalid but ordered the respondent to pay US$200 Million on grounds of unjust enrichment and restitution. In arriving at this decision, the tribunal found that the arbitration agreement did come into existence notwithstanding the invalidity of the main agreement and distinguished between the nullity of the contract and its non-existence.

Another example on the principle is the case of **Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of Libya**,[26] one of the Libyan nationalization cases. The government failed to participate in the proceedings and the sole arbitrator, appointed by the president of the ICJ, had to determine its jurisdictional competence over an objection made by the government. The sole arbitrator held that it had jurisdiction to determine its own jurisdiction based on customary rule of international law and decided cases.

These cases reflect the correct position of the law as recognized under major international conventions and rules to the effect that an arbitral tribunal has power to determine its jurisdiction.

3.1.2 Doctrine of Separability

The separability doctrine is another way of giving effect to the arbitral process. It is said that "while competence competence empowers the arbitration tribunal to decide its own jurisdiction,

[24] Cited in Bishop, R., *International Arbitration of Petroleum Dispute: The Development of a Lex Petrolea*, p.2 at https://my.dundee.ac.uk/cepmlp/journal/html/vol2/article2-3.html (last visited 30th April 2009).
[25] See Redfern, A., supra, note 7, p.302.
[26] See Lew, J., et al. supra, note 1, p.333.

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separability affects the outcome of this decision."[27] The principle traditionally gives the arbitral tribunal power to separate the arbitration agreement from the main contract where it is contained. This is to enable the tribunal determine a case where one of the parties is challenging its jurisdiction on grounds of invalidity or termination of the arbitration agreement. Other grounds of objection may be that there was no agreement or that parties never concluded the terms of the main contract.[28] An arbitral tribunal faced with such a problem would notionally sever the arbitration agreement from the entire contract and determine the issue notwithstanding the fact that the arbitration agreement is the subject of challenge.[29] Like many arbitration laws, the UNCITRAL Model Law adopted in 1985 expressly provides that an arbitral tribunal shall have the power to determine its own jurisdiction and any objection relating to the existence or validity of the arbitration agreement.[30]

Several cases have well enunciated the principle. In **TOPCO v. Libya,**[31] one the issues for resolution was whether the arbitration clause contained in the deed of concession had been voided by the government's act of nationalization. The sole arbitrator decided that the arbitral clause remained valid on the basis of the separability doctrine.

In the **Elf Aquitane Iran v. National Iranian Oil Company (NIOC)**[32] case, the NIOC contended that the government was not bound to arbitrate the dispute because the 1980 declaration of the Iranian Government rendered the Exploration and Production contract void ab initio. The tribunal rejected this contention on the basis the of the separability doctrine.

The doctrine was also espoused in the English Court of Appeal case of **Harbour Assurance Co. Ltd. v. Kansa Insurance Ltd.**[33] where the plaintiffs contended that the a reinsurance contract with the defendant containing an arbitral clause was illegal and void because the defendants' company

[27] Ibid. p.334
[28] Schwebel, S., International Arbitration: Three Salient Problems, (Cambridge, Grotius Publication Ltd., 1987). p. 1.
[29] Park, W., The Arbitrator's Jurisdiction to Determine Jurisdiction, TDM Vol. 6, Issue 1, March 2009 at www.transnational-dispute-management.com (last visited 29th April 2009), p.93.
[30] Art. 16(1), see also s.7, English Arbitration Act 1996.
[31] Supra, note 28.
[32] Bishop, D., supra, note 26, p.5
[33] [1993] Q.B. 701; see generally Gross, P., *Separability Comes of Age in England: Harbour v. Kansa and Clause 3 of the Draft Bill,* Arbitration International, Vol. 11, No. 1, 1995.

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had not been validly registered in the United Kingdom. The Court of Appeal rejected this argument and held that the separability principle extends to save arbitral clauses even when the main contract may be void for illegality.

With the basic principle of autonomy well grounded across jurisdictions there remains the issue as to how far the separability doctrine can be applied especially in cases where the ground of objection directly affects the arbitration agreement and not the main contract.[34] The House of Lords in **Premium Nafta Products Ltd. v. Fili Shipping Co. Ltd.**[35] whilst dealing with the issue of whether the allegation of bribery rendered the main contract void and consequently the arbitral clause, held that by virtue of the separability principle, the allegation that the contract was induced by bribery did not affect the validity of the arbitration agreement and that for any objection to succeed, such must directly relate to the arbitration agreement.[36]

The Law Lords also considered whether the interpretation of the arbitral clause – any dispute arising under this charter – was too narrow to accommodate claims that the charter party was void or voidable and held remarkably that the usual attempt to narrowly interpret arbitration clauses based on drafting should be avoided. They held that a new approach is to be assumed i.e. an arbitration clause should be assumed to cover all disputes arising out of or relating to the contract notwithstanding the words that have been used. The purport of this is to meet the expectations of rational business men by having their disputes resolved by arbitration. After all, they could elect to expressly state in the arbitral clause their desire to remove certain matters from the terms of reference.[37]

Having examined the jurisdiction of the arbitral tribunal and the practical principles of competence competence and separability, the arbitral tribunal's powers may be positively or otherwise affected by the roles of courts at the seat of arbitration. The extent of this influence will be considered in the next part.

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[34] There are cases where the ground of objection relates to the main contract as well as the arbitration agreement e.g. forgery and non est factum at common law.
[35] [2007] UKHL 40
[36] Ibid. at p. 46. For further comments, See also, McNeill, M., & Juratowitch, B., *The Doctrine of Separability and Consent to Arbitrate*, Arbitration International, Vol. 24, No. 3, 2008, p.475.
[37] See generally, Samuel, A., *Separability and Construing Arbitration Clauses: The House of Lords Decision in Premium Nafta and the Fiona Trust,* Arbitration International, Vol. 24, No. 3, 2008.

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4. National Courts and Arbitration

When parties choose arbitration as a means of resolving their disputes, they are in a way excluding the courts from acting as their arbiter. They effectively relegate the courts to the back stage when an arbitral tribunal is seized of a matter. The assistance and intervention of the courts are often required by the parties and the arbitral tribunal to remove difficult issues from the way of proceedings. The courts are as a result enjoined in their role to always consider the principles of party autonomy, terms of reference and the governing applicable laws.[38]

The partnership between courts and arbitration in an ideal situation is described by Lord Mustill as akin to a relay race where the race baton is in the hands of the court whose assistance may be needed to set up the tribunal.[39] The baton is passed on to the tribunal at the commencement of arbitration and handed back to the courts at the end of the arbitration at which stage the assistance of the court is called upon to enforce the arbitral award.[40] In practice however, the situation is not as rosily described. The assistance or intervention of the court is usually required by parties during the arbitral process.[41] The stages of the arbitral process and the reasons for seeking court assistance would be considered next.

4.1 Court Assistance: Beginning, During and After.

At the beginning of the proceedings, the assistance of the court may be sought in setting up the arbitral tribunal where parties have failed to do so. This may not pose a problem in an institutional arbitration where the machinery of the institution is readily used in setting up the tribunal. The court may be required in certain instances to extend the time within which arbitration proceedings may be commenced.[42] It may also be the case that the court is called upon before the commencement of arbitral proceedings to test the arbitral tribunal's jurisdiction where it is being challenged by one of

[38] See Lew, J., et al. supra, note 1, p.361.
[39] Cited in Redfern, A., supra, note 7, p.391.
[40] Ibid.
[41] Ibid.
[42] See Lew, J., et al. supra, note 1, p.371.

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the parties.[43] Approaches on the issue of jurisdictional challenge vary from jurisdiction to jurisdiction.[44]

During the arbitral proceedings, the assistance of the court may be needed to fill a vacant arbitrator position due to illness of other incapacitating reasons. Where it is feared that a respondent may dissipate its assets before the end of proceedings, the courts may be called upon to make interim orders of preservation of property; preservation of evidence and attendance of witnesses pending the outcome of arbitral proceedings.[45]

After the arbitral proceedings, the baton is handed back to the courts to enforce or recognize the arbitral award at a place where the respondent resides or has property. An unsatisfied respondent may however seek to set aside the award, appeal against it, or resist its enforcement. The role of the court as seen above is doubtless necessary for the smooth running of arbitration proceedings. Powers of the courts may also be negatively used to impede the effectiveness of arbitral proceedings. This negative mode of intervention will be considered instant.

4.2 Interference by National Courts.

National courts may assist by making injunctive orders to protect the arbitral tribunal's jurisdiction as discussed above. They could also make injunctive orders to impede the conduct of arbitral proceedings. One of the modes of interference will be briefly examined here.

4.2.1 Anti Arbitration Injunctions

Injunctive orders restraining the further conduct of proceedings may be made by a court upon the application of one of the parties. In considering such applications, the courts are advised to order injunction only if it is manifestly clear that arbitral proceeding should not have been instituted.[46]

[43] Ibid., p.392
[44] See infra.
[45] Redfern, A., supra, note 7, p.393.
[46] Lew, J., et al. supra, note 1, p.371.

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The UNCITRAL Model Law particularly enjoins the courts in dealing with matters, the subject of an arbitration agreement, to refer the parties back to arbitration unless the agreement is found "null and void, inoperative or incapable of being performed."[47] Notwithstanding this provision, there are cases where injunctions are issued against the commencement or continuance of arbitration proceedings. A good example in this regard is the case of **Himpurna California Energy Ltd. v. Republic of Indonesia**[48] where the local court in Jakarta made injunctive orders not only against the claimant but also on the arbitral tribunal from proceeding with the arbitration. In a similar vein, the Supreme Court of Pakistan also upheld an anti-arbitration injunction which abruptly brought to an abrupt end a London international arbitration proceeding over the Hubco power project.[49]

4.3 Interference and Jurisdictional Approaches.

Courts approach across jurisdictions to the question of interference varies. Whilst French law requires courts to decline jurisdiction in matters adjudged to be subject to arbitration unless the arbitration agreement is manifestly void, the position in Switzerland is not totally dissimilar as the Federal tribunal has held that courts should decline jurisdiction, at least to cases which lex arbitri is Switzerland, unless the ineffectiveness of the arbitral agreement is patently manifest. [50] The USA courts adopt a more liberal approach with a willingness to entertain applications at the beginning or during arbitral proceedings.[51] In England, the attitude of the court is to support the conduct of arbitration proceedings whilst retaining the general supervisory powers to intervene in deserving cases.

[47] Art. 8(1)
[48] XXV YBCA 11 (2000), similar orders were made in Patuha Power Ltd. v. Republic of Indonesia, 14 Mealey's Int'l Arb., Vol. 15, No. 2 (2000).
[49] See Kantor, M., *Local Court Intervention in International Arbitration,* TDM, Vol. 1, Issue 1, Feb. 2004 at http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_69.htm (last visited 30th April 2009).
[50] Paulsson, J., *Interference by National Courts*, in Newman L. and Hill, R., (eds.), The Leading Arbitrators' Guide to International Arbitration, (2nd ed., Juris Publishing 2008), p.128; see also Jarvin, S., supra, note 5, p.107.
[51] See Jarvin, S., ibid. p. 99; see also First Options of Chicago Inc. v. Kaplan 115 S. Ct. 1920 (1995), XXII YBCA 278 (1997).

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5. Conclusion

Determining who decides the jurisdictional powers of the arbitral tribunal seem straight-forward and clear-cut at first. But having considered the entrenched party autonomy principle and its bounds across jurisdictions, a rethink is provoked. The fictional, yet practical doctrines of competence – competence and separability principles adopted by arbitral tribunals in resolving jurisdictional issues make the seeming simple answer more complex.

Everything perhaps is anchored on the arbitration agreement of which Schwebel, writing on the separability principle states that when parties enter into an agreement containing an arbitration clause, "they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement."[52]

The roles of national laws, international laws, rules and conventions and the various approaches of national courts across jurisdictions are also major factors in determining jurisdictional powers of arbitral tribunals. As have been observed, some jurisdictions have adopted a pro-arbitration attitude to their laws and judicial interpretation. To this end, they would rarely make interfering orders, like anti-arbitral injunctions, that are unsupportive of the arbitral process.

In all, having considered the autonomy of the parties to choose to refer their disputes to arbitration and determine the governing law; the powers of the arbitral tribunal to determine the applicable law using conflict of law rules when parties have failed to do so; national laws and international arbitration rules; and the decisive role of courts across jurisdictions, it may be said that the question as to who decides the jurisdictional powers of arbitral tribunals is a complex one. It is perhaps suggested that the answer depends on the circumstances of each case considering the interplay of the several factors mentioned above.

[52] Schwebel, S., supra, note 30, p.5.

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The Jurisdictional Tensions Between Domestic Courts and Arbitral Tribunals

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I. INTRODUCTION

This paper interrogates the relationship between national courts and arbitral tribunals to understand the jurisdictional tensions therein present. It examines the arbitral process to determine the separate spheres of influence of courts and arbitral tribunals and where these influences intersect. It also examines whether these two clearly defined systems of adjudication can symbiotically co-exist and cooperatively interact in the same space. The analysis leads to the conclusion that such co-existence is possible and is in the best interest of both systems if they wish to thrive. This paper then notes that jurisdictions whose laws and courts pursue a cooperative interaction between both systems are generally perceived as being supportive of arbitration. It argues that such perception attracts international arbitration disputes to those jurisdictions as seat; while the story is very different in jurisdictions that are not so perceived; they do not attract many international arbitration references as seat.

This paper therefore draws two major conclusions: first, for arbitration and litigation to thrive, both must accept the symbiotic nature of their relationship and strategically share space with confidence and trust and with the clear purpose of supporting each other in their own clearly defined spheres of influence; and second, for those jurisdictions wishing to attract more international arbitration references (as seat), not only do they need to modernize their arbitration related laws, but their courts must become supportive of the arbitral process. The analysis of these issues will draw from both qualitative and quantitative research that is already in the public domain including examination of the provisions of relevant legislation and conventions, judicial decisions, the views of legal commentators, and various statistics relevant to arbitration. The main arbitration law referenced in this paper is the UNCITRAL Model Law on International Commercial Arbitration, 1985 (amended in 2006) (Model Law). The Model Law has been adopted or adapted by 103 jurisdictions in 73 countries, 10 of which are in Africa.[1]

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1. The African states are: Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia and Zimbabwe. For the text and status of the Model Law, see the UNCITRAL website at: <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>

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This paper first examines the issues over which national courts and arbitral tribunals have sole jurisdictions, those issues over which their jurisdictions overlap and how these are regulated under various laws (II). It then examines the link between the perception of arbitration friendliness or support of a jurisdiction and the attractiveness of the same jurisdiction as a seat for international arbitration (III).

II. JURISDICTION OF NATIONAL COURTS AND ARBITRAL TRIBUNALS IN ARBITRATION

As is well known, arbitration is an alternative adjudicative mechanism to litigation for the resolution of disputes.[2] Arbitration as a private process entails that the decision makers in the process are private individuals, not officers of a state such as national judges.[3] These private individuals constitute the arbitral tribunal and they make final and binding decisions (duly recognized under the laws of most nations) over a particular dispute submitted to them by particular disputants.[4] National court judges perform the same judicial, decision-making function. Thus, as recognized by Mustill and Boyd, arbitrators are private judges.[5] It is this status accorded arbitrators and the decisions they make over the substantive dispute under various national laws that raises the tension between arbitral tribunals and national courts.[6] This tension is on the basis that both judges and arbitrators make binding decisions over disputes submitted by parties to them, albeit in different fora.[7] In addition, arbitrators now resolve major high-value

(last accessed 30 January 2017).

2. The semi-formalized nature of modern arbitration makes it therefore plausible to perceive of arbitration as "private litigation" as against the court process of public litigation. The Queen Mary International Arbitration surveys have consistently shown that commercial parties prefer arbitration. In their 2006 survey, 76 per cent of the respondents preferred arbitration. In 2008, 88 per cent of the respondents have used arbitration. In 2013, most respondents (52 per cent) still prefer arbitration while in 2015, 90 per cent of respondents still prefer to use arbitration. The Queen Mary University of London International Arbitration Surveys are all available online at: <www.arbitration.qmul.ac.uk/research/index.html> (last accessed 8 April 2016).
3. Interestingly Art. 37(1) of the Arbitration Rules of the East African Court of Justice (EACJ) provides that arbitrators shall be appointed from among the judges of the EACJ. This is not the norm even for supranational courts that also provide arbitral services. An example is the OHADA Common Court of Justice and Arbitration (CCJA), the Rules of which clearly state that the CCJA does not itself resolve disputes but appoints arbitrators. See Art. 2(2) CCJA Arbitration Rules.
4. UNCITRAL Model Law (2006) defines arbitral tribunal in Art. 2(b) as "a sole arbitrator or a panel of arbitrators", and in Art. 2(c) defines court as "a body or organ of the judicial system of a State".
5. Michael J. MUSTILL and Stewart C. BOYD, *Commercial Arbitration*, 2nd ed. (Butterworths 2001) p. 220.
6. Such tension does not exist in non-adjudicative alternative dispute resolution processes, such as mediation. This is because mediators do not make, but assist the parties in making (binding) decisions over their dispute. So in effect the powers of the mediator are not comparable in status to those of a judge of a national court. Thus there is no cause for rivalry.
7. An example of this tension was evident in the call for a rebalancing of the two systems (arbitration and litigation) in England by the Lord Chief Justice, Lord Thomas of Cwmgiedd in 2016. The Lord Chief Justice's views also stimulated some lively debates beyond the shores of England. At the

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The Power of an Arbitral Tribunal to Determine Its Own Jurisdiction in International Commercial Arbitration

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Abstract

This article discusses the powers of an arbitral tribunal to determine its own jurisdiction. The determination of the question of the jurisdiction of a tribunal lies in its own domain at least in the first instance by virtue of the principle of competence-competence. The principle enables a tribunal to test its own jurisdiction and confirm the extent of its power. This is one of the pillars of arbitration as it promotes party autonomy. The positive aspect of this power of the tribunal is that it cures the excesses of jurisdiction or any lack of it by granting an objecting party with immediate remedy thereby saving costs and time. The downside of this power is that an objecting party may still be permitted under the English Act and the Model Law to revert to court during the proceedings if he is not happy. However, time is of the essence. The article rests on an accumulation of case law, current and secondary literature. It takes cognizance of the fact that parties to an arbitration agreement have, by virtue of their autonomy a choice of subjecting the arbitration proceedings to rules of arbitration. As such, this article uses the ICC Rules of Arbitration and the UNCITRAL Rules of Arbitration as reference sets of rules. An arbitral tribunal's power to rule on its own jurisdiction is unique in the sense that it is a test of its jurisdiction. It is indeed an exceptional power as it helps define the extent a tribunal's powers and therefore becomes its own judge when queried. This power is important as it enables the arbitration proceedings to progress as scheduled.

Keywords

Arbitration Agreement, Jurisdiction, Competence-Competence, Power, Party Autonomy

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1. Introduction

The essence of this article is to analyze an arbitral tribunal's power to determine its own jurisdiction in international commercial arbitration. The first factor worth noting is the existence of an international commercial contract between the parties. By virtue of the parties' agreeing to have a defined legal contract, a party may seek the protection of an agreed legal system when his rights are infringed or in the event of non-performance by the other party. It is from the need to establish the parties' rights and obligations emanating from their contract that leads to the need to draw an arbitration agreement. The voluntary nature of arbitration is seen from the parties' willingness and consent to subject their disputes to be resolved using the process of arbitration in a private manner.

The subject matter in dispute ought to be clear and precise in the arbitration agreement in order for an arbitral tribunal to know the kind of dispute that it is to deal with.

By virtue of their consent to arbitrate, the parties become bound to the terms of the agreement and may not depart from them unilaterally. By submitting to the process of arbitration, the parties must be understood to have put in place a mechanism for the appointment of an arbitral tribunal to resolve their disputes and determine their rights and obligations. The tribunal that is formed is given the sole responsibility of steering the arbitration to its conclusion. It determines the parties' bone of contention, deliberates, deals with the issues in dispute, collects evidence, and makes an arbitral award that is in essence final and binding. It is the fundamental duty of an arbitral tribunal to be able to interpret the parties' contract including issues relating to the validity of the contract. In doing so, the arbitral tribunal must be alive to the separate nature of the arbitration agreement from the parties' contract, which enables the two instruments to be measured using different benchmarks. In the case of *Ferris & Anor v. Plaister & Anor and Stap & Anor v. Plaister & Anor* [(1994) BLC 417; CLOUT], the court decided that an arbitration clause in a contract was separate and therefore severable from the main contract.

The objective of this article is to determine how an arbitral tribunal that already has conduct of the arbitration would be competent to address a challenge against it by the same parties whose dispute it is resolving. In addressing this objective, the study has adopted an analytical legal research methodology that is qualitative in nature. This descriptive form of inquiry will help to obtain a detailed analysis of case law, applicable statutes and regulations. In addition, the doctrinal legal research methodology will help guide this study in understanding and appreciating why parties are able to empower an arbitral tribunal to determine its own jurisdiction in the first instance. Primary and secondary sources will be used. The arbitration process marks the scope of this investigation.

1.1. The Tribunal's Obligations

An arbitral tribunal's assumption of office and its observance of its fundamental

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obligations are two sides of the same coin. The decision that an arbitrator makes to accept an appointment to serve as arbitrator in essence binds him to his fundamental obligations to exercise procedural justice in the conduct of the arbitration proceedings. One cannot exist without the other. An arbitrator that accepts an appointment places himself under an obligation to disclose any material facts that may in any way infringe upon his work to the parties. This responsibility is on-going and disclosure has to be made as the issues arise.

An arbitral tribunal is obliged to remain impartial and independent throughout its mandate. A case in point is the case of *Weissfisch v. Julius and others* [(2006)2 All ER (Comm) 504]. The tribunal must also ensure that it maintains confidentiality to the extent that is expected of the parties to the arbitration agreement. These fundamental obligations arise from the fact that the parties expect to be treated fairly by a tribunal that conducts itself in an independent, impartial and juridical manner. The principle of openness and fair dealing between parties to an arbitration process was discussed in the case of *Athletic Union of Constantinople v. National Basketball Association* [(2002) 1 Lloyd's Report 305].

An arbitral tribunal owes the parties to an arbitration agreement an obligation to disclose. This obligation exists throughout the tribunal's mandate. An arbitrator whose name is being floated for possible appointment owes the parties to an arbitration agreement a general duty of disclosure (Binder, 2010). At the time that an arbitrator accepts his appointment, he is obliged to make a statement of disclosure to the parties. [*Metal Distributors* (*UK*) *Ltd v. ZCCM Investment Holdings Plc*) [(2005) 2 Lloyd's Law Reports 37]. A statement of disclosure amounts to an assurance by the arbitrator to the parties that he has laid bare any issues that are likely to be regarded as influencing his decision making process. These issues may relate to any previous business dealings or relations that the arbitrator may currently have or may have had in the past with any of the parties.

An arbitrator's duty is to make a statement of disclosure to the parties stating that he has previously dealt with or worked for either one or both of them. Thereafter, it is up to the parties to decide whether the disclosed statement is likely to infringe upon an arbitrator's determination of their rights and obligations in that particular arbitration.

The duty to disclose is an on-going obligation that an arbitrator should uphold throughout his term of office as the case progresses. This is because fresh evidence in the case and fresh witness statements may reveal information that may not have been previously available to the arbitrator. For example, the arbitrator may discover that one of the witnesses that a party is calling is the arbitrator's business partner. In such a case, the arbitrator should immediately make a declaration to that effect and it is up to the parties to decide whether they believe that the issues raised in the statement of disclosure place the arbitrator in a compromising position or not.

If an arbitration agreement adopts rules of an arbitration institution to govern the arbitration proceedings, the arbitrator may not only owe the parties a duty of

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disclosure but the institute as well as the other members of the arbitration team [ICC Rules, SCC Arbitration Rules, 1999 and the AAA International Arbitration Rules, 2001]. Article 17(2) of the SCCArbitration Rules, places an obligation on an arbitral tribunal to exercise its general duty of disclosure (The SCC Rules of Arbitration). An arbitrator owes the parties to an arbitration process this ethical (IBA Ethics for International Arbitrators, 1987) and fiduciary duty of care (IBA Guidelines on Conflicts of Interest in International Arbitration, 2004).

The duty of disclosure may be summed up as being a promise made by an arbitrator to the parties to the effect that having accepted to conduct the arbitration proceedings, he is obliged to conduct himself fairly, with diligence and skill (The Law Reform (Miscellaneous Provisions) (Scotland) Act, LR(MP)(S) Act, 1990). The promise to be impartial and independent is one way of giving an assurance of fairness without a compromise on his professionalism.

The arbitral tribunal must be capable of being able to identify the issues in dispute between the parties and in this way be able to determine the extent of its jurisdiction. These attributes are essential as they assist in defining the scope of the arbitration agreement and the extent of the jurisdiction within which an arbitral tribunal is to function. Further the attributes also show that parties to a contract are able to draw a number of arbitration agreements with different sets of tribunals assigned to deal with different aspects of a dispute between the parties at any given time. The parties are obliged to ensure that the arbitration agreements that they draw conform to the legal system that they wish to subject their arbitration to if the validity of the agreements is to be assured.

Each arbitrator is under an obligation to ensure that it reaches the threshold of the standard of behaviour befitting of a person conducting juridical duties. This obligation may be achieved by a party upholding the principles and attributes of disclosure, impartiality, independence and maintaining confidentiality to the extent required by the parties. This is fundamental as the arbitrator exercises his procedural duties. The adherence to these principles prevents personal challenges on the arbitrator by a party.

1.2. The Objective Test of Impartiality & Independence of the Tribunal

An arbitral tribunal is mandated to work within the limits of its jurisdiction and in accordance with the fundamental principles of fair play, impartiality and independence (IBA Guidelines on Conflicts of Interest in International Arbitration).

Systems of law and rules of arbitration place an obligation on the arbitral tribunal to be independent and impartial. The Model Law demands that an arbitral tribunal treats the parties with equality and give each one of them an opportunity to present their case. This is a fundamental obligation that may not be derogated from. Judge Lax when sitting in the Ontario Superior Court of Justice in the case of *Corporacion Transnacional de Inversiones, S.A. de C.V.*, et al. *v. STET International, S.p.A. and STET International Netherlands, N.V*, CLOUT (1999) stated

that the purpose of Article 18 of the Model Law was aimed at protecting a party from egregious and injudicious conduct by an arbitral tribunal (The UNCITRAL Model Law on ICA).

The English Arbitration Act under Section 33 also places a mandatory responsibility on the tribunal to "act fairly and impartially as between the parties." (The English Arbitration Act of 1996). Eminent authors have defined impartiality and independence in the context of arbitration (Binder, 2010).

Impartiality is a fluid principle in that it relates to a person's attitude of mind and behaviour. Independence on the other hand "is a necessary external manifestation of what is required as a prerequisite of that attitude and is an objective examination into the relationship between the parties and appointed arbitrators" (Yu and Shore, 2003). The objective test of impartiality is whether a reasonable man could conclude that the actions of an arbitral tribunal are biased or not. This test was alluded to in the case of *Porter v. Magill* [(2001) UKHL67] by Lord Hope of Craighead. His Lordship's test was whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Bias in this case may arise in circumstances where an arbitral tribunal holds a private meeting in chambers with one of the parties in the absence of another. The party that is absent may portray such an action as bias on the part of the tribunal.

The Swedish Arbitration Act (2019) is a non-Model Law instrument that provides instances that may point to an arbitral tribunal being partial. These include:

- That the arbitrator or anyone closely affiliated with him is a party or otherwise may expect benefit or detriment as a result of the outcome of the dispute;
- That the arbitrator or anyone closely affiliated to him is a member of the board of a company or any other association which is a party or in any other way represents a party or anyone that may expect benefit or detriment as a result of the outcome of the dispute;
- That the arbitrator, acting as an expert or otherwise, has taken a position in the dispute or has assisted a party in the preparation or conduct of his case; or
- That the arbitrator has received or demanded compensation in violation of the Act (Bagner and Rosengren, 2006).

An arbitral tribunal will be considered as being partial if it loses its independence. In the case of *Porter v. Magill* [(2001) UKHL 67], Lord Hope of Craighead referred to the close relationship of independence to impartiality as was stated by the European Court in the case of *Findlay v. United Kingdom* [(1997)24 EHRR 21]. In order to be impartial and independent an arbitral tribunal must exercise fairness in its attitude towards all parties. A failure by an arbitral tribunal to abide by this obligation could lead to a party raising a personal challenge against an arbitral tribunal.

2. Reasons & Time Frames of Raising Objections

A jurisdictional challenge is essential in curing the excess of jurisdiction or lack

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of jurisdiction of an arbitral tribunal. The lack of jurisdiction or the excess of jurisdiction amounts to a violation of jurisdiction that an arbitral tribunal has under an arbitration agreement. It is this violation that a party may wish to halt when making an application for a jurisdictional challenge against an arbitral tribunal. An arbitral tribunal's exercise of power outside its jurisdiction may amount to a ground for a jurisdictional challenge if not acquiesced to by the parties to an arbitration agreement. It is common for a respondent to challenge the jurisdiction of an arbitral tribunal although it is not unusual for a claimant to raise the objection. For instance, in the case of *Primetrade AG v. Ythan Ltd* (*The Ythan*) [(2006) 1 All ER (Comm) 157], the claimant applied to challenge the jurisdiction of the arbitral tribunal.

The ICC Rules and the UNCITRAL Rules like the instruments referred to above also make available to an arbitral tribunal the power to rule on its own jurisdiction. Under the ICC Rules for instance, an arbitrator who accepts an appointment undertakes to abide by the ICC Rules in conducting its functions. It is possible for an arbitrator to be faced with a situation where by whilst the claim that he is faced with is within his jurisdiction, a respondent raises issues in its counterclaim which are beyond his mandate. It is obvious that the arbitrator in such a case should only deal with the issues that he is allowed to deal with under his jurisdiction. It is up to the parties to acquiescence to extend his jurisdiction if they wish that the same arbitrator should deal with the dispute in whole. If an arbitrator disregards the fact that he has got no jurisdiction to decide an issue and still proceeds with it, any of the parties may challenge his jurisdiction.

The UNCITRAL Rules under Article 21 (3) and (4) requires that a plea for jurisdiction be raised not later than the filing of a defence (The UNCITRAL Arbitration Rules); or with respect to a counter-claim, in the reply to the counter-claim. Under Article 11 of the ICC Rules, the reasons for an objection to an arbitral tribunal's jurisdiction should be submitted in writing to the Secretariat within a prescribed period of time. Although the arbitral tribunal may join the issue of the jurisdictional objection to the merits of the disputes and make one ruling in the final award, it is encouraged to treat the question of jurisdiction as a preliminary issue to which a ruling may be made before the final award. The most usual manner to pursue these objections is for a challenging party to raise an objection immediately it becomes aware of the grounds for the objection. Undue delay could lead to abuse of the arbitral process by the party who knows that the award will eventually be against him.

An arbitral tribunal has a duty to act within the confines of its jurisdiction (English Arbitration Act of 1996, section 33). The fact that the parties wish the arbitral tribunal to establish certain rights and obligations on their behalf does not imply that the arbitral tribunal's jurisdiction is open ended. There must be limits as to what subject matter the arbitral tribunal is allowed to deal with and what it cannot deal with (*Glencore v. Agros* [(1999)2 Lloyd's Rep. 410]). In the event of a party perceiving that an arbitral tribunal does not have jurisdiction, that party has got the prerogative to immediately raise an objection. The case of

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Margulead Ltd v. Exide Technologies [(2005) 1 Lloyd's Law Report 324] is instructive here.

The failure by a party to promptly challenge an arbitral tribunal may result in a party's waiver of his rights (Webster and Buhler, 2014). In the case of *Rustal Trading Ltd v. Gill & Duffus SA* [(2000) 1 Lloyd's Rep. 14], Judge Moore-Bick drew attention to the function of section 73(1) of the English Arbitration Act that requires a party with grounds for objection to the constitution of the tribunal or the conduct of the proceedings to raise the objection as soon as he is, or ought reasonably to be aware of it (The English Arbitration Act of 1996).

Section 31(2) of the English Arbitration Act shows that the most appropriate time to raise a challenge is as soon as the pleader realizes that an arbitral tribunal has acted beyond its powers. The English Arbitration Act requires that a challenge before an arbitral tribunal in relation to its excess of jurisdiction be raised as soon as a party becomes aware of the anomaly. The English Arbitration Act gives wide discretionary latitude to an arbitral tribunal to be able to alter the time within which an objection can be made under section 31(1) and (2). This power is enshrined in section 31(3). By virtue of this section an arbitral tribunal is at liberty to use its discretion, depending on the circumstances of each case to allow a jurisdictional challenge to be raised outside the prescribed period of time.

The ICC Rules empower an arbitral tribunal under Article 18 to draw up its own Terms of Reference that could include the subject matter which the arbitral tribunal may be dealing with. Given this scenario, one is led to assume that the arbitral tribunal's jurisdiction will be known at this early stage. Therefore any challenge to the jurisdiction of the arbitral tribunal as enshrined in the Terms of Reference should be raised at the earliest opportunity at least before the Terms of Reference are signed by the parties.

The tribunal may determine the question of its jurisdiction at this stage of the proceedings in the first instance but not finally by virtue of the principle of *competence-competence* (Binder, 2010). The principle of *competence-competence* is a French illustration of the power of an arbitral tribunal to rule on its own jurisdiction (Redfern & Hunter, 2015). *Competence/competence* that literally means jurisdiction concerning jurisdiction is aimed at delaying court intervention in the arbitration process until after the arbitral tribunal has made its decision on the challenge (Park, 2012). This power of an arbitral tribunal is also often referred to in practice using the German illustration of *Kompetenz/Kompetenz* that may be interpreted as meaning "jurisdiction to decide jurisdiction."

Article 13 (1) & (2) of the Model Law provides a limited time frame within which a party may raise a personal challenge against an arbitrator before an arbitral tribunal. The limitation on time within which an arbitral tribunal may entertain a personal challenge is a procedural safeguard that prevents the waste of time, and thus helps the tribunal to work within its set time limits. Further, the Model Law permits a double action at this stage of the proceedings and this

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enables the arbitral tribunal to get on with its work with minimum delay. The arbitral tribunal is able to continue with the arbitration proceedings whilst the application against the arbitral tribunal proceeds in court. The fact that the Model Law specifies the time frame within which to challenge the decision of the arbitral tribunal promotes finality in the arbitration process. Article 4 of the Model Law shows that a party that fails to abide by the prescribed time factor may be considered as having waived his rights to challenge the arbitral tribunal's decision (The UNCITRAL Model Law on ICA).

Section 31 of the English Arbitration Act, provides the procedure for challenging the jurisdiction of an arbitral tribunal. A jurisdictional challenge could be made even before a statement of claim is filed. This is the most appropriate stage at which the objection to the arbitral tribunal's jurisdiction may be made and if the challenge is successful, it will stop the process before it even begins. This is fair to all the parties as time and money are saved. In dealing with an objection to its jurisdiction, an arbitral tribunal may under section 30(4) of the English Act, choose to make an award as to jurisdiction, or deal with the objection in its award on the merits. What matters is whether the tribunal has answered all the issues that the parties have raised. It is up to the arbitral tribunal only to give weight to evidence that it considers relevant. It is not obliged to consider all the submitted evidence

Rix J identified three options available under the English Arbitration Act to a party raising a challenge against an arbitral tribunal's jurisdiction in the case of *Azov Shipping Co. v. Baltic Shipping Co.* [(1999) 1 All ER 476] Rix J stated that:

Where a challenge to an arbitrator's substantive jurisdiction is made, the party that challenges the jurisdiction has a number of options under the Act. It may agree to participate in the argument before the arbitrator of the question of his competence and jurisdiction: see s. 30 of the Act. It may do so while reserving its right to challenge the arbitrator's award as to his own competence.

Alternatively, it may seek, without arguing the matter before the arbitrator, to promote the determination of the preliminary point of jurisdiction by the court under s.32.

The third option of someone disputing an arbitrator's jurisdiction is to stand aloof and question the status of the arbitration by proceedings in court for a declaration, injunction or other appropriate relief under s.72 of the Act. In such a case he is in the same position as a party to arbitral proceedings who challenges an award under s.67 on the ground that there was no substantive jurisdiction (*Azov Shipping* case).

Amongst the three options that Rix J identified in the *Azov Shipping* case, the first option is the one that is commonly applied in practice. The second option is usually adopted more as an exception than the norm. The third option of standing aloof, in essence denies the party challenging the arbitral tribunal's jurisdiction an opportunity of presenting his arguments before the tribunal. The first option of taking part in the arbitration proceedings and raising a challenge be-

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fore the tribunal is a method that gives the tribunal the opportunity of ruling on its own jurisdiction in the first instance. The arbitral tribunal must be given the opportunity to address the issues pertaining to the challenge and make a decision accordingly.

3. Findings

The power of an arbitral tribunal to determine its own jurisdiction is supported by both case law and statutory legislation. Article 1458 of the *Nouveau code de procedure civile* (NCPC) requires a court to declare itself incapable of dealing with an objection against an arbitral tribunal's jurisdiction once the tribunal starts to deal with the issue. The Swiss position embedded in Articles 186 of the *Loi federale sur le droit international prive* (LDIP), permits an arbitral tribunal to rule on its own jurisdiction through an interlocutory decision. The arbitral tribunal will in dealing with an objection against its jurisdiction that is raised in the course of the arbitration proceedings be governed by the *lex arbitri.*

From the analysis made in this article, a finding is made that the doctrine of the power of an arbitral tribunal to determine its own jurisdiction has received worldwide acceptance and recognition in both Model Law and non-Model Law jurisdictions (Binder, 2010). It is clear from the discussion that the doctrine of *competence/competence* is key here. The English Arbitration Act [section 30(1)] and the Model Law [Article 16(1)] permit the question of jurisdiction to be raised before an arbitral tribunal itself in the first instance whilst the arbitration proceedings are in progress. In this way, an arbitral tribunal is able to investigate its own jurisdictional powers whilst the proceedings are on-going thus expediting the arbitration proceedings and saving the parties costs and time. A decision that an arbitral tribunal makes in relation to a challenge against its jurisdiction will remain final and binding on the parties unless an objection is raised by a party (Tweeddale & Tweeddale, 2007). Most legal systems that support international commercial arbitration as well as some arbitration rules recognize the competence of an arbitral tribunal to rule on its own jurisdiction, at least in the first instance [UNCITRAL Rules, ICC Rules & the LCIA Rules (The LCIA Arbitration Rules of 2014)]. In order for this power of an arbitral tribunal to be established, the parties to an arbitration agreement must clearly and precisely intend for the tribunal to possess such power.

An arbitral tribunal has got the option of dealing with a challenge immediately it is raised as a preliminary issue or, it may deal with it with the main case and include it in its final decision. Article 16(1) of the Model Law supports the position that an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. In the case of *Rio Algom Inc. v. Sammi Steel Co.* CLOUT (1991) (Case No. 18), the Ontario Court of Justice held that an arbitral tribunal had jurisdiction in the first instance to determine its own jurisdiction and the scope of its authority under Article 16 of the Model Law.

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The English Arbitration Act in section 30 gives power to an arbitral tribunal to make a preliminary award when deciding its own jurisdiction. Section 30(1) of the English Arbitration Act gives competence to an arbitral tribunal to rule on its own jurisdiction and its decision is final unless appealed against or reviewed by a court (The English Arbitration Act of 1996). Switzerland does not permit a party to question an arbitrator on the power he possesses to deal with an issue unless the issue was unknown to the said party prior to the appointment (Swiss Private International Law Act, 1987). Unlike the Swiss law, the English law provides for any of the parties to challenge an arbitral tribunal's jurisdiction even though that party participated in nominating the tribunal. Whilst the Swiss Law gives guidance on the law that the arbitral tribunal should apply when faced with a jurisdictional issue which is the parties' chosen law or the rules of law with which the dispute has the closest connection, the Model Law leaves open the question of the applicable law (Binder, 2010).

Under the Model Law, an arbitral tribunal may apply the law of the seat of arbitration when determining its own jurisdiction. This is because the tribunal's power that is embedded in Article 16(1) is a territorial provision (Article 1(2) of the Model Law). In order for Article 16(1) of the Model Law to be operative, there has to be a valid arbitration agreement in place to hold the parties to their bargain. Article 16(1) permits the arbitral tribunal to determine a jurisdictional objection. In the case of *Dalimpex Ltd v. Janicki; Agros Trading Spolka Z.O.O. v. Dalimpex Ltd* [(2003) 64 Ontario Reports (3d) 737] the Court of Appeal in Ontario held that in cases where it is not clear, it may be preferable to leave any issue related to the existence or validity of the arbitration agreement for the arbitral tribunal to determine in the first instance under article 16(1) of the Model Law.

An arbitral tribunal may be construed as lacking jurisdiction if it functions in the absence of a valid arbitration agreement. An arbitral tribunal may be acting outside its jurisdiction if it purports to establish the rights and obligations of a non-party to the arbitration agreement; or if it deals with a dispute that the parties have not agreed should be dealt with by the tribunal. Further, an arbitral tribunal that fails to abide by the prescribed time limits including the time within which to make an award risks being challenged for lack of jurisdiction.

An arbitral tribunal that functions outside the limits of its jurisdiction may invite an objection from a party aimed at rectifying the position (Tweeddale & Tweeddale, 2007). An arbitral tribunal owes the parties a responsibility to be certain of the limits of its mission. It cannot deliberately ignore its mandate in pursuance of the interests of one party (ICC Case No. 1776). Such exercise of its duties would be tantamount to acting in bad faith. Some countries such as England, Canada, Australia and New Zealand may hold such an arbitral tribunal personally liable for such action. There are cases where the arbitrator has no intentions of ignoring his mandate but is forcefully made to do so by the appointing party. A case in point is *Himpurna California Energy Ltd and The Republic*

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of Indonesia [(2000 Yearbook Commercial Arbitration, Volumme XXV-2000].

It may therefore be seen that an arbitral tribunal's power to rule on its own jurisdiction is different from its other powers in the sense that whilst those powers are exercised in order to resolve the dispute between the parties, this power is a test of its jurisdiction. It questions whether the tribunal is on the right track or not. It may therefore be described as an exceptional power in the sense that it helps the tribunal to define the extent of its powers and therefore becomes its own judge when queried. This power is important as it enables the arbitration proceedings to progress as scheduled in the sense that an arbitral tribunal is able to determine its own jurisdiction whilst continuing with the arbitration proceedings. Further, it promotes the independence of the process of international commercial arbitration as questions pertaining to its jurisdiction are answered in-house. By raising a jurisdictional challenge before the arbitral tribunal a party is able to obtain immediate remedy and in the process save costs and time.

4. Conclusion

Whenever a question that touches on the jurisdiction of an arbitral tribunal is raised during the course of the arbitration proceedings, the tribunal deals with it in the first instance. In this way, the arbitral tribunal is able to check and determine its own jurisdiction. This is a test of its jurisdiction. It is exceptional in that it is done without interfering in the work of an arbitral tribunal. It is also inevitable in the sense that it is made available in instances when an arbitral tribunal lacks power; is challenged or when the interpretation, maintenance or enforcement of the parties' agreement is required.

This article has discussed the background from which an arbitral tribunal's powers arise. It has also dealt with the basic standards of conduct required of an arbitral tribunal. It therefore marks the foundation of the tribunal's powers to determine its own jurisdiction as well as the way in which it is expected to conduct itself during the duration of the arbitration. The arbitration agreement is recognized in this article as one of the pillars upon which the process of international commercial arbitration rests. The whole structural framework of arbitration is designed by the agreement of the parties. The parties have got an independent controlling power over how they would wish the disputes arising between them in their international commercial contracts to be resolved, and by whom. It is evident that the parties' ability to privately design their own dispute resolution mechanism is one of the attractive features of arbitration.

An arbitral tribunal has a duty when questioned to determine whether it is functioning within the scope of its authority or not (Tweeddale & Tweeddale, 2007). It does this by examining its very existence where a doubt is raised. The power of an arbitral tribunal to rule on its own jurisdiction, like party autonomy forms the cornerstone of the process of international commercial arbitration in the sense that it establishes the independence and autonomy of the process of international commercial arbitration.

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Whenever a question that touches on the jurisdiction of an arbitral tribunal is raised during the course of the arbitration proceedings, the tribunal deals with it in the first instance. In this way, the arbitral tribunal is able to check and determine its own jurisdiction without delaying the proceedings and in so doing promoting and validating the process of arbitration.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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Arbitration laws in various jurisdictions usually set out the powers of arbitral tribunals and in some jurisdictions the same law also sets out some of the (supervisory) powers courts can exercise over arbitration within their jurisdiction.[9] Generally, a clear demarcation marked by the formation of the arbitral tribunal can be said to exist. For example, national courts exercise jurisdiction over all matters pertaining to the dispute, short of determining the substantive issues, before the formation of the tribunal. For all matters arising following the constitution of the arbitral tribunal, including determining the substantive dispute, the arbitral tribunal has jurisdiction. Following the publication of the arbitral award and the arbitral tribunal becoming *functus officio*, national courts decide all matters arising from the reference, such as enforcement of the final award. These divisions can also be conceived of as power "movements" or "shifts".[10] This is a very broad description and there are matters that do not neatly fall within one or another of the zones.[11] This section will examine the tasks solely performed by national courts in arbitration (*1*); and the tasks performed solely by arbitral tribunals (*2*) to identify their separate spheres of influence; and finally identify the tasks over which they both share jurisdiction (*3*).

1. Sphere of Influence of National Courts in Arbitration

The courts of a particular country become relevant to an arbitration reference connected to it. Such connection may be as tenuous as one party approaching the court for some

Chartered Institute of Arbitrators (CIArb) London branch AGM on 28 April 2016, The Hon Sir Bernard Eder in his keynote address titled, "Does Arbitration Stifle the Development of the Law: Should Sect. 69 be Revitalised?" argued against the view that arbitration was stifling the development of common law.

8. See for example Susan FRANCK, "The Role of International Arbitrators" (2006) p. 1 available at: <https://international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docsfranck2.pdf> (last accessed 8 April 2016).
9. An example is the 1996 English Arbitration Act (EAA) Sects. 42-45. The text of the English Arbitration Act 1996 is available at: <www.legislation.gov.uk/ukpga/1996/23/data.pdf> (last accessed on 7 April 2016).
10. I used the word "shift" to describe these power movements in Emilia ONYEMA, "Power Shift in International Commercial Arbitration Proceedings", 14 Caribbean Law Review (2004, nos. 1 and 2) pp. 62-77. An electronic copy of this article is available at: <http://eprints.soas.ac.uk/4425/> (last accessed 7 April 2016).
11. For example, emergency arbitrator mechanisms and post award actions (correction, interpretation and making additional awards) by arbitrators.

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assistance;[12] it being the court of the seat of arbitration;[13] or of the place where recognition and enforcement or annulment of the award is sought.[14] It is of course debatable whether the courts of other countries may have jurisdiction over an arbitral reference not otherwise connected to them as described. Examples include the courts of the country of the substantive law of the transaction or where assets are located for purposes of interim measures.[15] This debate does not affect the discussion in this paper so that national courts refer to courts in any jurisdiction connected to an arbitration reference.

The UNCITRAL Model Law expressly provides in Art. 5:

> "In matters governed by this Law, no court shall intervene except where so provided in this Law."

Art. 5 of the Model Law therefore makes it quite plain that for Model Law jurisdictions, precedence is given to the arbitral tribunal to decide those matters contained in it except where expressly stated. The Model Law also expressly provides in Art. 6 those matters over which designated national courts (or other authority) shall have jurisdiction.[16] Such intervention is also expressly stated to be for the purpose of "assistance and supervision". Again evidencing the intention of the drafters of the Model Law as it relates to the role of courts in international arbitration: to support and not hinder the arbitral process. The matters over which national courts can intervene are: to give effect to the arbitration agreement; appoint arbitrators; decide arbitrator challenge applications; enforce or refuse to enforce orders for interim measures granted by the arbitral tribunal; grant interim measures; terminate the arbitrator's mandate; finally determine the arbitrator's jurisdiction; take evidence; enforce arbitral awards; and set aside arbitral awards. This list further evidences the desire of the drafters of the Model Law to give to the arbitral tribunal full control over the arbitral process and to

12. An example is in the *National Iranian Oil Company v. State of Israel* dispute where the French courts assisted the Iranian party by appointing the arbitrator despite the dispute or arbitration agreement not having any connection to France. For the English text of the decision see 11(2) Mealey's International Arbitration Review B5 (1996).
13. See for example Arts. 34(2), 35 and 36 Model Law; Sects. 2 and 3, EAA. See also for example Julian D.M. LEW, Loukas A. MISTELIS and Stefan M. KROLL, *Comparative International Commercial Arbitration*, (Kluwer Law International 2003) (henceforth Lew, Mistelis and Kroll) p. 107.
14. See for example Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention). Text and status of the New York Convention is available at: <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> (last accessed 30 January 2017).
15. See for example Sect. 22B of the Hong Kong Arbitration Ordinance, Chapter 609, E.R. 2 of 2014 (HK Ordinance) on the enforcement by the courts of Hong Kong of a relief granted by an emergency arbitrator. See also Art. 17H Model Law on the recognition and enforcement of interim measures issued by an arbitral tribunal.
16. The matters are covered by Arts. 8, 11(3), 11(4), 13(3), 14, 16(3), 17H, 17I, 17J, 27 and 34(2) of the Model Law. For more details see the travaux preparatoire available on the UNCITRAL website already mentioned above.

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ensure minimal interference by national courts.[17] Thus court intervention is limited to the early stages of the arbitral reference (prior to and in aid of the proper constitution of the arbitral tribunal) and following the conclusion of the reference when the award is rendered, with possible interference during the arbitral proceedings (when the arbitrator is challenged, assist with taking evidence and granting interim measures to preserve the subject matter of the arbitration).

The Model Law therefore envisages a national court assisting with the constitution of the arbitral tribunal, following which the tribunal will be left in peace to determine the dispute and make an award which the court can assist with enforcing or setting aside. These clear provisions ensure that the spheres of influence of these decision-makers are reasonably clear cut and well defined.

Under English law, the 1996 Arbitration Act (EAA) goes a couple of steps further than the Model Law.[18] The EAA makes detailed provisions on the powers English courts can exercise over arbitration references. The Act commences by stating as one of its general principles that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".[19]

It then borrows from the Model Law the general caveat limiting court intervention except as provided in the law.[20] The EAA notes that even where a court may intervene, the court can exercise its discretion and decide against such intervention. An example is under Sect. 2(3) for forum non conveniens purposes. The EAA grants English courts powers or jurisdiction to stay legal proceedings in favour of arbitration; extend time to commence arbitration; appoint and remove arbitrators; determine the arbitrator's jurisdiction; make supportive orders; extend time to make awards; among others.[21]

Under the Arbitration Law of France, there are even fewer opportunities (in comparison with the Model Law) for courts to intervene. For example Art. 1448 provides:

> "Where a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable."[22]

This provision makes it clear that a court can act before the constitution of the arbitral tribunal and also in cases where the arbitration agreement is manifestly void. It therefore

17. See the preparatory documents for the Model Law available at <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html> (last accessed 30 January 2017).
18. See for example Sects. 42-45 of the EAA.
19. Sect. 1(b) of the EAA.
20. Sect. 1(c) of the EAA.
21. These are provided for in Sects. 9-11; Sect. 12; Sect. 17(3) and (5); Sect. 18; Sect. 23(5), Sect. 24; Sect. 32; Sects. 42-45; Sect. 50 of the EAA.
22. Art. 1448(2) provides that French courts cannot decline jurisdiction *suo moto*. A party must make a request to the court which follows the provisions of Art. II(3) of the New York Convention.

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settles any ambiguity in favour of arbitration. It also avoids the New York Convention confusion of whether it is for national courts to examine whether the arbitration agreement is "null and void, inoperative or incapable of being performed", before referring the parties to arbitration.[23] Section 6 of the Singapore International Arbitration Act 2012 also clearly empowers the court to determine whether the arbitration agreement is valid before referring the parties to arbitration.[24]

Art. 1446 of the French Arbitration Law gives parties the freedom to submit a dispute pending before the courts to arbitration.[25] There is similar provision in the Ghana ADR Act of 2010.[26] These provisions imply that the well-known principle of parties losing the right to take advantage of their arbitration agreement where they have "taken steps in the proceedings", may not be applied. Under French law, the courts can assist disputants to appoint and remove arbitrators, take evidence, grant certain interim orders, recognize and enforce the award, or annul the award.[27] It is instructive that the caveat, "the judge acting in support of the arbitration" is included against the powers granted to courts in most of these provisions under the French law. Such caveat is a helpful reminder to French courts and judges of the purpose of their role in arbitration.

National courts have the sole jurisdiction to recognize and enforce or set aside/annul arbitral awards. National laws clearly provide the standards and grounds parties need to

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23. For the position under Indian Law whose courts have been known to enquire into the validity of the arbitration agreement under this article, see: Avatar SINGH, *Law of Arbitration and Conciliation*, 8th ed. (Eastern Book Company 2007) pp. 414-416. Art II(3) of the New York Convention provides:

    "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

24. Sect. 6(2) Singapore International Arbitration Act, Chapter 143A of 2012. The text of this Act is available at: <http://statutes.agc.gov.sg/aol/download/0/0/pdf/binaryFile/pdfFile.pdf?CompId:dd9f0294-66ec-4d80-ac95-b40c1be85915> (last accessed 11 April 2016).
25. On the law of arbitration in France, see generally: Jean ROUCHE, Gerald H. POINTON and Jean-Louis DELVOLVE, *French Arbitration Law & Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd ed. (Kluwer Law International 2009) and Emmanuel GAILLARD and John SAVAGE, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999)
26. Sect. 7(1) Ghana ADR Act 2010 goes further by empowering the court to refer parties to arbitration even where there is no arbitration agreement in existence. The section provides:

    "Where a court before which an action is pending is of the view that the action or a part of the action can be resolved through arbitration, that court may, with the consent of the parties in writing, despite that there is no arbitration agreement in respect of the matter in dispute, refer the action or any part of the action for arbitration."

    See for a critique of this provision, Emilia ONYEMA, "The New Ghana ADR Act 2010: A Critical Overview", 28 Arbitration International, (2012, no. 1) p. 101 at pp. 113-115.
27. See Arts. 1452, 1453, 1454, 1456(3), 1463(3), 1468, 1469, 1516 of the French Arbitration Law.

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satisfy for their courts to recognize, enforce, set aside, annul or remit an arbitral award.[28] The New York Convention which has 156 parties, 35 of which are African States, specifically empowers national courts to recognize and give effect to arbitration agreements and recognize and enforce or set aside/annul arbitral awards.[29] Art. II(3) of the New York Convention expressly refers to the "court of a Contracting State" while the obligations under Arts. III and V both refer to the "competent authority" with the primary obligations contained in those articles reposed in the Convention State. These obligations are performed by national courts in the vast majority of the Member States of the Convention.[30]

So for the Model Law (and its jurisdictions) the relevance of the state playing a supportive role is to enable the parties to actualize their promises as contained in their arbitration agreement. Such promises include effectively commencing arbitration when a covered dispute eventuates. Most national laws through their provisions, clearly envisage the arbitral tribunal taking charge of the arbitral proceedings when it is constituted. Therefore national laws empower the arbitral tribunal to determine the substantive disputes between the parties and all consequential matters towards making such decisions. Such matters include, managing the proceedings; taking evidence; determining what weight to attach to the evidence; deciding the issues in dispute between the parties; deciding liability of the parties and the remedies to award; allocating costs and interest. These matters therefore fall outside the domain of national courts.

2. *Sphere of Influence of Arbitral Tribunals*

Arbitral tribunals on their part become relevant when they have been constituted in a particular reference. By constitution is meant the appointment and acceptance of appointment of all arbitrators forming the arbitral tribunal.[31] The powers of the arbitral tribunal are also, by virtue of the choice of a seat, connected to a particular jurisdiction.[32] It is generally accepted that the powers and jurisdiction of arbitral tribunals are subject

28. See for example Arts. 34, 35 and 36 of the Model Law; Sects. 66, 67, 68 and 69 EAA; Arts. 1516 and 1519 French Arbitration Law.
29. These powers are contained in Arts. II(1), III and V of the New York Convention.
30. Art. III of the New York Convention provides for the recognition of arbitral awards while Art. V provides grounds on which such awards may be refused enforcement.
31. See Emilia ONYEMA, *International Commercial Arbitration and the Arbitrator's Contract*, (Routledge 2010) pp. 84-102.
32. Such connection counters the idea of "floating" or totally delocalized arbitrations. For some commentaries on the delocalization and transnational theories, see, Jan PAULSSON, "Arbitration Unbound: Award Detached from the Law of the Country of its Origin", ICLQ (1981) pp. 358-387; Hong-Lin YU, "Explore the Void: An Evaluation of Arbitration Theories, Part 2", 8 Intl ALR (2005, no. 1) pp. 14-22; Julian LEW, "Achieving the Dream: Autonomous Arbitration", 22 Arbitration International (2006, no. 2) pp. 178-203; Ahmed MASSOUD, "The Influence of the Delocalisation and Seat Theories Upon Judicial Attitudes Towards International Commercial Arbitration", 77 Arbitration (2011, no. 4) pp. 406-422; Jonathan MANCE, "Arbitration: A Law unto Itself?", 32 Arbitration International (2016, no. 2) pp. 223-241; and Emmanuel GAILLARD, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010).

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to the mandatory requirements of the law of the seat of arbitration.[33] The law of the seat also acts as a gap-filler for matters not provided by the parties or which they have not agreed upon. It therefore guides the arbitral tribunal on what powers it can exercise over the dispute within that particular jurisdiction. Needless to say, such power differs from jurisdiction to jurisdiction. However, some degree of convergence is beginning to emerge in international arbitration laws.[34] The powers of any arbitral tribunal can therefore be found in the arbitration agreement between the parties, any set of arbitration rules adopted by the parties and the provisions of the law of the seat of arbitration.

Most international arbitration disputes are subject to a set of arbitration rules which may be for administered or non-administered references. In this section, examples will be drawn from the UNCITRAL (2010 revision),[35] ICC (2012),[36] LCIA (2014),[37] SIAC (2013)[38] and KIAC (2012)[39] Arbitration Rules to give a flavour of the powers exercisable by arbitrators.[40] The arbitral tribunal has general autonomy over the arbitral proceedings. This includes determining the conduct of the proceedings, including case management, taking of evidence, granting interim measures of protection, hearing the parties, deciding the issues in dispute and making the award.[41]

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33. See Gary B. BORN, *International Commercial Arbitration*, volume 1 (Kluwer Law International 2009) at p. 306 and p. 1765; LEW, MISTELIS and KROLL, supra, at p. 120. But see Emmanuel GAILLARD and John SAVAGE, eds., *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) pp. 633-636.
34. It is arguable that this convergence is strongly driven by institutional rules which themselves "codify" arbitral practice, especially international arbitral practice.
35. For the text of UNCITRAL Arbitration Rules 1976 with revisions in 2010, see: <www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last accessed 15 April 2016).
36. International Chamber of Commerce (ICC) available at: <www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/> (last accessed 15 April 2016).
37. London Court of International Arbitration available at: <www.lcia.org/> (last accessed 15 April 2016).
38. Singapore International Arbitration Centre available at: <www.siac.org.sg/> (last accessed 15 April 2016). A new set of SIAC Arbitration Rules was launched in May 2016 at the SIAC 2016 Congress and Golden Jubilee celebration, with details on the SIAC website.
39. Kigali International Arbitration Centre, available at: <www.kiac.org.rw/> (last accessed 15 April 2016).
40. The 2015 Queen Mary International Arbitration survey lists the ICC, LCIA, HKIAC, SIAC and SCC as the five most preferred arbitration institutions. KIAC is representative of arbitration institutions in Africa. It is recognized that most arbitration rules are modelled after the UNCITRAL Arbitration Rules in addition to it being used for ad hoc or non-administered references.
41. See for examples: Arts. 17-39 UNCITRAL Rules; Arts. 17-28, 31-32 and 35 ICC Rules; Arts. 14-23, 25-28 LCIA Rules; Rules 16-19, 21-29 and 31 SIAC Rules; and Arts. 26-33, 35-38 KIAC Rules.

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Some issues on which arbitration rules are beginning to converge are the competence of the arbitral tribunal to determine its jurisdiction in the first instance;[42] grant interim orders of protection to preserve the *res* of the arbitration;[43] join third or non-parties to the arbitration agreement;[44] consolidate arbitral proceedings;[45] manage the arbitral reference;[46] take and allocate weight to the evidence of the parties;[47] decide the dispute between the parties;[48] and make an arbitral award binding on the parties.[49] So arbitral tribunals effectively have full control over the proceedings, subject only to the agreement of the disputing parties and to a lesser degree the decisions of the particular arbitration institution (if any) whose arbitration rules apply to the dispute.[50]

3. Shared Jurisdiction Between National Courts and Arbitral Tribunals

There are however some issues in arbitration over which national courts and arbitral tribunals share jurisdiction. States in their national arbitration laws grant powers over these issues to both the arbitral tribunal (through the disputing parties) and national courts. It will be interesting to interrogate whether over these issues, national courts and arbitral tribunals have concurrent or coordinate jurisdiction. Put a different way, does this mean that once the arbitral tribunal has made a decision on the issue, national courts must respect the decision and cannot therefore override the decision made by the tribunal? It is arguable that this will be the position on those issues mentioned above (under II.*2*), over which the arbitral tribunal is granted sole authority to decide. Thus, national courts lack jurisdiction to entertain applications over such matters. For example, Sect.34 of the EAA expressly states "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter." It follows that for such matters, there is no concurrent or coordinate jurisdiction between national

42. See for example Art. 23 UNCITRAL Rules; Art. 23 LCIA Rules; Rule 25.2 SIAC Rules; and Art. 31 KIAC Rules.
43. See for example Art. 26 UNCITRAL Rules; Art. 28 ICC Rules; Art. 25 LCIA Rules; Rule 26 SIAC Rules; and Art. 33 KIAC Rules.
44. See for example Art. 17(5) UNCITRAL Rules; Art. 22.1(viii) LCIA Rules; Rule 24.1(b) SIAC Rules; and Art. 32.3 KIAC Rules. Under Art. 8 KIAC Rules, the KIAC Secretariat can also make this decision. Under the ICC Rules, the ICC Court makes this decision pursuant to Art. 7 of the ICC Rules.
45. See for example Art. 22.1(ix) LCIA Rules. Under Art. 11 KIAC Rules, the KIAC Centre makes this decision. Under the ICC Rules, the ICC Court makes this decision pursuant to Art. 10 of the ICC Rules.
46. See for example Art. 17(1) UNCITRAL Rules; Art. 22 ICC Rules; Art. 14 LCIA Rules; Rule 16 SIAC Rules; and Art. 28 KIAC Rules.
47. See for example Art. 27 UNCITRAL Rules; Art. 25 ICC Rules; Art. 22.1(vi) LCIA Rules; Rule 28.3 SIAC Rules; and Art. 28 KIAC Rules.
48. See for example Art. 33 UNCITRAL Rules; Art. 31 ICC Rules; Art. 22.3 LCIA Rules; Rule 24 SIAC Rules; and Art. 38 KIAC Rules.
49. See for example Art. 34 UNCITRAL Rules; Art. 31 ICC Rules; Art. 26 LCIA Rules; Rule 28.2 SIAC Rules; and Art. 39 KIAC Rules.
50. For example, arbitration institutions may decide the seat of the arbitration and the fees of the arbitrators.

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courts and the arbitral tribunal. If there is any such jurisdiction, it will be between the disputing parties and the arbitral tribunal. This is because arbitration laws generally empower disputing parties to agree some of these issues, for example, agreeing the seat and language of the arbitration. For some other matters, practicality of performance requires agreement between the parties and arbitral tribunal, for example, fixing the timetable for the hearings; while other matters, such as the weight to be attached to the evidence adduced by the parties, fall within the sole jurisdiction of the arbitral tribunal to decide. National courts do not have powers to entertain (least of all overturn) arguments on the decision of the arbitral tribunal over such matters.

To some degree, that is the same position with the arbitral tribunal's finding of facts in the substantive dispute. This explains why generally there is no appeal mechanism in arbitration,[51] similar to that in litigation; but a challenge mechanism on limited or circumscribed grounds. However, where for example, an arbitrator is challenged and the arbitral tribunal[52] determines the challenge in the first instance, with a national court making a final determination on the challenge, such a situation is clearly not one of coordinate jurisdiction.[53] The national court enjoys a superior jurisdiction to that of the arbitral tribunal, and its decision overrides that of the initial decision-maker, be it the arbitral tribunal, appointing authority or arbitration institution. The same can be said for the award which can be confirmed, set aside or remitted back to the arbitral tribunal by a national court.

There are other issues over which both the arbitral tribunal and the court can make a decision, for example, the grant of interim measures of protection. It should be quickly noted that even over interim measures, the powers of the arbitral tribunal may be limited primarily by the very nature of arbitration and the practicalities of the dispute. The consensual nature of arbitration necessitates that the arbitral tribunal lacks powers over non-parties to the arbitration agreement who have not submitted to its jurisdiction. Therefore if the interim measure affects the rights or interests of a non-party, this may limit the authority of the arbitral tribunal.[54] The powers of national courts generally do not have such limitations, subject to the question of territoriality.[55] Another issue of practical consideration is the urgency of the order sought. Where such an order is sought quickly, it may not be practicable for the party to convene the arbitral tribunal for a

51. This does not refer to appeal processes within the arbitral mechanism for example under trade arbitrations such as the Grain and Feed Trade Association (GAFTA) which operates a two-tier arbitration system, for which see: <www.gafta.com/arbitration> (last accessed 23 February 2017).
52. Or the arbitration institution or appointing authority, as the case may be.
53. Under most arbitration laws the national courts finally determine challenges to arbitrators regardless of who initially made the decision. Such decision-maker may be the tribunal itself, appointing authority or arbitration institution.
54. The word "may" is used here because the arbitral tribunal may achieve the same result through personal orders made directly against the party before them over whom they have jurisdiction. Arbitrators generally use such personal orders.
55. See however, Campbell MCLACHLAN, "Transnational Applications of Mareva Injunctions and Anton Piller Orders", 36 The International and Comparative Law Quarterly (1987, no. 3) pp. 669-679.

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hearing before the order is made. The same consideration will also affect the requesting party's need to surprise the other party with the order. An example is where the requesting party wishes to stop the other party moving funds out of the jurisdiction. Such an order clearly needs an element of surprise. But the need to observe due process prevents the arbitral tribunal from conducting an ex parte hearing with one party to the dispute in the absence of the other party. This effectively frustrates the urgency and surprise elements of the order. The impact of these issues, which is exemplified in the discourse on the ability of the tribunal to hear ex parte applications, is evident in the UNCITRAL Working Group papers.[56] The deliberations of this Working Group led to the additional provisions in Art. 17 of the Model Law which provides for the arbitral tribunal or national court to grant such measures: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures."

Art. 17 J on the other hand provides:

> "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."[57]

Therefore, expressly as it relates to those interim measures which an arbitral tribunal by its nature can order, it can be said to have concurrent jurisdiction with national courts. The effect of this concurrent jurisdiction is that a supportive court will assist the parties by enforcing the order of the arbitral tribunal.[58] An unsupportive court on the other hand, will either not enforce the order or deny the arbitral tribunal of such jurisdiction.

The same analysis applies to situations where the arbitral tribunal orders the appearance of a witness or production of documents. Under the laws of some jurisdictions, the arbitral tribunal can directly make such orders which their courts will enforce.[59] In some other jurisdictions, parties need to seek such assistance for witness production before national courts. Such access to the courts is very important especially over witnesses that the arbitral tribunal does not have powers to summon. It is important that since the onus lies with the presenting party to produce their evidence (and witnesses) that they can access the courts to assist them with that task. Closely allied to witness production is document production. The IBA Rules on the Taking of Evidence

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56. For Working Group II Papers on Interim Measures see the 32nd to the 44th available at: <www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html> (last accessed 15 April 2016).
57. Sect. 45 of the Hong Kong Ordinance dis-applies this Art. 17J of the Model Law while under Sect. 61 of the Ordinance; such orders granted by the arbitral tribunal will be enforced with leave of the court.
58. The English High Court in *Gerald Metals SA v. Timis* [2016] EWHC 2327 (Ch) considered that in appropriate cases, it would defer to the LCIA emergency arbitrator procedure as provided for in the LCIA 2014 Arbitration Rules.
59. See for example Sect. 56 Hong Kong Ordinance.

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in International Arbitration has greatly assisted with harmonizing practice on this subject.[60]

States therefore anticipate that arbitral tribunals will decide the substantive issues in dispute and the procedural matters connected to such decisions as consented to by the disputing parties. In addition states generally allow their courts to intervene to varying degrees with any arbitration connected to their territory. Such intervention may be prior to the constitution of the arbitral tribunal, during the arbitration proceedings and after the issuance of the arbitral award. These interventions by national courts may be necessary and supportive of the arbitration process. Supportive interventions by national courts will facilitate the commencement of the arbitration process, its smooth continuation and enforcement of the decisions made by the arbitral tribunal. Therefore the tools provided for national courts to intervene in arbitration may be construed positively as evidence of state support for the process of arbitration. Such tools may also be construed negatively. As shown above, the same tools are generally available for court support or negative intervention in arbitration in various jurisdictions. However, the difference in categorizing the attitude of national courts lies in how these courts use these tools.

There is no singular jurisdiction in the world that does not provide opportunities for its courts to intervene in arbitration proceedings within its territory. However, the states that are referred to as being "arbitration friendly" are those whose courts respect and support the jurisdiction of the arbitral tribunal and the arbitral process. States whose courts appear to not fully appreciate the role of, and sphere of influence of arbitration within their legal system, are described as being unfriendly towards arbitration. Such courts appear to compete for jurisdictional power and space with the arbitral tribunal, thereby negatively intervening in the arbitral process. Such negative intervention frustrates the right of choice of dispute resolution mechanism given to the disputants by the same state, since both the executive, legislative and judiciary are different arms of the same state or government. Such negative intervention by national courts in arbitration references causes additional expense of time and money, frustrates the parties' choice of dispute resolution mechanism and greatly erodes users' confidence in arbitration generally and more particularly in such jurisdictions.

III. LINKAGE BETWEEN SUPPORTIVE ARBITRATION JURISDICTION AND CHOICE OF SEAT

This section briefly examines the link between the perception by users of arbitration of a jurisdiction as being supportive of arbitration, and the ability of such jurisdiction to attract arbitration references as seat. It is generally recognized that a modern arbitration regime includes: content of the arbitration law (whether it accepts and codifies party autonomy and limited court interference, so generally meets the UNICTRAL Model law

60. For the IBA Rules on the Taking of Evidence in International Arbitration 2010 and Commentary, see: <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (last accessed 15 April 2016).

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minimum threshold); whether the jurisdiction is party to the New York Convention;[61] whether the jurisdiction is home to viable and sustainable arbitration institutions; whether the jurisdiction is home to qualified arbitration practitioners; and whether the attitude of the courts is supportive of arbitration.[62] This last factor shall be examined in more detail under this section.

1. Popular Seats for International Arbitration

The traditional seats for arbitration as noted by several arbitration surveys (in different orders) are, Geneva, London, New York and Paris. Examples from the Queen Mary Surveys consistently list these cities. The 2006 Queen Mary Survey notes that, "the four most popular venues were England, Switzerland, France and the United States of America".[63] Data from the Queen Mary International Arbitration surveys show that in 2010, London, Paris, New York and Geneva were the seats most preferred by their respondents with Singapore beginning to emerge as a "regional leader in Asia".[64] In their 2015 survey, London, Paris, Hong Kong, Singapore and Geneva were listed as the "five most preferred and widely used seats".[65] Interestingly, on number of caseload, China can be regarded as a major player with CIETAC recording a total of 18,078 cases between 2000 and 2015 of which 7,280 were foreign related and 10,798 were domestic cases.[66] However from the Queen Mary survey, China was not mentioned as one of the top destinations for international arbitration.[67] The Queen Mary 2015 survey found that parties chose seats primarily on the "reputation and recognition" of the seat and as a link to the substantive law of the transaction. When asked the reasons for their preferences, respondents to the Queen Mary survey chose, "neutrality and impartiality of the local legal system, the national arbitration law, and track record of enforcing agreements to arbitrate and arbitral awards" as their top three factors.[68] This is all very useful data which states wishing to attract more arbitration cases can use in formulating relevant policies.

Singapore was noted in the Queen Mary 2015 Survey as one of the popular (non-traditional) seats for arbitration. This finding by the Queen Mary Survey is supported by

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61. As listed by Sundaresh MENON, "Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence", Singapore Journal of Legal Studies (2013) pp 231 at 238-240.
62. The 2015 Queen Mary International Arbitration Survey at pp. 5, 11-17, found that their respondents preferred certain seats because of their "appraisal of the seats established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track record for enforcing agreements to arbitrate and arbitral awards".
63. See "International Arbitration: Corporate Attitudes and Practices 2006" at pp. 3, 14-15.
64. See "Choice in Arbitration" 2010 Survey, pp. 2, 17-20.
65. See "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration", pp. 2, 11-17.
66. For details of CIETAC caseload, see: <www.cietac.org/index.php?m=Page&a=index&id=40&l=en> (last accessed 6 February 2017).
67. This anomaly raises various qualitative issues on the use of surveys for example the results being very dependent on the location of the respondents. It also raises the question of what are the best forms of measureable indicators for these types of enquiry.
68. 2015 International Arbitration Survey at p. 13.

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recent data from the Singapore International Arbitration Centre (SIAC) which shows a year-on-year increase in its caseload of new cases, from 78 in 2004 to 222 in 2014.[69] SIAC continues to review its arbitration rules with the latest revision of its 2013 Rules in 2016.[70] These reviews keep abreast with developments in arbitral practice so the Rules meet the needs of its users. A very brief examination of the arbitration regime in Singapore may help with understanding its rise to becoming a popular seat for arbitration. Singapore (in addition to other policy changes) revised its International Arbitration law in 2012 and though based on the Model Law, reflects greater court support for arbitration.[71] However, an explanation of the popularity of Singapore as a seat for arbitration must go beyond these factors. This is because some other jurisdictions that have also reviewed their national arbitration laws (and some have more than one major arbitration institution with equally modern arbitration rules) have not garnered such popularity or seen such increases in their arbitration caseload. I will suggest that the role of the government and courts of Singapore in supporting arbitration, along with its geographical location (serving the Australian-Asian markets) have also greatly impacted on its emergence as a popular seat for arbitration. The government of Singapore and the courts of Singapore have adopted clear policies to support the growth and development of Singapore as an international centre for arbitration.[72] This has led to greater marketing of arbitration in Singapore and of Singapore to the international arbitration community. In addition to the availability of first-class non-legal support services for arbitration, Singapore has also put in place first-class legal services to support international arbitration.[73]

It must be noted that even for the traditional seats, their courts have not always made "supportive" decisions over arbitration disputes. Two examples from England will suffice: In the *Jivraj v Hashwani* litigation of 2009 where the English Court of Appeal decided that arbitrators were employees of the appointing parties in interpreting EU law[74]; the international arbitration community raised alarm over the decision of the Court of Appeal (to the effect that arbitrators were employees) and made strenuous "protests" in the media; with some institutions filing amicus briefs at the hearing of the

69. See the 2015 SIAC Annual Report at: <www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf> (last accessed 15 April 2016).
70. SIAC also recently launched its Investment Arbitration Rules with effect from 1 January 2017. The text of these Rules is available at <www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Arbitration%20Rules%20-%20Final.pdf> (last accessed 30 January 2017).
71. One example of such support is in Sect. 12. In 2016 further revisions came into effect; for example Sect. 16 on the appointment of a conciliator.
72. See for an example of an article on this: <http://simc.com.sg/singapore-became-arbitration-hub/> (last accessed 15 April 2016).
73. Such legal services include the increase in the numbers of international law firms with offices in Singapore providing access to legal and other expertise for complex disputes.
74. The Employment Equality (Religion and Belief) Regulation, 2003. This Regulation prohibits employers from discriminating against a prospective employee on grounds of religion.

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appeal at the Supreme Court.[75] The decision of the Court of Appeal was reversed by the Supreme Court to safeguard arbitration and the London arbitration market.[76] The intervention of the arbitration institutions (ICC and LCIA) must be commended. Such intervention is necessary to protect arbitration and must be made (wherever possible) in courts all over the world and not just in selective jurisdictions.

Again, in 2010, the English Supreme Court upheld the decision of the Court of Appeal in *Dallah v. Pakistan* by refusing to enforce in England the arbitral award made by an ICC arbitral tribunal sitting in Paris, though the same award was enforced by the French courts.[77] This was viewed as a decision that is not supportive of arbitration. However these decisions did not negatively affect the continued choice of London as seat of arbitration.[78] This may point to factors other than just having a supportive judiciary to attract arbitration as seat; or does this relate to the effect of arbitration users' perception of a jurisdiction; so that when a jurisdiction is perceived as supportive, its national courts can afford to occasionally give anomalous decisions on arbitration? This clearly calls for some interrogation for a clearer understanding of why such decisions do not adversely affect the reputation or choice of a traditional seat such as London as a top destination for arbitration references.[79]

2. *Some African Jurisdictions*

It will be remiss not to explore some African jurisdictions since the 23rd ICCA Congress was held in Africa (Mauritius). This section briefly examines four African jurisdictions whose national laws are based on the UNCITRAL Model Law; are parties to both the New York and ICSID Conventions; and home to known arbitration institutions with

75. For a good summary of the issues and decisions in *Jivraj v. Hashawani*, see commentary by Olswang LLP at: <www.lexology.com/library/detail.aspx?g=d9baca5b-a5fd-4692-b7e8-a8243fd1c323> (last accessed 15 April 2016).
76. See *Jivraj v. Hashwani* [2011] UKSC for the decision of the Supreme Court overturning the decision of the Court of Appeal which is reported in [2010] EWCA Civ. 712.
77. The refusal was on the ground that the Government of Pakistan was not a party to the arbitration agreement between Dallah and the Trust. See *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs and Government of Pakistan* [2010] UKSC 46 for the Supreme Court decision. See a summary from White & Case LLP at: <www.whitecase.com/publications/newsletter/insight-dallah-paris-court-appeal-and-uk-supreme-court-reach-contrary> (last accessed 15 April 2016).
78. For example in 2014 the second most frequently chosen place for ICC arbitrations was London; chosen in eighty-six cases. See ICC Bulletin (2015, issue 1) at page 14.
79. Such interrogation will help dispel the view expressed in some emerging jurisdictions that regardless of how "friendly" their arbitration regime becomes, international arbitration users will still choose the traditional seats.

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modern arbitration rules:[80] Nigeria, Rwanda, Mauritius, and Egypt. A brief mention will also be made of the OHADA arbitration regime.[81]

Nigeria hosts one of the African-Asian Legal Consultative Organization (AALCO) Regional Centres, the Lagos Regional Centre and at least one other major arbitration centre, the Lagos Court of Arbitration Centre.[82] Nigeria generates huge numbers of both domestic and international commercial disputes. The Nigerian Arbitration and Conciliation Act 1988 is based on the Model Law (1985 version) and its arbitration institutions have modern arbitration rules.[83] However Nigeria is not attracting international arbitrations as seat. It is obvious that apart from a weak non-legal environment, the systemic failures of Nigerian courts create a very weak judicial environment which is not perceived by arbitration users as supportive of arbitration.[84] There have been some very positive judicial decisions such as the Nigerian Supreme Court decision in *The Owners of the MV Lupex v. Nigeria Overseas Chartering and Shipping Ltd* upholding the arbitration agreement.[85]However, it is frustrating for parties to have to appeal all the way to the Supreme Court of Nigeria for their arbitration agreement to be recognized and given effect.

Rwanda has fared much better than Nigeria especially as a post-conflict state. Rwanda has a modern arbitration law also based on the Model Law (2006 version) and a very active and vibrant Kigali International Arbitration Centre (KIAC) supported by the government of Rwanda. From statistics made available by KIAC, it has a growing caseload and between 2012 and 2015 has administered twenty-eight cases with parties from the United States of America, Italy, South Africa, Kenya, Pakistan, Rwanda, and Senegal.[86]

Mauritius on its part has first class non-legal facilities, a developed tourism industry and a thriving global business industry. It is a Model Law (2006 version) jurisdiction and home to the LCIA-MIAC centre which is described by a report on three arbitration institutions in Africa commissioned by the African Development Bank, as having,

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80. For a list of seventy-two arbitration institutions in various African countries see: <www.arbitration-icca.org/media/7/14403606533411/list_of_arbitration_institutions_in_africa_-_emilia.pdf> (last accessed 30 January 2017).
81. OHADA refers to the "Organization for the Harmonization of Business Laws in Africa" created by Treaty in 1993 and revised in 2008. For more information on OHADA see: <www.ohada.com/> (last accessed 15 April 2016).
82. Nigeria is home to at least two other arbitration institutions: International Centre for Arbitration and Mediation, Abuja; and Lagos Chamber of Commerce International Arbitration Centre.
83. One example is the 2015 Arbitration Rules of the Lagos Chamber of Commerce International Arbitration Centre (LACIAC) which is available at: <www.laciac.org/> (last accessed 15 April 2016).
84. Such systemic failures include delays in the judicial process and allegations of judicial corruption. On delays see, Emilia ONYEMA, "IPCO v NNPC Saga and Liability of Nigerian Legal System", published in The Guardian Newspapers (Nigeria) of 22 December 2015 and also available at: <http://eprints.soas.ac.uk/21653/> (last accessed 15 April 2016).
85. *The Owners of the MV Lupex v. Nigeria Overseas Chartering and Shipping Ltd* [2003] 15 NWLR (Part 844) 469.
86. For more details see: <www.kiac.org.rw/IMG/pdf/-25.pdf> (last accessed 15 April 2016).

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"the potential to become a successful arbitration centre, as it is endowed with a very modern set of arbitration rules, the Centre's Registrar has responded to all requests for information in a very professional and efficient manner, and the local arbitration law also seems to meet all international standards".[87]

The government of Mauritius embarked on a clear policy initiative of making Mauritius a destination for international arbitration.[88] The Mauritian courts have adopted this policy and can be said to be supportive of international arbitration. This is evidenced from their decisions on arbitration and their specialist courts with final appeal to the Privy Council in London.[89] One recent example of a very supportive decision by the Mauritius Supreme Court is the *Cruz City 1 Mauritius Holdings v. Unitech Ltd* case.[90] In this case the Court enforced two LCIA arbitral awards in favour of Cruz City. The Supreme Court of Mauritius used the opportunity to declare the constitutionality of the New York Convention in Mauritius and its preference for a narrow public policy interpretation of Art. V(2) of the Convention. Mauritius therefore has in effect supportive arbitral, legal and non-legal environments for international arbitration to thrive. It is also suitably located to attract disputes from Indian parties. An assessment on the basis of caseload shows Mauritius is not yet thriving as a seat for international arbitration. This may be because LCIA-MIAC is still a relatively young arbitration institution.[91]

Egypt on its part is home to the oldest AALCO regional centre in Africa, the Cairo Regional Centre. Egypt's national arbitration law is also based on the Model Law (1985 version) while the arbitration rules of the Cairo Regional Centre are based on the UNCITRAL Rules.[92] The caseload of the Cairo Regional Centre has grown year-on-year. In their 2015 Annual Report, 54 new cases were filed with the Centre, bringing the total of cases filed with the Centre to 1,070.[93] Of these new cases, two were purely international (between parties from Saudi Arabia, United States and UAE).[94]

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87. See Werner JAHNEL, "Assessment Report of Arbitration Centres in Cote d'Ivoire, Egypt and Mauritius", a report prepared for the African development Bank, dated 10 April 2014 at p. 69 and available at: <www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Assessment_Report_of_arbitration_centres_in_C%C3%B4te_d%E2%80%99Ivoire__Egypt_and_Mauritius.pdf> (last accessed 15 April 2016).
88. For more details, see Duncan BAGSHAW, "The Experience of LCIA-MIAC" in Emilia ONYEMA, ed., *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* (Kluwer Law International 2016) pp. 95-108.
89. This is clearly geared towards reassuring foreign parties who need final decisions on their disputes made by such a panel of decision makers.
90. *Cruz City 1 Mauritius Holdings v. Unitech Ltd and Others* [2014] SCJ 100.
91. According to the LCIA website, LCIA-MIAC was established in 2011.
92. For more information on the Cairo Regional Centre see, Mohamed ABDEL-RAOUF and Dalia HUSSEIN, "The Cairo Regional Arbitration Centre" in Emilia ONYEMA, ed., *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* (Kluwer Law International 2016) pp. 61-74.
93. See the CRCICA 2015 statistics at: <http://crcica.org/FilesEnglish/Annual%20Report_2016-10-31_09-26-47_0.pdf> (last accessed 06 February 2017).
94. This figure contrasts with 2014 when the Centre administered nine purely international cases with parties from Kuwait, Lebanon, Panama, Saudi Arabia, Seychelles, Sudan, Switzerland, and United Arab Emirates. CRCICA 2014 Annual Report is available at: <http://crcica.org.eg/pub_annual.html> (last accessed 15 April 2016).

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Understandably, the disputes filed with the Cairo Regional Centre are predominantly from parties from the Middle East, North Africa (MENA) region.[95] However it is noted that the Centre has stepped up its engagement with countries of sub-Sahara Africa. For example it appointed a Nigerian arbitration expert to its Board of Trustees in 2014.[96] The Cairo Regional Centre remains a very active and engaged arbitration institution and will play a major leadership role for other arbitration institutions on the continent, as it shares its experience of administering arbitrations and participating in the global arbitral space.

As it relates to the OHADA arbitration regime, there are arbitration institutions in most of the seventeen OHADA member states and these have varying degrees of success and operate in similar fashion to other private arbitration institutions.[97] Within the OHADA region, the states apply the Uniform Arbitration Act of 1999 (UAA) which is currently under review. The UAA, though not modelled after the UNCITRAL Model Law, provides for a relatively modern arbitral regime as the law of arbitration for the member states.[98] Arbitration under the Common Court of Justice and Arbitration (CCJA) Arbitration Rules is unique.[99] This uniqueness is based on the dualist nature of the CCJA as the OHADA supranational court and final authority on OHADA uniform acts. As an arbitration institution, the CCJA performs the same tasks and functions as any other arbitration institution. However when the arbitral tribunal renders its award, the same can be enforced or annulled by the CCJA (with no appeal to any other court).[100] Over the years the CCJA has shown its support for arbitration through robust enforcement of arbitral awards. However very recently, the CCJA annulled an arbitral award (in keeping with its practice) where the arbitrators agreed higher fees with the parties than was agreed by the CCJA.[101] This action of the arbitral tribunal and the parties was contrary to the mandatory provision in the CCJA Arbitration Rules, which binds the

95. In 2015, CRCICA administered disputes involving parties from Egypt, Saudi Arabia, Lebanon, Libya, UAE, USA, Turkey, British Virgin Islands, Russia, Spain, Taiwan and the Cayman Islands. Correspondingly, the arbitrators came from Egypt, Lebanon, Saudi Arabia, Libya, Tunisia, USA, UK, Germany, France and Spain.
96. The appointee is Mrs. Olufunke Adekoya. This is in addition to Judge Abdulqawi Yusuf from Somalia. See, Cairo Regional Centre 2015 Annual Report, at p. 14.
97. The seventeen OHADA member states are: Benin, Burkina Faso, Cameroon, Central Africa Republic, Comoros, Democratic Republic of Congo, Guinea, Guinea Bissau, Equatorial Guinea, Chad, Côte d'Ivoire, Gabon, Mali, Niger, Republic of Congo, Senegal, and Togo. For arbitration institutions in these jurisdictions see the list at: <www.researcharbitrationafrica.com/#!arbitration-institutions-in-africa/lvi7c> (last accessed 15 April 2016).
98. See Boris MARTOR, Nanette PILKINGTON, David S. SELLERS, and Sabastien THOUVENOT, *Business Law in Africa: OHADA and the Harmonization Process*, 2nd ed. (GMB Publishing Ltd 2007) pp. 259-284.
99. See Emilia ONYEMA, "Regional Arbitration Institution for ECOWAS: Lessons from OHADA Common Court of Justice and Arbitration", Int'l ALR (2014, issue 5) pp. 99-111.
100. See Mahutodji Jimmy Vital KODO and Narcisse AKA, "The CCJA as a Regional Arbitration Institution" in Emilia ONYEMA, ed., *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, (Kluwer Law International, 2016) pp. 47-59.
101. See *Republic of Guinea v. Getma International*, decision of the CCJA of 19 November 2015.

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parties to the fees set by the CCJA.[102] This decision has drawn negative commentary from the media[103] and the wider arbitration community on its possible impact on the development of OHADA arbitration.[104]

An examination of the rankings of these African States in the World Bank Ease of Doing Business Reports shows a clear connection between governmental regulatory (in)efficiencies and growth of arbitration. Comparing the 2015 and 2016 Reports for the World Bank Ease of Doing Business Rankings, Singapore ranks first out of 189 jurisdictions in both Reports. For the four African countries explored above, Mauritius maintained its top ranking among African countries but fell from 28th in 2015 to 32nd in 2016 in the world. Rwanda fell from 46th in the world in 2015 to 62nd in 2016, but moved from 3rd to 2nd in Africa over the same period. Egypt fell from 112 in 2015 to 131 in 2016 globally and also lost ground within the continent from 12th in 2015 to 15th in 2016. Nigeria however, ranked 170 in 2015 and 169 in 2016 in the global rankings and among African countries moved from 42nd to 40th showing a very slight improvement. As compared with the traditional seats of arbitration mentioned above (London, Paris, Geneva), the United Kingdom was ranked 8th in 2015 and 6th in 2016 globally. France was ranked 31st in 2015 and 27th in 2016 while Switzerland was ranked 20th in 2015 and 26th in 2016.[105] These bare comparisons suggest a connection between the governmental regulatory environment of each country and its ability to attract international arbitration references as seat. It therefore appears the African States will need major improvements in their regulatory environments in addition to modernizing their laws and signing up to the relevant conventions, if they wish to attract international arbitration references as seats.

This paper has argued that if international arbitration users perceive a jurisdiction as being supportive, such jurisdiction will attract international arbitration references as seat. Published statistics on traditional seats for international arbitration primarily based in Europe and the United States of America support this thesis. As applied to emerging jurisdictions, there is evidence to show that the same is true. However, the question that needs to be examined is how a supportive jurisdiction is defined. As shown above, Singapore meets the classic definition of a supportive jurisdiction. Rwanda is a small (as is Singapore) post-conflict state with a lot of reconstruction on-going. The role played by the government with a clearly defined business-friendly policy appears to support and complement the work of the Kigali International Arbitration Centre. Mauritius is in the

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102. It should be noted that the CCJA is empowered to fix a higher rate of fees for arbitrators under Art. 24(3) of its Arbitration Rules.

103. See for example, a Newspaper article at: <www.jeuneafrique.com/285543/societe/affaire-getma-guinee-les-arbitres-repondent/> (last accessed 15 April 2016).

104. See commentary from Herbert Smith Freehills at: <http://hsfnotes.com/arbitration/2016/01/19/ohada-ccja-court-annuls-e38-million-arbitral-award-against-guinea/> (lst accessed 15 April 2016). Getma unsuccessfully applied to enforce the annulled award before the courts in the United States. See for example, the decision of the District Court of Columbia in *Getma International v. Republic of Guinea*, Civil Action No. 2014-1616 (D.C. 2016).

105. See the World Bank *Doing Business Reports*: 2016 "Measuring Regulatory Quality and Efficiency"; and 2015 "Going Beyond Efficiency" available at: <www.doingbusiness.org/> (last accessed 15 April 2016).

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same position. However, these two African jurisdictions are not recording the same successes as Singapore, so there is a need to investigate this further.

It appears that in addition to providing a supportive legal environment (modern laws, ratification of relevant conventions, supportive courts, and availability of legal expertise); and non-legal services (first-class hotels, ancillary hearing facilities, easy access to and out of the seat, among others); the geographical location of a seat and the stage of economic development or growth of the state or region are equally important.[106] These factors are relevant for states wishing to attract international arbitration as seat to also consider. However, the strength or degree of the relationship between the existence of these services and the numbers of international arbitrations hosted by the seat needs further interrogation which goes beyond the remit of this paper. The Queen Mary 2015 Survey concludes that "reputation and recognition are decisive factors when selecting a seat", as a result of which traditional seats will remain popular because of the perception that their legal systems are neutral and impartial, with effective national arbitration laws and courts with a track record of enforcing arbitration agreements and arbitral awards.[107] The key task before emerging arbitral seats in Africa is whether users of international arbitration will one day also perceive them in those terms.

IV. CONCLUSION

Arbitral tribunals act in a different sphere than national courts; however, they both are in the same business of resolving disputes. There appears to be a growing convergence in arbitration laws on matters over which the arbitral tribunal has greater decision-making powers, issues on which national courts have overriding powers, issues in which both national courts and arbitral tribunals enjoy truly concurrent jurisdictions, and finally those issues over which national courts have sole power and control. However the interpretation and implementation of these laws differ in various jurisdictions. This paper argued that there is a link between the perception of international arbitration users on how supportive a jurisdiction is of arbitration and the ability of that jurisdiction to attract international arbitration as seat. It raised other possible connecting factors showing that there is need for further research to clearly identify the factors that constitute the support of a jurisdiction for arbitration. The result of such research will set out principles which those states wishing to become destinations for international arbitration can adopt and implement to hopefully begin to change the perceptions of users of arbitration on the support for arbitration by those states and the attendant benefits of such perception.

106. Other factors that may be relevant to this question are the size of the country involved and location of international law firms.

107. Queen Mary 2015 International Arbitration Survey, pp. 11-15.

Nguồn/source:
https://eprints.soas.ac.uk/24492/1/Emilia%20Onyema%20on%20Jurisdictional%20Tensions%20btw%20Domestic%20Courts%20and%20Arbitral%20Tribunals%20ICCA%202017.pdf

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ARBITRATION LAW IN THE UAE: AN OVERVIEW ON JURISDICTION

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December 2021

ABSTRACT

Arbitration is a quasi-judicial process that has alternate jurisdiction to arbitrate the dispute. It is a way to end certain civil disputes between parties without the intervention of the court. Before enacting Federal Law No. 6 on Arbitration (the "**Arbitration Law**") in 2018 as a separate legislation, the arbitration was governed by the Articles 203 - 218 of Federal Law No. 11 of 1992 (the "**Civil Procedure Code**"). This research paper examines the relevant provisions of the Arbitration Law that cover the jurisdiction of the court and the Arbitration Tribunal. An examination of these provisions elucidates the circumstances under which jurisdiction of the court and Arbitration Tribunal can be challenged.

Keywords: Arbitration Law, UAE, Jurisdiction of Arbitration matters

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I. INTRODUCTION

Arbitration is a form of private justice that is based on the consent of all parties. According to the Arbitration Law, an arbitration is an agreement between the parties to refer a dispute to arbitration, irrespective of whether the agreement is made before or after the issue arises.[2] It is essential that an arbitration agreement should be in writing either as a separate agreement or a clause in the contract/reference in a contract or any other document which includes an arbitration clause.[3]

The Arbitration Law was passed in May 2018. It took effect on 16th June 2018 and repealed prior legislation governing arbitration under Articles 203 to 218 of the Civil Procedure Code.[4] The Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (the "**Model Law**"). The Model Law has been adopted by both civil law and common law jurisdictions around the world, with 118 jurisdictions in 85 states adopting legislation based on it to date. In 2018, the United Arab Emirates (the "**UAE**") became the 81st country to adopt Model Law-based arbitration legislation.[5] However, there are some differences between the Arbitration Law and the Model Law, which include but are not limited to:

- The Arbitration Law provides that the signatory of the agreement must be authorised to enter into the arbitration agreement.
- The date of the commencement of arbitration in the Arbitration Law differs from the Model Law.
- The Arbitration Law has provisions on the use of technology in arbitration.
- The Arbitration Law expressly protects the confidentiality of arbitration hearing and awards.

[2] Article 1 of the Arbitration Law
[3] Article 7 and Article 5 of the Arbitration Law
[4] Article 60 of the Arbitration Law - Abrogation of the provisions on arbitration in the Civil Procedure Law:
1. The Articles from 203 to 218 of the aforementioned Federal Law No. 11 of 1992 shall be abrogated, provided that the proceedings performed according to them remain valid.
2. Any provision contrary to the provisions of the present Law shall be abrogated.

[5] UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006, *available on*: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

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In October 2018, Federal Decree No. 24 of 2018 removed Article 257 from the UAE Penal Code, which imposed criminal liability on arbitrators. It is a positive step to make UAE a friendly-arbitration country in the world.[6]

The UAE has two tiers of law: one is federal law and the second is local law in each emirate. The Arbitration Law being a federal law is not applicable on the financial freezones. The Dubai International Financial Centre (the "**DIFC**") and the Abu Dhabi Global Market (the "**ADGM**") are the two financial freezones in the UAE, having their own laws and the courts.

Today, each emirate now has at least one arbitration center. The following are the key arbitration institutions in the UAE:

- Dubai International Arbitration Centre ("**DIAC**"): The DIAC is one of the leading arbitration institutions in the UAE. In 1994, it was established by the Dubai's Chamber of Commerce as the Center for Commercial Conciliation and Arbitration. In 2007, it was renamed to as DIAC.
- Abu Dhabi Commercial, Conciliation and Arbitration Centre (**ADCCAC**): The ADCCAC was established in 1993 by Abu Dhabi chamber of commerce and industry. It is the main center in Abu Dhabi.
- Sharjah International Commercial Arbitration Centre (**Tahkeem**): The Tahkeem was established in 2009 by the Amiri Decree No. 6 of 2009.[7]
- Ras Al-Khaimah Commercial and Arbitration Centre established in 2008.[8]

On 14 September 2021, the Dubai Ruler Sheikh Mohammed bin Rashid Al Maktoum issued Decree No. 34 of 2021 to merge two arbitration centers located within the DIFC into Dubai International Arbitration Centre ("**DIAC**"):[9]

(i) The Emirates Maritime Arbitration Centre ("**EMAC"**), and
(ii) the DIFC-LCIA Arbitration Centre (the DIFC Arbitration Institute) (**DIFC-LCIA**).

[6] Kehoe, C., & Hopps, B. (2018, November 29). The Threat of Imprisonment for Arbitrators In the UAE Has Been Removed As Article 257 Is Amended. Herbert Smith Freehills.
[7] Rules of Arbitration Sharjah International Commercial Arbitration Centre (Tahkeem), available on: https://www.tahkeem.ae/contents/files/RulesofArbitration-e.pdf
[8] Ras Al-Khaimah Commercial Reconciliation & Arbitration Center, available on: https://www.rakchamber.ae/rakrcac/
[9] Galandari Law, "Decree No. 34 of 2021 Concerning the Dubai International Arbitration Centre (DIAC)", available on: https://www.galadarilaw.com/news/decree-no-34-of-2021-concerning-the-dubai-international-arbitration-centre/

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II. JURISDICTION OF THE ARBITRATION TRIBUNAL

Jurisdiction of Arbitral Tribunal (Article 19)

Principle of kompetenz-knompetenz:

Article 19 of the Arbitration Law empower the arbitral tribunal to decide its jurisdiction on any objections raised on the existence or validity of the arbitration agreement or inclusion of the subject matter of the dispute. It is based on the Article l6[10] of the Model Law's principle of "kompetenz-knompetenz" or "competence – competence". Which states that an arbitral tribunal has the power to rule on the questions raised on its competence. Due to the adoption of this principle the preliminary issues raised during arbitration process can be resolved in prompt manner without seeking court intervention. This principle is adopted by the major global arbitral institutions in their arbitration laws such as the International Court of Arbitration (ICC)[11], and London Court of International Arbitration (LCIA)[12].

Principle of Separability:

The Article 6 of the Arbitration Law, states that the arbitration clause should be treated as a separate agreement form the other terms of the contract. The valid per se arbitration

[10] The Article l6 of the Model Law[10] states that:

1. *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.*
2. *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. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.*
3. *The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*

[11] Article 6 of the ICC Arbitration Rules, "Effect of the Arbitration Agreement", *available on*: https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration /

[12] Article 23 of the LCIA Arbitration Rules, "Jurisdiction and Authority", *available on*: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2023

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agreement will not have affect even by nullity, rescission or termination of the contract. Further, as per the principle of "separability of the arbitration clause" if the arbitrators decide, within the scope of their jurisdiction, that the contract containing the arbitration clause is null and void, it does not cause the loss of jurisdiction.

Bar on Arbitral Tribunal's Jurisdiction (Articles 43, 18, & 20)

The jurisdiction of the Arbitral Tribunal is barred when a question outside its scope arises during arbitration.[13] The question should be such which is essential for issuing an award on the merits and is of criminal in nature or relates with forgery of the documents. In such case, the UAE courts have the exclusive jurisdiction to arbitrate the matter until conclusion of all arbitral proceedings.[14]

When the Arbitral Tribunal rules on the preliminary issue that they have jurisdiction to arbitrate the matter, the aggrieved party has 15 days after receiving notice of the decision from the Arbitral Tribunal to file a plea before the court, after which the Arbitral Tribunal's jurisdiction is barred.

The time limit for submitting a Plea on issue of jurisdiction of the Arbitral Tribunal shall be raised before filling of the statement of the defense by the respondent as per Article 30 of the Arbitration Law. Once statement of the defense is submitted neither claimant nor defendant is allowed to raise question on the jurisdiction of the Arbitral Tribunal as per Article 20 of the Arbitration Law.

Bar on the Court's Jurisdiction (Article 8)

The court's jurisdiction to take cognizance of disputes is limited by the arbitration clause in a contract. If one of the party of the contract files a lawsuit in court, the defendant can object by claiming that the jurisdiction of the court is waived due to an arbitration agreement between the parties.

The defendant should such raise the objection before advancing any defenses before the court[15]. That is so because arbitral jurisdiction is waivable, and the waiver would be presumed if the plaintiff filed a complaint and the defendant failed to challenge the court's jurisdiction.

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[13] Article 43 of the Arbitration Law no. 6 of 2018

[14] Article 18 of the Arbitration Law no. 6 of 2018

[15] Article 8- Adjudication of the dispute containing an Arbitration Agreement

1. The Court before which the dispute is brought in a matter covered by an Arbitration Agreement, shall declare the inadmissibility of the action, if the defendant has raised such plea before any claim or defense on the substance of the case, and unless the Court finds that the Arbitration Agreement is null and void or incapable of being performed.
2. Where an action referred to in the preceding Clause has been brought, the arbitration proceedings may nevertheless be commenced or continued, and an arbitral award may be made.

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Exclusive Jurisdiction of the Court (Article 6)

Some matters are exclusive reserved for the jurisdiction of the UAE courts. They are matters related to public policy (Article 3 of the UAE Civil Code), Labor Disputes, and Commercial Agency and distribution disputes (Article 6 of the Federal Law No. 18 of 1981).

Original jurisdiction To ensure proper administration of justice court may exercise original jurisdiction in certain circumstances. The Dubai Court of Cassation have exercised original jurisdiction in Case No. DCC 290/2021[16], DCC 1112/2018[17], DCC 153/2019[18], and DCC 300/2019[19], proclaiming that arbitration is an alternative method of resolving commercial disputes between parties, and the court has original jurisdiction that may be exercised in order to ensure proper administration of justice.

III. JURISDICTION BY COURT INTERVENTION.

Petition for enforcement of the arbitral award (Article 55)

The Arbitration award is final and binding on the parties of the arbitration. However, if any party do not comply with the arbitration award, then the aggrieved party has the option to file a petition before the court for recognition of the award and issuance of the enforcement order under Article 55 of the Arbitration law. The request for seeking enforcement of award can be made before the president of the Court or a delegated judge along with the following documents as attached:

a) *The original award or a duly certified copy thereof.*
b) *A copy of the Arbitration Agreement.*
c) *A translation into Arabic of the arbitral award duly certified by a duly recognized entity, if the award is made in another language.*
d) *A copy of the minutes of deposit of the award in the Court*.

The president of the court or a delegated judge shall issue an order within 60 days of submitting the request for recognition and enforcement of the order under Article 52 of the Arbitration Law. The ratified arbitral award by the court shall have the force of res judicata and same enforceability as a Court judgment has.

[16] Construction Dispute in Multiple Contracts, Jurisdiction of the Court where Arbitration Clause is not in all contracts, *available on*: Lexis Middle Ease http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2021/10/DCC_2021_290_2021_pdf.pdf
[17] presentation of the verdict (dc.gov.ae)
[18] presentation of the verdict (dc.gov.ae)
[19] presentation of the verdict (dc.gov.ae)

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Petition to annul an arbitral award (Article 53 (1))

Arbitration award can be challenged before the court on the grounds of validity or non-existence of the arbitration agreement in the contract. The clause (1) of Article 53 of the Arbitration Law provides various ground upon which an arbitral award may be challenged such as invalid arbitration agreement, lack of capacity to agree to arbitrate, defective notification of the appointment of the arbitrator, and failure to observe the correct arbitration procedures.

The various ground on which objection to the arbitration award can be made, as per the Article 53, are as following:

a. *There was no Arbitration Agreement, or such agreement was null and void, or forfeited pursuant to the Law chosen by the Parties, or according to the present Law if no reference is made to a certain law.*

b. *A party was, at the time of conclusion the Arbitration Agreement, incapacitated or lacking capacity according to the Law governing his legal capacity.*

c. *A party has no legal capacity to act in the disputed right, according to the law governing his legal capacity, set out in Article 4 of the present Law.*

d. *A party to the arbitration was unable to submit his statement of defence due to that he was not given a proper notice of the appointment of an arbitrator or of the arbitration proceedings, or due to the failure of the Arbitral Tribunal to comply with the principles of litigation or for any other reason beyond his will.*

e. *The arbitral award has not applied the law agreed by the Parties to cover to the subject-matter of the dispute.*

f. *The composition of the Arbitral Tribunal or appointment of an arbitrator has been made contrary to the provisions of the present Law or the agreement of the Parties.*

g. *The arbitration proceedings are void in such a way that has influenced the award, or if the arbitral award was issued after the termination of its specified period.*

h. *The arbitral award has decided on matters not covered by the Arbitration Agreement or falling beyond the scope of said arbitration. Nevertheless, if the decision on matters submitted to arbitration can be separated from those not so submitted, then only the last said parts of the award may be deemed null and void.*

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Limitation period of Arbitration

The same legal constraints apply to arbitrations as they do to litigation. The statute of limitations for civil claims is 15 years (Article 473, Federal Law No. 5 of 1985 (Civil Code)), whereas the statute of limitations for commercial claims is ten years (Article 95, Federal Law No. 18/4993 (Commercial Code)). The parties must agree on a deadline for the final award to be issued. If no such agreement can be reached, the final decision must be made within six months after the first hearing of the arbitration (which is generally the preliminary hearing). The tribunal can extend this period by up to six months unless the parties agree to a longer extension.

IV. CONCLUSION

The provisions of the Arbitration Law as examined shed light on the circumstances wherein jurisdiction of the Arbitration Tribunal, or the Court can be called into question.

As noted previously, the Arbitral Tribunal has sole jurisdiction to hear arbitration issues. However, under some instances, the arbitral tribunal's jurisdiction does not remain exclusive, as indicated by Articles 43 and 18, as well as Article 20 of the Arbitration Law.

But the same is not the case with respect to the court. In the first instance, the court lacks authority to hear cases involving arbitration agreements. However, in certain circumstances, as specified in Articles 55, and 53 (1) of the Arbitration Law, the court maintains exclusive authority over arbitration disputes.

Yet, in some cases[20] to ensure proper administration of justice, UAE courts have exercised Original Jurisdiction and ignored the jurisdiction provisions of the Arbitration Law.

Nguồn/source: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3991916

[20] Construction Dispute in Multiple Contracts, Jurisdiction of the Court where Arbitration Clause is not in all contracts, *available on*: Lexis Middle Ease http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2021/10/DCC_2021_290_2021_pdf.pdf
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Kompetenz-Kompetenz: An Arbitral Tribunal Authority to Decide Its Jurisdiction

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Abstract

The authority of an arbitral tribunal to establish its own jurisdiction is discussed in this article. Under the Kompetenz-Kompetenz (competence-competence) principle, a tribunal's decision about its jurisdiction must be made within its own purview, at least in the initial stage. The principle permits a tribunal to define its authority's scope and determine its jurisdiction. As it encourages party autonomy, this is one of the fundamental principles of arbitration. The significance of this tribunal power is that it corrects any excesses or inadequacies in jurisdiction by providing a prompt remedy to a party objecting, saving both money and time. The drawback of this power is that if an opposing party is not pleased with the processes, he may still be able to go back to court under the English Arbitration Act and the Model Law. Time, though, is of the essence. The article is supported by a body of secondary, current, and case law literature. It recognizes that parties to an arbitration agreement have the autonomy to decide whether to subject the arbitration procedures to arbitration rules. As a result, the UNCITRAL Rules of Arbitration and the ICC Rules of Arbitration are used as model rules in this article. The ability of an arbitral tribunal to decide on its jurisdiction is distinctive in that it tests that panel's authority. It is undoubtedly a unique power because it contributes to determining the scope of a tribunal's authority and thus acts as its own judge when called upon. This authority is crucial because it allows the arbitration processes to proceed according to plan.

Keywords

Tribunal, Authority, Jurisdiction, Arbitration Agreement, Autonomy

1. Introduction

This article examines an arbitral tribunal's ability to establish its own jurisdiction in international commercial arbitration cases. The first point is that the par-

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ties are parties to an international commercial transaction. A party may seek the protection of a recognized legal system when his rights are violated, or the other party fails to uphold its obligations because the parties agreed to establish a clearly defined legal contract. The necessity to draft an arbitration agreement results from the requirement to clarify the parties' rights and obligations under the terms of their contract. The parties' willingness and permission to have their problems arbitrated privately via arbitration demonstrates the voluntary nature of arbitration.

A listed and precise description of the subject matter in dispute must be included in the arbitration agreement so that the arbitral tribunal is aware of the nature of the dispute it will adjudicate.

By agreeing to arbitrate, the parties must abide by the agreement's provisions and may not unilaterally change them. The parties must be understood to have established a mechanism for selecting an arbitral tribunal to undertake their disputes and determine their rights and obligations by agreeing to the arbitration procedure. The sole duty of directing the arbitration to completion is placed on the newly established tribunal. It establishes the points of disagreement between the parties, deliberates, addresses the topics in controversy, gathers evidence, and renders an arbitral decision that is essentially conclusive and binding. According to Chukwumerije (1994), an arbitral tribunal's primary responsibility is to interpret the parties' agreement, including any questions regarding the agreement's legality. The arbitral tribunal must remember that the arbitration agreement and the parties' contract are two distinct instruments that might be evaluated using different standards. According to the court's ruling in the cases of ***Ferris & Anor v. Plaister & Anor and Stap & Anor v. Plaister & Anor*** **(1994)**, an arbitration clause in a contract is independent of the rest of the agreement and can be severed from it.

This article's sole objective is to ascertain how an arbitral tribunal that has already conducted the arbitration would respond to a challenge brought by the parties whose dispute it is resolving. The study has utilized a qualitative, analytical legal research technique to achieve this objective. This descriptive research style will enable a thorough examination of the case law, related laws, and regulations. Additionally, the doctrinal legal research technique will aid the study's comprehension and appreciation of why parties are allowed to give an arbitral tribunal the authority to establish its own jurisdiction in the first instance. The study uses both primary and secondary sources. The arbitrator's decision defines the parameters of the investigation.

2. Duties of an Arbitral Tribunal to the Parties

The assumption of office by an arbitral tribunal and its adherence to its core duties are two sides of the same coin. The arbitrator's decision to accept an appointment as arbitrator binds him to his fundamental duty to conduct arbitration procedures with procedural justice. Both are necessary for existence. When

an arbitrator accepts an appointment, he is obligated to disclose to the parties any substantial facts that may infringe on his work in any way. This obligation is continuous, and disclosure must be provided as difficulties occur.

An arbitral tribunal must maintain its impartiality and independence throughout its mandate. *Weissfisch v. Julius* et al. (2006), is a pertinent example. In addition, the tribunal must guarantee secrecy to the extent required by the parties to the arbitration agreement. The parties are supposed to be handled fairly by a tribunal that acts independently, impartially, and legally. In the case ***Athletic Union of Constantinople v. National Basketball Association* (2002)**, C. J. Morris explored the principles of openness and fairness between parties to an arbitration process.

An arbitration panel must disclose to the parties to an arbitration agreement. This obligation exists for the duration of the tribunal's existence. Binder (2010) argues that an arbitrator whose name is being considered for appointment owes an essential responsibility of disclosure to the parties to an arbitration agreement. In ***Metal Distributors (UK) Ltd v. ZCCM Investment Holdings Plc* [2005]**, the court opined that when an arbitrator accepts an appointment, the arbitrator must provide the parties with a statement of disclosure. A statement of disclosure is the arbitrator's assurance to the parties that the arbitrator has disclosed any issues that may be perceived as influencing the arbitral's decision-making. These concerns may pertain to the arbitrator's present or former commercial operations or relationships with the parties.

The arbitrator must inform the parties of any previous dealings or work done for either one or both parties. The parties are then responsible for determining whether the disclosed statement will likely interfere with the arbitrator's judgment of their rights and obligations in the arbitration.

The need to reveal is a continuing duty that an arbitrator must uphold during his whole term of office as the case develops. This is because new evidence in the case and witness statements may reveal information the arbitrator did not have access to earlier. For instance, the arbitrator may discover that one of the witnesses called by a party is a business partner. In such a situation, the arbitrator must immediately issue a declaration to that effect, and it is up to the parties to determine whether the problems addressed in the statement of disclosure leave the arbitrator in a compromised position.

As the case develops throughout the arbitrator's term, the arbitrator should uphold the ongoing disclosure duty. This is so that new evidence in the case and witness testimony may reveal details that the arbitrator was unaware of. For instance, the arbitrator might learn that one of the witnesses a party is calling is the business partner of the arbitrator. The arbitrator should declare to that effect in such a situation, and it is up to the parties to conclude whether they think the problems addressed in the statement of disclosure put the arbitrator in a precarious position.

Several arbitration rules require disclosure. The ICC Rules, SCC Arbitration Rules, 1999, and The AAA International Arbitration Rules, 2001 provide that

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arbitrators may not only owe the parties a duty of disclosure but also the institution and the other members of the arbitration team if an arbitration agreement adopts the rules of an arbitration institution to govern the arbitration proceedings. An arbitral tribunal must execute its general duty of disclosure under Article 17(2) of The SCC Rules of Arbitration (2010). This ethical and fiduciary responsibility of care is owed by an arbitrator to the parties to an arbitration proceeding as stated in IBA Ethics for International Arbitrators, 1987; IBA Guidelines on Conflicts of Interest in International Arbitration, 2004.

The Law Reform (Miscellaneous Provisions) (Scotland) Act (1990) defines the duty of disclosure as the promise made by an arbitrator to the parties that, having agreed to preside over the arbitration proceedings, the arbitrator is required to conduct himself fairly, diligently, and skillfully. One method to ensure justice without sacrificing his professionalism is to promise to be objective and independent.

To establish the boundaries of its jurisdiction, the arbitral tribunal must identify the topics the parties are arguing about. These qualities are essential because they aid in defining the terms of the arbitration agreement and the scope of the arbitral panel's jurisdiction. Additionally, the characteristics show that parties to a contract can construct numerous arbitration clauses with different tribunals chosen to address various aspects of a disagreement at any time. The parties need to ensure that the arbitration agreements they form are in accordance with the legal system they wish to subject their arbitration to, which would provide the validity of the agreements.

Each arbitrator is responsible for ensuring they uphold the minimum standard of conduct expected of someone performing legal tasks. A party can fulfill this commitment by adhering to the values and standards of candor, objectivity, and independence and maintaining confidentiality to the extent necessary. This is crucial while the arbitrator carries out their procedural obligations. Following these guidelines prevents parties from personally challenging the arbitrator.

3. The Objective Appraisal of an Arbitral Tribunal's Independence and Impartiality

According to the IBA Guidelines on Conflicts of Interest in International Arbitration, an arbitral tribunal is required to operate within the bounds of its authority and in accordance with the fundamental principles of fair play, impartiality, and independence.

Legal systems and arbitration rules require the arbitral tribunal to be impartial and independent. According to the Model Law, an arbitral tribunal must treat all parties equally and allow them to argue their case. This is a fundamental requirement that cannot be waived. In the case of ***Corporacion Transnacional de Inversiones, S.A. de C.V.*, et al. *v. STET International, S.p.A. and STET International Netherlands, N.V., CLOUT* (1999)**, Judge Lax ruled that Article 18 of the Model Law was intended to protect a party from egregious and unjustified conduct by an arbitral tribunal. Per Section 33 of the 1996 English Arbitration

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Act, the tribunal must act fairly and impartially between the parties. In the context of arbitration, eminent scholars have defined independence and impartiality (Binder, 2010).

Unbiassability is a flexible ideal because it relates to a person's attitude of mind and behavior. According to Yu and Shore (2003), independence is both a requirement for that attitude and an essential external manifestation of what is needed as a precondition of that attitude. Independence objectively assesses the relationship between the parties and designated arbitrators. The objective test of impartiality is whether a reasonable person may conclude that an arbitral tribunal's actions are biased.

In the case of *Porter v. Magill* (2001), Lord Hope of Craighead referred to this test. His Lordship evaluated whether a rational, well-informed observer would conclude that the tribunal was biased after considering the evidence. When an arbitral tribunal meets privately with one of the parties in chambers without the presence of the other, bias may occur in this scenario. The absent party may claim that such behavior indicates a preference on the part of the tribunal.

The Swedish Arbitration Act (2019), a non-Model Law, lists situations that could indicate partiality on the part of an arbitral tribunal. These consist of:

1) The arbitrator or anyone associated with the arbitrator may stand to gain or lose financially or otherwise from resolving the dispute.

2) The arbitrator or anyone associated with the arbitrator serves on the board of a business or other organization that is a party, or in any other capacity, represents a party or anyone who would stand to gain or lose by resolving the dispute.

3) The arbitrator has taken a side in the dispute or helped a party prepare for or conduct the case, whether acting as an expert or otherwise.

4) The arbitrator accepted payment or made a demand for payment in contravention of the Act (Bagner & Rosengren, 2006).

If an arbitral tribunal loses its independence, it will be viewed as biased. Lord Hope of Craighead remarked on the intimate connection between independence and impartiality as indicated by the European Court in *Findlay v. United Kingdom* (1997) in *Porter v. Magill* (2001). An arbitral tribunal must treat each party with justice to be impartial and independent. If an arbitral tribunal breaches this responsibility, a party may bring a claim against the arbitral tribunal on a personal basis.

4. The Causes & Deadlines for Filing Objections

The resolution of an arbitral tribunal's excess or deficiency of jurisdiction necessitates initiating a jurisdictional challenge. A violation of the jurisdiction that an arbitral tribunal has under an arbitration agreement occurs when there is either insufficient or excessive jurisdiction. A party may want to stop this breach when applying for a jurisdictional challenge against an arbitral tribunal. Suppose the parties to an arbitration agreement do not consent. In that case, an arbitral tribunal's exercise of authority outside its jurisdiction may constitute a basis for a

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jurisdictional challenge. Although it is not uncommon for a claimant to object, it is customary for a respondent to question the jurisdiction of an arbitral panel. For instance, the claimant sought to contest the arbitral tribunal's jurisdiction in ***Primetrade AG v. Ythan*** **(2006)**.

Like the instruments mentioned above, the ICC Rules and UNCITRAL Rules allow an arbitral tribunal to decide on its own jurisdiction. In accordance with the ICC Rules, for example, an arbitrator who accepts an appointment agrees to follow the ICC Rules when performing its duties. While the claim the arbitrator is dealing with falls under his purview, it is feasible for the respondent to bring concerns in its counterclaim that fall outside his purview. In a situation like this, the arbitrator should only address matters that fall under his purview. If the parties agree that the same arbitrator should handle the entire issue, they may agree to expand their jurisdiction. Any of the parties may contest the arbitrator's jurisdiction if he ignores that he lacks the authority to decide an issue and nevertheless does so.

A claim of jurisdiction must be made per UNCITRAL Rules Article 21(3) and (4) no later than filing a defense or, in the case of a counterclaim, in reply to the counterclaim.

According to Article 11 of The ICC Arbitration Rules (2012), the Secretariat must receive the justifications for a challenge to an arbitral tribunal's jurisdiction in writing within a certain time frame. The arbitral tribunal is encouraged to approach the jurisdictional issue as a preliminary matter on which a decision may be taken before the final award, even though it may link the issue of the jurisdictional objection to the merits of the disputes and make one judgment in the final award. The most common way to pursue these challenges is for the challenging party to make a challenge as soon as it learns of the challenge's grounds. Unnecessary waiting could result in the side anticipating losing the arbitration by abusing the procedure.

As per section 33 of The English Arbitration Act of 1996, it is incumbent upon an arbitral tribunal to operate within the boundaries of its jurisdiction. The desire of the parties for the arbitral tribunal to establish specific rights and obligations on their behalf should not be misconstrued as an indication of the arbitral tribunal's unrestricted jurisdiction. The case of ***Glencore v. Agros*** **[1999]** highlights the necessity of establishing boundaries regarding the subject matter that an arbitral tribunal is authorized to address and those that fall outside its jurisdiction. If a party perceives that an arbitral tribunal lacks jurisdiction, it possesses the right to object promptly. The legal precedent established by the ***Margulead Ltd v. Exide Technologies*** **(2005)** case is relevant to this context.

According to Webster and Buhler (2014), if a party fails to challenge an arbitral tribunal promptly, it may lead to the party waiving its rights. The case of ***Rustal Trading Ltd v. Gill & Duffus SA*** **(2000)** prompted Judge Moore-Bick to highlight the purpose of section 73(1) of the English Arbitration Act, which mandates a party to promptly raise any objections regarding the constitution of the tribunal or the conduct of the proceedings as soon as they become aware of it

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or should have been aware of it in a reasonable manner.

According to Section 31(2) of the English Arbitration Act, it is deemed most suitable to bring forth a challenge at the earliest possible moment when the pleader becomes aware that an arbitral tribunal has exceeded its jurisdiction. According to the English Arbitration Act, raising a challenge before an arbitral tribunal regarding its excess of jurisdiction is mandatory as soon as a party becomes aware of the anomaly. The Arbitration Act in English law confers significant discretionary power to an arbitral tribunal to modify the timeframe for objecting according to section 31(1) and (2). Section 31(3) is the legal provision that establishes this authority. This section confers upon an arbitral tribunal the authority to exercise its discretion, contingent upon the unique circumstances of each case, to permit the raising of a jurisdictional challenge beyond the designated time frame.

Article 18 of The ICC Arbitration Rules (2012) confers authority upon an arbitral tribunal to formulate its own Terms of Reference, which may encompass the subject matter that the tribunal addresses. Based on the presented scenario, it can be inferred that the arbitral tribunal's jurisdiction will be ascertained in the initial phase. Hence, it is imperative that any objection to the arbitral tribunal's authority, as stipulated in the Terms of Reference, be presented promptly, preferably before the parties endorse the Terms of Reference.

At this juncture of the proceedings, the tribunal has the authority to decide on its jurisdiction initially, albeit not conclusively, in accordance with the principle of competence-competence (Binder, 2010). The concept of competence-competence is a manifestation of the authority of an arbitral tribunal to make determinations regarding its jurisdiction, as exemplified by the French legal system (Redfern et al., 2015). The concept of competence-competence, which pertains to jurisdiction, is designed to defer court intervention in the arbitration proceedings until the arbitral tribunal has rendered its decision on the challenge, as per Park's (2012) analysis. The authority of an arbitral tribunal is commonly denoted in practical terms through the German concept of Kompetenz-Kompetenz, which can be understood as the "jurisdiction to determine jurisdiction."

The Model Law's Article 13(1) and (2) prescribe a restricted duration during which a party is entitled to initiate a personal objection against an arbitrator before an arbitral tribunal. The temporal constraint imposed on an arbitral tribunal's ability to consider a personal challenge is a procedural measure designed to prevent inefficiency and enable the tribunal to operate within its prescribed temporal boundaries. Moreover, the Model Law authorizes a dual course of action during this phase of the proceedings, facilitating the arbitral tribunal's progress with minimal interruption. The arbitral tribunal can proceed with the arbitration process concurrently with the ongoing court application against the arbitral tribunal. The Model Law's provision of a prescribed time limit for contesting the arbitral tribunal's decision bolsters the arbitration process's finality.

According to Article 4 of The UNCITRAL Model Law on ICA (International Commercial Arbitration) of 1985, if a party fails to comply with the specified

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time limit, it may be deemed to have relinquished its right to contest the arbitral tribunal's decision.

The process for disputing the authority of an arbitral tribunal is outlined in Section 31 of the Arbitration Act of England. It is possible to initiate a jurisdictional challenge before submitting a statement of claim. This stage represents the optimal opportunity to raise an objection to the arbitral tribunal's jurisdiction. A successful challenge at this juncture would effectively terminate the proceedings before they commence.

This approach is equitable for all involved parties, as it saves time and financial resources. Section 30(4) of the English Act provides that an arbitral tribunal can render an award on jurisdiction or address the objection to its jurisdiction in the award on the merits when faced with such an objection. The crucial aspect pertains to whether the tribunal has adequately addressed all the concerns raised by the parties involved. The discretion to assign significance to pertinent evidence lies solely with the arbitral tribunal. There is no obligation to consider all evidence that has been submitted.

In the case of ***Azov Shipping Co. v. Baltic Shipping Co*. [1999]**, Rix J delineated three potential courses of action that a party may pursue under the English Arbitration Act when contesting an arbitral tribunal's jurisdiction. According to Rix J, in cases where an arbitrator's substantive jurisdiction is challenged, the challenging party has several courses of action available to them under the Act. Section 30 of the Act provides that an individual may consent to the dispute resolution process before an arbitrator regarding their competence and jurisdiction matters. The entity in question may engage in such behavior while retaining the option to contest the arbitrator's decision regarding its capability.

In an alternative approach, the party may opt to refrain from presenting arguments before the arbitrator and instead endeavor to facilitate the resolution of the initial jurisdictional issue by the court, according to Section 32.

The third alternative available to an individual contesting an arbitrator's jurisdiction is to maintain a distance and challenge the legitimacy of the arbitration by initiating legal proceedings in court for a declaration, injunction, or other suitable remedy as per Section 72 of the Act. If such a scenario arises, the individual is placed in a comparable situation to a participant in arbitration proceedings who contests an award according to Section 67, citing the absence of substantive jurisdiction, as was the case in the Azov Shipping matter.

Rix J identified three options in the Azov Shipping case, and it is commonly observed that the first option is the preferred course of action in practical applications. The second alternative is typically employed as an atypical measure rather than a standard practice. The third alternative of maintaining a distance precludes the opposing party from presenting their arguments before the arbitral tribunal, thereby challenging its jurisdiction. The initial approach of participating in the arbitration process and submitting a challenge before the tribunal affords the tribunal the chance to render a decision on its own authority in the primary stage. It is imperative that the arbitral tribunal is allowed to examine the

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matters related to the challenge and subsequently render a verdict.

5. Observations

The authority of an arbitral tribunal to ascertain both judicial precedent and legislative enactments bolster its jurisdiction. As per Article 1458 of the Nouveau Code de procedure civile (NCPC), a court must declare its incapability of addressing an objection against the jurisdiction of an arbitral tribunal once the tribunal commences its proceedings on the matter. According to Article 186 of the Loi federale sur le droit international prive (LDIP), the Swiss position allows an arbitral tribunal to decide on its jurisdiction through an interlocutory ruling. In arbitration proceedings, the arbitral tribunal shall adhere to the *lex arbitri* when addressing an objection to its jurisdiction that arises during said proceedings.

The present analysis reveals that the principle of the authority of an arbitral tribunal to decide on its jurisdiction has been widely acknowledged and embraced across Model Law and non-Model Law jurisdictions, as per Binder's (2010) research. The discourse indicates that the principle of competence-competence holds significant importance in this context. Section 30(1) of the English Arbitration Act and Article 16(1) of the Model Law both allow jurisdiction to be brought before the arbitral tribunal during the ongoing arbitration proceedings. Through this approach, an arbitral tribunal can conduct an inquiry into its jurisdictional authority during the ongoing proceedings, thereby streamlining the arbitration process and conserving resources and time for the involved parties. According to Tweeddale and Tweeddale (2007), the determination made by an arbitral tribunal concerning a challenge to its jurisdiction will retain its status as final and binding upon the involved parties unless one of the parties objects. Most legal systems that endorse international commercial arbitration, along with certain arbitration regulations, acknowledge the ability of an arbitral tribunal to make decisions regarding its jurisdiction, primarily during the initial stages of the arbitration process. This is evident in the UNCITRAL, ICC, and LCIA Rules. To establish the power of an arbitral tribunal, the parties involved in an arbitration agreement must exhibit a clear and precise intention for the tribunal to possess such authority.

When faced with a challenge, an arbitral tribunal may address it as a preliminary matter or incorporate it into its final decision as part of the main case. The stance that an arbitral tribunal has the authority to decide on its jurisdiction, encompassing any objections regarding the existence or legality of the arbitration agreement, is reinforced by Article 16(1) of the Model Law. The Ontario Court of Justice ruled in the *Rio Algom Inc. v. Sammi Steel Co. CLOUT* (1991) that an arbitral tribunal possessed the initial authority to ascertain its jurisdiction and the extent of its power under Article 16 of the Model Law.

Section 30 of the English Arbitration Act confers authority upon an arbitral tribunal to issue an initial award while determining its jurisdiction. According to

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The English Arbitration Act of 1996, Section 30(1) confers authority upon an arbitral tribunal to make determinations regarding its jurisdiction, and such decisions are conclusive unless subject to appeal or review by a court. According to the Swiss Private International Law Act of 1987, Switzerland prohibits a party from interrogating an arbitrator regarding their jurisdiction to address an issue unless the issue was not previously known to said party before the arbitrator's appointment. In contrast to Swiss legislation, English law allows either party to contest the jurisdiction of an arbitral tribunal, even if said party was involved in the selection of the tribunal. The Swiss Law provides direction regarding the legal framework that the arbitral tribunal should employ when confronted with a jurisdictional matter that pertains to either the law chosen by the parties or the regulations of law that are most closely related to the dispute. However, the Model Law does not provide a definitive answer regarding the law that should be applied in such circumstances (Binder, 2010).

As per the Model Law, the arbitral tribunal holds the authority to determine its jurisdiction and may choose to apply the law of the seat of arbitration for the same. This is because the tribunal's jurisdiction, as stipulated in Article 16(1), is based on territoriality, as indicated in Article 1(2) of the Model Law. To operationalize Article 16(1) of the Model Law, a legally binding arbitration agreement is a prerequisite to ensure adherence to the parties' contractual obligations. Article 16(1) states that the arbitral tribunal can decide a jurisdictional objection. The legal matter of ***Dalimpex Ltd v. Janicki*** and ***Agros Trading Spolka Z.O.O. v. Dalimpex Ltd*** **(2003)** is under consideration. According to the Ontario Court of Appeal, in situations where ambiguity exists, it may be advantageous to defer any matters concerning the legitimacy or presence of the arbitration agreement to the arbitral tribunal for initial determination, as outlined in article 16(1) of the Model Law.

The absence of a valid arbitration agreement may result in the arbitral tribunal being deemed to lack jurisdiction. The jurisdiction of an arbitral tribunal may be exceeded if it endeavors to establish the rights and obligations of an individual who is not a party to the arbitration agreement. Additionally, if the tribunal addresses a dispute that the parties have not mutually agreed to be resolved by the tribunal, it may be acting outside its jurisdiction. Moreover, an arbitral tribunal that does not comply with the designated time constraints, including the timeframe for rendering an award, is susceptible to being contested for want of jurisdiction.

According to Tweeddale and Tweeddale (2007), if an arbitral tribunal operates beyond its jurisdictional boundaries, it may prompt an objection from one of the parties involved in order to correct the situation. The arbitral tribunal is obligated to ensure that it is fully aware of the scope of its mandate and responsibilities towards the parties involved. The International Criminal Court, as per ICC Case No. 1776, is obligated to refrain from intentionally disregarding its prescribed duties in favor of the agenda of a singular entity. Engaging in such a performance of its responsibilities would be equivalent to behaving in a manner

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that lacks sincerity or honesty. Certain nations, including England, Canada, Australia, and New Zealand, can hold an arbitral tribunal accountable for their actions on an individual basis. Instances may arise where the arbitrator is compelled to deviate from their mandate despite their lack of intention to do so due to external pressure exerted by the appointing party. An illustrative example can be found in the legal dispute between Himpurna California Energy Ltd and The Republic of Indonesia, as documented in the 2000 Yearbook Commercial Arbitration, Volume XXV-2000.

An arbitral tribunal's power to decide on its own jurisdiction is distinct from its other powers. This is because while the tribunal's other powers are utilized to settle the dispute between the parties, this particular power determines its jurisdiction. The inquiry pertains to the extent to which the tribunal is proceeding in a suitable direction. Consequently, it can be characterized as a unique authority that enables the tribunal to delineate the scope of its jurisdiction and thus assumes the role of an arbiter when challenged. The authority mentioned above holds significant value as it facilitates the smooth progression of arbitration proceedings by granting an arbitral tribunal the ability to ascertain its jurisdiction while simultaneously carrying out the arbitration proceedings. Moreover, it enhances the autonomy of the international commercial arbitration procedure by internally resolving issues related to its jurisdiction. By raising a jurisdictional challenge before an arbitral tribunal, a party can expeditiously obtain redress while simultaneously reducing costs and conserving time.

6. Conclusion

If an inquiry pertaining to an arbitral tribunal's jurisdiction arises throughout the arbitration process's progression, the tribunal assumes responsibility for addressing it initially. Through this approach, the arbitral tribunal possesses the ability to verify and ascertain its own jurisdiction. This is an assessment of its legal authority. The exceptional aspect of this approach lies in its ability to achieve its objective without impinging upon the proceedings of an arbitral tribunal. The provision of arbitration is deemed inevitable in situations where an arbitral tribunal is devoid of authority, is contested, or when there is a need for construing, preserving, or executing the agreement between the parties.

The present article has provided an overview of the historical and contextual underpinnings that give rise to the powers of an arbitral tribunal. The matter has also addressed the fundamental behavior principles expected of an arbitral tribunal. Consequently, this signifies establishing the tribunal's authority to ascertain its legal authority and how it is anticipated to comport itself throughout the arbitration. This article acknowledges the arbitration agreement as a fundamental international commercial arbitration process component. The entirety of the arbitration's structural framework is fashioned through the mutual agreement of the involved parties. The parties possess the autonomous authority to govern the resolution of disputes arising from their international commercial agreements, including selecting an adjudicating body. The capacity of parties to devise their

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mechanism for resolving disputes is a discernible and appealing characteristic of arbitration.

As per Tweeddale and Tweeddale (2007), the arbitral tribunal is obligated to ascertain whether it is operating within the confines of its jurisdiction when challenged. This is achieved by examining its ontological status, which gives rise to a state of uncertainty. The authority of an arbitral tribunal to make decisions regarding its jurisdiction, along with the concept of party autonomy, is a fundamental aspect of the international commercial arbitration process. This principle reinforces the impartiality and self-governance of the international commercial arbitration process.

If an inquiry about an arbitral tribunal's jurisdiction arises throughout the process, the tribunal assumes primary responsibility for addressing it. Through this mechanism, the arbitral tribunal can conduct an assessment and establish its jurisdiction promptly and efficiently, thereby advancing and legitimizing the arbitration process.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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On Arbitral Jurisdiction. How to Deal with the Complementarity between Arbitral Tribunals and the Courts?

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Abstract:
Why might one argue that the arbitral tribunal should have the "competence" to rule, as of right, upon its own jurisdiction? Is this natural power consistent with the legitimacy of arbitration? Can it unquestionably achieve the greatest level of efficiency for the parties?
Although a considerable body of literature has attempted to answer these questions, this article aims to address (and partially reframe) the core issues relating to arbitral jurisdiction by comparing different legal systems and operative solutions in order to search for new and valuable insights on the topic . There is no doubt, in fact, that the orthodox position traditionally starts from the assumption that access to the courts within parallel proceedings, which (also) questions the allocation of jurisdiction, is problematic also due to the risk of delaying tactics by one party. According to this line of reasoning, when the authority of the arbitrators is challenged, the balance between the legitimacy and the efficiency of the arbitration process could be conditioned by prejudices relating to the (necessary) interference of the courts with the power of the arbitral tribunal to determine its own potestas judicandi (or its lack thereof) on the merits.
In an attempt to move on from the classical framing of this issue and towards a comparative evaluation of the rationales and values underlying domestic legislation on arbitral jurisdiction, considered also with reference to the provisions of the UNCITRAL Model Law, this article will seek to provide a solution that is rooted in the complementary role of the courts and of arbitral tribunals. The complementarity between arbitral tribunals and the courts will be shown to be key in securing the legitimacy of arbitration and the actual pre-eminence of this source of alternative private justice and, accordingly, also as a way of striking the optimum balance with the efficiency of the arbitration process.

Keywords: arbitral jurisdiction, kompetenz-kompetenz; negative effect doctrine; comparative arbitration law;
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1 Introduction

It has been argued that one of the most important aspects of the role of arbitration law (both domestic and international) is an analysis of the relationship between arbitral tribunals and the courts, with a view to preventing a possible clash of jurisdiction.

The solution to the said jurisdictional conflicts has been found in the so called *Kompetenz-Kompetenz* principle. Having it been rightly defined as the "conceptual cornerstone" of international arbitration law[1], a comparative study on the rules governing this issue within domestic law should also be treated separately, as international arbitration operates as a different scenario, within which this principle has its own rationale and functional values.

Therefore, the aim of this essay is firstly to analyse, from a comparative perspective, the impact of the *Kompetenz-Kompetenz* principle adopted within domestic laws on arbitration, irrespective of the origin of the legal system in question; secondly it will also seek to establish the most appropriate rule for best achieving the complementarity between arbitral tribunals and the ordinary courts.

The question could be framed as follows: why and how does the solution to this issue pertain to the *complementarity* between the courts and arbitral tribunals?

What does *complementarity* mean? It means that, whenever the parties to the contract have chosen arbitration, the courts (irrespective of whether the dispute has been brought before them) should have the task of encouraging that choice and consider it to be final for the parties. In other words, the courts should not discourage arbitral tribunals from dispensing justice as an alternative to the ordinary courts.

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Complementarity is thus rooted in the specific provisions governing arbitration law within each country, and mostly reflects the mainstream position that each arbitration law is modelled on the relationship between public and private forms of civil justice, which are conceived of as alternatives. Do these forms really have a symmetrical function? How does the law (of arbitration) in each specific country's legislation enforce that role? Does the law (of arbitration) place its trust in the private form of civil justice as a form that is completely capable of replacing the usual public justice dispensed by the courts?

I would thus propose defining these crucial questions as follows: given the relevant terms of the arbitration agreement (within the comparative context), how is it possible to achieve the highest standard of complementarity (or not) by searching for and drawing inferences from the rules governing the eventuality of parallel proceedings concerning jurisdiction? I refer here to a scenario in which the same issue is brought both before the courts and the arbitral tribunal, irrespective of which procedure was launched first.

On the other hand, could parallel proceedings (brought according to applicable procedures) impair the efficacy of arbitration as an alternative form of dispute resolution? This is because a scenario involving parallel proceedings is that in which jurisdiction is usually allocated on the merits.

Are we sure that this scenario is the best scenario, in which *Kompetenz-Kompetenz* can play its own role? And if it could be the best scenario, how can we thereby achieve the best complementarity within the value context of the arbitral procedure?

2 The doctrine of separability

2.1 The classical meaning

Before explaining the main provisions from a comparative perspective, it must be specified that & aside from the classic foundation for this issue & the goal of this essay could be achieved (as the subtitle of this paper intentionally suggests) also by setting aside the doctrine of "separability" between the arbitration agreement and the contract as a whole. As has been duly stressed,[2] this doctrine essentially concerns the main question as to whether the issue concerning the validity of the container-contract (so-called because it necessarily contains the arbitration clause) must, or must not, be separated from the validity (and accordingly the enforceability) of that clause.

The said doctrine, which is actually recognized and regulated in almost every legal tradition, however has a specific "history" within the U.S. context of arbitration law. Within this context, in fact, the issue referred to as "separability" starts from a consideration of the validity of the container-contract as a preliminary matter that may be brought before the ordinary courts, and the ordinary courts alone.

Having framed the issue in this manner, the U.S. Supreme Court (*Prima Paint)*[3] established the doctrine of separability with the aim of implementing "*pro- arbitration policy considerations*"[4] in order to justify the presumptive jurisdiction of the arbitral tribunal. Aside from other considerations (which have been well-defined by the leading voices in the field), it is also important to consider the doctrine of separability as not specifically imposing a rule concerning the procedural issue of identifying (exclusive) arbitral jurisdiction, especially if it is considered that parallel proceedings may be brought before both the courts and an arbitral tribunal.

As Professor Bermann has noted, the only "part" of the U.S doctrine of separability that has worldwide "acceptance"[5] is precisely that which does not establish jurisdiction based on the validity of the contract (in order to avoid a situation in which a contract that is claimed to be void must also and *ipso facto* entail the invalidity of the arbitration agreement). Consequently, the worldwide notion of separability seems to amount to mere recognition of the *potestas judicandi* of the arbitrators to adopt a valid and enforceable award concerning the invalidity of the contract, as the exclusive object of the legal issue raised in the request for arbitration.

In other words, separability is not accepted worldwide if the question is whether the courts can ascribe jurisdiction (over a claim alleging the invalidity of the container-contract, rather than the invalidity of the arbitration agreement) either to themselves or to arbitration. Separability is nonetheless recognised throughout the world as the mere survival of the authority of the arbitral tribunal in the event of the demise of the contract as whole. This doctrine follows logically from the context of prior access to arbitration by the parties with reference both to the container-contract and the arbitration clause and cannot ever operate as a procedural rule on the allocation of jurisdiction.

If the procedural aspect of allocating jurisdiction is precluded, the role of separability otherwise operates as a touchstone for every systematic approach to arbitration law, including indeed the issue of the allocation of jurisdiction between the courts and arbitral tribunals whilst proceedings are pending before both in relation to the same claim. What role might that be?

The answer ought to be as follows. Separability (of the arbitral clause from the container-contract) must imply that the consent of the parties to choosing the arbitral tribunal notwithstanding the courts (as in any

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case the "natural" judge) has been granted separately from the consent to the conclusion of the contract as a whole. If arbitration is preferred over the jurisdiction of the courts, it systematically requires a separate act in law, such as an autonomous declaration of intent. The declaration is autonomous because the subject matter of the arbitration clause is genuinely very different from the subject matter of the container-contract, which is essentially characterised by the substantive rights and obligations of the parties.

Within the civilian legal systems, concern for the necessarily autonomous consent of the parties, included amongst the consent demonstrated in concluding the agreement as a whole, is a specific basis for the theory of contract in each country; however, while this model is not a particular feature of the common law (sub)tradition, the same approach and goal is apparent within the rigorous interpretation of the doctrine of separability by leading U.S. scholars on this topic.

As Professor Rau has argued, the actual basis for separability, aside from "pro & arbitration policy", should be rooted in the context of the "scope" of the arbitration clause .[6] A discussion of the scope of the arbitration agreement naturally entails a focus on the aims of the choice pursued by the parties in referring disputes to an arbitral tribunal rather than the courts, i. e. in choosing an alternative form of dispute resolution as the best way of resolving any problem that might arise during the term of the contract.

The approach adopted by Professor Rau is simple yet at the same time exhaustive regarding this issue, and is moreover consistent with the specific provisions of civilian systems. Essentially, the issue of the arbitrator's power to decide on the validity of the container-contract, far from operating as a kind of allocation of jurisdiction, simply involves a question of contractual interpretation.

In other words, the meaning of separability as a default rule means that the arbitral tribunal's power over the validity of the main contract must be rooted in the consent that the parties would have given had they had known that the relevant issue could be raised by the request for arbitration. The response may turn on the default rule if we simply consider "ordinary contract interpretation reasoning", [7] considered rightly as a more systematic basis than overly general "pro- arbitration policy" arguments. Accordingly, the interpretation of the contract clearly shows how the issue of the validity of the container-contract should be treated as another issue concerning the merits of the same contract, on the assumption that the parties did not explicitly preclude the arbitrability of such an issue.

If we agree with such an anti-classical basis for separability, as I also do, we must however recognise how this way of thinking comes close to the classic civilian way of conceiving this relevant issue. The "self-government" of the arbitration clause as a basic rule of each country's specific arbitration act within civilian systems seems to have the same significance as that raised by the U.S. doctrine of separability mentioned above: although common law systems do not recognise (in contrast to civil systems) the central role played by consent and the declaration of intention in contract law, the result of the comparative interpretation essentially appears to be the same, if the effect on the arbitral tribunal's power is considered.

Within both systems of arbitration law, the arbitral tribunal has the authority to decide on the validity of the container-contract because, within both systems, the enforcement of the express consent stipulated in the arbitral clause is separate from the consent otherwise provided to the main contract.

2.2 The actual role within the complementarity context

What role is ultimately played by separability within discussions of the *Kompetenz-Kompetenz* principle as a possible rule governing complementarity between the arbitral tribunal and the courts? Considering the issue mostly from a comparative perspective, the answer is quite straightforward, although also nuanced.

As argued more extensively hereinunder in the concluding remarks, it should probably be highlighted that separability can play an important role with regard to the aim of this essay. Nevertheless, if one starts from an acknowledgement of the actual meaning within both systems, separability serves indirectly as an introductory guideline, which is properly referred to as to the natural and due enforcement of the consent expressed in consenting to the arbitral agreement. This must be conceptualised as the touchstone for upholding the choice made by the parties to the contract to refer to private justice rather than public justice.

In doing so, I argue, the first step is completed. Consequently, it is necessary to examine how the complementarity between the arbitral tribunal and the courts can be enhanced by the not uncommon situation in which parallel proceedings are initiated, irrespective of which one was commenced first, but certainly with reference also to the universally recognition of the value and function of the arbitration agreement as the actual meaning of the doctrine of separability has clearly established.

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3 The model law suggestion

Having reinvigorated the role of separability as a premise of the *Kompetenz-Kompetenz* principle in order to prevent interference by the courts with arbitral jurisdiction, it is important to understand the rule laid down by the UNCITRAL Model Law in relation to this issue with its real meaning, and also in relation to its actual impact on the (often) different rules adopted under each domestic system of arbitration law, assessing the best way to shape the complementarity between the courts and the arbitral tribunal, rather than focusing on the splits between them, as usually occurs.

The distinction between positive and negative effects of the Kompetenz-Kompetenz principle has been commonly accepted as a scholarly framework .[8] This is also commonly referred to as the "double" ruling adopted by the UNCITRAL Model Law in this regard. In fact, regardless of whether Article 16 of the Model Law explicitly sustains the competence of the arbitral tribunal to rule on its own jurisdiction (including to questions concerning the the very existence and validity of the arbitration agreement, Article 8 (1) makes provision for the eventuality that proceedings are brought before the ordinary courts in relation to a legal issue that is covered by an arbitral agreement. It provides that the parties may be referred to the arbitral tribunal unless the court finds the arbitral clause to be "null and void, inoperative or incapable of being performed", thus operating as a form of negative *Kompetenz-Kompetenz* .[9]

Both these provisions actually give quite clear expression to the complementarity between the courts and the arbitral tribunal. Irrespective of the specific rules adopted in relation to this issue under the arbitration law of each country, there is no doubt that the arbitral agreement must be enforced in action, and not only in theory, with a view to fulfilling the obligations which the parties have taken on towards each other .[10]

Therefore, by referring to these provisions, it may be seen and considered how, despite possible optimistic opinions, *Kompetenz-Kompetenz* appears to be a sophism, especially if considered in negative terms. In any case, any court before which the issue of arbitral proceedings is brought in fact retains the power to establish its own jurisdiction: in other words, it falls within the competence of the courts (of each state) to decide on the validity of the arbitration clause.

The provisions of the Model Law certainly inspire a pro-arbitration policy approach to the allocation of jurisdictional competence between the courts and the arbitral tribunal. Nevertheless, it cannot be inferred that this allocation will achieve a better complementarity between the courts and the arbitral tribunal. In fact, these provisions seem to be those most frequently advanced when ruling whether parallel proceedings may both be pending (irrespective of which was launched first), and one of these is rooted in a private agreement to depart from the jurisdiction of the courts as the primary and natural jurisdiction. In fact, if one focuses on Article 16(3), the courts have the final say (indirectly) on their own jurisdiction over the issue, especially if the review is requested by the parties immediately after an interim award on the issue of jurisdiction only, whilst the arbitral proceedings may continue in the meantime and make an award on the merits.

If one seeks to achieve greater complementarity between the courts and arbitrators, the following comparative survey of the country-specific rules adopted in relation to this key issue of arbitration law should confirm this conclusion.

4 Comparative evaluation

4.1 Rationale and functional values

4.1.1 The U.S. FAA and first options of Chi. Inc. V. Kaplan

A (new) comparative survey of this issue should be useful in understanding why the *Kompetenz-Kompetenz* principle could operate as a mirror of and (at the same time) a limit on complementarity between the courts and the arbitral tribunal. In other words, the survey does not seek merely to select the "best rule" currently applicable, but aims to evaluate whether there is a best rule, or whether it might potentially be better to define a new different rule in order to resolve the allocation of jurisdiction and to achieve real complementarity starting from this preliminary issue of arbitration law.

Complementarity is in fact based on a preliminary premise: even if the issue is to establish exclusive jurisdiction for the parties, the only consideration of the arbitration agreement should be to consider the role of the (public power of the) courts as an auxiliary to the arbitration agreement and ensuring compliance, and not as a "shadow" overwhelming the natural enforcement of the arbitration clause.

The main question is: how should that "help" be construed, with regard to the growing pro-arbitration policies adopted around the world?

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Traditionally & and unavoidably & the matter has been approached considering the procedural situation resulting from parallel proceedings. It has usually been considered as the situation in which one of the parties launches court action with a view to asserting the invalidity of the arbitration agreement & an agreement that has specifically stressed the parties' consent to removing the matter from public jurisdiction.

Can it be argued that this was the real intention of the provisions of the Model Law recalled and described above? Can it be assumed that those provisions, and the double meaning of *Kompetenz-Kompetenz* (both positive and negative), were merely the necessary consequence of a ruling on (unavoidable) parallel proceedings? Alternatively, can prior access to public justice be possible notwithstanding the arbitration clause, which is in any case still valid at that time (or at any rate has not yet been challenged)? Finally, can it be asserted that those provisions have focused on a growing reputation of arbitrators, which is universally acknowledged, to advance also the pre-eminence of A.D.R. as the best practice for dispensing civil justice as an alternative to the ordinary courts, within both civilian and common law systems?

As far as the answer to these questions is concerned, which in my opinion is crucial in order to define complementarity, the comparative evaluation may provide some insights. However, this assessment must engage with the questions as framed above.

If the analysis is started from the provisions of the Model Law, it will be noted that French law adopts a similar & albeit way more permissive & view to the Model Law in dealing with these rules. By contrast, it has also been argued that the U.S. provisions in this area are not so close to those of the Model Law, up to the point that the U.S. rules essentially disapply the Model Law .[11]

The comparison between these extreme views may however be useful if considered in light of the questions mentioned above. It is thus important to start with a brief examination of the core of the U.S. mainstream view concerning this issue, not before recalling that the FAA rules do not involve any specific provision that comes close to the *Kompetenz-Kompetenz* principle, as traditionally understood and reflected by the domestic statutory law of other countries, including common law systems .[12]

Therefore, the key issue for how *Kompetenz-Kompetenz* operates or not within FAA rules is still rooted in *First Options* .[13]*First Options* marks the opposite approach to the issue of arbitrability, if compared to the classic opinion previously adopted, according to which Sections 2 and 3 of the FAA had to be interpreted as conferring jurisdiction exclusively on the courts .[14]*First Options*, in fact, changed the classic approach by adopting a contractual interpretation of the arbitration clause according to which the arbitrator's power to establish its own jurisdiction on the merits can be rooted exclusively in the "language" of the parties in making a "clear and unmistakable" reference to the adoption of the *Kompetenz-Kompetenz* principle by the arbitrators.

How then can we answer the questions set out above, in the light of the *First Option* ruling? In other words, how did the U.S. Supreme Court try to resolve the issue of the allocation of jurisdiction? Can any complementarity between the resolution of this main issue by arbitrators and the courts be discerned?

We should expect the answer to be negative. However, this is by no means the case, as the answer depends on the main and prior assessment of values concerning the relationship between the court and arbitration as the "best" way of doing justice.

Federal arbitration law, as set out in Sections 3 and 4 of the FAA, did not impose specific time limits on the parties for bringing the issue of jurisdiction before the courts, whether whilst arbitral proceedings are pending or after the award .[15] The rational value for this lack of clarity is however clear. It is based on a twofold consideration: first, the goal is to strike a fair balance between the "costs and benefits related to the expenditure of either public or private resources[16] ".

Secondly, moving beyond this main argument, one can glimpse a kind of mistrust for arbitrators and arbitration as an equivalent way of doing justice (with the courts). This type of suggestion originates from an "old" way of thinking engaged in by the U.S. Supreme Court itself, which specifically held[17] in *Tumey v. Ohio*[18] that:

> Arbitrators are not national court judges; they are usually private practitioners, of some sort, engaged in the business of providing legal services for a fee. Often, they face significant financial and competitive pressure to earn more money and handle more cases.

Accordingly, the growing change in the allocation of power over the issue of jurisdiction to arbitral tribunals, as conceptualised by the contractual view developed by *First Options*, entails a real evolution of & and mostly an emancipation from & the negative role assigned to arbitrators as institutional judges. In that sense in fact, if we consider how any preference in favour of arbitration is not be raised by the FAA rules, *First Options* must be construed as expressing a favourable view of arbitrators, who must decide on their own authority whether the parties agreed that it should be "clear and unmistakable".

I am however not sure whether "the die is cast": *First Options* in any case vests the courts with the power to decide on any *Kompetenz-Kompetenz* clause that may be contained in the arbitral agreement. The court will in fact decide whether or not the parties agreed to give to the arbitrators the power to rule on arbitrability.

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The courts, which may be seized at any time by the parties, have the power first to decide on the clear and unmistakable intention of the parties that the issue of jurisdiction should be resolved by arbitrators only.

First Options certainly reinvigorates the notion of arbitrability, and moves a long way from considering arbitrators as "private" judges remunerated by fees; however, the FAA preserve the pre-eminent role of the courts regarding this matter in law, even if an optimistic interpretation might appear to vest the parties with the exclusive power to choose who is to decide on the allocation of jurisdiction. In any case, the courts will indeed decide on this issue, if it is brought before them by the respondent (where the arbitral proceedings have already been launched).

Nevertheless, *First Options* opens the door to a possible *finality* of the exclusive power of the arbitral tribunal to rule on its own jurisdiction over the matter in law. The connection between courts and arbitrators does not turn on the complementarity of any court ruling concerning the arbitral agreement and the *Kompetenz-Kompetenz* principle. Ultimately, the court will "help" the parties to pursue arbitration when the parties have certainly agreed to the application of the *Kompetenz-Kompetenz* principle by the arbitrators and by them alone (clearly and unmistakably).

However, this connection & based on the consideration that "arbitration is a simply matter of contract[19] " & seems rather to be the result essentially of two backgrounds within the U.S. arbitration law context. Firstly, the purely contractual view of arbitration, despite the public context of the jurisdiction of the ordinary courts; secondly, the preference for the power of the courts to declare their own jurisdiction wherever the parties (to the contract) did not "certainly" agree on the *Kompetenz-Kompetenz* of the arbitrators.

The conclusions do not differ if we refer to the arguments discussed in *Rent & A & Center, West, Inc. v. Jackson*,[20] whereby the Supreme Court analyses the concept of "*delegation agreement*" as a separate agreement from the overall "*core agreement*". In concluding a "delegation agreement", the parties have intended and concluded in writing & i. e. with that "clear and unmistakable evidence" required under *First Options* & that the issue of arbitrability (and not the different question concerning the validity of the delegation clause) should be resolved by the arbitrators rather than by the courts, thereby resolving any question regarding the interpretation of the will of the parties to the core agreement regarding this matter.[21]

In conclusion, it may be argued that the U.S. provisions on this key issue do not, considered overall, appear to achieve complementarity: or rather more precisely that they are not aimed at guaranteeing a complementary function between arbitral tribunals and courts. *Electa una via, alteram non datur* is the operative principle under the FAA rules (Section 9) in the highly unlikely eventuality that an award concerning jurisdiction is annulled by the Court of Appeal.[22]

4.1.2 The U.K. AA 1996. Slow progress towards the model law

The U.K. Arbitration Act 1996 makes detailed provisions concerning the possible relationship between arbitral tribunals and the ordinary courts, which in part follows the provisions laid down by Article 8(1) of the Model Law and the Article II(3) of the N.Y. Convention .[23] In fact, Sections 9, 30&32 and 67 of the 1996 Act lay down precise rules.

In the first place, Section 9 applies for stay of legal proceedings in order to give to the (written) arbitration agreement the prior effect .[24]

Specifically, Sections 9(1) and 9(4) consider the case in which a matter purportedly covered by the arbitration agreement is brought before state courts. In this regard, the said provisions highlight the discretionary power on the part of the court, when deciding on jurisdiction, to consider also the validity of the arbitration agreement itself. Pursuant to the said Sections, courts will usually grant a stay allowing arbitrators to determine whether they have competence, unless satisfied that the arbitration agreement is null and void inoperative, or incapable of being performed. .[25] In particular, *Albon v. Naza Motor Trading* clarified that the suspension of proceedings before the court and the parallel referral of the decision on jurisdiction (i. e. concerning the validity of the arbitration clause) to the arbitral tribunal may be ordered "if the arbitral proceedings preceded the court action" and "if any arbitral decision on jurisdiction would have been subject to court review". Furthermore, as famously held by the then House of Lords in *Fiona Trust & Holding Corp v. Privalov*, "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".[26]

The rationale of this interpretation is very clear and is consistent with the broader systematic framework of the other provisions, including in particular Section 30(2) and Section 67. In fact, the court may stay the proceedings brought before it and refer the decision to the arbitral tribunal not only if the latter has already been established and arbitral proceedings are pending (*lis pendens* rule), but also and above all because the law

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(UK 1996 Arbitration Act) provides for an early review by the courts of any partial award on jurisdiction issued by the arbitral tribunal, which thereby retains its priority power to decide on its own jurisdiction pursuant to Section 30. Section 9(1) and (4) thus enables a balance to be struck between the legitimacy and efficiency of the arbitral proceedings since, as noted by John J. Barcelo III, "if such early review is available, then the potential unfairness and inefficiency of sending a non & contenting party to arbitration is significantly reduced".[27]

Sections 30&31 then expressly provide that arbitral tribunals have power to rule on their own jurisdiction, either by way of a preliminary award, or by addressing the issue in the award on the merits. The provision has in any case been adopted with the purpose of securing a decision by the arbitrators concerning their own jurisdiction as quickly as possible, which may potentially be subject to appeal to the ordinary courts. In fact, the parties may also ask the arbitrators to give an immediate partial award concerning the jurisdiction of the tribunal, thereby avoiding any delay in the review of that decision by the courts. .[28]

In partial contrast to the Model Law, Section 32 provides that a party may request the courts to determine the substantive jurisdiction of the arbitral tribunal, and the courts may give their decision on jurisdiction either with the permission of the arbitrators or, alternatively, if agreed between all parties to the proceedings .[29] The arbitrators will only consent to the grant of such jurisdiction to the courts if they consider that the application submitted to the court does not constitute a delaying tactic, and will thereby cause a delay in the decision on the merits, and that it will allow for a reduction in costs for the parties. The court must in any case satisfy itself that there are good reasons to decide on jurisdiction in place of the arbitral tribunal, as the natural body that should decide on such an issue.

Nevertheless, the provision that, if the parties do not reach agreement concerning the court's decision, the arbitral tribunal may also issue an award on the merits even if proceedings are still pending before the courts, is highly significant .[30]

The renowned decision in *ABB Lummus Global Ltd v. Keppel Fels Ltd* offers particularly lucid clarification of how the courts may become involved in determining the jurisdiction of an arbitral tribunal .[31] In this case it was in fact held that the courts *cannot* consider a request to rule on jurisdiction if the arbitral tribunal has not yet been constituted, and thus essentially when it is *not yet* possible to refer to "pending" arbitral proceedings, as the prerequisites laid down by Section 32 must be fulfilled in order for the courts to be apprised of such a question. The decision in *Vale de Rio Ltd v. Keppel Fils Ltd*[32] appears to be much more significant, also at a more general systemic level, in holding that Section 32 sets out the exceptional grounds on which the courts may become involved in the decision concerning the jurisdiction of the arbitrators (in place of the natural competence of the arbitral tribunal to determine its own jurisdiction): as a general matter, the court held that it is not expedient to pre-empt the ruling on jurisdiction by the court as an alternative to waiting for a challenge of the final or interlocutory award pursuant to Section 67 of the 1996 Act .[33] This is because, as was held in *Vale de Rio*, the main rationale of the 1996 Arbitration Act is that the parties who chose arbitration as an instrument for dispute resolution must pursue it as the *sole* instrument, as an alternative to and a replacement for ordinary litigation.

It therefore appears that such a conclusion cannot be excluded by the subsequent renowned ruling of the U.K. Supreme Court in *Dallah Real estate & Tourism Holding Co. v. Pakistan*,[34] which concerned an ICC award. First and foremost, that ruling concerned arbitral proceedings before the International Chamber of Commerce, where the mere presumption that the arbitral tribunal has the power to rule on its own jurisdiction is offset by the possibility that the ruling on jurisdiction may be challenged before the courts. According to *Dallah*, this will be the case unless the parties have agreed that such a power must be reserved exclusively to the courts, along the lines of *First Options*. In fact, the High Court does not carry out a mere review of the issue of jurisdiction, but rather holds a full rehearing in accordance with Section 67 of the 1996 Act .[35]

A closer consideration of the arrangements relating to the application of the principle of (*positive and negative*) *Kompetenz-Kompetenz* by the 1996 Arbitration Act essentially indicates that it more closely follows the general principles laid down by the Model Law, even though it does not exclude the possibility of a residual supplementary ruling by the courts, duly supported by reasons, concerning a ruling on jurisdiction .[36] This approach goes so far as to set out expressly & in Section 32 & a rule analogous to that provided for under Article 5 of the Model Law that "*in matters governed by this Law, no court shall intervene except so provided in this Law*": however, any involvement of the court, which will albeit occur under exceptional circumstances and according to the dictates of prudence, is conceptualised as a natural form of *complementarity* rather than as an *interference*. However, it cannot be both at the same time: either the parties to the arbitral agreement have stipulated that the court may rule on jurisdiction before the arbitrators have made any ruling, or, if they have not made any agreement to this effect, any involvement of the court & even if framed as an exception & will amount to interference rather than assistance that is conducive to the most expedient conduct of the proceedings before the arbitrators, including from the viewpoint of the economic efficiency of the proceedings.

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4.1.3 The 1998 German arbitration act, the 2011 French arbitration act and the 2006 Italian arbitration act: a small variation from the model law

The principles laid down respectively in Articles 8 and 16 of the Model Law essentially reflect Sections 1032 and 1040 of the German ZPO, following the enactment of the 1998 German Arbitration Act. The only substantial difference may be found in Section 1040 insofar as it expresses a choice in favour of the immediate issue by the arbitrators of a partial interlocutory award concerning the issue of jurisdiction, which may be challenged immediately before the courts, according to a rule that is more stringent than that laid down by Section 31 of the 1996 UK Arbitration Act .[37]

It must nonetheless be stressed that the German model & in contrast with the position stated in *ABB Lummus Global Ltd v. Keppel Fels Ltd* - expressly provides that any proceedings brought before the ordinary courts concerning the jurisdiction of the arbitral tribunal may only be brought if the arbitral tribunal has *not* yet been constituted, and thus if arbitral proceedings are not yet pending. In other words, complementarity between the arbitral tribunal and the courts may be achieved until the third arbitrator (the chairperson of the arbitral tribunal) has accepted the appointment, otherwise when the tribunal is constituted the proceedings will become pending for all purposes before the arbitrators (and the arbitral tribunal thereby constituted will be required to issue its award in the same manner as the ordinary courts are required to issue a ruling following the filing of a claim by the claimant).

This provision clearly indicates that German law endorses (albeit partial) the *Kompetenz-Kompetenz* principle. Insofar as it allows for the immediate challenge of the interlocutory award on jurisdiction and the parallel possibility for the arbitral tribunal to continue with the proceedings notwithstanding the fact that a challenge is pending against its ruling, Section 1040 indicates a cautious application of the *Kompetenz-Kompetenz* principle by the arbitrators.

The courts' function of complementarity in determining the issue of jurisdiction thus appears to be rather circumscribed and certainly does not interfere with the power of self-determination under the German law of arbitration so as to enable the choice made by the arbitrators to be in some sense frustrated by delaying tactics pursued by the respondent in the arbitration.

The important aspect which must be stressed, within a perspective of comparative enquiry, results rather from the clearly different approach taken under the 1998 *German Arbitration Act* to the previous legislation, which was much more clearly aligned with the US model as set out by *First Options*. In fact, it is particularly clear that the German legislation currently applicable has sought to set aside the rule providing for the application of a genuine *Kompetenz-Kompetenz* clause as such, on the grounds that it was intended by the parties, that is capable of vesting the arbitrators with exclusive *potestas judicandi* over their own jurisdiction .[38] The comparison is highly important and significant as it points to a radical change in the approach followed by German law (but, as will be noted below, also and above all under French and Italian law) with regard to the general status of arbitration within the overall framework for the protection of rights, precisely through the change in the rules governing the arbitrators' decision making power over their competence to hear the merits of the dispute brought before them.

In fact, the decisive influence of the Model Law has favoured a reversal of the terms of the question as previously posed under German law. In particular, whilst obviously recognising the transactional foundation to arbitration, due to the autonomous status of the arbitration clause, including in the event of the invalidity of the container-contract, it may be concluded that the *potestas judicandi* of the arbitrators over their own jurisdiction does not result from a further sub-clause of the arbitral agreement, but rather by contrast arises directly by operation of law, although it is not entirely exclusive due to the possibility of an immediate challenge before the courts. The complementary role of the courts in giving effect to the arbitral agreement concluded by the parties as an option for securing protection for their rights is even more apparent (in contrast to the models derived from the common law) precisely in the fact that all civilian systems only allow for access to the courts in order to determine the issue of jurisdiction before the arbitral proceedings have been formally initiated.

French law, and today also in part Italian law, appear to be even more decisive in favouring arbitration as an alternative and substitute form of civil procedure, once it has been chosen by the parties in concluding a valid arbitration agreement .[39]

The courts' function of complementarity in fact becomes clear if one considers the provisions contained in Articles 1448 and 1465 of the French Code of Civil Procedure, as amended by the reform of the law of arbitration in 2011 .[40]

The recent reform has decisively reiterated the clear preference for arbitration in restating that the only exception to the *Kompetenz Kompetenz* principle applies in the event that the arbitral clause is *manifestly void or manifestly not applicable*. Above all, the case law of the *Cour de Cassation* interprets the *manifest nullity exception* very narrowly in requiring that there must be a *prima facie* lack of even a minimum basis for establishing arbitral proceedings, in place of those being conducted before the courts .[41]

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The complementarity between the arbitral tribunal and the courts is thus fully apparent, with the courts being vested with a power to impose sanctions or corrections only where it is clear that the parties did not intend to have recourse to arbitration in order to uphold their rights, or that they did so in a manner that was entirely invalid. Once arbitral proceedings have been initiated, following the constitution of the arbitral tribunal, only the arbitrators are empowered to rule on their own jurisdiction, although their award may be challenged before the courts .[42]

The Italian Arbitration Act, which is set forth in Articles 806&840 of the Italian Code of Civil Procedure as amended by Italian Legislative Decree no. 40/2006, adopts a rather articulate solution, which can certainly not be regarded as a clear expression of the principles set forth in the Model Law. In fact, Article 819-*ter* provides for a clear application of the *Kompetenz-Kompetenz* principle, stipulating that the fact that proceedings are pending before the courts does not preclude the jurisdiction of the arbitrators; however, the law subjects the ongoing jurisdiction of the arbitrators (and hence the arbitrators' exclusive power to determine jurisdiction) to the requirement that the defendant must file a statement of defence (the first filing in its defence) promptly within the court action, failing which it will forfeit this entitlement. As the same time, in a not dissimilar manner to German and French law, the courts may only be accessed directly in order to determine the issue of jurisdiction if the arbitration is not yet pending, that is until the arbitral tribunal has been properly constituted by the acceptance of the appointment by the third arbitrator .[43]

The Italian legislation must be implemented in the light of the Constitutional Court judgment from 2013, which ruled unconstitutional Article 819-*ter* of the Italian Code of Civil Procedure on the grounds that it precludes (or rather precluded) the application of Article 50 CCP concerning the *translatio iudicii* from arbitration to judicial proceedings following a decision on jurisdiction .[44]

As a result of this keenly awaited ruling, which essentially legitimised arbitration as an alternative instrument for protecting rights that could act as a substitute for the jurisdiction of the ordinary courts, it may now be reasonably concluded that arbitrators have the power to decide *on an exclusive basis* on their own jurisdiction whenever the arbitral tribunal has been validly constituted, at least if the establishment of the tribunal occurred in parallel with the initiation of proceedings in relation to the same case before the courts. The above is naturally subject to the right to challenge the ruling concerning jurisdiction before the courts, which challenge must be filed directly before the Supreme Court in the event that jurisdiction is declined (Article 42 CCP).

As a result of the above-mentioned judgment of the Constitutional Court, Italian legislation tends to align with French law in granting the arbitrators the power to establish their own jurisdiction on a priority basis once the tribunal has been duly constituted, without at the same time precluding the possibility & at the discretion of the arbitrators & to issue an interlocutory award concerning that issue, which may also be challenged along with the award on the merits .[45]

The most interesting aspect of the Italian legislation by contrast lies in the degree of complementarity between the arbitral tribunal and the courts. The application of the *Kompetenz-Kompetenz* principle by the arbitral tribunal, which for some authoritative authors may go so far as to render inadmissible any subsequent application *de eadem re* before the courts,[46] in any case enables the courts to issue a ruling on jurisdiction, in the event that they are apprised whilst arbitral proceedings are ongoing, not exclusively on a *prima facie* basis, as by contrast occurs under French law, but by way of a full examination of the application, which ruling has the effect of *res judicata* and is immediately binding on the pending arbitral proceedings.

In other words, Italian law first establishes a clear preference in favour of arbitration in vesting the arbitrators with a priority power to determine their own jurisdiction once proceedings are pending before the arbitral tribunal; on the other hand, if the question of jurisdiction is raised on a preliminary basis before the courts, the ruling adopted by the court, which must consider the argument presented in full and not on a *prima facie* basis, will be binding on the arbitral tribunal if it has constituted itself in the meantime, which will either continue with the proceedings pending before it or terminate them on the grounds that it lacks jurisdiction.

The 2006 Italian Arbitration Act thus attempts to strike a (not so efficient) balance between *Kompetenz-Kompetenz* and complementarity: the presumption in favour of arbitration as an instrument for alternative dispute resolution is pursued by reinforcing the power of the arbitrators to rule exclusively on the their own jurisdiction once the tribunal has been constituted; the moderate application of the *Kompetenz-Kompetenz* principle helps to avoid the initiation of duplicate proceedings before the arbitrators and before the courts as a delaying tactic. In order to ensure correct and effective protection for the rights of the parties, Italian law correctly provides for a fully *complementary* function of the courts, whether in relation to any appeals against the arbitral award concerning jurisdiction, or, when ruling in advance of the arbitrators, through the adoption of orders that are immediately effective and enforceable within arbitral proceedings, and as such capable of preventing the respondent in the arbitral proceedings from engaging in delaying tactics.

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5 Concluding remarks

Why and How to Achieve Complementarity?

The comparative scenario as set out above offers a basis for the concluding remarks, which will seek to answer the question posed in the title of this chapter, along with those put in the introduction to this study. Following the now long-standing debate concerning the rationale underlying the *doctrine of separability* and the *Kompetenz-Kompetenz* principle, along with the comparison between the various manifestations of this principle and the Model Law, it would in fact appear appropriate first to re-conceptualise the issue, and then to search for a new *solution*.

To summarise briefly the core issues considered in the previous chapters, the crucial aspect of the exclusive vesting in arbitrators of the power to decide on their own jurisdiction (so-called *negative Kompetenz-Kompetenz*) along with the by no means remote risk, on the one hand, for the *inefficiency* of the arbitral proceedings whenever the courts annul the entire proceedings on the grounds that the arbitral agreement is invalid after the filing of an appeal against the award represents an almost insoluble conundrum; on the other hand, the adoption of such a strong priority rule in favour of arbitration would ultimately be tantamount to an incontrovertible allocation of *potestas judicandi*, as it is both illogical and above all illegitimate "*to confer exclusive jurisdiction on a forum whose validity is at stake*" .[47] Nevertheless, the *growing preference* for *negative Kompetenz-Kompetenz* is certainly nothing new and was asserted long before by the French Arbitration Act of 1985&2011 as well as the Model Law itself, *at least at European level* .[48] Accordingly, a comparative analysis from the standpoint of complementarity offers scope for revisiting the underlying question on the basis of a two-pronged approach.

In the first place, that comparison has quite clearly brought to light how the principle of *Kompetenz-Kompetenz* is construed differently under U.S. law and other legal systems. The main reason for this difference in construal is first and foremost that no specific statutory law has been enacted in the U.S. in relation to this issue, in contrast to the comparative position set out above. *First Options* and *Howsam* in any case engage with the problem and offer a solution, albeit framed in different terms compared to the rules adopted in the other systems analysed here.

The comparative analysis in actual fact offers various insights into the values underpinning the application of the (negative) *Kompetenz-Kompetenz* principle, none of which has taken due account of *the scope of the arbitration process, which has also been referred to as the most important form of private A.D.R., primarily on account of its complementarity with the ordinary courts' task of rendering civil justice*.

Whilst it is beyond doubt that the purpose of the Model Law has been, and still is, to give a greater force and autonomy to arbitration as one of the alternative instruments for upholding rights to ordinary litigation, nevertheless, the different and controversial application of the provisions laid down in this Model with regard to the *issue of arbitral tribunal jurisdiction* suggests that there has been some misunderstanding regarding relations between arbitration and litigation, which are at times regarded as antagonists and almost never complementary. It is unlikely that a heightening of the antagonism could confer greater force and autonomy on the private justice rendered by arbitrators.

The rationales and values underlying this question have been effectively rejected by George A. Bermann, who criticises the French model of arbitration, arguing that the application of *negative Kompetenz-Kompetenz* results in a substantial indifference on the part of the law towards the "*efficacy cost*" of arbitration for the parties to an arbitral agreement .[49] In other words, the preference for the U.S. model compared to the Model Law (and the legal systems that come closest to it, such as French law) is justified by the need to strike an "*optimal balance*" between "*efficacy*" and "*legitimacy*", [50] as the power of arbitrators to rule on their own competence only becomes exclusive if the parties have unequivocally consented to this.

Following this line of argument, one must ask whether it might not be better to frame the question differently. At the same time however, the (not even remote) possibility of parallel proceedings concerning the same case before the arbitral tribunal and the courts, which may have been seized merely in order to review the validity of the arbitration agreement, will on the other hand entail a risk of delaying tactics on the part of the respondent, especially if it is aware that the arbitral tribunal will not have the exclusive power to decide whether it has jurisdiction without its (i. e. the respondent's) consent.

There is therefore an opposition in terms of values between the U.S. model and the models inspired more or less closely by the Model Law in terms of the priority afforded to *efficiency* and the *legitimacy* of the arbitrators' *Kompetenz-Kompetenz* as a condition for procedural economy on the one hand and the prevention of delaying tactics on the other hand; such tactics in any case impinge upon the efficiency of arbitration in itself in the sense that they from the outset render it as it were vulnerable as an instrument for protection & as an alternative to/substitute for litigation & to obstructionist tactics by a party which, despite having signed the arbitration clause, attempts & often in vain & to release itself from it.

In other words, the aspect of "*wasting time and money*" cannot be considered to prevail over all other values underpinning the arbitration. This aspect will in any case become relevant if the possibility of parallel pro-

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ceedings is accepted, and also if it is considered possible to circumscribe the court's power to decide on the "*gateway issue*" of arbitral jurisdiction only until the arbitral tribunal has been constituted whereas after it has been constituted, the initiation of parallel proceedings "*would not in any event suspend the arbitral proceedings*".[51] However, if this is the price that must be paid in order to defend (rightly) the autonomy and legitimation of arbitration from judicial interference, I am convinced that the entire problem analysed here can be framed in fundamentally different terms and can be resolved differently.

First and foremost, the problem of legitimacy (which results from a contractual understanding of arbitration as also establishing the power of the arbitrators to decide concerning their own jurisdiction) is in reality nothing other than a duplication of the legitimacy of arbitration as an instrument of justice rooted in the parties' intention to agree on an instrument for upholding their rights that is different from and operates as a substitute for that normally operated by the courts.

This provides a powerful explanation for the rationale of both *separability* (at least in the understanding recognised worldwide) as well as *Kompetenz-Kompetenz* as principles of *self-generating authority*, in the sense that they are born out of and are rooted in the consent already encapsulated in the agreement between the parties to conclude an arbitration clause, which is presumed to be valid and to have performative effect. And just as this presumption enables the arbitration to rule on the validity of the container-contract (separability), it also vests the arbitrators with the power to rule on its validity when considering the issue of jurisdiction on the merits. In fact, it is precisely the application of the *Kompetenz-Kompetenz* principle that establishes arbitration as an alternative form of procedure operating as a replacement for litigation as it vests the arbitrators with the power ordinarily reserved to the courts to rule on their own *potestas judicandi*: the ultimate basis for this power results from the parties' consent to the derogation from the jurisdiction of the courts in favour of the private jurisdiction of the arbitrators.

Put more simply, arbitrators are like judges and the power to decide on their competence results directly from the parties to the dispute, who intended them to have such a power in concluding the arbitration agreement.

The problem thus concerns "rebuttal evidence" for this *presumption* and the role played by the court seized by one of the parties to the arbitration agreement (almost always the respondent, often before the arbitral tribunal is constituted at all). One must therefore ask whether that role is one of (*judicial*) *interference* or of *complementarity*. There is a question as to which of the two fundamental frameworks will be better able to guarantee the autonomy and efficiency of arbitration as a preventive choice made by the parties in order to protect their rights.

Whilst there is no doubt that the answer to such a question will constitute the basis for and lead to the legislative response to a precise policy choice, nevertheless the difficult task facing the scholar is first and foremost to direct that choice, in doing so also clarifying how the question is being framed in new terms compared to the traditional understanding.

A new and different understanding could therefore be proposed on the basis of a different approach to the question & which need not *a priori* be regarded as a necessarily *pro arbitration* stance & simply by focusing on the legitimacy of arbitration as an informed choice by the parties as manifested in the arbitration agreement. To focus on that legitimacy is not by definition tantamount to imposing a *pro arbitration* line of reasoning. Much more simply and naturally, it means defending and emphasising the parties' consent to the contract in deciding to refer any future disputes to the private justice of arbitration in place of the public justice of the courts. This is moreover most likely the rationale underlying Article II (3) of the 1958 New York Convention and the UNCITRAL Model Law .[52]

Why therefore should the jurisdictional issue deal with the complementarity between the arbitral tribunal and the courts?

The answer must first and foremost be rooted in an underlying methodological directive. If the law provides for arbitration as an alternative instrument for protecting rights to replace that normally provided by the courts, and which is based on agreement between the parties, the same laws should regulate relations between the arbitral tribunal and the courts not in terms of interference, but rather of assistance, and thus with a function that is complementary to the full realisation of the arbitral proceedings as a replacement for court action.

The realisation of this complementarity must therefore be assessed first and foremost with reference to the issue of the allocation of jurisdiction whenever this "gateway issue" ends up being disputed by the parties to the arbitration agreement. Moreover, there is no doubt that the function of complementarity performed by statute law must strike precisely the right balance between the autonomy and efficiency of the arbitral proceedings, guaranteeing due fairness to the parties.

However, it is precisely the realisation of complementarity that must ensure this balance. Accordingly, it is necessary to ask which of the various models examined and of the various solutions proposed could perform this purpose (and in conjunction with which measures) with the aim of upholding the autonomy of arbitration whilst at the same guaranteeing the utmost efficiency (economic efficiency).

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In the first place, can the autonomy of arbitration be maintained as a primary consequence of the parties' intention to exclude the jurisdiction of the courts over the protection of their own rights if they are permitted to initiate litigation before the courts with the aim of securing a mere declaration concerning the validity, existence and efficacy of the arbitration clause with reference to the specific dispute that has arisen? In other words, what autonomy is guaranteed to arbitration if statute law allows for parallel proceedings? One might say that, in itself, very little autonomy is guaranteed, even if it is considered that, once it has been constituted, the arbitral tribunal may decide on the merits, pending the court's decision on the allocation of jurisdiction. Under these circumstances, autonomy would not be guaranteed, and moreover the efficiency of the arbitration would be potentially impaired if, once the proceedings had been launched, a decision were to be issued concerning the lack of *potestas judicandi* on the part of the arbitrators.

On the other hand, it is barely conceivable that, in the event that the vesting of jurisdiction in the arbitrators is disputed, a rule providing for example for the Tolerance of Parallel Proceedings on the one hand of the Mechanism of First-Seized Approach on the other could be stipulated .[53] Both in fact are open to clear distortions within application and do not achieve any substantial efficiency for the arbitration. The Tolerance of Parallel Proceedings in fact does nothing other than resolve a potential decision making conflict by applying the doctrine of *res judicata*, thereby resulting in a significant waste of time and money for the parties .[54] On the other hand, the rule of the Mechanism of First-Seized Approach, or of the First-To-File-Rule, will not only entail a race towards concurrent jurisdictions, but above all negates from the outset the autonomy of arbitration. Each party may in fact release itself from the arbitration agreement by bringing an action before the courts on a preventive basis, even though the courts will be unable to assess the existence of a (nonetheless valid) arbitration clause, which must now be deemed to have been implicitly resolved between the parties.

A second question is how the autonomy of arbitration can then be upheld in relation to the allocation of jurisdiction. There is no doubt that the best and most natural approach is that of the *Kompetenz-Kompetenz* principle, which vests the arbitrators with the power to rule on their own jurisdiction. This is the case also and above all if the possibility of parallel proceedings before the courts is accepted, both before and after the arbitral tribunal has been established.

If the attribution of this power appears to be a natural corollary of the establishment of equal status for the arbitrators and the ordinary courts when exercising judicial powers with binding effect for the parties, it is therefore necessary to understand how to guarantee the autonomy of arbitration in the event that the attribution of that power is disputed.

According to this viewpoint, the possibility of disputing before the courts the efficacy of the arbitration clause (and hence the allocation of jurisdiction) before the arbitral tribunal has been constituted in itself undermines the autonomy of arbitration and provides guarantees to the parties only in the event that the court subsequently finds that it has exclusive jurisdiction. On the other hand, if it upholds the jurisdiction of the arbitrators, and if arbitral proceedings are not yet pending, it will without doubt have the twofold defect of not having defended the autonomy of arbitration and at the same time of having also caused it to be inefficient, deferring its launch and thus undermining one of the reasons why the parties concluded the arbitration agreement in the first place. Furthermore, if the arbitration has been launched and pursued pending a decision by the courts, the arbitrators will in any case have exposed the parties to a potential inefficiency within the trial were the court subsequently to deny the jurisdiction of the arbitrators.

If this line of reasoning is followed, access to the courts in order to determine jurisdiction on a preventive basis only apparently achieves a form of complementarity between private justice and public justice, both in the event that the arbitration is not launched and also in the event that, after the arbitral tribunal has in any case been constituted, the proceedings are continued.

The comparative panorama set out in the previous pages in any case makes it possible to frame the problem in terms that ensure that a fair balance is struck between the value of the autonomy of the arbitration & without which arbitration would not exist at all & and the complementary function of the courts when allocating *potestas judicandi*.

The legislative formulation offered by the French model (so-called negative *Kompetenz-Kompetenz*) in fact offers an important basis for argument, precisely because it guarantees the autonomy of arbitration from the outset as the respect which statute law ascribes to the parties' intention to remove disputes between them from the jurisdiction of the courts. It is in fact no surprise that this model is typical of the international conventions adopted in the area of arbitration in the area of international trade, which are sensitive to the parties' intention to adopt this mechanism for resolving disputes as an alternative to the jurisdiction of the courts.

The negative effect of the *Kompetenz-Kompetenz* principle, which obliges the courts to refer the decision on the allocation of jurisdiction to the arbitrators, has the effect of rendering exceptional the courts' role in relation to that decision. The courts will in fact intervene wherever they consider the that the arbitration agreement is *prima facie* manifestly incapable of establishing the *potestas judicandi* of the arbitral tribunal on the merits, and will then go on to establish jurisdiction by a binding decision adopted following a full review, deciding

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either on the merits of the dispute (if the party filed such a request, thereby launching parallel proceedings to all intents and purposes) or deciding only on the issue of jurisdiction, if the party apprised the courts of the matter exclusively for that purpose.

In any case, pending a decision by the courts, whether to refer the matter to arbitration or *a fortiori* to decide on the issue of jurisdiction according to a full review, it will not be possible either to launch or to pursue arbitral proceedings.

This solution suggests a complementary role for the courts, which as such is capable of using parallel proceedings as an instrument for arriving at a preliminary and effective solution to the "gateway issue" and not as a potential delaying tactic engaged in by one of the parties. The pillars for this solution may be identified in two aspects: the *prima facie* prognosis that the arbitration agreement is null and void, and secondly the automatic staying of the arbitration whenever the courts, having considered the arbitration agreement to be null and void according to a *prima facie* assessment, arrive at a due assessment following a full review that the arbitral tribunal lacks jurisdiction.

In the final analysis, the striking of an appropriate balance between legitimacy and efficiency is premised on the prior acceptance by the parties to the arbitration agreement of the "lower risk" of inefficiency from the viewpoint of "wasting time and money", whilst fully and effectively safeguarding the original agreement reached between them to remove the decision on the dispute from the organs of public justice.

Notes

1 See *e multis* Robert H. Smit, *Separability and Competence in International Arbitration: Ex Nihilo Nihil fit? Or Can Something Indeed Come from Nothing*? 13 Am R. Int'l. Arb., 19 (2002); Alan S. Rau, *Arbitral Jurisdiction and the Dimensions of 'Consent'*, 24 Arb. Int'l, 199 (2008); Id., *Understanding (and Misunderstanding) "Primary Jurisdiction"*, 21 Am. R. Int'l. Arb. 47 (2010); Alan S. Rau & George A. Bermann, *Gateway Schmateway: An Exchange Between George Bermann and Alan Rau*, 43 Pepp. L. Rev. 469 (2016). See also *infra*.

2 John J. Barcelò III, *Who Decides the Arbitrator's Jurisdiction? Separability and Competence & Competence in Transnational Perspective*, 36, Va. J. Transnat'l. L., 1115 (2003). See also George A. Bermann, *The «Gateway» Problem in International Commercial Arbitration*, 37 Yale J. Int'l L., 1 (2012), 1.

3 See *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967).

4 See, expressly, Barceló III, *supra* note 2, at 1121.

5 See Bermann, *supra* note 2, at 23,24.

6 See Alan S. Rau, *Everything You Really Need to Know About «Separability» in Seventeen Simple Propositions*, 14 Am R. Int'l. Arb 1 (2003).

7 See, expressly, Barcelò III, *supra* note 2, at 1120, accordingly to the Rau's opinion cited above.

8 This distinction was suggested by Emmanuel Gaillard in 1994. See Emmanuel Gaillard, *Convention d'arbitrage, Juris Classeur: Droit International*, 49, 50 (1994). On the negative effect of competence-competence and the *prima facie* review, see Emmanuel Gaillard, *L'effet négatif de la compétence-compétence, Etudes de procédure et d'arbitrage en l'honneur de Jean- François Poudret* 387, (1999); Id., *La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence, Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in honour of Robert Briner* 311, ICC Pub. No. 693 (2005). See, more recently, Ashley Cook, *Kompetenz & Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz & Kompetenz*, 2014 Pepp.L. Rev., 17 (2014. The terminology is now increasingly deployed both by commentators and by courts: see *e. g.* Ct. First. Inst. Geneva, 2 May 2005, *Air(PTY) Ltd v. International Air Transport Ass'n (IATA)*, 23(4) *ASA Bull*. 739,746 (2005).

9 See *Article 8. Arbitration agreement and substantive claim before court*.

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Art. 16. *Competence of arbitral tribunal to rule on its jurisdiction*

(1) 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 con- tract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. 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. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

10 It has suggested just by one of the Principles of Transnational Civil Procedure (par. 2.4), that the «party agreement to exclusive jurisdiction, including an arbitration agreement, ordinarily should be honored».

11 With this regard, see William W. Park, *Arbitral jurisdiction in the United States: Who decides What?* 11 Int. Arb. L. Rev. (2008), 33. See also, more recently, Cook, *supra* note 8, at 31.

12 See *The Federal Arbitration Act* U.S. Code, Title 9 Arbitration, http://codes.findlaw.com/us/title-9-arbitration

Section 2. *Validity, irrevocability, and enforcement of agreements to arbitrate*.

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A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
Section 3. *Stay of proceedings where issue therein referable to arbitration*
If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
Section 4. *Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination*.
A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
13 See *First Option of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).
14 See, moreover, Shirin Philipp, *Is the Supreme Court Bucking The Trend? First Options v. Kaplan In Light of European Reform Initiatives In Arbitration Law*, 14 B.U.Int'l L.J. 1996), 119, 134&137. See also Adrianna Dulic, *First Options of Chicago, Inc v. Kaplan and the Kompetenz & Kompetenz principle*, 2 Pepp. Disp. Res. L.J. (2001), 77.
15 See, with this specific regard, Park, *Arbitral Jurisdiction in United States*, 38, who textually writes that «judges determined arbitral jurisdiction at the outset of the process, rather than waiting to see what the arbitrators would decide». See, also, 537 U.S. *Howsam v. Dean Witter Reynolds Inc*., 79 (2002), and 539 U.S. *Green Tree Financial Corp v. Buzzle*, 444 (2003). Considering these arguments, it has usually said that American arbitration law has never adopt *Kompetenz Kompetenz* principle and, mostly, has not dealt with the Model Law provisions on this topic.
16 See textually Park, *supra* note 11, at 39.
17 see Dulic, *supra* note 14, at 77.
18 See *Tumey v. Ohio*, 273 U.S: 510 (1927).
19 See *First Options*, 514 U.S. at 943.
20 See *Rent & A & Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010).
21 See, recently, David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363 (2018).
22 See Horton, *supra* note 21, at 412&413: "*Thus, in giving arbitrators carte blanche to decide whether a dispute falls within the scope of a valid arbitration clause, the United States stands alone*".
23 See Barcelò III, *supra* note 4, at 1130. See also Thomas E. Carbonneau, *A Comment on the 1996 United Kingdom Arbitration Act*, 22 Tul. Mar. L. J. 131 (1998); more recently, see John J. Barcelo III, *Kompetenz -Kompetenz and Its Negative Effects & A Comparative Review*, available at http://ssrn.com/abstract&3035485, Cornell Law School research paper No. 17&40 (2017).
24 See 1996 Arbitration Act, https://www.legislation.gov.uk/ukpga/1996/23/contents
Section 9. *Stay of legal proceedings*.
(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.
25 See, *e. g., Albon v. Naza Motor Trading Sdn Bhd* [2007] EWHC 665 (ch), 2 Lloyd's Rep 1 at [24];
26 *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40, 7. But see *Trust Risk Group Spa v. Amtrust Europe Ltd* [2015] EWCA Civ 437, *per* Beatson LJ. In the latter case, Beatson LJ still recognized the relevance of Fiona but distinguished from it & and therefore did not apply the thereof pro-arbitration presumption & because the case brought before her court involved two arbitration clauses and not just one as in Fiona.
27 See Barcelo III, *supra* note 23, at 29.
28 Section 30. *Competence of tribunal to rule on its own jurisdiction*.
(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—
(a) whether there is a valid arbitration agreement,
(b) whether the tribunal is properly constituted, and
(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.
(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.
Section 31. *Objection to substantive jurisdiction of tribunal*.

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(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.
A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.
(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.
(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.
(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—
(a) rule on the matter in an award as to jurisdiction, or
(b) deal with the objection in its award on the merits.
If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.
(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).
29 See Section 32. *Determination of preliminary point of jurisdiction*.
(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.
A party may lose the right to object (see section 73).
(2) An application under this section shall not be considered unless:
(a) it is made with the agreement in writing of all the other parties to the proceedings, or
(b) it is made with the permission of the tribunal and the court is satisfied.
(i) that the determination of the question is likely to produce substantial savings in costs,
(ii) that the application was made without delay, and
(iii) that there is good reason why the matter should be decided by the court.
(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.
(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.
(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.
(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.
But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.
30 See Neil Andrews, On Civil Processes, Arbitration and Mediation, (2013), 345: «*while these matters are pending, the "main show" can go on, including the making of an award, if the arbitral tribunal is happy to do so, but subject to the parties' power to agree otherwise*».
31 See *Lummus Global Ltd v. Keppel Fels Ltd*, [1999] 2 Lloyd's Rep. 24. See also Andrews, *supra* (note 21), 345.
32 See *Vale de Rio Ltd v. Keppel Fils Ltd*, [2000] Lloyd's Rep. 1.
33 See Section 67. *Challenging the award: substantive jurisdiction*.
(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court:
(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.
(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order:
(a) confirm the award,
(b) vary the award, or
(c) set aside the award in whole or in part.
(4) The leave of the court is required for any appeal from a decision of the court under this section.
34 See *Dallah Real estate & Tourism Holding Co. v. Pakistan* [2010], UKSC 46, available at www.supremecourt.gov.uk/docs/UKSC_2009_0165_Judgmentv2.pdf.
35 See, e. g., *Azov Shipping Co. Ltd v. Baltic Shipping Co.* [1999] Lloyd's Rep. 68.
36 See also, in this sense, *FT Mackley &Co. Ltd V. Gossport Marina Ltd*, [2002] BLR, 367.
37 See Peter Schlosser, *La nouvélle Legislation allemande sur l'arbitrage*, Rev. Arb. (1998) 291, 298. Id., *Arbitral Tribunal or State Court, Who must defer to whom*?, ASA Bull., *Special Series* no.15, (2001) 15; Klaus P. Berger, *Germany Adopts the UNCITRAL Model Law*, 1 Int'l Arb. L. Rev. (1998) 121, 122. See also, Gino Lorcher et al., Das Schiedsverfharen & national & international & nach deutschen Recht, 19&22 (2001); Peter Schawb & Gerhard Walter, Schiedsgerichtsbarkeit, 58 (2005).
See *German Code of Civil Procedur*e as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Article 1 of the Act dated 10 October 2013 (Federal Law Gazette I page 3786):
Section 1032. *Arbitration agreement and proceedings brought before the courts*.
(1) Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible provided the defendant has raised the corresponding objection prior to the hearing on the merits of the case commencing, unless the court determines the arbitration agreement to be null and void, invalid, or impossible to implement.
(2) Until the arbitral tribunal has been formed, a petition may be filed with the courts to have it determine the admissibility or inadmissibility of arbitration proceedings.
(3) Where proceedings are pending in the sense as defined by subsection (1) or (2), arbitration proceedings may be initiated or continued notwithstanding that fact, and an arbitration award may be handed down.
Section 1040: *Authority of the arbitral tribunal to decide on its own competence*
(1) The arbitral tribunal may decide on its own competence, and in this context also regarding the existence or the validity of the arbitration agreement. In this context, an arbitration clause is to be treated as an agreement independent of the other provisions of the agreement.
(2) The objection as to a lack of competence of the arbitral tribunal is to be submitted by no later than the time at which the reply to the request for arbitration is made. A party shall not be prevented from raising such an objection because of its having appointed an arbitral judge, or because of its having assisted in his appointment. The objection as to the arbitral tribunal having exceeded its authorities is to be

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raised as soon as the matter with regard to which this allegation is being made is discussed in the arbitration proceedings. In either case, the arbitral tribunal may permit such an objection to be raised later if the party raising it provides sufficient excuse for such delay.
(3) Where the arbitral tribunal believes it has competence, it shall rule on an objection raised pursuant to subsection (2) in an interim decision as a matter of principle. In such event, each of the parties may apply for a court decision to be taken, doing so within one (1) month of having received the written notice as to the interim decision. For the period during which such a petition is pending, the arbitral tribunal may continue the arbitration proceedings and may deliver an arbitration award.

38 See, e. g., Peter Schlosser, Stein &Jonas, Kommentar zur Zivilprozessordnung, 222 (1994).

39 See the previous Art. 1458 of the Code De Procedure Civile [C. PR.Civ.] art. 1458 (Fr.), translated in Code of Civil Procedure, Legifrance (30 September 2005), http://195.83.177.9/upl/pdf/code 39.pdf:
(1) Where a dispute, referred to an arbitration tribunal pursuant to an arbitration agreement, is brought before a court of law of the State, the latter must decline jurisdiction.
(2) If the dispute is not yet before an arbitral tribunal, the State court shall also declare itself incompetent, unless the arbitration agreement is manifestly null and void.
(3) In neither case may the State court declare itself incompetent at its own motion.
See also Arthur Taylor von Mehren, *International Commercial Arbitration: The Contribution of the French Jurisprudence*, 46 La. L. Rev. 1045, 1046 (1986); Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators, in*Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention In Practice ((2008), 257, 260.

40 See the Decret no 2011&48 du 13 January 2011 portant reforme de l'arbitrage [Decree 2011&48 of 13 January 2011 on arbitration reform], Journal Officiel De La Republique Francaise [J.O.] [Official Gazette Of France], 14 January 2011, p. 777, *available at*http://www.iaiparis.com/pdf/Decret n_2011- 8 du 13 janvier_2011_ portant reforme de l'arbitrage.pdf.
Article 1448.
When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.
Article 1465.
The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.
See also Yves Strikler, *La Jurisprudence del la Cour de Cassation en Matière d'Effet Négatif de la Compétence & Compétence*, Rev Arb (2011), 191.

41 See, *e. g.*, Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] 1e. civ., 29 January 2014, no. 12 & 29,086, Procédure, 2014, No 145; Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] 1e. civ Nov.25, 2008,, Bull. civ. IV 2008, No. 197; Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] 1e. civ., 26 June 2001, no. 99&17.120, Bull. civ. 2001 I, No. 183; Cour de Cassation [Cass.] [Supreme Court for Judicial Matters] 2e civ., 10 May 1995, no. 93&12.676, Bull. civ. 1995 II, No. 135.

42 See, e. g., Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence & Competence: The Rule of Priority in Favour of the Arbitrators*, in Enforcement of Arbitration and International Awards. The New York Convention in Practice, (Ed. by Gaillard etAl., 258 (2008); Filip De Ly - Audley Sheppard, *ILA Final Report on Lis Pendens and Arbitration*, 25, Arb. Int'l, (2009), 3.

43 See Code of Civil Procedure [CPC] (It.), translated in Simona Grossi - Cristina Pagni, Commentary on the Italian Code of Civil Procedure, 481 & 482 (2006).
Article 819 *ter. Relation between arbitrators and judges*.
(1) The arbitrators' venue is not excluded when the same case is pending before a judge, nor if the action pending before the arbitrators is related to an action pending before a judge. The judgment by which the judge affirms or denies his venue in relation to an arbitration agreement, may be challenged pursuant to Articles 42 and 43. The exception of improper venue of the judge due to the existence of the arbitration agreement shall be filed, under penalty of waiver, in the answer. The failure to file the exception excludes the arbitrators' venue only with reference to the controversy decided in that judicial proceeding.
(2) In relations between arbitration proceeding and judicial proceeding, the provisions of Articles 44, 45, 48, (50: abrogated) and 295 shall not apply.
(3) Judicial claims having as their object the invalidity or inefficacy of the arbitration agreement shall not be filed while the arbitration proceeding is pending.

44 See Corte Costituzionale [Corte Cost.] [Constitutional Court] 19 July 2013, No. 223, Foro It. 2013, I, 2697.

45 Italian legislation represents the model of arbitration law with the greatest scope for evolutionary interpretation since - in contrast to French and German law & it takes account of the most problematic aspect surrounding the allocation of jurisdiction, that is the possibility of parallel proceedings before arbitrators and before the courts *de eadem re*. The possibility of parallel proceedings before both an arbitral tribunal and the courts establishes a textbook case for the application of Article 819-ter CCP, including in the light of the above-mentioned judgment of the Constitutional Court, which by contrast allows for communicability between arbitration and judicial proceedings through the *translatio judicii* of the proceedings following a ruling on jurisdiction.
See., e. g., Antonino Barletta, *Translatio Judicii e Nuovi Rapporti tra Giudici e Arbitri*, Il giusto processo civile, 2015, 61.

46 See Giovanni Verde, Lineamenti di Diritto dell'Arbitrato, 20 (2006); Romano Vaccarella, *Sulla Competenza Esclusiva del Collegio Arbitrale a Giudicare della Propria Competenza*, Riv. Arb., (1997), 329; Francesco P. Luiso, *Ancora sui Rapporti tra Arbitri e Giudice*, Riv. Arb., (1997), 773.

47 Stavros Brekoulakis *The Negative Effect of Compétence-compétence: The Verdict has to be Negative*, 2 Austrian Arb. Rev., (2009), 253.

48 See, in fact, the *European Convention on International Commercial* Arbitration of 1961, which, in Article VI (3) provides that "Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary".

49 See Bermann, *supra* note 2, at 19.

50 Id., at 49. "The central claim of this Article, however, is a normative one, namely that the allocation between courts and arbitrators of competence to determine threshold issues in arbitration should be driven by the goal of achieving an optimal balance between efficacy and legitimacy, the latter measured largely in terms of party consent. The equilibrium that U.S. law pursues stands in sharp contrast with French Law, which posits that arbitration's attractiveness depends on its real and reputed efficacy, and that efficacy in turn dictates an even more conspicuously pro-arbitration bias than the one that prevails in U.S. law.".

51 Id., at 50.
In reality, if the "gateway issue" is limited to the period until the arbitral tribunal has been constituted, it is not possible to speak of a rule for resolving parallel proceedings since, until that time, no proceedings are yet pending, including in particular arbitral proceedings, which only become pending once the arbitral tribunal has been constituted, the mere conclusion of the arbitration agreement not being sufficient. If it is envisaged that, once the arbitral tribunal has been constituted, the proceedings in question will not have to be suspended pending the resolution of the issue of jurisdiction by the courts, this will be tantamount to accepting the doctrine of the Tolerance of Parallel Proceedings, which will in any case entail a waste of time and money for the parties.

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52 See the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, http://www.uncitral.org/uncitral/it/uncitral_texts/arbitration/NYConvention.html.
Article II (3).
"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".
See, e. g., Gary Born, International Arbitration: Law and Practice, 53&59 (2016).
53 See, e. g., Filip De Ly, *ILA Final Report on Lis Pendens and Arbitration*, (25) Arb. Int'l. (2009), 1&87.
54 McLachlan - Campbell, Lis Pendens in International Litigation (2009), 60.

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Jurisdiction of the Arbitral Tribunal in the Case of Multiple Contracts

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The foundation of the arbitration jurisdiction is the arbitration agreement entered into by the parties to a contract. Usually, only the signatory parties to a contract and the disputes arising from a contract that includes an arbitration clause or to which the arbitration clause relates are the ones that can be submitted to arbitration. This article discusses some of the arguments for extending the arbitration clause in complex arbitrations, that is, in those cases where there are more than two parties, more than two contracts or more than two parties and contracts. Particularly, this paper addresses multiple contract arbitration when the contracts are related. One of the arguments used by the arbitral tribunal for the extension of jurisdiction is the existence of a link between the contracts. Additional arguments include implied consent, participation in the negotiation and performance of a contract and good faith. The article also discusses some of the typical cases of linked contracts in many civil law countries, such as subcontracts, third party beneficiaries and standard terms of contracts, from which arbitral jurisdictions problems may arise. Finally, special attention is given to Article 14 of the 2008 Peruvian Arbitration Law as the first provision in an arbitration law in Latin America that extends the arbitration agreement to non-signatory parties using for this a mixed approach.

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Key Words : Multiple contract arbitration, Linked contracts, Implied consent, Subcontracts, Standard terms of contract, Good faith, Peruvian arbitration Law, Mixed approach.

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Ⅰ. GENERAL[1)]

1.01 This article covers the extension of the arbitration clause for disputes arising from multiple contracts when these contracts are linked. One example is the case of a contract and a subcontract when the contract has an arbitration clause and the subcontract has none. If the subcontractor wants to bring a direct action against the employer for collection of amounts owed on the subcontract, can he avail himself of the arbitration clause in the main contract if the subcontract does not have an arbitration clause (see *post*, section 4.03 on subcontracts)? Does the fact the contracts are linked provide a justification for extending the arbitration clause to the subcontract?

1.02 Complex arbitration arises in three cases: (i) when there is multiplicity of contracts, that is, the dispute arises from two or more contracts; (ii) when there is multiplicity of parties, that is, when the parties in the arbitration are

1) Abbreviations: Uncitral, United Nations Commission on International Trade Law; Uncitral Model Law, 2006 Uncitral Model Law on International Commercial Arbitration; NYC, Convention on the Recognition and Enforcement of Foreign Arbitral Award or 1958 New York Convention, adopted by Venezuela on February 8, 1995, by Panama on October 10, 1984 and by Peru on July 7, 1988; ICC, International Chamber of Commerce; ICC Rules, Rules of Arbitration of the International Chamber of Commerce, in force from January 1, 2012; Unidroit, International Institute for the Unification of Private Law; Unidroit Principles (PIC), Principles of International Commercial Contracts 2010 Edition; PAL, 2008 Peruvian Arbitration Law; LAV, 1998 Venezuelan Arbitration Law; PAA, 2014 Panamanian Arbitration Act.

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more than two, but the dispute relates to only one agreement; and, (iii) when there is multiplicity of parties and of contracts. One of the most common arguments to extend arbitral jurisdiction when there is a multiplicity of parties, is the concept of corporate group or group companies[2] where one of the parties to the arbitration tries to bring into the dispute a parent company that was not a party to the contract. However, we do not in this article cover the problem of corporate groups[3]. Rather, the arguments for the extension of the arbitration clause that we present here are related to the fact that the contracts that are pulled into the arbitral proceedings are in some way related (linked contracts) and do not require necessarily that the multiple parties form a group of companies.

1.03 Our main purpose is to deal with the problem of multiple contract arbitration, that is, when the dispute arises from two or more contracts, where one of the contracts has an arbitration clause and the other contract does not. Most of the cases of disputes related to two or more contracts also involve a multiplicity of parties, some of which were not original signatories of the arbitration clause. However, there are also cases where the same parties have entered into several contracts, one of which does not have an arbitration clause. The fact that a dispute arises between parties to a contract with an arbitration clause does not mean that all disputes between the same parties arising out of other contracts are covered by this arbitration clause. Arbitral jurisdiction does not extend to all contracts between the same parties. To extend the arbitration clause in these cases, the agreements must be linked in some way.[4]

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2) The existence of a corporate group was used as one of the arguments to extend the arbitral jurisdiction in the case Dow Chemical France vs. Isover Saint Gobain (*see post*, section 3.05)

3) The concept of corporate groups is initially developed in Anglo-American corporate law and, in general terms, is a reference to "the legal rights and responsibilities of one legal unit forming part of a collective enterprise are attributed to another legal unit with which it conducts a common integrated economic undertaking under common control", Philip I. Blumberg and Kurt A. Strasser, *The law of corporate groups, enterprise liability in commercial relationships,* Aspen, MD (1998), § 1.01, p. 5. This definition of corporate groups has been adopted in many civil law countries; see José Augusto Quelhas Lima Engrácia Antunes. *Os Grupos de Sociedades.* 2nd Ed. Almedina, Coimbra (2002). P. 52

4) See Bernard Hanotiau, *Complex Arbitrations, Multiparty, Multicontract, Multi-Issue and Class*

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1.04 The article is written in the context of a civil law country, specifically Latin American civil law in Venezuela, Panama and Peru. These countries, in turn, are strongly influenced by European law (France, Spain, Portugal and Italy).[5] It does not deal with arguments typical of common law. However, *estoppel*[6], though originally a concept taken from common law and supplemented by equity, has now made its way into international commercial law and is used in international arbitration.[7] In fact, implied consent in arbitration derives from *estoppel* and has become a cornerstone of multiple contract arbitration.[8] We do not cover in this article the issues of conflicts of laws[9].

Actions. Kluwer Law International (2005), p. 141. This author quotes ICC case No. 7893 of 1994 where the tribunal rejected jurisdiction even though there where two connected contracts with arbitration clauses between the same parties. The arbitral tribunal considered that its jurisdiction was based on the arbitration agreement contained in the first contract which limited its scope to disputes arising from such contract. This decision is also reported in the *Collection of ICC Arbitral Awards,* Volume V, Kluwer Law International, p. 67.

5) The 1942 Venezuelan Civil Code amended in 1982 is directly influenced by the 1865 Italian Civil Code and the 1804 French Civil Code, with some provisions taken from the 1927 French-Italian Project of Code of Obligations. The Panamanian Civil Code is influenced by the 1879 Spanish Civil Code. The Peruvian Civil Code of 1983 is an updated version of the 1942 Italian Civil Code. Civil law countries of Latin influence constitute a broad and important geography which includes in addition to France, Belgium, Luxemburg, Italy, Portugal and Spain, all of Latin America, an important segment of Africa, the Middle East and certain countries in South East Asia.

6) *Estoppel* is generally defined as a ban that prevents a party from asserting a right for a defense of some kind (Black's Law Dictionary). "By the nineteenth century, both at law and in equity, the rule was that there would be an *estoppel* where by words or conduct there had been a representation of existing facts (not of law) which was intended to be acted upon…", John McGhee, *Snell's Equity,* 13th Ed., London (2000), p. 631, § 39-01. *Estoppel* can be used to prevent a party from asserting a defense of lack of jurisdiction when, by its conduct, it leads the parties to act on the assumption of acceptance of the terms of another contract.

7) Originally, *estoppel* was a concept totally strange in civil law, though now it is reflected in the principle of "interdiction de se contredire" (limitation to the right to contradict a previous conduct), Philippe Fouchard, Emmanuel Gaillard and Bethold Goldman, *Traité de l'arbitrage commercial international,* Paris (1996).

8) The theory of implied consent is developed from substantive law, especially contract law.

9) Conflicts of laws related to the scope of the power of the tribunal to extend the jurisdiction nor to the law applicable to the determination of when the contracts are linked.

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1.05 Arbitral jurisdiction is based on the agreement of the parties to submit any controversy that may arise in a particular contract to arbitration; this agreement appears in the arbitration clause. The agreement to submit a controversy to arbitration is what is called the conventional foundation of arbitration, according to which, parties in a contract are only obligated to submit to arbitration if they have so agreed to it. The need to have an agreement to submit to arbitration is universally accepted in most municipal laws[10]; the agreement to submit to arbitration is the cornerstone of arbitration. Arbitral jurisdiction is protected through two separate principles: (i) the concept of the independence of the arbitral clause, according to which the agreement to arbitrate is considered an agreement separate from and independent of all the other provisions in the contract (Uncitral Model Law, Article 16(1)); and, (ii) the principle of *kompetenz-kompetenz*, that gives the arbitration tribunal the capacity to decide its own jurisdiction even in decisions related to the existence or validity of the arbitration agreement (Uncitral Model Law, Article 16(1)).

1.06 The principle of *kompetenz-kompetenz* allows an arbitral tribunal to extend its jurisdiction in the case of complex arbitrations, that is, in those cases where it is faced with more than two parties, more than two contracts or more than two parties and contracts. When deciding its jurisdiction, however, the arbitral tribunal must always keep in mind that an improper extension of its jurisdiction may be a causal to request to set aside the award (Uncitral Model Law, Article 34(2)(a)(i) and (2)(a)(iii))[11], or recognition can be rejected (Uncitral

10) Fouchard, Gaillard and Goldman, idem, § 44. Arbitration always assumes the existence of an agreement under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration, NYC, Article 2, N° 1; in Venezuela, LAV, Article 5, defines the arbitration agreement as the agreement in which the parties decide to submit to arbitration all or some of the controversies which have arisen or may arise between them with respect to a legal relationship, contractual or non contractual. This definition is taken from the Uncitral Model Law. In the PAL, the arbitration agreement is defined in Article 13 and in the PAA in Article 15.

11) According to the 2012 Uncitral Digest of Case Law on the Model Law, referring to case law of Article 34, courts have considered claims based on the ground that a person was not a party to the arbitration agreement under either paragraph (2)(a)(i) or paragraph (2)(a)(iii). Available at: http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf(last visit on July 26, 2014).

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Model Law, Article 36(1)(a)(i)[12] and (1)(a)(iii)) (NYC, Article V (1)(a) and (1)(c)). This forces the tribunal to develop arguments in favor of an extension that will later hold up in action to set aside the award; the extension of the arbitration clause is not discretional for the arbitrators, therefore, the decision to include in the same procedure contracts where not all the agreements have an arbitration clause must be properly founded.

1.07 Despite the risk of having the award set aside or not being recognized when brought in for enforcement, some arbitral tribunals ignore this as an argument to refuse jurisdiction and determine their jurisdiction according to the criteria adopted by the tribunal and not according to the risk of having the award not recognized. In ICC Case 8910 (1998)[13], the tribunal held that it was perfectly aware of the fact that its decision may not be recognized in the United Arab Emirates. However, though it is true that a tribunal should decide taking into account that its decision can be legally enforceable (citing ICC Rules effective at the time, Article 26)[14], it will not be tied by the rules of a particular country where the award may be enforced.[15] According to the 2012 ICC Rules, the International Court of Arbitration as well as the tribunal "shall make every effort to make sure that the award is enforceable at law".[16] ICC Rules, Article 41 refers to enforceable at law but it does not say enforceable according to the laws of the country where the award will be enforced. The fact is that an arbitral award cannot be universally enforceable.

12) According to the 2012 Uncitral Digest of Case Law on the Model Law, idem, referring to case law of Article 36(1)(a)(i), awards rendered against non-signatories, which cannot be considered parties to an arbitration agreement, have in general not been declared enforceable.

13) ICC, ICC *Collection of Arbitral Awards,* Vol. IV (1996-2000), Paris (2003), p. 574.

14) Currently this is ICC Arbitration Rules (2012), Article 41.

15) ICC 8910 (1998), idem.

16) ICC Arbitration Rules, Article 41.

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1.08 One approach to this risk that has been followed in the case of multiple contract or multiple party arbitrations is to make a decision through a separate award, that is, through the use of an interim award on jurisdiction. The interim award on jurisdiction of course should be used in those cases where the tribunal believes that it does not have jurisdiction on the additional contract or additional party, and it is convenient in those cases where it is going to extend its jurisdiction to include an additional contract that does not have an arbitration clause. This allows the party that is not in agreement with the award to request the setting aside of the award at the beginning of the arbitral procedure and not wait until there is a final award.[17)]

Ⅱ. EXTENSION OF THE ARBITRATION CLAUSE IN LINKED CONTRACTS

2.01 In most cases involving multiple contracts, the contracts are linked. Linked contracts in most civil law[18)] countries are a reference to two or more independent agreements that are in some form connected to the extent that the performance of one of the contracts depends on the other contract. Linked

17) The use of the interim award as a way of solving the problem of jurisdiction is recognized as a valid procedure in international arbitrations, see Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on international arbitration,* 5th Ed., Oxford (2009), § 5.114 through 5.116. According to Redfern and Hunter, the use of an interim award normally is adopted when one of the parties has requested it. From our experience in domestic arbitrations in Venezuela, at times tribunals have actually rendered an interim award on jurisdiction, independently of the request of the parties. Of course, a defense of lack of jurisdiction must have been raised by one of the parties.

18) The study of linked contracts in civil law appears as early as 1962; see Francesco Messineo, *Contratto collegatto,* in "Encyclopedia del Diritto", Milan (1962), Vol. X, p. 48. In France, linked contracts have been the subject of extensive work since the publication of *Les groupes de contrats* by Bernard Teyssie, LJDG N° 139, Paris (1975), and has continued, see Mireille Bacache Gibeili, *La relativité des conventions et les groupes de contrats,* LGDJ Vol. 268, Paris (1996). In Venezuela, see James Otis Rodner, Los *Contratos Enlazados, El Subcontrato,* Academia de Ciencias Políticas y Sociales, 2nd Ed. Caracas (2013). Link or group contracts are also recognized in Dutch and in German law; see Sanne van Dongen, *Groups of Contracts: an exploration of the types and the archetype from a Dutch Legal Perspective* in Ilse Samoy and Marco Loos, *Linked contracts,* Cambridge (2012). Linked contracts are also referred to as "group of contracts."

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contracts are independent agreements, but where each contract has a reference in its purpose[19] or in the performance, to another agreement. The link in the contracts derives from the fact that parties share the same purpose when entering into the agreements or in the performance of one or various obligations under the contracts. There are many examples of linked contracts in contemporary international commerce. For example, franchise agreements have linked supply agreements that are tied to and derive exclusively from the main contract; ordinary guaranties have traditionally been linked to the principal obligation; subcontracts, particularly for works, are connected in their performance to the main contract.

2.02 In the case of linked contracts, the existence of the link itself is a strong argument in favor of the extension of the arbitration clause. Moreover, in most cases where the arbitration clause has been extended to linked contracts arbitrators add other justifications for this extension, such as, the fact that some of the linked contracts are entered into by one of the parties to the main agreement and a company related to the other party (group company theory); the performance of one of the contracts depends on the performance of the other contract; arbitral tribunals also use as justification for the extension implied consent and good faith. The willingness of an arbitral tribunal to extend its jurisdiction based on the existence of a link between two or more contracts depends in part on the strength of the link.[20] If both contracts are strongly dependent on each other, some tribunals accept the extension of the arbitration clause because both of the contracts behave as one agreement (see *post*, section 2.04), this is especially true when the contracts are between the same parties or related parties. In case of contracts with weaker links, the tribunal will normally add additional justifications for the extension. The extension is more acceptable in cases where one contract has an arbitration clause and the other does not.

19) The reference to purpose is to "causa" in civil law. Causa is a reference to purpose of the parties for entering into a contract, Jacques Ghestin, *Cause de l'engagement et validité du contrat,* Paris (2006), § 135.

20) For the extension based on the strength of the link, see François-Xavier Train, *Les contrats liés devant l'arbitre du commerce international: étude de jurisprudence arbitrale,* LGDJ 395, Paris (2003), § 40 et seq.

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Additional difficulties arise when both contracts have incompatible arbitration clauses. In these cases, the arbitral tribunal will have to evaluate the incompatibility of the clauses. [21] The incompatibility can be found in three different forms: (i) one contract has an institutional arbitration clause and the other has ad hoc arbitration; (ii) both contracts have an institutional arbitration clause but with procedural differences (different places of arbitration, applicable law or procedural rules); (iii) both contracts have an institutional arbitration clause but with reference to different arbitration institutions (i.e. one has the Korean Commercial Arbitration Board and the other has an ICC clause). [22]

2.03 In the case of related (linked) contracts, there are a few decisions that have extended the arbitration clause without the requirement of the development of other justifications (such as implied consent). In ICC Case 8708 (1997)[23], the tribunal extended the arbitration clause in a framework contract to an accessory or implementation contract of the principal contract without requiring the showing of implied consent or good faith. The tribunal held that an arbitration clause in the framework contract could be extended to a sales contract among the same parties. The sale contract was an implementation agreement of the framework contract. [24] The extension of the arbitration clause was taken from the framework contract down to the implementation contract, that is, a form of vertical extension of the arbitration clause. The arbitration clause in ICC Case 8708 was contained in the framework contract. The extension in these cases was vertical, from the principal, framework or main contract down to the accessory. A horizontal extension is not always acceptable. Horizontal would be an extension from one implementation contract into another. So, for example, if the party entered into a general terms of contract and subsequently into a sales contract for certain goods and later into a lease agreement, the arbitration clause contained in the sales contract does not necessarily extend itself horizontally to

21) See François-Xavier Train, idem, § 522 et seq. Also see Hanotiau, idem, § 337 et seq.
22) See François-Xavier Train, idem, § 522.
23) This decision is taken from François-Xavier Train, *Les contrats liés devant l'arbitre du commerce international: étude de jurisprudence arbitrale,* idem, § 230. This award does not appear reported in the collection of ICC arbitral awards.
24) François-Xavier Train, idem, § 230.

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the other accessory agreements. However, the arbitration clause contained in a general terms of contract can be extended down to any one of the implementation contracts; in the example, the lease and sales contract.

2.04 In ICC Case 8910 (1998)[25], the tribunal considered that the "*ensemble*" complex contract structure constituted one single agreement. The arbitral tribunal called this a unique or a single operation and therefore extended the arbitration agreement to contracts that did not have one. The structure included the following agreements: first, the Claimant entered into a distributorship agreement with the Respondent N° 1. The distributorship agreement provided for ICC arbitration in Paris. Second, the Claimant signed with Respondent N° 1 and Respondent N° 2 a tripartite agreement in which the Respondent N° 2 substituted Respondent N° 1 in the performance of the distributorship agreement. Finally, Respondent N° 3 guaranteed all payments overdue by Respondent N° 2 under the distributorship agreement. When the Claimant started the arbitration, Respondent N° 2 and Respondent N° 3 objected the jurisdiction of the arbitral tribunal because their agreements did not include an arbitration clause. The tribunal decided that it had jurisdiction over the first two agreements (distributorship and tripartite agreements) based on the close interconnection among the agreements entered into by the Claimant and Respondent N° 1 and Respondent N° 2.[26]

Ⅲ. FURTHER JUSTIFICATIONS OF THE EXTENSION OF JURISDICTION

3.01 In most cases, the arbitral tribunal has to develop additional arguments to reinforce its decision parallel to the explanation of the existence of related contract. The principal arguments used in linked contracts include implied consent, participation in negotiation or performance of the contract and good faith.

25) ICC Case 8910 reported in *Collection of ICC Arbitral Awards,* Vol. IV, p. 569 *et seq.*

26) Bernard Hanotiau also reports this case in *Multiparty, Multicontract, Multi-issue and Class Actions.* Idem, § 261-262.

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1. Implied consent

3.02 The most developed argument in favor of the extension of the arbitration clause is that of implied consent. Implied consent in many civil law countries is a reference to an act or a conduct by a party that implies the intention to be bound by the terms of an agreement to which it is not a party.[27] The consent is indirect (implied from something else) but in contract law it must be certain.[28] Consent must come from a conduct or an act or some form of exteriorizing the will of a party to be bound; a simple tacit acceptance by silence is normally not enough to imply consent to be bound by another agreement or an arbitration clause[29]. Implied consent refers to an arbitration clause not to the contract itself, though frequently they appear together. It is possible that a party agrees to be bound by certain terms of another contract but expressly rejects the arbitration clause. A case in point would be a Venezuelan government entity. Under the Venezuelan Arbitration Law a government entity can only agree to arbitration if they have an approval from the Ministry (LAV, Art. 4). The government entity can agree to be bound by certain terms of a separate contract, but cannot agree to settle disputes by arbitration unless it has been authorized.

3.03 The implied consent to arbitration is implied consent to be bound by an existing arbitration clause. Implied consent is always consent to be subject to an arbitration clause contained in some form of writing.[30] Therefore, implied consent does not mean that the party is consenting orally to arbitration but rather that it is implicitly, through its conduct, consenting to be bound by an existing arbitration clause. By definition, it assumes that there is a valid and binding arbitration clause that is included in a separate agreement. If, under the

27) Jean-Luc Aubert, *Notions et rôles de l'offre et l'acceptation dans la formation des contrats,* LGDJ, T. 119, Paris (1970). This classical concept in French doctrine is also developed in the Unidroit Principles (see Article 2.1.1).

28) Jean-Luc Aubert, idem. Certain in the sense that there is no doubt that the conduct is directed at consenting to be submitted or bound by another agreement.

29) Arbitrators must take into account the applicable law to the arbitration agreement to analyze if there are particular requirements to derive implied consent.

30) If the applicable arbitration law establishes that the arbitration agreement must be in writing.

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applicable law, the arbitration clause must be in writing, it cannot be substituted by the conduct of the party. The conduct of the party does not create the arbitration jurisdiction, but rather, the conduct of the party creates the implied consent to be bound by a valid arbitration clause.

3.04 Consent has been extended to cases where one of the parties, even though it was not a party to the contract that provided for arbitration, has executed or performed obligations under the contract. Implied consent can also extend to the beneficiary of a third party stipulation under the civil law principle of stipulation in favor of a third party at the time that the beneficiary accepts the stipulation made in its favor (see *post*, section 5.03).

2. Participation in the negotiation and performance of a contract

3.05 The second argument in favor of the extension of the arbitration clause is the active participation in the negotiation of a contract that contains an arbitration clause. The participation in the negotiation and performance of a contract as an argument of the extension of the arbitration clause appeared initially in the known award in the case of Dow Chemical France against Isover Saint Gobain.[31] Dow Chemical Venezuela entered into a contract initially with the company Boussois-Isolation. Later, Boussois-Isolation assigned the contract to a company called Isover Saint Gobain (ISG). The contract was for the distribution in France of certain equipment for thermal isolation. Dow Chemical Venezuela subsequently assigned its condition as party to the contract to Dow Chemical AG (Switzerland), Claimant N° 3, which in turn was a wholly owned subsidiary of Dow Chemical Company (USA), Claimant N° 1. Later in 1968, there was a second agreement of distribution between Dow Chemical Europe, in turn a subsidiary of Dow Chemical AG (Claimant N° 3); with three companies of the group Boussois-Isolation which contracts originally had been assigned to ISG,

31) Interim award on jurisdiction ICC Case 4131 of September 23, 1982 reported in *ICC Arbitral Awards,* Vol. I (1974-1985), p. 146. Against this award an action for setting aside was filed and was rejected by the Court of Appeals of Paris in a decision of October 21, 1983.

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the defendant in this procedure.

The arbitration was commenced by four claimants, of which two were parties to the contract with ISG that is, Dow Chemical AG and Dow Chemical Europe. Both of these agreements contained arbitration clauses with arbitration submitted to ICC. In turn, both agreements provided that deliveries could be made by Dow Chemical France, which was not a party to the contract, as well as by any subsidiary of the company Dow Chemical. In practice, Dow Chemical France proceeded to make the deliveries under the contract. The four Dow Chemical companies (Dow Chemical AG, Dow Chemical Europe, Dow Chemical France and Dow Chemical Company) started arbitration against Isover Saint Gobain for damages resulting from defective products.

The Defendant alleged that the arbitral tribunal did not have jurisdiction to issue an award in the proceeding between Dow Chemical France and Dow Chemical Company against Isover Saint Gobain on the grounds that it had not signed any agreement with these parties that included an arbitration clause.

In an interim award, the arbitral tribunal held that it had jurisdiction to decide the dispute, including the claim from Dow Chemical Company and Dow Chemical France, although they were not parties to the contracts. Some of the arguments of the arbitral tribunal were as follows. First, Dow Chemical Company had absolute control over its subsidiaries, and confirmed the contracts. In the case of Dow Chemical France, the company had participated effectively and individually in the conclusion, performance and termination of the contracts. Second, the counterparty did not object at any time to which company of the group was performing the obligations. Third, Dow Chemical France actively participated in the performance of the obligations. Fourth, Dow Chemical France and Dow Chemical Company had an important role in the termination of the contracts. Finally, the arbitration clause expressly accepted by some of the companies of the group must also bind the other companies of the group because of the role they had in the negotiation, performance and termination of the contracts and because their participation testified to their intention to be a party to the proceedings and accept the arbitration clause.

Based on the above arguments, the arbitral tribunal rejected the objection to

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jurisdiction over the claim brought by Dow Chemical Company and Dow Chemical France.

The Dow Chemical award was one of the first cases where the concept of group companies and the active participation in the performance of the contract of non-signatories were used to extend the scope of the arbitration agreement. In this case, the active participation in the performance of the obligations of the contract was used as an argument to derive implied consent to the arbitration agreement included in the contracts.

3. Good faith; protection of third parties

3.06 Good faith is a very broad term, at times related to a behavior in accordance with general moral principles, a reference to honesty, legal spirit.[32] In the context of contract relations it relates to some form of reliance on an erroneous assumption of the truth.[33] When applied to the extension of the arbitration jurisdiction, good faith implies respecting what others have relied on. Good faith, more than a single argument in favor of broadening the arbitral jurisdiction beyond the strict limits of an arbitration clause, is a condition that is added to try to satisfy a sense of justice or the legitimate expectations of a third party in a related contract. A criterion of good faith appears in a recent decision of the Appeals Court in Cairo (2011), which held that the arbitrator should take into consideration the protection of third parties from fraud or collusion or undue delay for insignificant reasons; since the Egyptian Arbitration Law did not regulate joining non-signatories to arbitration proceedings, the arbitrator was free to seek the solution best suited to the nature of the arbitration process and its requirement. Further, in an international dispute the interpretation of the applicable arbitration rules is different, since it relates to different cultures frameworks and legal consequences.[34] In lieu of an express provision of the

32) Denis Alland and Stéphane Rials, *Dictionnaire de la Culture Juridique,* Paris (2003), p. 143.
33) Alland and Rials, idem.
34) Cairo Court of Appeals Judgment No. 70 of 123, Seventh Commercial Circuit. March 9, 2011. Quoted in Fatma Salah, *Extension of Petroleum Arbitration Agreements.* Journal of International Arbitration. Vol.30. February 2013.

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Egyptian Arbitration Law, this decision refers to the general protection of third parties as an argument to extend the arbitration agreement to non-signatories.

Ⅳ. THE CASE OF SUBCONTRACTS

4.01 In many civil law countries, an example of the extension of the arbitration clause to multiple contracts is the case of subcontracts. A subcontract is used as a form of transferring the price and obligations contained in the main contract and reproducing them vis-à-vis the subcontractor without eliminating the original (main) contract. The subcontractor, in the case of works contracts[35], assumes part of the performance of the obligations that were included in the main contract. The subcontractor has a right to collect a price, which in turn comes from the main contract.

4.02 The subcontractor, at least in most civil law countries, has a direct action against the employer for the collection of amounts owed under the subcontract but up to the limit of the amounts in turn owed by the employer to the contractor. A direct action in most civil law countries is a reference to direct standing to sue the employer in the case of a subcontract for works. [36] The right

35) Works contract is a reference to contracts where a party undertakes the performance of transformation and construction of something, normally related to some form of construction of building, plant, or equipment. According to the Venezuelan Civil Code, Article 1630, a work contract or construction contract is that where a party agrees to perform a specific work by himself or under his direction for a price, which the other party agrees to pay. A similar provision is found in Article 1771 of the Peruvian Civil Code.

36) A direct action is a standing to bring an action in your own name, between parties that are not related or are not tied under a contract, without having the plaintiff the obligation to previously sue his direct debtor and when the plaintiff is acting in his own right *(in iure propio)* and not by substitution of his debtor, Miguel Pasquau Liaño, *La acción directa en el derecho español,* Madrid (1989), p. 20. In a similar sense, in Venezuela, Enrique La Roche, *La acción directa,* the direct action does not operate as a procedural substitution, but comes from the legitimate right of the plaintiff (proper standing) acting in defense of his own rights, Ricardo Enrique La Roche, *Código de Procedimiento Civil - Anotaciones,* Vol. I, Caracas (1995), p. 417. Pursuant to Article 1643 of the Venezuelan Civil Code, the workers of the construction of a building have a direct action against the employer up to the amount owed to the contractor. A similar provision is in the Panamanian Civil Code, Article 1349. The direct action, in the case of a subcontract, is justified on the existence of a strong link between the main contract and the subcontract. Pedro Romano Martinez, *O Subcontrato,* Coimbra (2006), §58, p. 172.

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of the subcontractor to sue the employer directly is further recognized by a decision of the Spanish Supreme Court in 1999, which extended the direct action that workers have against the employer pursuant to Article 1597 of the Spanish Civil Code to subcontractors.[37] In addition, the Spanish Supreme Court in 199 6[38] recognized the right of the employer to bring a direct action against the subcontractor for the destruction of the construction, if the subcontractor has contributed to the destruction. In Venezuela, the standing of the employer to sue the subcontractor comes from Article 1637 of the Civil Code, which establishes a ten years period of liability of the architect and the contractor for the destruction of the construction. Any other defect in the construction is also covered by this responsibility.[39]

4.03 The right to bring a direct action gives the subcontractor the possibility of enforcement of its rights that in fact arise from the main contract. Rights run together with their accessories including the right to enforcement, which materializes in the right to bring an action. One of the accessories tied to the right to bring an action is the right to claim the existence of an arbitration clause contained in the contract from which the action arises. If the main contract has an arbitration clause and the subcontract has none, because the subcontractor has a direct action against the employer and, the employer has a direct action against the subcontractor for improper performance, in our opinion the arbitration clause extends to the action brought by the subcontractor against the employer[40] or by the employer against the subcontractor. This right of a direct action can also be justified with an argument of implied consent in those cases

37) See Decision RJ 1999, N° 4115. Reported by Francisco Fernández Urzainqui, *Código Civil,* 10th Ed. Madrid (2011).

38) See Decision of January 30, 1996 (RJ 1996, N° 740) and decision of November 23, 1985 (RJ 1985 N°5634). Reported by Francisco Fernández Urzainqui, idem.

39) See Luis Corsi, *La responsabilidad decenal,* 2nd Ed. Caracas (1998).

40) There are opinions on the contrary. For example, Hanotiau quoting Bacache-Gibeili, M, states "… it is generally admitted that the fact that the owner has a direct action against the subcontractor does not justify the extension to the latter of the arbitration clause contained in the owner main contractor agreement". See Hanotiau, idem, § 471. However, Hanotiau does not take into consideration the fact that subcontracts have a strong link to the main contract. He is willing to accept the extension of the arbitration clause to other linked agreements but does not explain why the subcontract should not enjoy the same effect.

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where the subcontractor was aware of the existence of the arbitration clause in the main contract.

4.04 We note that we are looking at two different types of actions. When the subcontractor files a request for arbitration against the employer because of its right to bring a direct action against the employer, the subcontractor is recognizing its willingness to submit to arbitral jurisdiction. At this point, the employer had already agreed to submit to arbitral jurisdiction any actions arising out of the contract and these include the direct actions of any subcontractor. If the subcontractor has commenced the arbitration, it cannot bring as a defense the lack of jurisdiction of the arbitral tribunal. In turn, if it is the employer that commences an arbitration against the subcontractor, the problem of extension of the arbitration jurisdiction could come up as a defense, since the subcontractor would only be submitted to arbitral jurisdiction under an interpretation of the action (arbitration agreement) arising out of the main contract and not out of the subcontract, but the link of the subcontract to the main contract originates in the subcontract.

V. THIRD PARTY BENEFICIARIES[41)]

5.01 Many civil law countries recognize the possibility of conferring a right to a third party.[42)] In addition, the Unidroit Principles include a section that refers to third party rights (PIC, Articles 5.2.1 to 5.2.6).[43)] A stipulation in favor of a third party (*estipulación a favor de terceros*) or, as it is known in common law, a third party beneficiary contract[44)] is a contract whereby the promisor agrees with the stipulator (the other party or promisee) to perform an obligation

41) Some parts of this section are taken from James Otis Rodner, *Contratos Enlazados,* idem.

42) See Venezuelan Civil Code, Article 1164; French Civil Code, Article 1121; Italian Civil Code, Article 1411; Peruvian Civil Code, Articles 1457 to 1469; Panamanian Civil Code, Article 1108; Argentinean Civil Code, Article 1712.

43) See the integral version of the 2010 UNIDROIT Principles, available at: http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf (last visit on June 20, 2014).

44) A contract that directly benefits a third party and that gives the third party a right to sue any of the original contracting parties for breach. This definition was taken from Black's Law Dictionary. 7th Ed. (1999). p. 325.

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in favor of a beneficiary. The beneficiary is the third party claiming rights under the main contract.[45] In Venezuela and in other civil law countries, a stipulation in favor of a third party is a typical case of linked contracts if two agreements coexist: (i) the agreement between the promisee and the promisor (main agreement); and (ii) the agreement between the promisee and the beneficiary.

5.02 In Venezuela, a stipulation in favor of a third party must meet the following conditions. First, there must be a valid agreement between the promisee and the promisor. Second, the parties must have expressed their intention to make the third party (the beneficiary), the creditor of the obligation. That is, there must be a clear intention to confer a benefit to the third party. Third, the promisee must have an interest in the performance of the obligation by the promisor.[46]

In many civil law countries, a stipulation in favor of a third party cannot be revoked after the beneficiary declares that he wants to take advantage of it.[47] Similarly, Article 5.2.5 of the Unidroit Principles states that the parties may revoke or modify the rights conferred until the beneficiary accepts them or has acted reasonably in reliance of them. Reliance seems to be a form of implied consent based on some argument of good faith.[48] The commentary of Article 5.2.5 of the Unidroit Principles includes an example of the acceptance of the beneficiary through reliance in the right received. It refers to a contractor that takes out an insurance policy to cover the damages of the work in progress. The policy covers damages incurred by subcontractors. Subcontractors are informed of the contracted policy. If a subcontractor does not take up his own

45) A third party beneficiary is a person who, though not a party to a contract, stands to benefit from the contract's performance. This definition was taken from Black's Law Dictionary, idem. p. 149

46) See José Melich-Orsini, *Doctrina General del Contrato,* Academia de Ciencias Políticas y Sociales, 5th Ed., Caracas (2014), § 379. Also, pursuant to the Peruvian Civil Code, Article 1457, the promisee must have a personal interest in to enter into the contract in favor of the third party.

47) See Venezuelan Civil Code, Article 1164. Peruvian Civil Code, Articles 1458 and 1464.

48) The concept of reliance when referring to third party beneficiaries seems to be taken by the Unidroit Principles (PIC) from the *American Restatement of Contracts Second,* American Law Institute, Restatement 2nd, § 302. See also E. Allan Farnsworth, *Farnsworth on Contracts,* 4th Ed, New York (2004), § 10.3.

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policy, it is acting in reliance of the contractor's policy. Therefore, the subcontractor is accepting the stipulation and making it irrevocable.[49)]

5.03 A crucial element of a stipulation in favor of a third party is that the beneficiary has a direct action against the promisor for the enforcement of the promise.[50)] This right is derived from the contract between the promisee and the promisor. Thus, if the main agreement (between promisee and promisor) includes an arbitration clause then, in our opinion, the claim of the beneficiary against the promisor must be submitted to arbitration.[51)] Furthermore, one could interpret that when the beneficiary accepts the stipulation, it is also implicitly consenting to submit any dispute that may arise related to the contract to the resolution mechanism chosen by the parties in the promise. If the parties to the main contract (promisor and promisee) have chosen arbitration, then the beneficiary must submit his claim to arbitration. A dispute in the context of a stipulation in favor of a third party is a case of complex arbitration because there is a multiplicity of parties, i.e., promisee, promisor and beneficiary, and, potentially, multiple contracts (linked contracts).

5.04 In common law, the arguments for the extension of the arbitration agreement to third party beneficiaries appear to be different. In the United States, various decisions rely in the parties' intention to determine whether the third party beneficiary is bound by the arbitration agreement.[52)] A United States court

49) See comment to Article 5.2.5 in the integral version of the Unidroit Principles, idem.

50) Venezuelan Civil Code, Article 1164; Peruvian Civil Code, Article 1461.

51) The arbitrator must always take into account the wording of the arbitration clause to be able to decide to extend the arbitral jurisdiction. For arbitration in case of third party beneficiaries, see Roque Caivano and Verônica Sandler, *Arbitraje y estipulación a favor de terceros bajo el derecho peruano.* Available at: http://www.forseti.pe/sites/default/files/9_0.pdf (last visit on June 22, 2014), p.9. When the beneficiary accepts the substantive right created by promisor and promisee in his favor, he accepts it as it is, with the mechanism to exercise the corresponding action established in the contract. If the contract has an arbitration clause, the action must be exercised through arbitration.

52) See Gary Born, International Commercial Arbitration, idem, p. 1457 quoting a decision that concluded that under the third party beneficiary theory a court must look to the intention of the parties at the time the contract was executed. See also Hanotiau, B., *Complex Arbitrations. Multiparty, Multicontract, Multi-issue and Class Actions,* idem, p. 15.

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decision (Georgia) in the case Hugh Collins v. International Dairy Queen, Inc. (1998) decided that third party beneficiaries are not beneficiaries of the arbitration clause contained in the contract. This decision was based on the limited scope of the wording of the arbitration clause that was not intended to cover the third party beneficiary.[53] Further, a recent award has accepted that third party beneficiaries are bound by the arbitration agreement included in the contract from which they benefit. The award stated that "it is generally accepted that if the third party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such a third party is also bound by the arbitration clause or arbitration agreement, even if it did not sign it."[54] In England, the solution is established in the Contracts (Rights of Third Party) Act 1999 that states that if the arbitration agreement is in writing for the purposes of the Act, a third party shall be treated as a party to the arbitration agreement regarding the disputes between himself and the promisor relating to the enforcement of a substantive term of the contract (Contracts (Rights of Third Party) Act 1999, section 8).

Ⅵ. STANDARD TERMS OF CONTRACTS[55]

6.01 Standard or general terms of contracts are a set of terms and clauses that can be applied to particular agreements. Similar to standard terms of contracts are framework contracts (*contratos base*)[56] and standard form contracts.[57] Framework contracts include general terms and conditions presented

53) See Hanotiau, idem, p. 16 case reported in 2F.Supp.2nd p. 1465, MD. Ga. 1998. The wording of the arbitration clause of the main contract limited the scope of it to the parties of the main contract (disputes between "Territory Operator" and "Licensee").

54) See Born, idem. p. 1456, quoting the ICC Final award in case No. 9762 (2001). This decision is also reported in *Collection of ICC Arbitral Awards,* Vol. V, p. 180.

55) Parts of this section are taken from Rodner, James, *Los Contratos Enlazados,* idem, § 3.20 and § 4.120.

56) In French doctrine known as *contrat cadre.*

57) These are defined as preprinted contracts containing set clauses, used repeatedly by a business or with a particular industry with only slight additions or modifications to meet the specific situation. Definition of standard-form contract taken from Black's Law Dictionary, idem, p. 325. Arbitration clauses contained in standard-form contracts may raise special issues of validity, depending on the applicable national law. See Born, idem, p. 893-894.

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as a structure for future contracts (implementation contracts). Usually, these contracts contain conditions that are imposed by a party on the other party through what is known as adhesion contracts.[58] There are different examples of standard terms of contracts and framework contracts in international commercial practice. One of them is the International Federation of Consulting Engineers (Fédération International des Ingénieurs Conseils-FIDIC) Conditions of Contract. The FIDIC Conditions of Contract include terms for Construction Contracts, Plant and Design-Build and Engineering, Procurement and Constructions (EPC) Turn Key Contracts.[59] Another example is the International Swaps and Derivatives Association (ISDA) master agreement.[60] This master agreement has two formats. The first format is a base contract, which is ready to be adopted by the parties. It includes all the terms of the obligations of the parties. The second format includes a set of definitions that can be adopted and applied to a specific contract.[61]

6.02 If the standard terms of contract or the framework contract contain an arbitration clause that expressly states that it is applicable to the particular agreements and the parties of the main contract and the specific contracts are the same, then they can submit their controversies to arbitration. Problems arise when the main agreement or standard conditions of contract do not state that the arbitration clause must be applied to the particular agreements or when the parties to the contracts are different. In ICC case number 8708 of 1997 (see *ante,* section 2.03) there was a framework, principal or main contract called Protocol signed by three companies. The arbitral tribunal held that it had jurisdiction and extended the arbitration clause included in the framework agreement to the disputes that could arise from any of the contracts included in the transaction (the framework contract and the six implementation agreements including the

58) An adhesion contract is a standard-form contract prepared by one party, to be signed by the party in weaker position, usually a consumer, who has little choice about the terms, Black's Law Dictionary, idem, p. 319

59) For more information please visit: http://fidic.org

60) For more information please visit: http://www2.isda.org

61) The usual base contract is the ISDA 2002 Master Agreement and the particular contracts are named confirmations.

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one without arbitration clause).[62]

6.03 An arbitration clause included in the standard terms of contracts can be incorporated by reference to those terms in a particular agreement.[63] For example, the FIDIC Conditions of Contract include an arbitration clause.[64] If a particular contract makes reference to the application of the FIDIC Conditions of Contract, then the arbitration agreement included in such conditions may also be incorporated by reference in the particular contract. Therefore, a party to a contract that on the face of it does not include an arbitration clause can submit a controversy to arbitration taking advantage of the arbitration agreement of the standard terms of contract.

In an interim award of the Netherlands Arbitration Institute ("NAI") dated February 10, 2005, a sole arbitrator held that it had jurisdiction to decide a dispute between a seller and buyer that entered into several sale contracts without arbitration clauses. The dispute arose because the buyer refused to pay under the last three contracts claiming defects on the goods. The decision of the arbitrator was based on the arbitration agreement included in the seller's general

62) Hanotiau, idem. p. 120-121. The *UNCITRAL 2012 Digest of Case Law on the Model Arbitration Law* in the case law of Article 34(2)(a)(i), specifically in awards against non-signatory, explains that arbitration agreements contained in framework agreements were extended to disputes arising out of related contracts. As an example, the Digest quotes a case of the Hungarian Supreme Court. The Hungarian Supreme Court refused to set aside an award dealing with a dispute arising from a contract where the underlying asset management contract contained a broadly worded arbitration clause.

63) Uncitral Model Law, Article 7(6) (Option I). "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract". "Incorporation by reference is related to whether an arbitration clause contained in standard conditions or in a document or contract other than the main contract concluded between the parties binds the latter or third parties or permits bringing all the parties of these agreements to the same arbitral proceeding", Hanotiau, idem, p. 29. The author also explains that incorporation by reference seems to be generally accepted by statute or case law in Western European countries. The requirement of the arbitration clause to be in writing have been interpreted by most courts in a more relaxed fashion. According to the PAL, Article 15, arbitration clauses referred to agreements in general terms of contracts or adhesion contracts, would only be enforceable if the other party knows or could have known about the existence of the arbitration clause.

64) Clause 20.6 of the FIDIC Conditions of Contract for Construction Plant and Design-Build and Engineering, Procurement and Constructions Turn Key Contracts. *See FIDIC Contracts Guide,* 1st Ed., Lausanne (2000).

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terms of contract. The general course of business was that the buyer placed an order. The seller sent a confirmation of order followed by an invoice after the delivery of the goods. The buyer returned the confirmation of order signed. The confirmation of order and the invoices included a clear reference to the seller's general conditions of contract. Also, in the confirmation of order the seller's general conditions were printed on the reverse. The general conditions provided for arbitration pursuant the rules of the NAI. The sole arbitrator concluded that when the buyer did not inform the seller that it did not accept the general conditions, it created an expectation that it did agree with the application of the general conditions. This conduct of the buyer in light of the good faith principle entails that the seller may have relied on the signature of the buyer on the confirmations and on its conduct to imply acceptance to the general conditions and thus to the arbitration clause.[65] This decision mixes implied consent and good faith to incorporate the arbitration agreement in the general conditions to several contracts without arbitration clause.

Ⅶ. MIXES APPROACH; THE PERUVIAN ARBITRATION LAW

7.01 Article 14 of the 2008 Peruvian Arbitration Law[66] includes a provision that is an innovation in arbitration laws in Latin America. In fact, Article 14 extends the arbitration agreement to parties that did not sign it but have expressed their consent to be bound by it through other means. Although many laws around the world have eliminated the requirement of signature in the arbitration agreement[67], this provision goes a bit further and establishes new ways of expressing consent to submit to arbitration. We refer to new means of

65) *Yearbook Commercial Arbitration,* Volume XXXII, Kluwer Law International BV, The Netherlands (2007). p. 93-106.

66) Decree Law N° 1071 published on June 28, 2008. The complete text of the Peruvian Arbitration Law is available online at: http://www.peruarbitraje.org/pdf/revista/REVISTA_PERUANA_DE_ARBITRAJE_RPA_7_2008.pdf (last visit on June 12, 2014).

67) Jean Marguerat, *Extensión de la cláusula arbitral a terceros no firmantes* in "Arbitraje Comercial Internacional en Europa", Lima (2013), p. 100. Available online in: http://www.castillofreyre.com/archivos/pdfs/vol22.pdf (last visit on June 11, 2014). The author states that most countries in Europe, with the exception of Germany, have eliminated the requirement of signature of the arbitration clause.

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expressing consent because in contract law consent of a party comes from the acceptance of an offer. Such acceptance is expressed by the execution of a contract. The same principle applies to commercial arbitration. Therefore, consent to arbitration is usually expressed through the execution of the arbitration clause or the contract where such clause is included.

The concept of extension of the arbitration clause to parties and contracts is not foreign to international commercial arbitration. Since the case Dow Chemical v. Isover Saint Gobain (see *ante*, section 3.05), several arbitral awards have used different foundations to extend the arbitration agreement to parties that did not sign it and to related contracts that do not have one. Also, numerous articles have been written on the subject. Nevertheless, today no other arbitration law in Latin America regulates this possibility as the Peruvian Arbitration Law does, not even the recently enacted Panamanian Arbitration Act of 2014.[68] Further, the Uncitral Model Law does not contain a similar provision.[69]

7.02 Article 14 of the Peruvian Arbitration Law is related to Article 13. This article was modified from the previous PAL. It refers to the form and content of the arbitration agreement. It states that the arbitration agreement must be in writing but expands the definition of written arbitration agreement. Further, according to PAL the arbitration agreement is in writing when its contents are recorded in any form, be it the arbitration agreement or contract concluded by executing certain actions or by any other means (PAL, Article 13). Pursuant to this provision, the requirement of written form is only for the purposes of proving the existence of the agreement. This article is taken from the Uncitral Model Law, Article 7, Option I.[70] This option of the Uncitral Model Law no longer requires the signature of the parties in the arbitration agreement.[71]

68) Law N° 131 of December 31, 2013 published in Official Gazette No. 27449-C of January 8, 2014. Also, the 2012 Colombian Law on Arbitration (Law Nº 1563 of July 12, 2012) does not include a similar provision.

69) The Uncitral Model Law amended in 2006 eliminated the requirement of signature of the arbitration agreement. See *Uncitral Model Law of International Commercial Arbitration,* available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visit on June 13, 2014).

70) Carlos Soto Coaguila, Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* Vol. I, Instituto Peruano de Arbitraje, Lima (2011). p. 169.

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When Article 13 states that the arbitration agreement or contract can be concluded "by executing certain actions or by any other means", it is recognizing the possibility of entering into the arbitration agreement orally or by conduct, paving the way for Article 14 which uses conduct to derive the consent of non-signatories to submit to an existing arbitration clause.

PAL is applicable when the place of arbitration is Peru. Furthermore, Articles 13 and 14 of the PAL are also applicable when the place of arbitration is not Peru, but a judicial procedure related to the matter submitted to arbitration has been initiated before a Peruvian Court (PAL, Article 1)[72].

7.03 Article 14 of the Peruvian Arbitration Law expressly provides: "The arbitration agreement extends to those whose consent to submit to arbitration, according to good faith, is determined from their active and decisive participation in the negotiation, performance or termination of the contract that includes the arbitration agreement or to which the arbitration agreement relates. It also extends to those who pretend to derive rights or benefits from the contract, according to its conditions."[73]

Peruvian authors stress that this provision of the Peruvian Arbitration Law (PAL, Article 14) refers to an extension of the agreement to arbitrate to non-signatory parties. The Peruvian Arbitration Law does not permit the inclusion of third parties to the arbitration. On the contrary, the arbitration clause extends to those that are parties (referring to those that have expressed their consent to be bound by the arbitration clause) to the arbitration agreement but have not signed it.[74] The traditional consent (express consent through the execution of the arbitration agreement or the contract where it is included) does

71) Explanatory Note of the Uncitral Model Law of International Commercial Arbitration, available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (last visit on June 21, 2014).

72) Carlos Soto Coaguila, Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* ídem, p. 6.

73) Translation for informational purposes. Peruvian Arbitration Law, Article 14. Text taken from Carlos Soto Coaguila, Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* ídem p. 200-201.

74) See Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* ídem, Article 14, p. 202.

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not occur but a form of implied consent is always necessary.[75] Thus, consent to submit to arbitration continues to be the cornerstone of this institution.

7.04 According to Article 14 of PAL, non-signatory parties can express their consent to arbitrate through:

(1) The active and decisive participation of the non-signatory party in any of the stages of the contract that contains the arbitration clause or in the contract to which the arbitration clause relates. The participation must be interpreted according to the good faith principle. This form of expressing consent relies on the behavior of the non-signatory party to the arbitration clause. He must have some kind of participation in the contract that would make it possible to be bound by the arbitration clause. Under the provision, not any type of participation is enough to be able to imply consent to submit to arbitration. The participation in the contract must be relevant. That is why the law refers to an active and decisive participation. How do arbitrators decide what decisive participation is? In international awards the most common argument for the extension of the arbitration agreement using conduct as a form of consent seems to be when a non-signatory party participates in the performance or negotiation of the contract.

On the other hand, according to Article 14, the decisive participation of the non-signatory party must be interpreted using the good faith principle. It is difficult to define what good faith is. Good faith in the performance of a contract refers to a general duty of loyalty and cooperation that parties must have when performing their obligations. In this context, good faith is related to the expectations of the parties. The participation of a non-signatory in the negotiation, performance or termination of a contract creates an expectation in the other party of being bound by the provisions of such contract. It would be against the good faith principle to fail to fulfill the other party's expectations.

75) See Pablo Mori Bregante and Giuseppe Galluccio Tonder, *Aplicación del Artículo 14 de la Ley Peruana de Arbitraje al Caso de los Grupo de Sociedades.* Anuario Latinoamericano de Arbitraje, *Aplicación del Convenio Arbitral a Partes No Signatarias. Intervención de Terceros en el Arbitraje.* Lima (2012), p. 234-235.

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(2) Deriving rights of benefits from the contract: The typical example of a contract from which a third party derives benefits is a stipulation in favor of a third party which is explained above (see *ante*, sections 5.01 to 5.04). According to Article 14, he who expects to receive benefits from a contract to which he is not a party is bound by the arbitration agreement contained in such contract. This provision makes the "third party" to whom the benefit is conferred a "non-signatory party" of the arbitration agreement. Here, consent is not only extending the arbitration agreement to the non-signatory party but also to the linked contract between the beneficiary and the promisee or stipulator (if any). It is important to point out that the provision refers to "expects" to derive benefits of a contract. It does not matter if the existence of the right conferred to the third party is in dispute. Pursuant to Article 14, simply by expecting to derive benefits from a contract, the beneficiary has the right to submit any claim to arbitration based on the arbitration clause included in the contract between promisee and promisor.[76)]

7.05 The good faith principle is used in PAL to interpret the scope of participation in the contract of the non-signatory party from which consent is intended to be derived.[77)] From the text of the article there seem to be two standards to extend the arbitration clause to non-signatory parties: a subjective standard that mixes participation in the contract and good faith and an objective standard based on the possibility of deriving benefits of a contract. On the other hand, some authors imply that good faith should not only be used to interpret the participation of the non-signatory party but also for the case of deriving benefits of a contract. For example, one author states that if a third party beneficiary takes advantage of the benefits of a contract, taking into account the good faith principle, he must also be bound by the obligations of the agreement.[78)] Another author explains that good faith must be the cornerstone of

76) See Roque Caivano and Verónica Sandler, *Arbitraje y estipulación a favor de terceros bajo el derecho peruano.* Available at: http://www.forseti.pe/sites/default/files/9_0.pdf (last visit on June 22, 2014).

77) According to Alfredo Bullard González in *Comentarios a la Ley Peruana de Arbitraje,* idem, p. 213. "The interpretation regarding to the existence of consent must be done pursuant to the rules of good faith".

78) Idem, p. 214.

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extension of the arbitration clause in both cases (participation in contract and deriving benefits) in order to avoid the arbitrary extension of the arbitration clause to third parties.[79] For the latter, the reference to good faith in Article 14 is related to the concept of *doctrina de los actos propios* or what is known in common law as *estoppel* (see *ante*, section 1.04). This concept requires consistency in the parties' behavior to the point of repudiating acts that contradict prior acts of a party that created the expectation of compliance with the contract.[80] Therefore, taking into account the good faith principle, if a non-signatory party participates decisively in any of the stages of a contract, it cannot later deny its consent to the arbitration clause contained in such contract. Further, if a beneficiary expects to derive a right from a contract, it is bound by the dispute mechanism clause contain in said contract. Finally, the inclusion of good faith in Article 14 of the PAL leaves the door open for arbitrators to use other expressions of consent to extend the arbitration clause to non-signatory parties or to related contracts.[81]

7.06 We refer to this provision (PAL, Article 14) as a mixed approach since the Peruvian Arbitration Law requires two elements to arrive at implied consent. These are: (i) there must be a decisive participation in the contract or the intent of deriving benefits from it, and (ii) the interpretation of the conduct of the non-signatory party must be made in light of the good faith principle. There is some ambiguity in the law as to the extent of the scope of good faith. However, it seems to be a way of ensuring that the non-signatory party that participated in the contract does not later go back and deny the consequences of its conduct. Taking into account good faith, one could conclude from the

79) See Jorge Satistevan, *Extensión del Convenio Arbitral a Partes No-Signatarias: Expresión de la inevitabilidad del arbitraje,* Revista Peruana de Arbitraje, Vol. 8 (2008). Available online at: http://www.peruarbitraje.org/pdf/revista/REVISTA_PERUANA_DE_ARBITRAJE_RPA_8_2009.pdf (last visit on June 23, 2014). p. 44.

80) See Jorge Satistevan, *Extensión del Convenio Arbitral a Partes No-Signatarias: Expresión de la inevitabilidad del arbitraje,* idem, p. 45.

81) See Alfredo Bullard González, *Comentarios a la Ley Peruana de Arbitraje,* idem, p. 213. The author explains that "good faith" was included in the text of the project of law at the last moment to make the article suitable to adapt to new situations that in the future could be relevant to derive consent.

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Peruvian Arbitration Law that when there is an active participation in the contract but the non-signatory party expressly states that it does not want to be bound by the arbitration clause, then the arbitral tribunal cannot extend its jurisdiction to that particular party.

7.07 PAL, by defining the criteria that must be used to determine jurisdiction in the case of complex arbitration (PAL, Article 14), grants the tribunal a defined power to decide if it will broaden its jurisdiction to cover additional contracts and/or additional parties into the procedure. In Peru, following the principle of *kompetenz-kompetenz* (see ante, section 1.06), the tribunal is the only one competent to decide on its jurisdiction (PAL, Article 41(1)). Article 14 of the PAL defines the scope of this power when used to broaden jurisdiction in complex arbitrations[82]. Modern commerce is no longer the result of single contracts and simple relations, but rather it is reflected in complex structures with multiple agreements and parties participating. Peru recognizes this and shows a possible route to take.

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82) PAL, Article 14, in fact orders the tribunal to extend its jurisdiction, by developing the rules to determine implied consent. This in effect gives the tribunal, by virtue of Article 41 of PAL, the tools to decide if it will extend jurisdiction.

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FIVE RECURRING PROBLEMS IN INTERNATIONAL ARBITRATION: THE RELATIONSHIP BETWEEN COURTS AND ARBITRAL TRIBUNALS

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Abstract

In recent years, five recurring problems regarding the relationship between courts and tribunals have gained prominence due to case law developments. These run the gamut from preliminary issues with the arbitration agreement to disputes at the enforcement stage. This article examines these problems in detail, with a view to shed new light on the question of what it means for a jurisdiction to be "pro-arbitration". The authors argue that the oft-repeated binary categorisation of "pro-arbitration" and "anti-arbitration" jurisdictions is too broad-brush. Instead, there is no easy answer to what constitutes a truly "pro-arbitration" approach, and no one-size-fits-all approach to being a "pro-arbitration" jurisdiction.

I. Introduction

The relationship between national courts and arbitral tribunals is an evergreen topic that has generated much discussion.[1] In this article, we take a closer look at five recurring problems that have gained fresh currency due to case law developments from various jurisdictions. *First*, when can parties appeal from a tribunal's decision to a court (or vice versa), or to another tribunal? *Second*, how does the availability of court review of the tribunal's jurisdiction under Article 16(3)[2] of the UNCITRAL Model Law ["**Model Law**"] affect the availability of other avenues to challenge the tribunal's jurisdiction, such as setting-aside proceedings under Article 34 or enforcement proceedings under Article 36? *Third*, what can a party do when it is on the receiving end of a foreign judgment, when it would prefer to arbitrate the dispute or enforce an award? *Fourth*, when, if ever, should awards annulled at the seat be enforced by the national courts of another jurisdiction, under Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**NYC**"]? *Fifth*, when can enforcement be refused under Article V(1)(d) of the NYC? By examining the approaches to these five specific problems, some insight can be gained into the overarching question of whether there is truly a dichotomy between jurisdictions that are "*pro-arbitration*" and "*anti-arbitration*."

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1 *See, e.g.*, Elizabeth Gloster, *Symbiosis or Sadomasochism? The relationship between the courts and arbitration*, 34(3) ARB. INT'L 321 (2018); Emmanuel Gaillard, *Coordination or chaos: Do the principles of comity, lis pendens, and res judicata apply to international arbitration?*, 29(3) AM. REV. INT'L L. 205 (2019).

2 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration art. 16(3), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "Model Law"].

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II. Problem 1: Exploring the Possibility of Appeals to and from Arbitral Tribunals

In arbitration, as parties have made their bed, so they must lie in it. Those who opt for arbitration "*must live with the decision of the arbitrator, good or bad. Commercial parties appoint arbitrators for their expertise and experience – technical, legal, commercial or otherwise.*"[3] This part of the article examines the ways that parties may get around the notion of "no merits review"[4] of an award, and conversely, whether arbitration may provide additional recourse when parties are unhappy with the result of litigation.

A. Appealing against an Arbitral Award

The questions for consideration are – *first*, what are the circumstances in which a national court will entertain an appeal on the merits against an arbitral award, and *second*, whether parties can agree to an appeal mechanism from one tribunal to another.

B. Appeals to a National Court

International arbitration awards cannot generally be judicially reviewed on the merits.[5] Parties are entitled to a fair decision, but not necessarily a correct one.[6] However, there is at least one well-established exception that parties should pay attention to: appealing an arbitration award on a point of law. While not contemplated by the Model Law, this is an option under Section 69 of the English Arbitration Act 1996 ["**UKAA**"],[7] and items 5 and 6 of Schedule 2 to the Hong Kong Arbitration Ordinance ["**HKAO**"].[8] Singapore is also considering the amendment of its international arbitration statute to allow appeals on points of law on similar grounds.[9]

Provisions allowing for appeals on points of law serve the public interest in re-introducing important questions of law to be decided by the courts, rather than behind closed doors in arbitration.[10] The approaches under the statutes mentioned are broadly similar, with parties being permitted to appeal to the court only on a question of law arising out of an award. An appeal may not be brought unless all parties agree, or with the leave of the court. If leave is sought, the test requires, amongst others, that "*the decision of the tribunal be obviously wrong or the question is one of general public importance and the tribunal's decision is at least open to serious doubt*".[11] The main difference is that the HKAO distinguishes between domestic and international arbitration, with automatic opt-in to

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3 TMM Division Maritima SA de CV v. Pacific Richfield Marine Pte Ltd., [2013] 4 SLR. 972, ¶ 65 (Sing.).

4 Generally, the substantive merits of the decision rendered an arbitral tribunal cannot be reviewed by a court or any other tribunal.

5 Jessica L. Gelander, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80(2) MARQ. L. REV. 625, 627 (1997).

6 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3170 (2d ed. 2014) [*hereinafter* "BORN"].

7 Arbitration Act, 1996, c. 6, § 69 (Eng.) provides that "Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section." [*hereinafter* "UKAA"].

8 Arbitration Ordinance, (2011) Cap. 609, sch. 2, items 5, 6 (H.K.) [*hereinafter* "Hong Kong Arbitration Ordinance"].

9 Sebastian Perry, *Singapore considers allowing appeals on questions of law* (Apr. 15, 2019), GLOBAL ARB. REV., *available at* https://globalarbitrationreview.com/article/1190225/singapore-considers-allowing-appeals-on-questions-of-law. This procedure is already available in domestic arbitration, where the right to appeal applies unless excluded by parties. The proposed amendment in international arbitration would apply on an opt-in basis.

10 The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales Lord, The Bailii Lecture 2016, ¶ 23 (Mar. 9, 2016), *available at* https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf.

11 Hong Kong Arbitration Ordinance, sch. 5, item 4(c); UKAA, § 69(3)(c).

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items 5–6 of Schedule 2 available only for domestic arbitration.[12] The HKAO also provides for deeming provisions in subcontracting cases if the opt-in provisions apply to the head contract.[13]

Parties who wish to appeal under this route should note the following practical points:

First, the key determinant would be the selection of the seat, i.e., the *lex arbitri*. Only if the relevant statute contemplates appeals to a national court on a point of law will such a right of recourse be countenanced.

Second, the preconditions for invoking this right of appeal must be considered. For instance, a party may be required to exhaust all available arbitral processes of review and any available recourse under national law (for e.g., "*correction of award or additional award*").[14] They should also be mindful of any inadvertent waivers, such as by agreeing to dispense with the reasons for a tribunal's award (which stands to reason, as a court cannot be expected to scrutinise a non-speaking award).[15] Logically, the appeal mechanism would also not be available if parties agree that the tribunal may decide *ex aequo et bono* (from equity and conscience), because there simply would be no question of law for the court to determine.

Third, the parties must consider whether the appeal mechanism applies on an opt-in or opt-out basis,[16] and if the former, it ought to be clarified at which stage the agreement should be made. It may be worthwhile including an opt-in provision at the outset in drafting the arbitration agreement, or at the latest, before the award is rendered, to avoid the need to obtain leave of court. Parties seeking to appeal against an arbitral award on a point of law, without the other party's consent, face an uphill task due to the stringent requirements of the test for grant of leave. The numbers speak for themselves: In 2017, 56 applications for leave were brought under Section 69 of the UKAA, permission for leave was granted in ten cases, and only one case was successful (which was a significant improvement from the previous year!).[17]

C. Appeals to an Appellate Arbitral Tribunal

Given the narrow circumstances in which appeals to national courts may be made on the merits, an alternative would be to include an appellate arbitration clause. Such clauses permit the parties, if dissatisfied with the decision of a first arbitral tribunal, to appeal to another tribunal.[18] Appellate arbitration clauses can take various forms, such as a two-tier arbitration clause where parties assemble their own preferred appeal mechanism. An example of this is the clause in *Centrotrade*:[19]

12 Hong Kong Arbitration Ordinance, § 100.

13 *Id.* § 101.

14 UKAA, § 70(2).

15 *See id.* § 69(1).

16 In opt-in cases, the appeal mechanism is available only if parties so provide in their arbitration agreement (as would be the case under the proposed amendments to Singapore's International Arbitration Act). In opt-out cases, the appeal mechanism is available by default, unless parties contract out. *See id.* § 69(1).

17 Commercial Court Users' Group, *Meeting Report* 1 (Mar. 13, 2018), *available at* https://www.judiciary.uk/wp-content/uploads/2018/04/commercial-court-users-group-report.pdf.

18 Prachi Aggarwal, *Multi-tier Arbitration Clauses*, RMLNLU L. REV. BLOG (Oct. 25, 2017), *available at* https://rmlnlulawreview.com/2017/10/25/multi-tier-arbitration-clauses/; Gracious Timothy Dunna, *Supreme Court in Centrotrade 2016: Too Quick to Nod at the Validity of the Two-Tier Arbitration Clause?*, 14(1) ASIAN INT'L ARB. J. 58 (2018).

19 M/s Centrotrade Minerals and Metals Inc v. Hindustan Copper Ltd., (2017) 2 SCC 228, ¶ 3 (India) [*hereinafter* "Centrotrade II"].

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> *"Arbitration – All disputes or differences whatsoever arising between the parties […] shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration[…]*
>
> *If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce[.]*"[20]

Alternatively, parties may incorporate in their arbitration agreement an institutional arbitration procedure, such as those offered by the International Institute for Conflict Prevention and Resolution, 2007 ["**CPR Appeal Procedure**"], the Judicial Arbitration and Mediation Services Comprehensive Arbitration Rules and Procedure, 2014 ["**JAMS Appeal Procedure**"], or the American Arbitration Association Appellate Arbitration Rules, 2013 ["**AAA Appeal Procedure**"].

i. Validity of Appellate Arbitration Clauses

A preliminary issue is whether such clauses will be regarded as valid by national courts, and if so, for what purposes. The Supreme Court of India recently held in the affirmative when it had to occasion to consider the question in *Centrotrade Minerals and Metals Inc* v. *Hindustan Copper Ltd.*[21] ["**Centrotrade (II)**"]. The decision is significant because the Indian Arbitration and Conciliation Act, 1996 ["**ACA**"] is based on the provisions of the Model Law.[22]

In *Centrotrade (II)*, the appellate arbitration clause was in the form provided as an example above. The court rejected the submission that the latter part of the clause which set out the appellate mechanism, was contrary to Indian law. *First*, the court disagreed that the right to file an appeal can only be created by statute and not by an agreement between the parties. That holds true for litigation, but not non-statutory appeals that can be dealt with without resorting to court processes.[23] *Second*, the validity of appellate arbitration clauses is supported by background materials such as the Explanatory Note by the UNCITRAL Secretariat on the Model Law and the Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General ["**Analytical Commentary**"]. *Third*, the principle of party autonomy supports the acceptance of appellate arbitration clauses.[24]

The clause in *Centrotrade (II)* was upheld even though it provided for arbitration under the rules of the Indian Council of Arbitration ["**ICA**"] in the first instance, and International Chamber of Commerce ["**ICC**"] arbitration on appeal. But such "Frankenstein" clauses[25] are not always workable, especially where parties incorporate an institutional arbitration procedure. For instance, the JAMS Appeal Procedure only applies to awards that have been rendered under the JAMS

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20 Shivansh Jolly, *Supreme Court of India Upholds Validity of Appellate Arbitration Clauses*, KLUWER ARB. BLOG (Feb. 16, 2017) *available at* http://arbitrationblog.kluwerarbitration.com/2017/02/16/supreme-court-india-upholds-validity-appellate-arbitration-clauses.

21 Centrotrade II, (2017) 2 SCC 228.

22 Arbitration and Conciliation Act, No. 26 of 1996, pmbl. (India) [*hereinafter* "Indian Arbitration Act"].

23 Centrotrade II, (2017) 2 SCC 228, ¶ 14.

24 *Id.* ¶ 40.

25 So-called because they are assembled of a mish-mash of parts and may not function as envisaged, much like the eponymous monster.

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Arbitration Rules.[26] The CPR Appeal Procedure applies to "*any binding arbitration conducted in the United States, pursuant to the CPR Rules for Non-Administered Arbitration or the CPR Administered Arbitration Rules […] or otherwise.*"[27] What happens if the first-tier clause is valid but the appellate mechanism is not?

One would imagine that the courts, by applying the principle of effective interpretation, will adopt a very forgiving approach and uphold at least the first-tier arbitration clause once they find an intention to arbitrate – recall *Lucky-Goldstar Ltd.* v. *Ng Moo Kee Engineering*,[28] where the clause referred to non-existent rules of arbitration, and there was uncertainty as to the arbitral institution and place of arbitration. In this case, it was held that the clause was not "*inoperative or incapable of being performed*" and that the intention of the parties to arbitrate was clear. A counter argument would be that parties had intended to arbitrate *conditional upon* having the right to appeal to an appellate tribunal, and the lack of the latter makes the clause unworkable. However, such an argument is unlikely to succeed: if courts are willing to accept even "*bare*" arbitration clauses,[29] (as they have in certain pro-arbitration jurisdictions),[30] there is no reason why they would not do the same when only the appellate portion of the clause is in doubt. Hence, it is quite likely that appellate arbitration clauses will be found workable regardless of their form, even if they are contrary to specific institutional appellate arbitration procedures.

But that begs a logically prior question. Assuming that the first-instance arbitration is seated in country 'X', the appellate arbitration in country 'Y', and the substantive law of the contract is that of country 'Z', which law determines whether the arbitration agreement is valid? The threshold issue is whether the *Sulamerica* approach[31] applies, i.e., where the arbitration agreement forms part of the main contract, parties are presumed to have intended the same law to govern both the underlying contract and the arbitration agreement.[32] If so, the law governing the arbitration agreement is that of country Z. However, the *Sulamerica* approach is not universally adopted, and an alternative approach is to apply the law of the seat to assess the validity of an arbitration agreement.[33] The latter approach, however, would pose another problem: *which* seat's laws would be relevant – those of country X (where the first-instance arbitration is seated) or Y (where appellate arbitration is seated)? The better view is that it would be the law of the country where the first-instance arbitration is seated, i.e., country X. The contrary view entails some circularity because country Y would only be the seat *if* the clause were valid and encompassed the possibility of an appellate arbitration, but the very question here is whether that clause is valid. But what if

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26 Theodore K. Cheng, *Merits-Based Review of Arbitration Awards: A Potentially "Appealing" Option*, 22(2) N.Y. STUDENT BAR ASS'N NY LITIGATOR 21, 22 (2017).

27 International Institute for Conflict Prevention and Resolution [CPR] Appellate Arbitration Procedure, r. 1.1, 2015.

28 Lucky-Goldstar Int'l (H.K.) Ltd. v. Ng Moo Kee Eng'g, [1993] 2 H.K.L.R. 73C. (H.C.) (H.K.).

29 Bare arbitration clauses do not mention the place of arbitration nor the means of appointing arbitrators. Darius Chan, *How Should "Bare" Arbitration Clauses Be Enforced by the Courts?*, KLUWER ARB. BLOG (Apr. 11, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/04/11/how-should-bare-arbitration-clauses-be-enforced-by-the-courts/.

30 *See, e.g.*, KVC Rice Intertrade Co. Ltd. v. Asian Mineral Res. Pte Ltd., [2017] 32 S.G.H.C. 43–48 (Sing.).

31 Sulamerica CIA Nacional de Seguros S.A. v. Enesa Engenharia S.A. [2012] EWCA Civ. 638 (Eng.).

32 Ashurst, *Which law governs the arbitration agreement: the law of the seat or the underlying contract*? (Feb. 7, 2017), *available at* https://www.ashurst.com/en/news-and-insights/legal-updates/which-law-governs-the-arbitration-agreement-the-law-of-the-seat-or-the-underlying-contract/.

33 *See, e.g.*, FirstLink Inv. Corp. Ltd. v. GT Payment Pte Ltd., [2014] SGHCR. 12 (Sing.); *Cf.* BCY v. BCZ, [2017] 3 SLR 357 (Sing.).

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the arbitration agreement is valid only under the laws of country Y? This might be resolved by applying the validation principle, which is that the validity of an arbitration clause will be upheld if it is valid under *any* of the potentially applicable laws (here, any of countries X, Y, or Z), even if it is invalid under all the other potentially applicable laws.[34] All things considered, courts are likely to uphold the validity of appellate arbitration clauses.

ii. Practical Considerations in Deciding whether to agree to Appellate Arbitration Clauses

Deciding on whether to agree to appellate arbitration clauses involves weighing various considerations. Without such a clause there might be greater speed and finality in the arbitral process,[35] but parties would have to live with the outcome, unless the award can be challenged on due process or other grounds. On the other hand, the security of having a right of appeal against the award might be the very reason why parties accept a one-member tribunal for disputes that might have otherwise warranted a three-member tribunal, thus leading to time and cost savings.[36] Speed and finality are also not a given, if the counterparty tries to set aside the award or plays cat-and-mouse with enforcement.[37] Determining whether to include such clauses would, therefore, require careful gauging of the counterparty's track record, the state of the parties' relationship, and other relevant indicia.

We also highlight the following practical considerations:

First, parties should note that institutional rules chosen by them might provide for specific grounds or standards of appeal.[38]

Second, if an appellate arbitration clause is adopted, there is a question as to whether the seat court of the first-instance award can entertain applications for setting aside or enforcement pending the award being reviewed on appeal. We agree with the view that this should be disallowed as it would contradict the principles of judicial economy and efficiency when an appellate arbitration clause has been agreed upon by the parties.[39] There is also the concern of the appellate arbitration award being rendered nugatory or futile, if enforcement efforts have caused irremediable damage.

Third, parties should note when the limitation period for seeking to set aside an award commences (if they have not selected institutional appellate procedures that provide for this).[40] Would this be from the date of the first award or appellate award? This is significant because the timeline can in some cases be as short as three months. The answer to this question might well be found in Article 34(3) of the Model Law,[41] which states:

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34 Gary Born, *The Law Governing International Arbitration Agreements: An International Perspective*, 26 SING. ACAD. L. J. 814, ¶ 51 (2014).

35 Though it should be noted that problems of speed and finality might be mitigated if parties also set a mutually acceptable time limit for invoking the arbitral appeal mechanism.

36 Theodore K. Cheng, *supra* note 26, at 21, 32.

37 *See*, *e.g.*, the long-running Astro v. Lippo saga spanning Singapore and Hong Kong.

38 *See*, *e.g.*, under AAA's Optional Appellate Arbitration Rules, r. A-10 (2013), the award must contain "*material and prejudicial*" errors of law or have "*clearly erroneous*" determinations of fact.

39 *Validity of Appellate Arbitration Clauses*, INT'L ARB. INFO. (Feb. 28, 2017), *available at* https://www.international-arbitration-attorney.com/validity-appellate-arbitration-clauses.

40 Shivansh Jolly, *supra* note 20.

41 Model Law, *supra* note 2, art. 34(3).

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> *"An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received* ***the award*** *or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal."* [emphasis added]

On a plain reading of Article 34(3), the time to set aside the first-instance and appellate awards will run from their respective times of receipt. Might this pose a problem for applicants who fear they will be out of time to challenge the first award, if this is upheld on appeal? It is no answer to say that a party can challenge the appellate award, because the grounds for challenge might not apply in a transferable way – a breach of natural justice in the first proceedings would not affect the appellate proceedings. The solution, perhaps, is to first commence setting aside proceedings for the first award in the seat court and have those proceedings stayed pending determination by the appellate tribunal. It may also be argued that any grant of a stay on the first award may be more palatable if it would include the payment of the full award amount, possibly into an escrow account, to extinguish liability pending the decision by the appellate tribunal. While this solution is a little cumbersome, inelegance is preferable to a party challenging the Article 34(3) timeline and finding, to its dismay, that it is non-extendable.[42]

D. Appealing from a National Court Decision to an Arbitral Tribunal

The final issue in this section is whether parties can appeal against the decision of a national court to an arbitral tribunal. The issue arises from a clause that featured in *ST Group Co. Ltd.* v. *Sanum Investments Ltd. appeal* ["**Sanum (SGCA)**"].[43] The clause, reproduced below, provided for the parties to refer any disputes to mediation, and then either to the "*Resolution of Economic Dispute Organisation*" or the Laotian courts:

> *"If one of the parties is unsatisfied with the results of the decision or judgment of the above procedure, the Parties shall mediate and, if necessary, arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC".*[44]

While the Singapore Court of Appeal acknowledged that the clause may lead to appeals against concluded national proceedings using an arbitral tribunal, it declined to adjudicate upon the validity of such a clause given that it would be a matter to be decided under the governing law of the agreement, that being Lao law.[45]

There are strong arguments against such clauses being upheld. *First*, is there even a "*dispute*" to be sent to arbitration? The tribunal might well determine, in the exercise of its competence under Article 16 of the Model Law, that the court's decision is *res judicata*. A ruling of a competent court would conclusively resolve a dispute, subject to any possible appeals to national appellate courts.

Second, it is questionable whether the parties could engraft, by their own fiat, a separate branch of appeals to an arbitral tribunal onto the appellate decision-tree. A "*dispute*" over a national court decision potentially falls under the non-arbitrability doctrine; national courts are meant to be the final arbiters of legal disputes within their jurisdiction. It is inherently objectionable that the decision of a national court as a manifestation of state authority should be appealable to arbitrators,

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42 *See, e.g.*, BXS v. BXT, [2019] SGHC(I) 10, ¶¶ 37–41 (Sing.).
43 ST Group Co. Ltd. and Ors. v. Sanum Inv. Ltd. and Anr., [2019] SGCA 65 (Sing.).
44 *Id.* ¶ 8.
45 *Id.* ¶¶ 70–74.

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who are appointed at the whim of parties without any assurance of legal training or quality (for ad hoc arbitrations). In a similar vein, it could be argued that allowing parties to appeal to an arbitral tribunal against a national court's decision violates public policy.

Third, there are difficulties arising from the mismatch over what the court, versus the arbitrator, can adjudicate and pronounce upon. Leaving aside whether *the court decision* per se is a priori non-arbitrable regardless of subject matter, what happens if the court makes a ruling that affects third parties, or there is joinder of third parties in the course of proceedings? Can that part of the dispute be hived off and the rest sent to arbitration? Even if it could, what of the risk of potentially inconsistent findings of fact? Messy situations like these can be minimised by refusing to accept such arbitration clauses as valid, albeit that these may still arise in other circumstances (such as if the court decides to grant case management stays over certain parts of the dispute). Accordingly, it is suggested that such clauses should be void.

E. Conclusion on Problem 1

Provisions that provide either for appeal *against* an award to a court or tribunal, or for appeal from a court decision *to* an arbitral tribunal, test the limits to which courts in a broadly pro-arbitration climate will uphold party autonomy. In the authors' view, while the former should be (and is) given effect to as far as possible, the latter should not be allowed.

III. Problem 2: The Effect of Article 16(3) of the Model Law on Subsequent Challenges to the Tribunal's Jurisdiction

Article 16(3) of the Model Law entitles a party that is dissatisfied with a tribunal's *preliminary* ruling on jurisdiction to request, within thirty days, the curial court to decide the issue of jurisdiction again.[46] How does the availability of the Article 16(3) mechanism affect the parties' right to challenge jurisdiction at the setting-aside and enforcement stages? In many jurisdictions, a party's failure to raise an Article 16(3) challenge precludes any subsequent attempt to rely on the same ground.[47] Interestingly, recent decisions by the Singapore courts have gone the other way. This section will discuss the interpretation of Article 16(3) taken by the Singapore courts, and evaluate the attractiveness of this approach against competing views taken elsewhere.

A. Singapore's Interpretation of Article 16(3)

In *PT First Media TBK* v. *Astro Nusantara International BV* ["**Astro**"],[48] the Singapore Court of Appeal held that even where a party failed to *actively* raise jurisdictional objections under Article 16(3) of the Model Law in time, it was still open to such a party to raise those objections as a ground for *refusing enforcement* of the award (what the court referred to as a "*passive remedy*"). The court was satisfied, after analysing the *travaux préparatoires*, that the Model Law incorporates a "*choice of remedies*" system.[49] Given the differences in purpose and effect between setting aside applications

46 Model Law, *supra* note 2, art. 16(3) provides that "The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

47 *See* Nata Ghibradze, *Preclusion of Remedies under Article 16(3) of the UNCITRAL Model Law*, 27(1) PACE INT'L L. REV. 345, 385-389 (2015).

48 PT First Media TBK v. Astro Nusantara International BV, [2013] SGCA 57 (Sing.) [*hereinafter* "Astro"].

49 *Id.* ¶ 65.

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and refusal of enforcement proceedings, "*parties that do not actively attack an award remain able to passively rely on defences to enforcement.*"[50] After a perusal of the *travaux*, the Court observed that nothing suggested that Article 16(3), as another form of active challenge to a tribunal's decision on jurisdiction, was intended to be carved out from this "*choice of remedies*" system.[51] But the court left open the question of whether a party who failed to utilise the Article 16(3) challenge was still able to raise the same jurisdictional objection in *setting-aside* proceedings, although it expressed the tentative opinion that it would be "*surprised*" if the answer was in the affirmative.[52]

That question was revisited by the Court of Appeal in May 2019, albeit for non-participating respondents only. In *Rakna Arakshaka Lanka Ltd.* v. *Avant Garde Maritime Services (Pte) Ltd.* ["**Rakna**"],[53] Rakna Arakshaka Lanka Ltd. ["**RALL**"] did not participate in the arbitration at all due to its protest to the tribunal's jurisdiction. The tribunal issued a preliminary ruling stating that it had jurisdiction, to which RALL did not respond. After the final award was given in favour of Avant Garde Maritime Services (Pte) Ltd. ["**AGMS**"], RALL sought to set aside the award. The question was whether RALL was now precluded from raising the jurisdictional issue in setting-aside proceedings, given its failure to raise an Article 16(3) challenge earlier.

Reversing the decision of the High Court, the Court of Appeal held that a *non-participating party* in an arbitration was *not* precluded from applying to set aside an award on jurisdictional grounds, even if he had not raised those objections in an Article 16(3) challenge. Significantly, the court stated:[54]

> *"Art 16 [of the Model Law] requires parties to an arbitration to bring out their challenges to jurisdiction at an early point of the proceedings. But this requirement pre-supposes that parties are before the arbitral tribunal and that a party to an arbitration agreement who is served with a notice of arbitration by a counterparty has no option but to participate in the ensuing proceedings."*

The court reasoned that there is no clear legal duty on a respondent to participate in an arbitration that it believes was wrongly commenced against it. Accordingly, it would be wrong to force such a party to utilise the Article 16(3) mechanism despite its objections.[55] The court also relied on the Analytical Commentary,[56] which states that a non-participating party who did not "*submit a statement or take part in hearings on the substance of the dispute*" remains able to challenge jurisdiction in both setting aside or enforcement proceedings.[57]

These decisions are unlikely to be the last word from the Singapore courts on this point, but it is clear that there are at least two exceptions to the preclusive effect of Article 16(3) under Singapore

50 *Id.* ¶ 71.
51 *Id.* ¶¶ 104–105, 111, 115, 123.
52 *Id.* ¶¶ 130, 132.
53 Rakna Arakshaka Lanka Ltd v. Avant Garde Maritime Services (Pte) Ltd., [2019] SGCA 33 (Sing.) [*hereinafter* "Rakna"].
54 *Id.* ¶ 72.
55 *Id.* ¶ 73.
56 UNCITRAL Sey. Gen., *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Rep. of the Secretary-General*, U.N. Doc. A/CN.9/264 (Mar. 25, 1985) [*hereinafter* "Analytical Commentary"].
57 *Id.* at 39.

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law (subject to other doctrines like waiver and estoppel).[58] Where a respondent refuses to participate in the arbitration at all, he may still apply to set aside any award against him later on jurisdictional grounds. Moreover, even if a party chooses not to mount an active challenge to the tribunal's jurisdiction (under Article 16(3) or Article 34), it may resist enforcement on the same grounds.

B. Other Interpretations of Article 16(3)

Against the approach taken in Singapore, the prevailing view in Germany, Canada, Hong Kong, and Australia is that Article 16(3) is the *only* avenue for challenging a preliminary award on jurisdiction.[59] Nata Ghibradze, undertaking a comprehensive survey of the case law on Article 16(3), attributes this to "*the primary purpose behind the mechanism of early determination of jurisdictional issues, legal certainty and efficiency*."[60] In *China Nanhai Oil Joint Service Corporation Shenzhen Branch* v. *Gee Tai Holdings Co. Ltd.* ["**China Nanhai Oil**"], the Hong Kong High Court stated in *obiter* that "*if you do not seek the view of the court [under Article 16(3)], then you cannot raise the matter subsequently at [the] enforcement stage*."[61] The Supreme Court of Quebec, in *Compagnie Nationale Air France* v. *Libyan Arab Airlines* ["**Compagnie**"], held that Article 943.1 of the Quebec Code of Civil Procedure (the equivalent of Article 16(3)) was the sole means of contesting the tribunal's preliminary ruling on jurisdiction – thus, excluding both setting aside and refusal of enforcement options.[62]

There is some support in the *travaux préparatoires* for this view. In particular, the Analytical Commentary and Working Group Reports show that the drafters' concerns behind Article 16 of the Model Law were in ensuring that any jurisdictional objections were raised early. It was stated by the UN Secretariat, in a comment on Article 16(3):[63]

> *"Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) provides for instant court control in order to avoid unnecessary waste of money and time. […] In those less common cases where the arbitral tribunal combines its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36."*

This comment leaves the effect of not utilising Article 16(3) ambiguous, but it has been suggested that these words indicate the drafters' intention of carving out Article 16(3) from the "*choice of remedies*" system.[64]

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58 Astro, [2013] SGCA 57, ¶¶ 199–202 (Sing.). It is stated in ¶ 200 that "the concept of waiver and estoppel are distinct. Broadly speaking, waiver of rights occurs when a party has indicated that it will be relinquishing its rights. Estoppel, however, requires something more. The party invoking the estoppel must typically show that it had relied on the representations of the other party to its detriment".

59 *See* Ghibradze, *supra* note 47, at 385–389; Remigius Oraeki Chibueze, *The Adoption and Application of the Model Law in Canada – Post-Arbitration Challenge*, 18(2) J. INT'L ARB. 191, 200–201 (2001).

60 Ghibradze, *supra* note 47, at 385–389.

61 China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., [1994] 3 H.K.C. 375, 676–677 (H.C.) (H.K.).

62 Compagnie Nationale Air France v. Libyan Arab Airlines, [2000] R.J.Q. 717 (Can. Que.); Ghibradze, *supra* note 477, at 387.

63 *UNCITRAL Model Law on International Commercial Arbitration: Note*, U.N. Doc. A/CN.9/309, *reprinted in* [1988] 19 UNCITRAL Y.B., U.N. Doc. A/CN.9/SER.A/1988, ¶ 25.

64 Ghibradze, *supra* note 47, at 384; BORN, *supra* note 6, at 3019, where the author states, "As discussed above, the better view is that positive jurisdictional rulings are properly characterised as awards, generally subject to annulment, recognition and enforcement like other awards, but national court authority on the subject remains divided."

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In our view, the divergent approaches taken by the jurisdictions outlined above (as well as eminent commentators)[65] demonstrate – and stem in part from – the ambiguity of the drafters' intention. Absent any clear direction in the Model Law or the *travaux préparatoires*, a principled interpretation of Article 16(3) must consider what this provision sets out to achieve in the entire context of the scheme and purpose of the Model Law.

C. How Far should a Failure to Raise an Article 16(3) Challenge Preclude Setting Aside or Refusal of Enforcement on the Same Grounds?

i. Failure to Raise Article 16(3) should not Preclude Resisting Enforcement on Jurisdictional Grounds

Though much has been said about the drafters' intentions of expediting jurisdictional challenges, the structure and provisions of the Model Law do not suggest that jurisdiction is a question best reserved only to the seat court, or that any jurisdictional questions must be resolved quickly within a predefined time frame. That the ground for *refusing recognition and enforcement* of an award for lack of jurisdiction exists in Article 36 of the Model Law, in tandem with Article V(1) of the NYC, suggests that leeway is given to the enforcing court to examine the question of jurisdiction for itself regardless of deference to the seat court.[66] If so, there is no good reason why Article 16(3) must be carved out from the "*choice of remedies*" system, such that the enforcing court cannot consider the question of jurisdiction simply because it has been the subject of a *preliminary* ruling by the tribunal.

The contrary view (i.e., that failing to raise Article 16(3) precludes resisting enforcement on jurisdictional grounds) would introduce an arbitrary imbalance in the scheme of remedies in the NYC and Model Law. Everything would turn on whether the tribunal decides to issue its decision on jurisdiction as a preliminary ruling, or together with the merits in a final award.[67] If the tribunal addresses its jurisdiction only in a final award, Article 16(3) would not apply and a respondent has not one, but two chances to raise the jurisdictional objection (in setting aside, or refusing enforcement). On the other hand, if the tribunal chooses to issue a preliminary ruling, a dissatisfied party must invoke Article 16(3) or be bound by the tribunal's decision. But why should a respondent in the latter case be penalised by losing its passive remedy on the jurisdictional point, simply due to the form taken by the tribunal's jurisdictional ruling?

ii. Failure to Raise Article 16(3) should Generally Preclude Setting Aside Applications on Jurisdictional Grounds except in Exceptional Circumstances

In contrast to affirming the availability of passive remedies despite a failure to mount an Article 16(3) challenge, we suggest a more nuanced approach as far as setting aside applications are

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65 For commentators more inclined to the view that Art. 16(3) is not preclusive, *see*, *e.g.*, HOWARD HOLTZMANN & JOSEPH NEUHAUS, A GUIDE TO THE 2006 AMENDMENTS TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 479 (2015); INT'L COUNCIL FOR COMM. ARB., INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 84 (Jan Paulsson ed., 1990); *Cf.* KLAUS BERGER, INTERNATIONAL ECONOMIC ARBITRATION 365 (1993).

66 *See* Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Govt. of Pakistan [2010] UKSC 46, ¶ 103 (Eng.). Lord Mance noted "Nor is there anything to support Dallah's theory that the New York Convention accords primacy to the courts of the arbitral seat, in the sense that the supervisory court should be the only court entitled to carry out a re-hearing of the issue of the existence of a valid arbitration agreement […] There is nothing in the Convention which imposes an obligation on a party seeking to resist an award on the ground of the non-existence of an arbitration agreement to challenge the award before the courts of the seat".

67 UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 16, ¶ 14, at 79.

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concerned: A party who fails to invoke Article 16(3) should generally be precluded from relying on the same annulment ground, *except* in circumstances where the Article 16(3) mechanism was not reasonably available.[68]

There is force in the view that a respondent who could have raised an Article 16(3) challenge, but chose not to do so, should not be allowed to raise the same objection in setting aside later. Both Article 16(3) and annulment lead to a final determination by the seat court on the tribunal's jurisdiction.[69] Since Article 16(3) was drafted to discourage a party from sitting on jurisdictional objections, it ought to have preclusive effect on any attempt to raise (at setting aside) a jurisdictional objection that could reasonably have been raised earlier.[70]

But there are situations where a party cannot sensibly be expected to have recourse to Article 16(3). It is undesirable to impose a blanket rule that Article 16(3) definitively precludes any later challenge under Article 34. In *Rakna*, the Singapore Court of Appeal stated without qualification that a "*non-participating respondent*" is one exception to the preclusive effect of Article 16(3).[71] On the facts, though *Rakna* dealt only with a fully non-participating respondent, who did not engage in the arbitration at all (beyond sending letters to the Singapore International Arbitration Centre ["**SIAC**"]) and had made clear its intention to stay away from the beginning. As commentators have pointed out, it may be useful to analyse the position of different types of non-participants:[72]

1. For *fully non-participating* respondents, like in *Rakna*, these parties did not engage in the arbitral process at all, and it would be clear to the claimant in such cases that the respondent cannot be said to have waived its right to object to the tribunal's jurisdiction.[73] By not participating, these respondents also do not contribute to the wasted costs and time in the arbitration.[74] Fully non-participating respondents would not run afoul of the purpose of Article 16(3), i.e., to require parties to bring their jurisdictional objections early instead of waiting until the award was rendered.

2. For *partially non-participating* respondents, however, the position is less clear. It may very well depend on how far the respondent chose to participate in the arbitral process before

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68 *See*, *e.g.*, Hanseatisches Oberlandesgericht Hamburg [HansOLG] [Hanseatic Higher Regional Court Hamburg] Nov. 8, 2001, CLOUT Case No. 562, 6 Sch. 04/01 (Ger.), where a party that had not raised any jurisdictional objection before the arbitral tribunal was later allowed to do so in setting-aside proceedings, because it had not been properly informed of the commencement of the arbitration.

69 Arts. 16(3) and 34(2)(a)(i) of the Model Law both subject the tribunal's power to rule on its own competence to final judicial control: *see* Analytical Commentary, *supra* note 56, at 122, ¶¶ 11–12.

70 *See*, *e.g.*, the SGCA's obiter statements in Astro, [2013] S.G.C.A. 57, ¶ 130 states that the court would be "surprised if a party retained the right to bring a setting-aside application on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration was still ongoing".

71 Rakna, [2019] SGCA 33, ¶ 74.

72 Darius Chan, *Is Article 16(3) of the Model Law a 'One-Shot Remedy' for Non-Participating Respondents in International Arbitrations?*, KLUWER ARB. BLOG (Sept. 5, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/09/05/article-163-model-law-one-shot-remedy-non-participating-respondents-international-arbitrations-2; Albert Monichino QC, *The Problem with Rakna: The Scope of the Preclusive Effect of Article 16(3) of the Model Law*, 31 SING. ACAD. L.J. 349, ¶ 38 (2019) [*hereinafter* "Monichino"].

73 Astro Nusantara International BV v. PT Ayunda Prima Mitra, [2013] 1 SLR 636, ¶ 133 (Sing.); *See also* Analytical Commentary, *supra* note 57, at 122, ¶ 9, where despite the view that the failure to raise the Art. 16(3) challenge in time precludes any arguments on jurisdiction later on, it is stated that such arguments "would remain applicable and of practical relevance to those cases where a party raised the plea in time but without success *or where a party did not participate in the arbitration*".

74 Monichino, *supra* note 72, ¶ 40.

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stepping out. It has been suggested that a respondent who participates in the arbitration to contest the tribunal's jurisdiction, and who immediately steps out of the proceedings after the tribunal renders a preliminary ruling unfavourable to it, arguably did not prolong the dispute or contribute to wasted costs despite its limited participation.[75] We would, however, point out that there is nothing unfair about requiring a respondent who willingly participated in a preliminary hearing on jurisdiction to use the *full* range of measures available to challenge jurisdiction immediately, including invoking the Article 16(3) challenge.

D. Conclusion on Problem 2

The extent to which Article 16(3) precludes subsequent attempts to set aside or resist enforcement of an award on jurisdictional grounds varies by jurisdiction. Some jurisdictions, such as the Singapore courts, adopt a somewhat more "*interventionist*" approach, and are inclined to allow parties more opportunities to challenge the tribunal's jurisdiction before the courts. On the other hand, other courts have been strict on limiting the parties' jurisdictional challenge to Article 16(3). It is difficult to say which is truly a more "*pro-arbitration*" view. Arguably, both approaches can be justified on upholding either speed and finality, or ensuring the correctness of jurisdictional decisions, in the arbitral process. Therefore, in selecting the arbitral seat and potential places for subsequent enforcement of the award, parties should consider the legal position of these courts on the effect of Article 16(3) beforehand, and take steps to safeguard their right to challenge the tribunal's jurisdiction before the court.

IV. Problem 3: The Availability of Anti-Enforcement Injunctions from Seat Courts

Two recent English and Singapore cases affirm a very restrictive approach to the grant of anti-enforcement injunctions ["**AEI(s)**"], requiring "*exceptional circumstances*" beyond the threshold considered for the grant of anti-suit injunctions ["**ASI(s)**"]. What can a party do when it is faced with a foreign judgment, when it would prefer to arbitrate the dispute or enforce an award? There are several potential options, which this part of the article will explore after giving a brief overview of the two types of injunction and the cases on this.

A. Definitions

ASIs restrain ongoing court proceedings. They can be issued in pre-award situations to restrain a party from commencing litigation in breach of an arbitration agreement, as well as in post-award situations to restrain a party from challenging the award outside the seat, or litigating claims that have already been determined in arbitration.[76] The focus here is on ASIs granted in breach of an arbitration clause, i.e., "*contractual*" ASIs. AEIs, on the other hand, come into the picture after a foreign court issues a judgment. They restrain a party from *relying on or enforcing* that foreign judgment.[77] The difference between ASIs and AEIs is usefully thought of as: the former concerns the *working* of a foreign court and the latter with their *output*.[78]

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75 *Id.* ¶¶ 44–45.

76 Terna Bahrain Holding Co. WLL v. Al Shamsi and Ors. [2013] 1 Lloyd's Rep. 86 (Eng.); Michael Wilson and Partners Ltd. v. Emmott [2018] EWCA (Civ.) 51 (Eng.).

77 Ecobank Transnat'l Inc. v. Tanoh [2015] EWCA (Civ.) 1309 (Eng.) [*hereinafter* "Ecobank"].

78 *Id.* ¶ 91.

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B. The Authorities – Two Recent Cases from England and Singapore

In *Ecobank Transnational Inc* v. *Tanoh* ["**Ecobank**"],[79] Ecobank and Mr. Tanoh were parties to an employment agreement containing an arbitration clause. In breach of that clause, Mr. Tanoh commenced proceedings in the courts of Togo and Cote d'Ivoire and obtained judgment in his favour. Subsequently, Ecobank obtained an *ex parte* interim injunction barring Mr. Tanoh from seeking recognition or enforcement of either foreign judgment.[80] The English Court of Appeal upheld the High Court's judgment discharging the interim injunction. Despite the fact that Mr. Tanoh's claims were brought in breach of the arbitration agreement and the bank had not submitted to the foreign courts,[81] an AEI was nonetheless refused.

The English authorities where AEIs were granted are "*few and far between*".[82] Such circumstances would include: (i) fraud on the part of the party obtaining the foreign judgment; (ii) where a judgment was obtained too quickly or secretly to enable an ASI to be obtained, and (iii) where a party could not have sought relief pre-judgment because either the exclusive jurisdiction agreement was reached post-judgment or he had no means of knowing that the judgment was being sought.[83] Further, delay in seeking injunctive relief was an important consideration, justified by a "*variety of reasons including the avoidance of prejudice, detriment and waste of judicial resources; the need for finality; and considerations of comity.*"[84] In the court's words, an applicant must act promptly and claim injunctive relief early, "*and should not adopt an attitude of waiting to see what the foreign court decides*".[85] Finally, the AEI was discharged because the bank could have sought an ASI at the outset of foreign proceedings but decided not to.

Sun Travels and Tours Pvt. Ltd. v. *Hilton International Manage (Maldives) Pvt. Ltd.* ["**Sun Travels**"],[86] concerned a Singapore-seated arbitration in which the tribunal rendered two awards against Sun. Hilton sought to enforce the award in the Maldives but ran into difficulties due to confusion about which Maldivian court had jurisdiction over enforcement. In the meantime, Sun commenced an action in the Maldives, essentially re-litigating the decided issues. Instead of immediately applying for anti-suit relief from the seat court, Hilton challenged the Maldivian action and failed. The Maldivian court issued judgment in favour of Sun. Hilton continued its attempt to enforce the awards, but enforcement was denied due to the Maldivian judgment.[87] Hilton appealed against the Maldivian judgment, while seeking (amongst others) a permanent ASI from the Singapore court to prevent Sun from relying on the Maldivian judgment. Instead of an ASI, an AEI was granted by the High Court,[88] but was later discharged by the Court of Appeal.

The Court of Appeal agreed with *Ecobank* that "*great caution*" should be exercised in granting AEIs because such an injunction would necessarily not have been sought promptly enough.[89] AEIs

79 *Id.*
80 *Id.* ¶ 24.
81 *Id.* ¶ 79.
82 *Id.* ¶ 118.
83 *Id.* ¶ 119.
84 *Id.* ¶¶ 126–127.
85 *Id.* ¶ 129.
86 Sun Travels and Tours Pvt. Ltd. v. Hilton Internat'l Manage (Maldives) Pvt. Ltd., [2019] SGCA 10 (Sing.) [*hereinafter* "Sun Travels"].
87 *Id.* ¶ 2.
88 *Id.* ¶ 43.
89 *Id.* ¶¶ 89-90.

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would be granted only "*very sparingly*" and only where "*exceptional circumstances*" can be shown.[90] The test for when an AEI would be granted must be more stringent than that for ASIs because an AEI proscribes the enforcement of a foreign judgment on pain of contempt proceedings in the jurisdiction where the injunction is granted.[91] Granting an AEI would be "*comparable to nullifying the foreign judgment, […] when only the foreign court can set aside or vary its own judgments.*"[92]

Thus, to obtain an AEI, the applicant must show not only the breach of a legal right (i.e., breach of agreement),[93] but also "*exceptional circumstances.*"[94] A non-exhaustive list of exceptional circumstances would include: (i) unconscionable conduct such as fraud, or (ii) when the applicant is not guilty of unconscionable delay, such as when it did not know of the foreign proceedings until delivery of the judgment.[95] However, the Singapore Court of Appeal did not consider the third exception in *Ecobank* (as discussed above) as a standalone ground.[96] The AEI was discharged because of Hilton's delay, which had resulted in the delivery of two Maldivian enforcement judgments and the filing of a Maldivian appeal.[97]

C. Discussion

i. Option 1: Argue against a Stricter Approach towards AEIs than ASIs

In jurisdictions where the matter has not been conclusively decided, the question arises whether a party should argue against a stricter approach towards AEIs compared to contractual ASIs, which are granted by default unless there are strong reasons not to.[98] The stricter approach towards AEIs is premised on the view that AEIs are more injurious to comity.

Comity in *Ecobank* was unpacked as comprising two facets: (i) comity vis-à-vis the prospective *enforcing* court, which has autonomy to decide whether to enforce a particular foreign judgment in accordance with its own law; and (ii) comity vis-à-vis the court *issuing* the foreign judgment, in terms of waste of foreign judicial resources.[99]

The first facet might be disputed. In *ICC Case No. 17176*,[100] the tribunal considered that an ASI is "*inherently more invasive*" than an AEI, i.e., that an ASI would be *more* injurious to comity than an AEI.[101] The logic is that an AEI does not cast aspersions on the competence of another court (as the pre-emptive nature of an ASI may be perceived to do), but only prevents the individual

90 *Id.* ¶ 121.
91 *Id.* ¶ 98.
92 *Id.*
93 Or, where non-contractual ASIs are concerned, vexatious or oppressive conduct.
94 Sun Travels, [2019] SGCA 10, ¶¶ 99, 105 where it is stated that the requirement of "*exceptional circumstances*" is traceable to the origins of an injunction as a form of equitable relief.
95 *Id.* ¶ 113.
96 *Id.* ¶ 104.
97 *Id.* ¶ 125.
98 Donohue v. Armco Inc [2002] 1 All ER 749.
99 Ecobank, [2015] EWCA (Civ.) 1309, ¶¶ 129, 132–133, 135.
100 ICC Case No. 17176, Final Award, [2016] 41 Y.B. COMM. ARB. 86–126 (Albert Jan Van den Berg ed.) (The tribunal had in a procedural order granted an interim AEI directing the respondents to refrain from enforcing any judgment rendered in state litigation for patent infringement claims before a final award was rendered in the arbitration. In its final award, it declined the grant of a permanent AEI because the situation had changed – the tribunal had in the final award found that the claimants could argue that they were licensed, with the consequence that the respondents would either withdraw their claims or the court would find that there was no infringement).
101 Maxwell Breana Obesi & Chrispas Nyombi, *Enforcement of anti-suit injunctions*, 36 EUR. COMPETITION L. REV. 513, 524–25 (2015).

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respondent from enforcing a handed-down judgment. But that explanation arguably misses the point. ASIs are not regarded as injurious to comity because they cast aspersions on the competence of a foreign court, but because they indirectly interfere with foreign proceedings even if they do not purport to direct what a foreign court should do (because they act *in personam*).[102] On this view, AEIs would be equally (if not more) injurious to comity.

Whether the second facet can be challenged depends on how exactly the waste of resources is conceptualised. *Sun Travels* appears to have endorsed an approach where there will *always* be a waste of resources if the foreign court has issued a judgment. It rejected the argument that because one Maldivian judgment spanned two and half pages, the effort expended must have been negligible.[103] This approach is likely to be accepted unless a court is prepared to pass judgment on the effort expended by its foreign counterpart based on factors such as the complexity of the case and duration of the hearing.

On balance, the stricter approach to AEIs as opposed to ASIs, appears to be here to stay. In that light, it is also worthwhile recalling that even ASIs are not well-accepted across the common-civil law divide, being considered offensive in many quarters.[104]

ii. Option 2: Seek to Expand the Categories of "Exceptional Circumstances"

Next, a party seeking an AEI could seek to expand the categories of "*exceptional circumstances*." The main circumstance identified in *Sun Travels* is fraud, under the umbrella of unconscionable conduct (the other category appears to be a negative stipulation – it is necessary but insufficient for an applicant to have brought its claim in a timely manner). While *Ecobank* also identified fraud, it did not go so far as to use unconscionability as a unifying rationalising doctrine. Beyond fraud, what else might suffice? On the approach in *Sun Travels*, the categories are not closed as long as the defect in the procuring of the foreign judgment is traceable to unconscionable conduct.[105]

We suggest that unconscionability is *not* an appropriate unifying theme for the circumstances in which an AEI may be granted, notwithstanding the equitable roots of an injunction, because it is both over and under-inclusive. It is over-inclusive because unconscionability is associated with numerous doctrines, some of which transfer awkwardly to the grant of AEIs. For instance, a broad view of unconscionability may sometimes include duress or undue influence,[106] but it is odd to claim that there has been undue influence in the procuring of a foreign judgment. In other contexts, unconscionability appears to have been used as a synonym for dishonest or reprehensible conduct.[107]

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102 Ecobank, [2015] EWCA (Civ.) 1309, ¶ 83; Sun Travels, [2019] SGCA 10, ¶ 69.

103 Sun Travels, [2019] SGCA 10, ¶ 123.

104 Obesi & Nyombi, *Recognition of anti-suit injunctions in civil and common law jurisdictions*, 36 EUR. COMPETITION L. REV. 473, 474 (2015).

105 Sun Travels, [2019] SGCA 10, ¶ 105 states as follows: "what is required for an AEI is exceptional circumstances tied to the notion of unconscionability and not exceptional circumstances in the abstract".

106 BOM v. BOK, [2018] SGCA 83, ¶ 118 (Sing.).

107 UKAA, § 68(2)(*g*) permits the court award to set aside an award procured by fraud; Celtic Bioenergy Ltd v. Knowles Ltd. [2017] EWHC 472, ¶ 103 (Eng.).

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It is under-inclusive because it would exclude doctrines such as breach of natural justice,[108] which is a fairly uncontroversial ground for denying recognition and enforcement of a foreign judgment.[109] If such a judgment would be refused recognition and enforcement in any case, there would be no additional injury to comity (if indeed comity is the justification for a narrow test for granting AEIs) if an AEI were granted. It is also unclear whether the situation where a party could not have sought relief pre-judgment because the relevant agreement was reached post-judgment (accepted in *Ecobank*) can indeed be subsumed under unconscionable delay or fraud (as rationalised by *Sun Travels*). The better approach would therefore be the one in *Ecobank*, i.e., considering this as a standalone exception – if this exception ought to be recognised at all.

If the court does indeed accept that "*exceptional circumstances*" may be assessed on a case by case basis without reference to unconscionability as a unifying principle (or indeed, *any* unifying principle because analytical clarity in the form of a grand unifying design may not always be possible or appropriate in all cases), the potential scenarios where an AEI will be available will be much broader.

iii. Option 3: Accept alternatives to AEIs

Given the difficulties involved in seeking an AEI, it is also worthwhile for a party to consider whether to pursue alternative relief. It is no longer open to such a party to seek a stay of proceedings.[110] AEIs are, by definition, only necessary when foreign proceedings have concluded and judgment has been delivered. The viable alternatives are, thus, to pray: (i) that the breach of an arbitration agreement constitutes a defence to recognition and enforcement at common law, or (ii) for damages.

Dealing first with defences, breach of agreement is in some jurisdictions a statutorily recognised defence. For instance, under Section 32 of the Civil Jurisdiction and Judgments Act, 1982, a foreign judgment must be denied recognition and enforcement if the bringing of the foreign proceedings was "*contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country.*"[111] A similar mechanism operates under Section 5(3)(b) of Singapore's Reciprocal Enforcement of Foreign Judgments Act,[112] which deems a foreign court not to have had jurisdiction if the action was brought in breach of agreement. These provisions would cover arbitration agreements. But it is unclear how far this defence exists at common law or how far courts will be willing to extend the rationale of this defence beyond where its application is mandated by statute.

Alternatively, a party could seek damages for breach of arbitration agreement in lieu of an AEI. The reasoning in the case of ASIs, which applies by analogy to AEIs, runs thus that the arbitration clauses have both positive and negative aspects (i.e., taking the necessary steps to arbitrate, and an

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108 With its two sub-rules of the right to be heard (*audi alteram partem*), and impartiality and independence (rule against bias).

109 Adams v. Cape Industries [1991] 1 All ER 929 (Eng.); Beals v. Saldanha [2003] 3 S.C.R. 416 (Can.).

110 Michelle Lee, *Anti-suit injunctions in aid of international arbitrations: A rethink for Singapore*, 27 SING. ACAD. L. J. 438, 442 (2015); Tiong Min Yeo, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17 SING. ACAD. L. J. 306, 321 (2005).

111 Civil Jurisdiction and Judgments Act 1982, c. 27, § 32(1)(a) (Eng.).

112 Reciprocal Enforcement of Foreign Judgments Act 2001, § 5(3)(b) (Sing.).

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undertaking not to sue other than in the agreed forum).[113] Thus, in principle, damages should be available for their breach.[114] Damages would compensate the innocent party for wasted legal costs in defending the parallel court proceedings,[115] and potentially, losses above and beyond such expenditure (e.g., the amount of loss equivalent to that expended in satisfying a foreign judgment that was successfully enforced).[116]

However, there are difficulties in claiming damages in lieu of an AEI, listed as follows:

First, it is not universally accepted that the breach of an arbitration agreement can found a claim for substantive damages,[117] because, in one view, arbitration agreements are procedural in nature.[118]

Second, who should the remedy of damages be sought from: the seat court or a tribunal?[119] The innocent party should opt for the latter because that would be consistent with his commitment to arbitrate,[120] but it is questionable whether under most institutional model clauses a tribunal can award damages for breach of the *arbitration agreement* as opposed to the main contract.[121] But this difficulty is surmountable by either rooting the tribunal's power to award damages for breach of arbitration agreement in the law applicable to the agreement in question,[122] or giving a broad approach to construction of the arbitration clause. Even so, damages in lieu of AEIs is evidently an imperfect remedy.

D. Conclusion on Problem 3

A party faced with a foreign judgment obtained in breach of an arbitration agreement may seek to obtain an AEI, but the conditions where an AEI are available are narrowly circumscribed. This seems to be the approach taken even in "*pro-arbitration*" jurisdictions such as England and Singapore. The importance of party autonomy and upholding parties' agreement to arbitrate seems to take a backseat to concerns of international comity. The alternative remedies of breach of agreement as a defence to enforcement and damages for breach of arbitration agreement have their own limitations. Neither is a perfect substitute for an AEI. Once again, therefore, the old adage holds true: prevention, through getting a stay or an ASI, is better than cure.

V. Problem 4: Enforcement of Arbitral Awards that have been Set Aside at the Seat

One aspect of international arbitration which invariably requires the assistance of national courts is in the recognition and enforcement of arbitral awards. An award is toothless if it cannot be enforced against the assets of the award debtor. The NYC was, therefore, enacted to provide

113 UST-Kamenogorsk Hydropower Plant JSC v. AES UST-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35 (Eng.).

114 Paul Todd, *Damages for breach of an arbitration agreement*, 5 J. BUS. L. 404, 423 (2018).

115 Rahim Moloo, *Arbitrators Granting Antisuit Orders: When Should They and on What Authority*, 26 J. INT'L ARB. 675, 697–698 (2009).

116 Albert Dinelli, *The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract meets Private International Law*, 38(3) MELB. U. L. REV. 1023, 1035 (2015).

117 *But see* Donohue v. Armco Inc [2002] 1 Lloyd's Rep. 425 (Eng.).

118 Jean Pierre-Fierens & Bart Volders, *Monetary Relief In Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements*, 9(34) REVISTA BRASILEIRA DE ARBITRAGEM 93, 96 (2012); Tiong Min Yeo, *The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements*, 17 SING. ACAD. L.J. 306, 322 (2005).

119 Julio Cesar Betancourt, *Damages for breach of an international arbitration agreement under English arbitration law*, 34 ARB. INT'L 511, 529 (2018).

120 *Id.* at 529.

121 *Id.*

122 *Id.*

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common legislative standards for court recognition and enforcement of foreign and non-domestic arbitral awards.[123] However, despite the attempts at harmonisation, there is substantial divergence over whether arbitral awards annulled by a seat court can nevertheless be enforced by the enforcing courts in another jurisdiction.

A. Different Approaches to Article V(1)(e) of the NYC

We take as our starting point Article V(1)(e) of the NYC, which states that recognition and enforcement of an award may be refused, if among other things:

> "*The award has not yet become binding on the parties, or* ***has been set aside*** *or suspended* ***by a competent authority of the country in which****, or under the law of which,* ***that award was made***." [emphasis added]

Some academics[124] and national courts[125] have interpreted Article V(1)(e) as imposing a *mandatory* obligation to refuse enforcement once an award has been set aside by the seat court. Some regard the term "*may be refused*" as an indication that the enforcement court still has the *discretion* to enforce an award notwithstanding that it may have been set aside by the seat court.[126]

These divergent approaches are well-illustrated by the case of *Nikolay Viktorovich Maximov* v. *Open Joint Stock Company "Novolipetsky Metallurgichesky Kombinat"* ["**Maximov**"].[127] The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation issued an arbitral award for almost USD 300 million in favour of Mr. Maximov.[128] The award debtor, NMLK, applied to set aside the award in the Moscow court on the basis that two of the arbitrators had failed to disclose their connections to Mr. Maximov's expert witnesses. But the judge also based her decision on two other grounds which were not argued by the parties, in relation to the public policy of Russia and the non-arbitrability of the dispute.[129] Undeterred by the annulment at the seat court, Mr. Maximov sought enforcement of the award in Paris, Amsterdam and London.[130] The French courts concluded that, the fact that the award had been set aside by the Russian courts was not sufficient to refuse recognition in France; the award had been procured in accordance with the parties' agreed contractual method and it should, therefore, be recognised and enforced.[131] In contrast, the Dutch courts held that an award set aside at the seat can only be enforced in the Netherlands under exceptional circumstances, for e.g., if giving effect to the

123 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Objectives, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [*hereinafter* "NYC"].

124 Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9(2) ICC BULL. 15 (1998) [*hereinafter* "Albert Jan van den Berg – Enforcement"].

125 Astro, [2013] SGCA 57, ¶¶ 76–77 (Sing.).

126 SIMON GREENBERG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 66 (2011).

127 Nikolay Viktorovich Maximov v. Open Joint Stock Company (Novolipetsky Metallurgichesky Kombinat) [2017] EWHC (Comm.) 1911 (Eng.) [*hereinafter* "Maximov"].

128 *Id.* ¶ 1.

129 *Id.* ¶ 5.

130 *Id.* ¶ 10.

131 Mike McClure, *Enforcement of Arbitral Awards that have been Set Aside at the Seat: The Consistently Inconsistent Approach across Europe,* KLUWER ARB. BLOG (June 26, 2012), *available at* http://arbitrationblog.kluwerarbitration.com/2012/06/26/enforcement-of-arbitral-awards-that-have-been-set-aside-at-the-seat-the-consistently-inconsistent-approach-across-europe.

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annulment judgment would violate Dutch public policy.[132] On the evidence before it, there were no such exceptional circumstances. A similar outcome was arrived at by the English court.[133] Mr. Maximov sought enforcement in London and argued that the Russian courts' setting aside judgments should not be recognised, as they were clearly biased. Enforcement was refused because there was no "*cogent evidence of bias*."[134]

B. Territorialism and Delocalisation

The willingness of the French courts to enforce the annulled award, and the corresponding reluctance of the English and Dutch courts to do the same, broadly correspond to the two main schools of thought on this issue. "*Territorialism*" holds that arbitration is inextricably tied to the seat, the law of the seat exclusively regulates the arbitration, and so seat-court annulment kills the award for good.[135] It ceases to have legal existence,[136] making subsequent enforcement a legal impossibility.[137] As explained by the Singapore Court of Appeal in the *Astro* case referred to in earlier sections: "*the contemplated erga omnes effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce.*"[138]

In contrast, the "*delocalisation*" theory holds that the seat of the arbitration is chosen only for convenience.[139] Arbitrators do not derive their powers solely from the seat's laws, but from the sum of all the legal orders that recognise the validity of the arbitration agreement and the award.[140] Therefore, the decisions of the seat court have no bearing on the validity of the underlying award, and an enforcing court is free to decide whether to enforce an award based on its own domestic laws. The delocalisation theory is championed most famously by the French courts. In *Arab Repub. of Egypt* v. *Chromalloy Aeroservs., Inc.* ["**Chromalloy**"], the Paris *Cour d'Appel* succinctly summarised the position thus:[141]

> *"[…] Considering finally that the award rendered in Egypt was an international award which by definition was not integrated into the legal order of that country such that its existence continues despite its nullification and that its recognition in France is not contrary to international public policy."*

C. Evaluating the Merits of Each Approach – No Satisfactory Solution?

i. Delocalisation

It may be argued that delocalisation is more consistent with the plain words of the NYC. The phrase "*may be refused*" suggests that an enforcing state retains the discretion to enforce an award even if it has been set aside by a competent authority of the seat. The French cases also rely on the

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132 Marike R. P. Paulsson, *Enforcement of Annulled Awards: A Restatement for the New York Convention?*, KLUWER ARB. BLOG (Dec. 21, 2017), *available at* http://arbitrationblog.kluwerarbitration.com/2017/12/21/enforcement-annulled-awards-restatement-new-york-convention.

133 Maximov, [2017] EWHC (Comm.) 1911.

134 *Id.* ¶ 63.

135 GREENBERG, *supra* note 126; FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 3 (Emmanuel Gaillard & John Savage eds., 1999) [*hereinafter* "FOUCHARD, GAILLARD & GOLDMAN"].

136 Albert Jan van den Berg, *Consolidated Commentary on the Court Decisions Concerning the New York Convention*, 28 Y.B. COMM. ARB. 562, 650 (2003); Albert Jan van den Berg – Enforcement, *supra* note 124, at 15, 16.

137 Albert Jan van den Berg – Enforcement, *supra* note 125, at 15, 16.

138 Astro, [2013] SGCA 57, ¶ 77.

139 Jan Paulsson, *Arbitration in Three Dimensions*, 60(2) INT'L & COMP. L. Q. 291, 298 (2011).

140 Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 18 (1999).

141 Arab Republic of Egypt v. Chromalloy Aero Services, Inc., (1997) 26 Y.B. COMM. ARB. 691 [*hereinafter* "Chromalloy"]; Emmanuel Gaillard, *id.* at 25.

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Article VII "*more favourable rights*" provision to refer to its own domestic laws on the recognition and enforcement of arbitral awards.[142] It should be noted that the French approach may not work in every country; for e.g., in jurisdictions that have incorporated Article V(1)(e) of the NYC into their own domestic laws there would no longer be a "*more favourable right*" in domestic law.[143] Moreover, delocalisation better accords with parties' intentions. By electing to arbitrate their dispute rather than submitting to the jurisdiction of any particular court, parties can be taken to have intended for extra-curial adjudication of their dispute. The "*territorialist*" approach contradicts parties' intentions as it over-emphasises the seat court.

However, a major drawback of the "*delocalisation*" approach is that it may severely detract from the finality and certainty of the arbitral decision, because it leaves the door open for the same issues to be re-litigated across multiple jurisdictions. One commentator has referred to these as "*floating awards*" which cannot be set aside once and for all,[144] and which encourages forum shopping as unsuccessful claimants attempt to get multiple bites at the cherry. The high potential for conflicting decisions creates "*systemic uncertainty*",[145] which undermines the harmonisation objectives of the NYC and the Model Law, in turn leading to higher transaction costs for commercial parties.[146]

In practice, however, these concerns might be somewhat overstated. Despite the fear of indefinite re-litigation, parties are realistically only concerned with the enforcement of awards in jurisdictions where the respondent has sizeable assets.[147] Once those have been exhausted, there need not be any legitimate concerns that further enforcement actions will be taken in other jurisdictions.

As for the risk of multiple conflicting decisions, this could in part be mitigated by the doctrine of issue estoppel. Issue estoppel typically arises when a foreign court of competent jurisdiction has decided on a specific issue between the same parties, which subsequently comes before another court for review.[148] Where there is an identity of parties and facts, issue estoppel may apply such that the parties are bound by the findings of the first court that hears the matter.[149] However, in the arbitration context, a distinction is sometimes drawn between decisions on distinctly domestic issues, such as public policy and arbitrability of disputes, and those which have a more international character, such as the interpretation of agreements or treaties.[150] Issue estoppel is less likely to arise

142 *See, e.g.*, Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation, (1995) 20 Y.B. COMM. ARB. 663; Chromalloy, (1997) 26 Y.B. COMM. ARB. 691; Art. VII of the NYC, also referred to as the "more favourable right" provision, states that the provisions of the NYC do not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. The French court relied on this provision to reason that the party seeking enforcement of the arbitral award could rely upon its own domestic arbitration law which does not list Art. V(1)(e) of the NYC as a ground for the refusal of enforcement.

143 *See, e.g.*, International Arbitration Act 2002, § 31(2)(f) (Sing.) [*hereinafter* "IAA"]; Indian Arbitration Act, § 48(1)(e); Arbitration Ordinance, (2011) Cap 609, § 87(1)(f) (H.K.).

144 Emmanuel Gaillard, *supra* note 140, at 40.

145 Sundaresh Menon, Chief Justice of Singapore, The role of the national courts of the seat in international arbitration, Keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre, New Delhi, ¶ 12 (Feb. 17, 2018) [*hereinafter* "Menon CJ's Keynote Address"].

146 Sundaresh Menon SC, *Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence*, SING. J. LEGAL STUD. 231, 243–244 (2013).

147 Emmanuel Gaillard, *supra* note 140, at 40.

148 Renato Nazzini, *Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context*, 66 AM. J. COMP. L. 603, 616 (2018).

149 *See, e.g.*, Mills v. Cooper [1967] 2 All ER 100 (Eng.).

150 Diag Human SE v. The Czech Republic [2014] EWHC 1639 (Comm.) (Eng.).

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in the former situation, given that the domestic courts of a particular jurisdiction would be best placed to decide such matters. Nevertheless, the application of issue estoppel would serve to reduce the instances of conflicting decisions on the same issues. It however remains to be seen whether such a typically common law doctrine will gain widespread adoption and acceptance in the civil law jurisdictions.

ii. Territorialism

The "*territorialist*" response is that the seat court's exclusive supervisory jurisdiction over the award would be futile if that decision need not be recognised in other enforcement jurisdictions. Further, this would efface the distinction between setting aside and refusal of enforcement.[151] Territorialism is not inconsistent with parties' intentions because the parties have willingly submitted to the supervisory jurisdiction of the seat court by agreeing on the seat of the arbitration (or, in a case where the choice of seat cannot be gleaned from the arbitration agreement, submitted to the jurisdiction of the tribunal to decide on the seat).

The main concern that arises from the territorialist approach is that it accords too much deference to the seat court in relation to matters which should be in the purview of each State's domestic courts. From an enforcing court's perspective, it is difficult to see why an award which does not offend the public policy of the enforcing court should not be given effect to – simply because the seat court finds it objectionable by local standards.

A few arguments against territorialism may be made. *First*, an enforcing court should not be hamstrung by the decision of the seat court on the status of the award, since the enforcing court has a strong interest in reviewing the award (it being the place where assets are actually seized).[152] *Second*, it would undermine confidence in international arbitration if even local standards (in the seat), that are perceived as improper or objectionable by the international community,[153] must invariably be given effect to. This problem is illustrated by the case of *Yukos Capital SARL* v. *OJSC Rosneft Oil Company* ["**Yukos**"],[154] which involved a Russian-seated arbitration. The tribunal rendered four awards in favour of Yukos against Rosneft. Rosneft successfully applied to set aside the awards before the Moscow *Arbitrazh* court.[155] Yukos nevertheless sought enforcement of the awards in Netherlands and England. Both the Amsterdam Court of Appeal and the English High Court held that the decision of the Moscow *Arbitrazh* court, setting aside the awards "*was a result of a partial and dependent judicial process.*"[156] The English High Court added that to recognise such a decision would offend "*basic principles of honesty, natural justice and domestic concepts of public policy.*"[157] The *Yukos* case, therefore, demonstrates that there may be circumstances where it would be in the interests of justice to recognise an award even if it has been set aside.

151 Astro, [2013] SGCA 57, ¶ 77.
152 Emmanuel Gaillard, *supra* note 140, at 45.
153 Daniel Ang, *Enforcement of Arbitral Awards Set Aside at the Seat of Arbitration: The Way Forward for Art. V(1)(e) in Singapore*, 9 SING. L. REV. – JURIS ILLUMINAE 1, 8 (2018).
154 Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co. [2014] EWHC (Comm.) 2188 (Eng.).
155 *Id.* ¶¶ 1–2.
156 *Id.* ¶ 7.
157 *Id.* ¶ 20.

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D. The Way Forward

Neither delocalisation nor territorialism presents a perfect approach. Delocalisation entirely disregards the decision of the seat court, generates uncertainty, and leads to wasted resources and costs due to re-litigation of a similar issue. On the other hand, strict territorialism unnecessarily restricts the capacity of an enforcement court to do justice under the right circumstances, as illustrated by the *Yukos* case.

The best way forward may be a middle path between the two approaches. Chief Justice Sundaresh Menon of the Supreme Court of Singapore, speaking extra-judicially at a conference in New Delhi, proposed what is essentially a two-step approach:[158]

1. The enforcing court should first decide whether it will recognise the seat court's annulment decision, by applying its own domestic rules on the recognition of foreign judgments. If the seat court's setting aside judgment is recognised, its decision should be respected, and enforcement should be refused.

2. If the foreign judgment is recognised, the next question is whether it raises an issue estoppel in the enforcement proceedings. If so, the seat court decision is the final word on that issue. Issue estoppel would likely arise where the seat court has made a decision on grounds with more "*transnational*" resonance, such as on the basis of procedural irregularities. Conversely, if the ground for setting aside is one that has a distinctly domestic flavour, the seat court's decision would not ordinarily be capable of founding an issue estoppel, and the enforcing court would be entitled to consider the matter afresh in accordance with its own domestic standards.

The grounds of setting aside under Article 34 of the Model Law that, in the authors' view, have greater "*transnational resonance*" are Article 34(2)(a)(ii) on improper notice or inability to present its case, Article 34(2)(a)(iii) on disputes outside the scope of submission to arbitration and Article 34(2)(a)(iv) on the tribunal's composition not according with the parties' agreement or *lex arbitri*. Conversely, the grounds under Article 34(2)(b) which involve arbitrability of disputes and public policy would be grounds for setting aside with a distinctly domestic flavour.

This proposed approach accords due deference to the decision of the seat court, in line with the "*territorialist*" approach, while also ensuring that the enforcement court retains discretion on matters involving its own domestic public policy, in line with the "*delocalisation*" theory. Such an approach also ensures that there is finality *only* when the decision of the seat court should properly be regarded as the final word on the matter. This would generally be in situations where the requirements for recognition and enforcement of a foreign judgment are met. For example, if a decision of the seat court is one that has not been arrived at through proper judicial processes, it would not be in the interest of parties for that decision to be accorded any sort of finality. Indeed, a foreign judgment which has been tainted by a breach of natural justice or unfairness would not likely be recognised in a foreign jurisdiction. In relation to issues of public policy, it should be each State's domestic courts which deliver the conclusive determination. Therefore, an enforcing court is unlikely to enforce a foreign judgment which has been decided purely on the basis of the domestic public policy of that jurisdiction. Ultimately, there is no utility to be derived from finality

158 Menon CJ's Keynote Address, *supra* note 145, ¶ 23.

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simply for the sake of finality, and courts should be afforded the flexibility to consider afresh whether to enforce a foreign arbitral award notwithstanding that it has been annulled in the seat court in the appropriate situations.

The effectiveness of Menon CJ's proposed approach is, in the authors' view, bolstered by the Convention of February 01, 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ["**Hague Convention**"], which was adopted by the Hague Conference on Private International Law on July 02, 2019.[159] The Hague Convention establishes common provisions on mutual recognition and enforcement of judicial decisions and leads to greater harmonisation and convergence in the recognition rules applied by each country. The Hague Conference presently has 83 members, including both civil and common law jurisdictions.

E. Conclusion on Problem 4

The extent to which a seat court's decision on the status of an award should be conclusive has long been uncertain. Pragmatists may contend that there is an incentive for national jurisdictions to take differing positions on this issue, precisely to market their attractiveness as an enforcement jurisdiction. Nevertheless, the authors believe that the more principled way forward is to tread the middle ground between pure territorialism and delocalisation – a unified approach which better aligns itself to the objectives of NYC.

VI. Problem 5: When can Enforcement be Refused under Article V(1)(d) of the NYC?

In our discussion of Problem 4 above, we touched on the enforcement court's residual discretion to allow enforcement even if a ground for refusal under Article V of the NYC has been made out, pursuant to the permissive language of Article V.[160] Following from the discretionary nature of Article V, the approach varies by jurisdiction. In the final part of this article, we examine the approaches taken *vis-à-vis* Article V(1)(d) of the NYC, which states that recognition and enforcement of an award may be refused if:

> "*The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.*"[161]

Specifically, some enforcement courts have read in a requirement for the award debtor to show that there has been a *serious violation* of the parties' agreement, which in turn led to the award debtor suffering *material prejudice* (the material prejudice test) before enforcement will be refused. In contrast, other courts have held that *any* deviation from the parties' agreement, no matter how slight (the minimal deviation test), would warrant refusal of enforcement. These approaches have been discussed below.

A. The Material Prejudice Test

One example of an enforcement court which has applied the material prejudice test is the Singapore High Court in *Sanum Investments Limited* v. *ST Group Co, Ltd* ["**Sanum Investments**

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159 The Final Act of the Hague Convention was signed and adopted by the Hague Conference on Private International Law on July 2, 2019, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (July 8, 2019) *available at* https://www.hcch.net/en/news-archive/details/?varevent=687.

160 BORN, *supra* note 6, §§ 22.02 [A], 25.11 [A], and 26.03 [B][6].

161 NYC, *supra* note 123, art. V(1)(d).

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(HC)"].[162] Two agreements were entered into between the parties: (1) a Master Agreement containing a multi-tiered dispute resolution clause providing for (amongst others) mediation followed by arbitration "*using an internationally recognised mediation/arbitration Company in Macau*",[163] and (2) a Participation Agreement entered into in conjunction with the Master Agreement, which provided for arbitration at the SIAC before a three-member tribunal.[164] The claimant commenced proceedings before a three-member tribunal seated in Singapore. Although the respondents objected and did not participate, the tribunal was satisfied that the dispute between the parties fell under the Participation Agreement, and eventually rendered an award in favour of the claimant.[165] The respondents sought to refuse enforcement relying on, amongst others, Article 36(1)(a)(iv) of the Model Law, which is the equivalent of Article V(1)(d) of the NYC.[166]

Disagreeing with the tribunal, the court concluded that the underlying dispute was governed solely by the Master Agreement, and the proper seat of the arbitration was Macau.[167] The appointment of a three-member tribunal was also not in accordance with the Master Agreement, because the Master Agreement was silent on this issue and the default position would be that prescribed by the chosen institutional rules (i.e., the SIAC rules which provided for a sole arbitrator).[168] Nonetheless, enforcement was not refused. Since the respondents had not produced any evidence of prejudice arising out of what the court characterised to be *procedural* irregularities, they had failed to discharge their burden of proof.[169] On appeal, the Singapore Court of Appeal accepted that *"lack of prejudice is not relevant to a jurisdictional challenge but would be relevant to a procedural challenge"*.[170] The Singapore Court of Appeal explained that such differing treatment of procedural and jurisdictional challenges is justified because of the need to avoid misusing the applicable procedural provisions as a basis for denying the award on the ground that there was a minor or incidental breach of an unimportant term in the arbitration agreement.[171] However, the Court of Appeal overturned the decision of the court below and held that it was not necessary for a party resisting enforcement of an award on the basis of a *wrongly seated arbitration* to demonstrate actual prejudice arising from the wrong seat.[172]

The material prejudice test has also been adopted in a line of cases from the United States District Courts. In *Compagnie des Bauxites de Guinee* v. *Hammermills, Inc.* ["**Hammermills**"],[173] the award debtor attempted to resist enforcement on the ground that the tribunal had breached the agreed arbitral procedure by inserting into the award the amount of legal costs to be assessed against a party after the draft award had been approved by the ICC International Court of Arbitration. The District Court rejected this contention, and held that the award should be set aside "*only if such violation worked substantial prejudice to the complaining party.*"[174] The test has also been adopted in the

162 Sanum Investments Limited v. ST Group Co., Ltd. & Ors., [2018] SGHC 141 (Sing.).
163 *Id.* ¶ 23.
164 *Id.* ¶ 24.
165 *Id.* ¶ 21.
166 *Id.* ¶ 111.
167 *Id.* ¶ 109.
168 *Id.* ¶ 110.
169 *Id.* ¶ 114.
170 *Id.* ¶ 93.
171 *Id.* ¶ 94.
172 *Id.* ¶ 103.
173 Compagnie des Bauxites de Guinee v. Hammermills, Inc., 724 F.2d 369 (1983) (U.S.).
174 *Id.* at 17.

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District Court decision in *Karaha Bodas Company, LLC* v *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*.[175]

B. The Slight Deviation Test

Other enforcement courts have adhered strictly to the parties' agreement and refused enforcement without requiring the award debtor to show serious breach of material prejudice.

In *Polimaster Ltd.* v. *RAE Systems, Inc.* ["**Polimaster**"],[176] the dispute resolution clause in the parties' agreement required the settlement of disputes by negotiation, and failing that, "*by means of arbitration at the defendant's side*," which the parties agreed referred to the geographical location of the defendant's place of business. The claimant in the arbitration correctly commenced arbitration against the respondent in California (the respondent's place of business), with the reservation that no counterclaims could be filed because, pursuant to the dispute resolution clause, counterclaims against the claimant could only have been filed in Belarus (the claimant's place of business). But the respondent did end up making several counterclaims, which the arbitrator declined to dismiss because it would be contrary to "*notions of fairness, judicial economy and efficiency*" to "*[p]rosecut[e] a claim with affirmative defences in one venue while simultaneously prosecuting counterclaims almost identical to the affirmative defences in another [venue].*"[177] The arbitrator dismissed the claims and allowed the counterclaim. The United States Court of Appeals for the Ninth Circuit, adopting a strict construction of the dispute resolution clause, held that the counterclaims should have been brought against the claimant in Belarus. The court "*must enforce the parties' agreement according to its terms, even if the result is inefficient.*"[178]

The approach taken by the court in *Polimaster* clearly prioritises party autonomy. Not only was the court unconcerned about whether the appellants had suffered material prejudice, it also disregarded the efficiency gains of having the entire matter heard in the same set of proceedings. We note here that the deviation from the parties' agreement in this case was in relation to the choice of the seat.

In the Hong Kong case of *China Nanhai Oil Joint Service Corporation Shenzhen Branch* v. *Gee Tai Holdings Co Ltd* ["**China Nanhai Oil**"],[179] refusal of enforcement was sought on the basis that parties had selected arbitrators from the Shenzhen list of arbitrators when the arbitration agreement specified for selection from the *Beijing* list. The Supreme Court of Hong Kong refused enforcement on this ground because the arbitrators technically did not have jurisdiction to decide the dispute,[180] though it should be noted that enforcement was ultimately allowed because the party objecting to enforcement had taken part in the arbitration despite being aware that the arbitrators were chosen from the wrong list.[181]

175 Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936, [2002] (U.S.), *cited in* 27 Y.B. COMM. ARB. 814.

176 Polimaster Ltd. v. RAE Systems, Inc., 623 F.3d 832 (9th Cir. 2010) (U.S.).

177 *Id.* at 832, 835.

178 *Id.* at 832, 841.

179 China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., [1995] 2 H.K.L.R. 215. (H.C.) (H.K.)

180 *Id.* ¶ 36.

181 *Id.* ¶ 49.

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Another example of a case where the court refused enforcement of an award due to the improper composition of the arbitral tribunal was *Encyclopaedia Universalis S.A.* v. *Encyclopaedia Britannica Inc.* ["**Universalis**"].[182] The clause provided that, amongst others, if the two arbitrators chosen by the parties could not reach consensus on a third arbitrator, the third arbitrator would be appointed by the Tribunal of Commerce of the Seine. The appellant prematurely requested the Tribunal of Commerce of the Seine to appoint a third arbitrator.[183] It was held that the premature appointment of the third arbitrator "*irremediably spoiled the arbitration process*."[184] The manner in which the third arbitrator was to be appointed was "*more than a trivial matter of form. Article V(1)(d) of the New York Convention itself suggests the importance of the arbitral composition, as failure to comport with an agreement's requirements for how arbitrators are selected [was] one of only seven grounds for refusing to enforce an arbitral award.*"[185] As the court noted:

> *"As to the complaint that this exalts form over substance, at the end of the day, we are left with the fact that the parties explicitly settled on a form and the NYC requires that their commitment be respected."*[186]

C. Reconciling the Authorities and a Way Forward

The material prejudice test approach is in line with the pro-enforcement aims of the NYC. By preventing relatively trivial deviations from the agreed arbitral procedure from resulting in the non-recognition of an award,[187] it, in the authors' view, prevents Article V(1)(d) from being used as a hair-trigger for non-recognition. The pro-enforcement approach in this regard reflects how procedural matters are generally subject to minimal curial intervention in arbitration.[188] On the other hand, the material prejudice test view has been criticised for detracting from party autonomy, because deviations from parties' agreed procedure may end up being disregarded more frequently. Party autonomy is yet another underlying principle of the NYC, as reflected in how the NYC does away with the previous requirement in Article 1(c) of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards that there be a departure from procedure as set out in *both* the parties' agreement *and* the *lex arbitri*. Against this, the converse would apply to the slight deviation test.

Having regard to the pros and cons of each test, we contend that the material prejudice test should be confined to cases where the alleged non-compliance is in relation to the parties' agreement on procedure. The slight deviation test should apply to jurisdictional defects and errors pertaining to the seat, in respect of which refusal of enforcement should be more readily granted. This would strike the appropriate balance between party autonomy and ensuring that awards are not refused enforcement too readily. As George A. Bermann argues, the procedural/jurisdictional distinction is significant not only because the policy of minimal curial intervention does not apply to jurisdictional defects, but also because it would be practically very difficult to affirmatively demonstrate prejudice for jurisdictional defects.[189] It is possible to determine "*what would have been*" for procedural errors that are discrete and contained events, but not so where the deviation from

182 Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85 (2nd Cir. 2005) (U.S.).
183 *Id.* at 88.
184 *Id.* at 91.
185 *Id.*
186 *Id.*
187 Holding Tusculum BV v. Louis Dreyfus Holding SAS [2008] Q.C.C.S. 5904 (Can. Que.).
188 Born, *supra* note 6, at 3562.
189 George A. Bermann, *Honouring the Parties' Intent*, 1 ICC BULL. 13 (2019).

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the agreement relates to tribunal composition (which depends on human interactions and dynamics).[190] Moreover, where the defect pertains to the selection of the seat, the loss of the right to seek annulment of the award that would eventually be rendered in a competent court of the agreed seat is *inherently* prejudicial.[191]

This approach would reconcile the cases mentioned above: in *Hammermills*, the material prejudice test applied because the defect was procedural. In *Polimaster*, the slight deviation test applied because the problem pertained to the seat, while in both *China Nanhai Oil* and *Encyclopaedia Universalis*, the slight deviation test applied because the alleged defect was with the composition of the tribunal. Indeed, none of the cases where awards were enforced, (notwithstanding some deviation from the parties' agreement in relation to procedural issues) involved deviations from the chosen seat, except the *Sanum Investments (HC)* case, which has been overruled by the Singapore Court of Appeal.

D. Conclusion on Problem 5

It is acknowledged that the line between a procedural and jurisdictional defect may not always be clear. For example, if the deviation from the parties' choice of seat affects little more than the procedural rules that are applied, should this still be regarded as a jurisdictional error when the effect is relatively trivial? Be that as it may, the authors think that the application of the material prejudice test in cases of procedural defects will ensure that arbitral awards are not set aside for trivial reasons, thereby maintaining the legitimacy and effectiveness of international arbitration.

VII. Conclusion

Hence in answer to the questions posed at the beginning:

1. Appeals to a national court may be permitted under statute, though these rarely succeed in practice. Appeals to an appellate tribunal are likely to be permitted. However, appeals from a national court to a tribunal should not be allowed.

2. Failure to request the seat court to determine the tribunal's jurisdiction under Article 16(3) of the Model Law should generally preclude later attempts to set aside the award on the same jurisdictional ground, unless the Article 16(3) mechanism is not reasonably available. But the failure to invoke Article 16(3) should not preclude reliance on the same ground to resist enforcement.

3. AEIs are difficult to obtain. The alternative remedies of breach of agreement as a defence to enforcement and damages for breach of arbitration agreement have their own limitations. Therefore, a party's best bet is to obtain a stay or an ASI.

4. A middle path should be struck between delocalisation and territorialism. The enforcing court should first decide whether it will recognise the seat court's annulment decision. If recognition is denied, it would not be constrained by the decision. If the foreign judgment is recognised, the next question is whether it raises an issue estoppel in the enforcement proceedings. If so, the seat court's decision has the final say.

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190 *Id.*

191 Bermann, *supra* note 189, at 14.

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5. The material prejudice test should be confined to cases where the alleged non-compliance with the parties' agreement is a procedural one. The slight deviation test should apply to jurisdictional defects and errors pertaining to the seat, in respect of which refusal of enforcement should be more readily granted.

Extrapolating from these answers, although jurisdictions are sometimes identified as "*pro-arbitration*" or "*arbitration-friendly*," there is, in reality no jurisdiction that seeks to enforce foreign arbitral awards regardless of the circumstances of the particular case. While party autonomy can be given great weight and underpin a general stance of minimal curial intervention, there are always limits. For e.g., the Singapore courts have adopted a more sympathetic stance towards procedural breaches, by accepting the material prejudice test for refusing enforcement of an award under Article V(1)(d) of the NYC. This promotes the enforcement and recognition of awards, and bolsters the legitimacy and efficacy of international arbitration as a dispute resolution mechanism. But in the same vein, the Singapore courts have indicated that if an award has been set aside at the seat, it will accord primacy to the judgment of the seat court and refuse enforcement of the award. Other examples of approaches taken by the Singapore courts which are not, at first glance, regarded as strictly pro-arbitration include for example, adopting a narrow approach when deciding whether to grant an AEI even if there has been a breach of an agreement to arbitrate.

The authors are therefore of the view that to label a jurisdiction as being pro or anti-arbitration is a false dichotomy. Even a court which aims to be a "*promoter*" of arbitration has an equally important role as a "*regulator*" of the arbitral process. Indeed, for arbitration to flourish, it is of paramount importance for national courts to create laws which are fair and just, even if it means that party autonomy has to temporarily take a backseat.

Much like zombies, these perennial questions – and the broader controversy over the interaction between courts and tribunals – never die. And exactly like zombies, they gnaw at the brain. The debate will continue to rage. But in the meantime, we are pretty sure that the arbitration fraternity will keep calm and carry on.

Nguồn/source: https://ink.library.smu.edu.sg/sol_research/3111/

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