INTERNATIONAL ARBITRAL JURISDICTION

by

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ABSTRACT

Among the several reasons that contribute to the success of international commercial arbitration is the maximization of party autonomy and the minimization of court interventions in arbitration. This paper considers international arbitral jurisdiction in view of party autonomy and court interventions.

The nature of international commercial arbitration involves both private consensus and public recognition. Private consensus lies in the agreement of the parties. Problems which arise from the agreement and concern arbitral jurisdiction are where arbitral jurisdiction comes from, whether international arbitrators have the power to decide their own jurisdiction, to what extent international arbitrators can assume jurisdiction and to what extent a national court should review the decisions of the arbitrators.

The analysis is primarily based on international arbitration rules, published arbitral awards, arbitration legislations and court decisions of countries which have a fairly developed system of international arbitration. The paper concludes that international arbitrators are empowered to deal with their own jurisdiction and their decision is subject only to attack at a national court. International arbitrators and national courts should cooperate to facilitate a speedy resolution of disputes. National laws should play the role of filling in the gaps of international arbitral jurisdiction. Parties should frame their agreement in a way to avoid future uncertainties.
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<td>BCICAC</td>
<td>British Columbia International Commercial Arbitration Centre.</td>
</tr>
<tr>
<td>CIETAC</td>
<td>China International Economic and Trade Arbitration Commission.</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce.</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes.</td>
</tr>
<tr>
<td>LCIA</td>
<td>London Court of International Arbitration.</td>
</tr>
<tr>
<td>SCC</td>
<td>Stockholm Chamber of Commerce.</td>
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INTRODUCTION

International commercial arbitration undoubtedly experienced a full-scale development during the last few decades. Today business people commonly use arbitration clauses in international contracts for the sale of goods, the transfer of technology, franchise and foreign investment. Arbitral institutions are administering a significant number of arbitrations every year.\(^1\) International lawyers significantly are involved in drafting arbitration agreements, presenting arbitration cases and seeking enforcement of arbitral awards. Arbitrators and legal experts not only provide part-time or full time service\(^2\) in arbitration cases, but also hold regular communal meetings to exchange experiences and research on arbitration.\(^3\) Published arbitral awards are taken frequently as precedents in the subsequent arbitrations.\(^4\)

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\(^1\) In the International Chamber of Commerce ("ICC") arbitration, e.g., in 1993, the International Court of Arbitration received 352 new requests for arbitration involving 900 parties from a record of 94 different countries: *The ICC International Court of Arbitration Bulletin*, Vol. 5, No. 1, May 1994, p. 20.

\(^2\) In China International Economic and Trade Arbitration Commission (hereinafter "CIETAC"), for example, some senior arbitrators work full time and permanently for CIETAC on arbitration cases. They are either appointed by the parties or frequently appointed as presiding arbitrators by the chairman of CIETAC.

\(^3\) For example, International Council for Commercial Arbitration ("ICCA") holds a congress every four years and an interim meeting every two years exchanging views on various problems in international commercial arbitration.

As far as the legal framework is concerned, national arbitration laws have been amended to accommodate the needs of international dispute resolution; new laws are expected to be enacted in countries having a less developed arbitral system. Bilateral agreements on trade relations provide legal protection for arbitration, and multilateral conventions have been worked out to facilitate and safeguard the recognition and enforcement of arbitral awards, for instance, the United Nations Convention of 1958 on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Further, the United Nations Commission of International Trade Law ("Uncitral") has provided the nations with a Model Law on International Commercial Arbitration for adoption by the states and a set of Arbitration Rules for optional use by private parties.

Among the several reasons that contribute to the success of international commercial arbitration is the maximization of party autonomy and the minimization of court intervention in arbitration. These are two sides of one coin, which concern the relationship between international

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5 For example, in England, the Arbitration Act of 1950 was amended in 1975 and further updated in 1979. In Canada, the old arbitration law based on the English Act of 1889 was replaced by the Uncitral Model Law in 1986 at both the federal and the provincial levels: see generally, Robert K. Paterson, "International Commercial Arbitration Act: An Overview" in Robert K. Paterson and Bonita J. Thompson, Q.C., eds., UNICTRAL Arbitration Model in Canada (Toronto, Calgary, Vancouver: Carswell, 1987), p. 113.

6 For example, in China an arbitration law is much demanded and a debate is going on as to whether to cover both domestic and international arbitration by one legislation.


8 According to information provided by the United Nations Treaty Section, there have been 117 signatories to the 1958 New York Convention as of 16 March 1993: see Yearbook Comm. Arb. XVIII (1993), p. 325.
arbitrators and national courts. This relationship has been seen as complementary or rival. The court provides a complementary role when exercising its coercive power to uphold arbitration and advance the arbitral proceedings, but the court acts as a rival when exercising its judicial power to control the arbitral process and prevent an award from being enforced in its State.

In this paper, we will consider international arbitral jurisdiction in view of the party autonomy and court interventions, and examine whether international arbitral jurisdiction has developed into a system of jurisdiction free of court control. Problems that centre on international arbitral jurisdiction include whether private parties are entitled to a private procedure for dispute resolution, where international arbitral jurisdiction comes from, whether international arbitrators have the power to deal with their own jurisdiction, to what extent arbitrators can assume jurisdiction and to what extent national courts should review the decisions of international arbitrators. We will examine these problems by looking into the theories and practices of arbitration. In the analysis, we primarily rely on international arbitration rules and conventions, published arbitral awards, national legislations and court decisions of countries which have developed a fairly sophisticated system of international commercial arbitration. We will reveal that international arbitral jurisdiction is to a great extent independent of the national courts and operates under its own principles. We will also note that to some extent international arbitral jurisdiction needs support of national courts.

Chapter One discusses some preliminary issues, including the character of arbitral jurisdiction and the purpose and nature of international commercial arbitration. Chapter Two and Three analyze

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the source of arbitral jurisdiction and the arbitrators' power to rule on their own jurisdiction. Chapter Four explores the scope of arbitral jurisdiction from published arbitral awards. Chapter Five deals with the pros and cons of judicial review of arbitral jurisdiction.

The paper will conclude with an assessment of the autonomy of international arbitral jurisdiction. We will point out the need for a cooperative relationship of the arbitrators and the courts, and advocate the role of national laws in filling in the gaps of international arbitral jurisdiction and the role of private parties in preventing jurisdictional problems of arbitration cases.
CHAPTER 1: PRELIMINARY ISSUES

We will start with a definitional question: what is international arbitral jurisdiction. We will also analyze the purpose of choosing international commercial arbitration and the nature of such arbitration.

1.1. Definition

Arbitration is a quasi-judicial procedure whereby the arbitrator appointed by the parties makes a binding decision.\(^\text{11}\) Since there involves a binding decision, questions arise as to what matters of the decision are binding and who is to be bound. These are jurisdictional problems which need proper solutions before a decision on the merits can be taken.

The term "jurisdiction" has several different meanings. It can mean, for example, the administration of justice or the extent of legal authority; it can also mean a geographical area with politically defined borders.\(^\text{12}\) In the field of court proceedings, it means the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control

\(^{11}\) "Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons - the arbitrator or arbitrators - who derive their powers from a private agreement, not from the authorities of a state, and who are to proceed and decide the case on the basis of such an agreement", Rene David, Arbitration in International Trade (Deventer: Kluwer Law and Taxation Publishers, 1985), p. 5; "An arbitration is the submission of a dispute between two parties for decision to a third party of their own choice", John Parris, The law and Practice of Arbitration (London: George Goodwin Limited, 1974), p. 1.

over the subject matter and the parties. By analogy, arbitral jurisdiction means the power of an arbitrator to render a binding decision on the merits of an international commercial dispute.

The ability of international arbitrators to deal with business disputes is generally undisputed. International arbitrators function as justice carriers in the international business community. They have jurisdiction over both the disputing parties and the subject matter referred. For the purpose of subsequent analysis, it is useful to spell out the basic features of arbitral jurisdiction, particularly those of international commercial arbitration.

First of all, in order for the jurisdiction to be exercised, there must exist legal disputes, or disputes arising from a legal relationship between the parties. This proposition does not imply that the parties may not formulate a reference of future disputes. The parties may arrange arbitration for future disputes at the time of concluding their contract. The existence of legal disputes requires that, at the time of submitting to the arbitrators' jurisdiction, there must be real disputes capable of being described or located before the actual submission of the disputes could be dealt with.

Second, there must be a basis for submission to arbitral jurisdiction. For different types of arbitration, there are different bases to rely upon. In consensual arbitration, the basis is the written

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13 Pinner v. Pinner, 33 N.C.App. 204, 234 S.E.2d. 633.

14 Such a legal relationship may be contractual or not contractual: see Art.II (1), United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (hereinafter "New York Convention"); Art. 7 (1), UNCITRAL Model Law on International Commercial Arbitration (hereinafter "Uncitral Model Law").


16 For types of arbitration, see general discussion by McLaren and Palmer, The Law and Practice of Commercial Arbitration (Toronto: The Carswell Company Ltd., 1982), p. 9; also see Quintette Coal Ltd. v. Nippon Steel Corp. 29 B.C.L.R. (2d) 233 (B.C.Supreme Court), where the court states:
arbitration agreement conferring the jurisdiction over the dispute on the arbitrators, while in statutory arbitration, the basis would be those specific legislations providing arbitration procedures for certain types of disputes.\textsuperscript{17} International commercial arbitration is based on the agreement to arbitrate, which renders the procedure consensual.

Third, in exercising arbitral jurisdiction, the arbitrators must remain impartial and treat the parties with equality. This is particularly true in the context of international commercial arbitration where one of the purposes of reference to arbitration is to avoid the likely prejudices emerging in the proceedings of a national court. Both arbitration laws and procedural rules require an arbitral tribunal to be impartial and neutral.\textsuperscript{18} In case that the parties are not treated equally, the immediate remedy available to the parties is to seek a challenge or replacement of the arbitrator(s) who are to be responsible for such treatment, and the ultimate remedy is to seek setting aside or non-enforcement of the award made by the said arbitrator(s).\textsuperscript{19}

Fourth, arbitral jurisdiction exists until a final and binding award is rendered. By formulating an agreement to arbitrate, the parties give the arbitrators a mandate to make a final and binding decision with respect to their rights and obligations. Whether a final arbitral award is rendered or not

\begin{quotation}
"Broadly speaking, there are two kinds of arbitral tribunals. One is statutory to which and its jurisdiction by statute parties must resort. The other is private" (p. 247).
\end{quotation}

\textsuperscript{17} For example, disputes relating to expropriation of property for government purposes are statutorily arbitrated: see McLaren & Palmer, op. cit., p. 12.

\textsuperscript{18} See infra Sect. 3.2.4. Most national laws impliedly provide the requirement of impartiality in the provisions on enforcement, i.e., if there is partiality or misconduct on the part of the arbitrators, the award shall be set aside. The Model Law, however, sets out this principle in express terms: see Art. 18, \textsc{UNCITRAL} Model Law.

\textsuperscript{19} For setting aside of awards, see infra Sect. 5.1.
is determinative of the question whether arbitral jurisdiction still effectively exists. An interlocutory decision does not terminate the arbitral jurisdiction unless the decision itself concludes otherwise.

Conferral upon the arbitrators by the private parties, arbitral jurisdiction is limited to the arbitration agreement and retains an ad hoc character. The coverage of arbitral jurisdiction may vary from case to case. When an award is rendered, arbitral jurisdiction terminates for the particular case and the arbitrators also terminate their office as arbitrators. They may be enlisted in a list of arbitrators, but they are dormant and cannot exercise arbitral jurisdiction unless freshly appointed.

1.2. The Purpose of Choosing Arbitration

Since arbitration is conducted by an ad hoc tribunal which might cause divergence in arbitral decisions, why do business people choose arbitration in the first place? What is the purpose of choosing arbitration? Is their choice motivated by economic considerations? Is the arbitral process itself an efficient private adjudicative procedure? We will use an economic analysis to approach these questions and to find the purpose of choosing international commercial arbitration.

1.2.1. Scarcity in Dispute Resolution

The term "ad hoc" is not being used in the context of institutional and ad hoc arbitration in the classical sense. The ad hoc character of arbitral jurisdiction applies to both institutional and ad hoc arbitrations. For the distinctions between these two types of arbitration, see infra Section 2.1.

For example, China International Economic and Trade Arbitration Commission (CIETAC) maintains a List of Arbitrators for the purpose of appointment; arbitrators must be appointed from that List: see Art. 10, CIETAC Arbitration Rules (adopted at the Third Session of the First Congress of the China Council for the Promotion of International Trade (China Chamber of International Commerce) and effective as of 1 January 1989 (hereinafter "CIETAC Rules").
A basic principle in economics is that there is scarcity in human resources. The existence of scarcity suggests that choices must be made by human beings within the confines of their resources. A resource, in the economic context, is in essence "any good or service that is potentially of value in some way". Given this definition of resource, it can be immediately discerned that all procedures designed for the purpose of dispute resolution involve a considerable amount of economic resources. It is argued that the volume of resources used by different sorts of procedure will influence the choice of procedure.

The spectrum of dispute resolution at the international level generally includes negotiation, mediation (or "conciliation"), arbitration and litigation. Faced with a limited choice of methods for dispute resolution, economically the parties have to consider which type of dispute resolution is more efficient and effective. They know by definition that negotiation is directly conducted between themselves and their business partners for the purpose of a direct settlement or an agreement on how to settle their disputes. They may also be aware that conciliation involves a third party: the conciliator, who is to assist the parties in reaching a settlement, but not to make a binding decision. They may further consult their legal counsel as to the legal ramifications of arbitration and litigation.

Transnational litigation with respect to commercial disputes takes place at a national court of a particular state. There is no other hierarchy as a supra-national commercial court whose

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24 Id.

jurisdiction may extend by international legislation to transnational parties. Thus considerations about whether to arbitrate or litigate in the international context are actually made against an unbalanced scale, as Redfern and Hunter observed:

"In a domestic context, parties who are looking for a binding decision on a dispute will usually have a choice between a national court and national arbitration. In an international context there is no such choice. There is no international court to deal with international commercial disputes. In effect, the choice is between recourse to a national court and recourse to international arbitration" (emphasis original).26

In evaluating the different processes of dispute resolution, it can be asserted without doubt that the parties to a dispute wish to have the annoying dispute settled at the least expenses and within as short a period of time as possible. The parties will ask which process is the most efficient and which saves time and money.

In view of other factors that are of parallel importance to the choice-making process, it is useful to generalize the fundamental factors which determine the advantages and disadvantages of different mechanisms. The following table is prepared for a rough comparison.

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Table 1: Comparison of Dispute Resolution Mechanisms

<table>
<thead>
<tr>
<th>Feature \ Type</th>
<th>Third party</th>
<th>Appeal</th>
<th>Cost</th>
<th>Flexibility</th>
<th>Result</th>
<th>Mutual Relation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiation (N)</td>
<td>n/a</td>
<td>n/a</td>
<td>Least</td>
<td>Much</td>
<td>Settlement or to A/L</td>
<td>Maintained</td>
</tr>
<tr>
<td>Mediation (M)</td>
<td>Mediator</td>
<td>n/a</td>
<td>&gt; N</td>
<td>Much</td>
<td>Same as N</td>
<td>Maintained</td>
</tr>
<tr>
<td>Arbitration (A)</td>
<td>Arbitrator</td>
<td>No</td>
<td>&gt; M</td>
<td>&lt; M</td>
<td>Award enforceable subject to conditions</td>
<td>Easy to maintain</td>
</tr>
<tr>
<td>Litigation (L)</td>
<td>Judge</td>
<td>Yes</td>
<td>Most</td>
<td>Least</td>
<td>Judgment enforceable</td>
<td>Broken</td>
</tr>
</tbody>
</table>

Note the cost column of the four mechanisms. The cost of arbitration is more than either negotiation or mediation but less than litigation. In some cases of significance, international commercial arbitration is not cheap because the parties have to pay the fees of the arbitrators as well as the administrative fees and expenses of an arbitration institution (if the parties resort to institutional arbitration) and the fees for international travel services, but international business and international litigation is not inexpensive.

Be that as it may, business people still tend to favour arbitration at the international level. What is the motive of the parties favouring the choice of arbitration? The answer may be sought from the economic concept of opportunity cost.

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27 Id., p. 18.
1.2.2. The Opportunity Cost

The concept of opportunity cost means, by choosing a specific resource, one has foregone the value that the chosen resource would have "if it were freed from its current use and applied to the most valuable competing alternative use". In other words, opportunity cost asks people to consider their next best option when making choices.

With this notion in mind, business people would ask what is the next best option in making a choice of dispute resolution methods. In considering litigation at a national court of a neutral third country, both parties will ask the same question. The unfamiliar language, culture and the legal system in the third country demand the parties to use interpreters and hire local lawyers, which will inevitably incur additional expenses. Although interpretation and local legal counsel also may be used in international arbitration and incur similar expenses, these expenses are balanced against such benefit from non-economic factors as familiarity with the chosen procedure, the flexibility of and confidentiality of the process, and a non-appealable arbitral award. In third country litigations, these benefits are lacking.

The opportunity cost of litigating either in the defendant's home country or the plaintiff's country is unbalanced for the two parties. In the first case, the plaintiff would have a higher opportunity cost than the defendant because it has to pursue the proceedings in the defendant's home country; in the latter case, the result is vice versa. When viewed with this analysis, the prospect of choosing litigation for claims arising out of an international business transaction is unattractive.

Negotiation and mediation definitely save the parties time and cost if (and only if) a settlement is reached and performed to the satisfaction of both parties. When these processes fail, things may

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28 See Bowles, op. cit., p. 192.
get worse and other more formal proceedings may have to be resorted to. In the international context, business people invariably think of negotiation in the first place, trying first on their own to get the matter amicably settled, or seeking a way of proper settlement. Many arbitration agreements are the result of such negotiations. It is the same with mediation. If substantial agreement is out of the question, businessmen would seek an agreement on procedure. Though generally these two mechanisms save time, they can be very time-consuming and uncertain. Patience has to be paid to these mechanisms until a stop is called.

1.2.3. Efficiency in Arbitration

"Because arbitration is a voluntary service provided in a competitive market, it may appear that any procedures widely used in arbitration must be efficient procedures for deciding the type of dispute in question".29 When turning to arbitration, the parties will naturally ask whether the arbitral procedure is efficient and operates with a minimum of expense, effort and waste.

First of all, is there any mechanism available to compel submission to the private adjudication of the arbitrators in case where one party dishonours his promise to arbitrate and refuses to submit to the arbitral jurisdiction? The answer can be found in the laws and rules of arbitration.30 The basic


principle is that when one party, though duly summoned, fails to appear, the arbitral tribunal, when satisfied that the party's absence is without valid excuse, shall have power to proceed with the arbitration and make the award on the evidence before it. The party's waiver of right to appear will not disrupt the procedure; on the contrary, it will deny itself the opportunities for the proper presentation of its case.

If a recalcitrant party deliberately challenges the jurisdiction of the arbitral tribunal, the latter has the power, subject to the relevant laws, to determine its own jurisdiction based on the agreement to arbitrate. Though the challenging party may have recourse to the court for a judicial decision as to the arbitrator's jurisdiction, this power to determine its own jurisdiction ensures that the arbitral tribunal proceeds with the process even if its jurisdictional issue is still pending before the court.

Second, selection of arbitrators is the area where questions arise as to whether the procedures available for the appointment of the private judge are efficient. This is a weak area in keeping efficiency because the party who envisages an unfavourable award from the arbitrator has an incentive to drag its feet in agreeing to the appointment of an arbitrator.

The rules vary as to the methods of appointment. The ICC practice is that the Court of Arbitration will appoint the arbitrator(s), unless otherwise agreed upon by the parties. The Chinese practice is that the third arbitrator who will serve as the presiding arbitrator is invariably appointed

31 See infra Chapter 3.


33 Art. 2 (2) (3) (4), ICC Rules.
by the chairman of the commission.\textsuperscript{34} The AAA practice in the international field allows parties "to mutually agree upon any procedure for appointing arbitrators".\textsuperscript{35}

Different as the method of appointment may be, the rules do provide a time limit for constitution of the arbitral tribunal. Under the Uncitral Arbitration Rules, the tribunal should be constituted within no more than ninety days in the case of a sole arbitrator, and one hundred and twenty days in the case of three arbitrators.\textsuperscript{36} The experience of the ICC Court of Arbitration is that, "barring exceptional circumstances, a tribunal is usually constituted within three months".\textsuperscript{37}

Third, the award rendered by the private judge is of a final and binding nature, which avoids any appeal on the substance of the case after the closure of the arbitral proceedings. The finality of the award renders the arbitral process advantageous to the court proceedings whereby judgments are subject to appeals. It is obvious that the more time a procedure consumes, the greater the expenses will be, let alone the uncertainties connected with the various procedures.

The binding nature of the award also makes arbitration more attractive than either negotiation or mediation, since these two methods result in no decisions directly enforceable before a competent authority, except, of course, a settlement agreement capable of being enforced on a contractual basis.

\textsuperscript{34} Art. 14, CIETAC Rules; cf., in Stockholm Chamber of Commerce arbitration, the Arbitration Institute retains the power to appoint the sole arbitrator or the chairman of the arbitral tribunal. see Art. 5, SCC Rules.

\textsuperscript{35} Art. 6 (1), International Arbitration Rules of the American Arbitration Association, as amended and in force on or after 1 May 1992 (hereinafter "AAA International Rules").

\textsuperscript{36} Arts. 6 (2), 7 (2), Uncitral Arbitration Rules.

Finally, in the international field, enforcement of arbitral awards is expected to take less time and effort than enforcement of a foreign judgement. This is because, first, the parties are more likely to honour the award as they have voluntarily chosen to accept the arbitrators' decision; second, even if the losing party chooses to dishonour the award, the winning party is entitled to seek enforcement of the award on the strength of the New York Convention, as long as enforcement takes place in the Contracting States of the Convention. Because the Contracting States are obliged to recognize and enforce foreign arbitral awards subject to certain conditions, this procedure seems more simple than the procedure of judgement enforcement in a foreign state, where bilateral agreement and the principle of reciprocal treatment should be presupposed.

It should be noted with emphasis that the purpose of choosing a procedure is to search for a final settlement of the existing disputes in the shortest possible time and with the least possible expense. For this purpose, the parties in international business transactions tend to seek a streamlined, efficient and inexpensive way of dispute resolution. Clearly arbitration is something that the parties are seeking.

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Some countries do not make the reciprocal reservation under the New York Convention, e.g., Canada. In this case, an award may be enforced regardless of the nationality of the arbitral awards.
1.3. Nature of International Commercial Arbitration

As a matter of choice, there must be consensus between the parties as to whether to choose arbitration or any other form of alternative dispute resolution, and if chosen, when, where and how to have arbitration take place. The parties' consensus on what to arbitrate, what law to be applied, what rules to follow and how to constitute the arbitral tribunal forms a framework within which the tribunal could come into being and conduct the process. Further, the agreement of the parties will continue to play its role once arbitration is in process.

If we ask why private parties can arrange an arbitral procedure by agreement, we will face the parties' contract right.

1.3.1. Freedom of Contract

The question is whether individuals are entitled to choose, by contract, a third party other than the court established by the state to decide the dispute that exists between them, or whether the individuals have an innate right to choose their own private judges to administer justice. There have been two conflicting schools of thought on this matter. One is in favour of the individuals' freedom of contract. "The possibility of selecting one's judge was regarded as a birthright (droit natural) of man, as it was considered that such a right had to be protected against any encroachment by the legislator". The other school is against the principle of freedom of contract, the contention of which is that the state court has the inherent right to handle disputes of a legal nature and is the sole organ

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40 Id., p. 55.
having jurisdiction over dispute resolution. Their judicial power can not in any way be deprived of by private agreement. Where this school prevailed, there might be no arbitration practice as in 1798 France where a measure of prohibition was contemplated as a reaction against the earlier excessive favour with arbitration.41

The first school of thought which favours the individuals' natural right to arbitration prevails ultimately due to the worldwide recognition of freedom of contract. "The Constitutions of a number of Swiss cantons, currently, incorporate the same principle; the Constitutions of El Salvador (art. 174) and of Venezuela (art. 190) likewise proclaim the right of parties to resort to arbitration, -- and the same right is regarded, in a number of other countries, as being implicitly guaranteed by provisions of more general purport, which in the Constitution affirm the principle of freedom of contract".42

Based on the freedom of contract, private parties are free to select their own private judge to resolve their disputes and confer upon him the decision-making power of a judge. This freedom of contract is recognized subject to mandatory regulations of arbitration.43

The creation of a private forum is analogous to that of the court system of the state. In the words of Professor Kitagawa:

"The arbitration tribunal is an autonomous tribunal based on the agreement of both parties, standing on an equal footing with the state tribunal, the theoretical source of the state is the 'social contract' of its members (staatsvertrag), whereby they tacitly

41 Id., p. 56.
42 Id.
agree in advance that all disputes between them should be referred to the state court, while both parties explicitly conclude an arbitration agreement either with respect to the existing dispute (submission) or to future disputes (clause compromissoire). The arbitration tribunal and state court are equally open to the choice of the disputants".\footnote{Tokusuke Kitagawa, "Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective", in Pieter Sanders ed., International Arbitration Liber Amicorum for Martin Domke (Martinus Nijhoff / The Hague, 1967), p. 138.}(emphasis added)

Transnational parties may choose not to resort to arbitration in the first place. But if they choose to use arbitration instead of litigation to settle their disputes, they will be bound by their own choice. The arbitration agreement is the parties' contract which holds them to their choice. The impact of the agreement to arbitrate is not limited to the parties, but extends to the arbitrators as well. Once an arbitrator accepts an appointment, he is not only bound by his promise to conduct arbitration, but also bound by the arbitration agreement. This brings us to the relationship between the arbitrators and the parties.

1.3.2. Relationship between Arbitrators and Parties

The relationship between the arbitrators and the parties seems to be an unsettled area of law.

In common law jurisdictions, there is no given answer. In British Columbia, for example, neither the International Commercial Arbitration Act nor the Commercial Arbitration Act which governs domestic arbitration defines the relationship between the arbitrator and the parties. In England, the same is true, but the matter has been examined in a pragmatic way by Mustill and
Boyd. They suggest three ways to look at the issue: as a quasi-contractual relationship, as a matter of status or as a matter of contract. They seem to favour the status approach. The office of arbitrator involves "some degree of permanent status", and thus status alone "is all that is needed by way of theoretical underpinning for the mutual rights of the arbitrator and the parties". As to the contractual suggestion, they hold:

"[T]his would be a mistake. To proceed by finding a contract and then applying to it the ordinary principle of the law of contract will not produce a reliable answer unless a contract really exists to be found. Even in the extreme case of a massive reference, employing a professional arbitrator for a substantial remuneration, we doubt whether a businessman would, if he stopped to think, conceive that he was making a contract when appointing the arbitrator. Such an appointment is not like appointing an accountant, architect or lawyer, Indeed it is not like anything else at all."

The English courts seem to favour the theory of contract. In Cie Europeene v. Tradax, when determining whether the plaintiff was entitled to an injunction restraining the defendant from proceeding with arbitration of claims which were time barred by statute, the court held:

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46 Id.

47 Id., p. 189.

"(S)ince the decision of Heyman v. Darwins Ltd., (1942) 72 L.L.Rep. 65; [1942] A.C. 356, it has been recognized that the arbitration clause is a self-contained contract collateral or ancillary to the commercial contract of which it forms part (see Lord Diplock [1981] 1 Lloyd's Rep. 253; [1981] A.C. 909 at pp. 259 and 980). It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are **as a matter of contract** (subject always to the various statutory provisions) bound by the terms of the arbitration contract."\(^49\) (emphasis added)

The contractual approach is particularly appropriate to analyze the arbitrators' agreement with the parties as to their remuneration fees.\(^50\)

In civil law jurisdictions, it is generally accepted that there is a contractual relationship between the parties and the arbitrators. Under the German and Italian law, there exists such a contractual relationship, which is established when the acceptance of the arbitrator is notified to the parties.\(^51\) In Swiss law, the arbitrator is seen as the joint agent of the parties ("mandataire").\(^52\) In Argentina, the National Code of Civil and Commercial Procedure expressly provides:

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\(^49\) Id., p. 306.


"Acceptance by arbitrators of their appointment as such shall entitle the parties to compel them to carry out their functions and to hold them liable for costs and damages derived from the non-performance of arbitral functions."\textsuperscript{53}

Such a contract obviously cannot be taken as an ordinary contract for a joint venture or the undertaking of a project. Nevertheless, opinions differ as to the nature of such contractual relationships. Some treat it as a mandate,\textsuperscript{54} some others see it as a contract for services, particularly for intellectual services.\textsuperscript{55}

It is submitted that the relationship between the arbitrators and the parties should be examined in view of the role of arbitrators in international commercial arbitration. The role of international arbitrators should not be reduced to that of international lawyers who provide professional services.\textsuperscript{56}
The arbitrators' role is not limited to a contractual framework. They not only use their knowledge and expertise to decide the disputes at issue, but also use their commercial integrity and impartiality to conduct a procedure on a progressive basis.

Though different from judges in a court of law who apply and interpret the law as they see fit and perform a rule-making function on behalf of the state, international arbitrators present some good resemblance to national judges. Being decision-makers in a private procedure, international arbitrators are not subject to the same constraints imposed on judges.\textsuperscript{57}


\textsuperscript{55} See David, op. cit., p. 275.

arbitrators do not represent the will of any state or the will of any of the parties, but they must be tested under the same criterion of impartiality as national judges, and, in most countries, enjoy the same immunity as judges in their performance of the arbitral function.

An arbitrator's position involves a judicial function which is an indication differing arbitration from appraisal or valuation. The arbitrator resolves the dispute through performing a judicial function. Therefore, the status of the arbitrator is unique and differs from that of both parties. The arbitrators' relationship with the parties can hardly be determined merely from a contractual point of view.

The theory of contract is limited in its application because of the public interest involved in the arbitral process. For example, the arbitrators' duty to conduct a fair procedure is not derived from their "contract" with the parties and is not aimed at the parties personally, but it is "what the interests of the state require." The state on the one hand recognizes a legally binding agreement to arbitrate and encourages the use of such agreement, on the other hand it regulates the conduct of arbitration.

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58 See Blanchette v. C.I.S.Ltd. [1973] 36 D.L.R. (3rd) 561 (S.C.C.), where the Supreme Court of Canada held: "The principle to be applied is the same for Judges as for arbitrators".


61 See Mustill & Boyd, op. cit., p. 188.
through its judicial as well as legislative organs and fills in the gaps of the law of contract by means of the law of arbitration.

1.3.3. Public Interest

Renzhe Jian Ren, Zhizhe Jian Zhi. 62 Different people have different views. If one looks at the public interest involved in international commercial arbitration from post-award stage, one may conclude that international commercial arbitration, private in nature, is supported by the national court system that represent the will of the state, as Redfern and Hunter observed:

"International commercial arbitration is a hybrid. It begins at a private arrangement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award which has binding legal force and effect and which, on appropriate conditions being met, the courts of most countries of the world will be prepared to recognize and enforce. The private process has a public effect, implemented by the support of the public authorities of each state expressed through its national law." 63

If one looks at international commercial arbitration from the view point of a national state where arbitration takes place, one may come to an extreme conclusion:

62 A Chinese adage which literally means "the benevolent see benevolence and the wise see wisdom".

63 Redfern & Hunter, op. cit., p. 7.
"In the legal sense no international commercial arbitration exists. Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration."64

It is submitted that international commercial arbitration as a system of dispute resolution does exist in the international business community, but not in a legal vacuum. In the first place, arbitration takes place within the territory of a certain state and involves a certain extent of interest of that state. When arbitration takes place in one state or the other, it is presupposed that the law of that state permits such arbitration to proceed. The state is concerned that such arbitration does not violate its own law. The court of that state will ensure that the arbitration is progressing within the boundary of the national law. Where one party moves the court to invalidate the arbitration on grounds, e.g., that non-arbitrable matters are being arbitrated, the court's judicial function is brought into play to double check the validity of such arbitration.

If arbitration takes place in a third country, where no national of the parties's home jurisdiction is involved, or even where its law is opted out by the parties, the state may still be concerned with the fundamental justice of the case and the fairness of the procedure. For example, in France, the Code of Civil Procedure permits parties to choose "a given procedure law".65 As a result, an international arbitration may be governed by a procedural law other than that of France. But if, e.g.,

64 F. A. Mann, Lex Facit Arbitrum in P. Sanders ed. International Arbitration Liber Amicorum for Martin Domke op. cit., p. 159.

"due process" is not respected in the arbitration subject to the foreign procedural law, an action seems to be possible to set aside the arbitral award on the basis of a territorial criterion.\textsuperscript{66}

The state not only ensures that the arbitration is fairly conducted, but also sees that the arbitral procedure begins on a valid agreement in the first place. In English arbitral practice before the Arbitration Act of 1975, the court had a considerable degree of discretion whether to grant a stay of proceedings where the same subject matter was being arbitrated. Upon request for a stay of proceedings, the court "may" make an order staying the proceedings, "if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration".\textsuperscript{67}

The Arbitration Act of 1975 restricted this discretion of the judge and adopted a less stringent approach: the court, when seized with an application for a stay of proceedings, "shall" order a stay "unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred".\textsuperscript{68} Apparently, a stay of court proceedings is mandatory unless the prescribed conditions are met.\textsuperscript{69} The court retains the power to decide the validity and existence of the

\textsuperscript{66} Id., Arts. 1502 and 1504. Art. 1502 deals with the grounds for an appeal against a decision granting recognition or enforcement; the first paragraph of Art. 1504 reads: "An arbitral award rendered in France in international arbitral proceedings is subject to an action to set aside on the grounds set forth in Article 1502" (emphasis added).

\textsuperscript{67} Sect. 4 (1), Arbitration Act 1950.

\textsuperscript{68} Sect. 1 (1), Arbitration Act 1975.

arbitration agreement. If it were proved that there had been no arbitration agreement, or the arbitrator named in the arbitration agreement had already died, rendering the agreement "inoperative", the court would not be bound to send the parties to arbitration.

The nature of international commercial arbitration involves both private consensus and public recognition. Private consensus is the basis of the arbitration. The consensus aims at seeking a speedy and economical settlement of the dispute, which is fundamental to the operation of international arbitral jurisdiction. Public recognition represents the concern of the state and ensures that the private procedure follows the rule of natural justice. Without state recognition the arbitral procedure would have no footing in the world, and there would be nothing for the parties to choose.

CHAPTER 2: SOURCE OF ARBITRAL JURISDICTION

International commercial arbitration is the business of arbitrators in terms of administering justice. It is the business of private parties in terms of formulating the process. The parties make the arrangement by way of an arbitration agreement. This chapter considers the private agreement to arbitrate as the source of the international arbitral jurisdiction. We will discuss the various aspects of the arbitration agreement which have a bearing on the proper assumption of arbitral jurisdiction, including the form, contents and enforceability of the arbitration agreement.

2.1. Form of Arbitration Agreement

Arbitration generally may be divided into two types: institutional and ad hoc. Institutional arbitration refers to arbitrations organized by an established institution, although the arbitration process is not conducted by the institution itself. For example, in ICC arbitration, it is the arbitrators who decide the cases. The Court of Arbitration serves only as an administrative organ to facilitate the progression of the arbitration process. This is also true in arbitrations before the British Columbia International Commercial Arbitration Centre ("BCICAC").

By contrast, ad hoc arbitration refers to arbitrations conducted without administrative assistance of a permanent arbitral institution. The parties formulate all the necessary procedures for

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70 "The Court of Arbitration does not itself settle disputes": see Art. 2 (1), ICC Rules.

71 See generally Guidelines for the Arbitration of Commercial Disputes (Vancouver Centre for Commercial Disputes and British Columbia International Commercial Arbitration Centre, 1992).
the arbitrators to follow,72 or, failing the parties' consensus, the arbitrator chosen by the parties decides the procedure subject to the mandatory rules of the law applicable to the arbitration.

No matter what types of arbitration the parties use, there must be an arbitration agreement to give effect to the arbitrators' jurisdiction.

2.1.1. Agreement in Writing

An arbitration agreement is subject to some formal conditions in order to be enforced by law. In some jurisdictions, it can be valid on an oral basis. For example, in Germany an oral arbitration agreement is valid between two merchants.73 The oral form might create serious problems of proof if one party decided to ignore the arbitration agreement.

In order to prevent such difficulties of proof, modern national laws impose a written form requirement on the arbitration agreement. In France, an oral arbitration agreement was perfectly valid under the French case law, nevertheless, the 1981 Code of Civil Procedure innovated the requirement by providing that the arbitral clause must be in writing.74 In Canada, the Federal Commercial

72 The European Convention on International Commercial Arbitration (the "European Convention") provides that in case of ad hoc arbitration, the parties are free inter alia:
"a) to appoint arbitrators or to establish means for their appointment in the event of an actual dispute;
b) to determine the place of arbitration; and
c) to lay down the procedure to be followed by the arbitrators."

73 Art. 1027, German Code of Civil Procedure, Zivilprozessordnung ZPO 30, 1, 1877, version 12, 9, 1950 (BGB1 533).

Arbitration Code which implements the Uncitral Model law and governs both domestic and international arbitration at the federal level, requires a written form of the arbitration agreement.\textsuperscript{75} In British Columbia, an arbitration agreement may be in an oral form in domestic commercial arbitration,\textsuperscript{76} but must be in writing in international arbitration.\textsuperscript{77}

International instruments also require the arbitration agreement to be made in writing. Though the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards provide no formal requirement for the arbitration agreement,\textsuperscript{78} the 1958 New York Convention requires the arbitration agreement to be in writing in order to obtain enforcement under the Convention.\textsuperscript{79} The New York Convention further provides that an agreement in writing may include a clause in a contract or an agreement "signed by the parties or contained in an exchange of letters or telegrams".\textsuperscript{80} Consequently the New York Convention recognizes the evidential value of the "exchange" of communications. If no exchange were effected, it would be difficult to find an agreement.\textsuperscript{81}

\textsuperscript{75} \textit{Intl Handbook on Comm. Arb.}, op. cit., (Suppl. 10), Canada - 9.

\textsuperscript{76} Sect. 2 (1) (c), \textit{Commercial Arbitration Act} S.B.C. 1986 c. 3.


\textsuperscript{79} Art. II, \textit{New York Convention}.

\textsuperscript{80} Id., Art. II, 3.

\textsuperscript{81} For example, in a case where one party forwards to the other a printed contract form with an arbitration clause, the German court seized of an application for enforcement of the award held that the forwarding of the contract does not constitute a written arbitration agreement within the meaning
2.1.2. Arbitration Clause v. Submission Agreement

As an instrument in writing, the arbitration agreement may take the form of an arbitration clause contained in a contract and a submission agreement independent from a contract. The former contemplates reference of future disputes to arbitration and the latter makes a reference to the existing disputes.

The difference between an arbitration clause in the contract and a submission agreement not only lies in the timing of the disputes, but also in the treatment of the scope of disputes. With respect to future disputes, the parties do not know at the time of conclusion of the arbitral clause the nature and extent of the disputes. They have to resort to a "broad form" clause, which says that any dispute arising in the future shall be the subject matter of arbitration. For example, the ICC recommends the following broad form arbitration clause for insertion into a contract:

"All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules". The "broad form" clause usually covers "all" or "any" dispute relating to the various aspects of the contract, ranging from the formation of the contract to the interpretation of the terms of the contract, the validity of the contract, the performance of the contract or the breach by one or more parties of the contract. Usually a "broad form" clause resorts to such terms as "arising out of", "in


relation to" or "in connection with" to define the scope of the possible disputes. These terms may be used together to ensure a broader interpretation of the scope of disputes. In ODC Exhibit Systems Ltd. v. Lee et al., the British Columbia Supreme Court held that "any dispute arising out of this agreement" relates to "such matters as interpretation of the agreement when disputes arise out of the carrying out of its terms". The Court refused to send the parties to arbitration primarily on grounds that the dispute about whether there was conspiracy, deceit and fraud in making the agreement did not arise out of the agreement. The soundness of the reasoning might be defeated if the terms "in relation to" or "in connection with" were used in the ODC case. The court might have to be more lenient in interpreting the arbitration agreement.

As opposed to the "broad form" clause, a "narrow form" clause anticipates a certain scope of disputes arising out of the contract, e.g., disputes as to the quality of the goods in an international sales contract or disputes as to the distribution of profit in international investment projects. The "narrow form" clause limits the reference to the contemplated disputes. If the reference is limited to disputes about the quality of the delivery in a sales transaction, arbitral jurisdiction may not extend

84 ODC Exhibit Systems Ltd. v. Lee et al. 41 B.L.R. 287 (B.C.S.C., 1988).

85 Id., p. 293.

86 Cf. Boart Sweden AB et al. v. NYA Stromnes AB et al., 41 B.L.R. 295 (Ontario Supreme Court (High Court of Justice), 1988), where the claims also include those of conspiracy, the Ontario court held that "(t)he matters in dispute in the Ontario action are inextricably bound up with the matters which the parties agreed to arbitrate. It would be mischievous to continue to litigate, pending arbitration, matters which depend so much on the facts which form the basis of the arbitration" (p. 305). The court stayed the proceedings pending arbitration. Also see, Roy v. Boyce, 57 B.C.L.R. (2d) 187 (B.C. Supreme Court, 1991), where the court held that whether the contract in issue was terminated is a matter of evidence and is a dispute "arising out of or in relation to" the contract.
to disputes of quantity unless otherwise agreed to by the parties. Ultra vires exercise of jurisdiction is not recognizable according to national laws and international conventions.87

The "narrow form" arbitration agreement usually fits in the case of existing disputes. The parties are clear about what they are disputing about. They may itemize or list all the disputing issues in the agreement. A submission agreement tends to take a "narrow form".

An arbitration clause and a submission agreement may also have different consequences on the effect of the agreement to arbitrate when the arbitral award is set aside. In the event that an award is set aside, the whole arbitral procedure is set aside and the parties return to the point at which the dispute arose.88 If it is an arbitration clause, then the agreement subsists after an award is set aside and the parties may start arbitration afresh; if it is a submission agreement specific to a dispute already in existence, then the submission agreement may not survive the setting aside of the award.89 The parties may have to reach a new agreement in order to start a new arbitration. A general arbitration clause commits the parties to the arbitral procedure until a valid award is effectively made.

2.2. Contents of Arbitration Agreement

87 For the consequences of ultra vires assumption of arbitral jurisdiction, see infra Sect. 5.2.2.


89 Id.
The consensus of the parties to arbitrate lies in the arbitration agreement. The agreement may be lengthy, covering some very specific procedural issues, but it may also be as simple as "Arbitration to be settled in London". In any event, the parties' intention to arbitrate must be present.

2.2.1. Intention to Arbitrate

The intention of the parties to refer to arbitration is virtually a condition precedent to the commencement of the arbitral procedure. The intention determines the definitiveness of the parties' choice of arbitration. If the intention is absent, arbitration simply cannot take effect.

Difficulties often arise in the borderline cases where the intention to arbitrate itself is in dispute. In these cases, one has to examine the circumstances of each case. For example, in a case involving a clause which reads "general average and arbitration to be settled in New York", the plaintiff obtained an arbitral award in its favour and a judgment based on it in New York. It then brought an action to enforce the judgment in New Brunswick. The defendant had consistently taken the position that there was no jurisdiction under the charter parties to hold the arbitration in New York. The precise issue before the court was whether or not the clause submitted all disputes arising out of the charter parties to arbitration in New York or only those disputes which arose out of general average differences. The court read the parties' intention from the circumstances of the case and held:

90 See Tritonia Shipping Inc. v. South Nelson Forest Products Corporation, [1966] 1 Lloyd's Rep. 114, where the English Court of Appeal held that such a clause must be given effect.


92 Offen v. McCain Produce Co. Limited, 46 N.B.R. (2d) 108 (New Brunswick Court of Queen's Bench, Trial Division, 1983).
"In this particular case the charter parties were printed and made in New York. Payment was to be made in New York. General Average was to be settled in New York. I can see no reason why the parties would not also have intended that arbitration on all other matters to carried out in New York as well."93

To ensure a smooth and effective arbitral procedure, it is advised that the arbitration agreement clearly indicate the parties' intention to arbitrate. For that reason, the intention to arbitrate should not be stated in equivocal terms or contradicted with other terms of the contract. Otherwise, it is likely to render the arbitration agreement "incapable of being performed".94

It also should be noted that international commercial arbitration is a binding procedure which results in a final award subject only to a few grounds for setting aside. Parties' arrangement of "arbitration first, litigation second" may not work in the international context. In a German case,95 a German manufacturer of rugs and a Dutch firm concluded an exclusive distributorship agreement, which contained the following arbitration clause:

"All disputes arising out of this contract will, if no friendly settlement can be reached between [the parties], be submitted in first instance to an arbitral tribunal of the

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93 Id., p. 114.

94 Art. II (3), New York Convention. "The words 'incapable of being performed' would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the arbitral clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate": see A.J. van den Berg, The New York Arbitration Convention of 1958 (Deventer: Kluwer, 1981), p. 159.

German-Dutch Chamber of Commerce. If the decision is not acceptable to either party, an ordinary court of law, to be designated by the claimant, will be competent.\textsuperscript{96}

Here arbitration is agreed as a step preceding litigation. When a dispute arose, the German party started Court proceedings before the Court of first instance (Landgericht). The Court gave a decision against the Dutch party, who then took recourse to the same Court claiming that the dispute should first be settled by arbitration.

The Court held that the validity of the arbitration clause should be judged under both German and Dutch legal systems. Both German and Dutch laws provide that an arbitration agreement is valid only if the agreement specifically selects arbitration, which means that if the parties have agreed to arbitration, the Court cannot function as a second instance. The Court concluded that the arbitration clause was not valid and the agreement was merely an attempt for conciliation preceding a court action. The parties' intention to arbitrate is defeated by their intention to litigate since the parties did not intend to accept a binding arbitral award.

For institutional arbitration, it should be noted that the selection of the arbitration institution per se must also be made clear in the arbitration agreement. An ambiguous indication of the arbitration institution will not effectively authorize the institution to take the arbitration case even on a \textit{prima facie} basis.\textsuperscript{97} The arbitration institution may have to obtain the consent of the defendant before it could assume jurisdiction.

\textsuperscript{96} Id.

\textsuperscript{97} E.g., in ICC arbitration, "(w)here there is no \textit{prima facie} agreement between the parties to arbitrate or where there is an agreement but it does not specify the International Chamber of Commerce, and if the Defendant does not file an Answer within the period of 30 days provided by paragraph 1 of Article 4 or refuses arbitration by the International Chamber of Commerce, the Claimant shall be informed that the arbitration cannot proceed" (emphasis added): Art.7, ICC Rules.
2.2.2. Scope of Disputes

The scope of disputes depends on the form of the agreement to arbitrate, i.e., a broad or a narrow form. In either form, it concerns (1) the availability of arbitration services and (2) the requirements of national laws on arbitrability.

For the first issue, most of the established arbitration institutions deal with disputes of commercial nature, not, for example, disputes about family relationships or personal matters. The ICC Court of Arbitration handles business disputes of an international character. The BCICAC deals with commercial disputes arising from a contract or a defined legal relationship as its recommended clause reads:

"All disputes arising out of or in connection with this contract, or in respect of any defined legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration under the rules of the British Columbia International Commercial Arbitration Centre."

Matters of a non-commercial nature may not fall within the jurisdiction of an institution. Such matters may never reach the hands of international arbitrators because the institution would have rejected them in the first place.

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100 See Guidelines for the Arbitration of Commercial Disputes (British Columbia International Commercial Arbitration Centre, 1992).
As for the second issue, under national laws arbitrability is a prerequisite for arbitration. If the dispute were statutorily non-arbitrable, for example, "issues dealing with the legal capacity and status of individuals or issues involving moral sentiments and acceptable standards", arbitrable jurisdiction could not found. A private procedure cannot derogate from the mandatory rules of the state. Otherwise, a state would have no control of the subject matter jurisdiction of arbitration.

Many national laws prescribe arbitrable matters in positive terms. Under English law, e.g., matters which affect the civil interests of parties are arbitrable. French and German laws provide that differences on which it is possible to reach a compromise may be arbitrated.

The new Swiss law on international arbitration provides that "any dispute involving property may be the subject matter of an arbitration". The term "property" is said to cover "all kinds of financial or monetary interests connected to contractual, quasi-contractual, commercial, civil, administrative and public law matters, whether arising under domestic, foreign or international law".

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The new Swiss law does not limit arbitrability to commercial matters. Any dispute which can be valued in monetary terms can be settled through arbitration.

Some nations list items that are non-arbitrable. For example, "under the existing Chinese law, disputes relating to infringement upon the rights of trademarks and patents cannot be arbitrated".107

Some others develop principles on arbitrability through case law. For example, in the United States, there has been a favourable judicial view of arbitrability with respect to international arbitration. In Mitsubishi v. Soler Chrysler-Plymouth,108 Soler claimed that the dispute were of an antitrust nature and were not arbitrable. The key issue was whether in a international business transaction involving the application of U.S. antitrust law the parties' choice of arbitration is still effective. The U.S. Supreme Court held in favour of arbitration109 and found that "having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed".110

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109 As to the scope of arbitration clause, the US Court of Appeals, First Circuit, stated at the outset that: "Our analysis of the arbitration clause is guided by two basic principle. First, the scope of the clause as it appears on the face of the contract is a question of law for our independent determination and not, as Mitsubishi argues, one of fact reversible only for clear error. Second, all doubts are resolved in favour of arbitration": see Soler Chrysler-Plymouth Inc. (U.S.) v. Mitsubishi Motors Corporation (Japan) (723 Federal Reporter, 2nd Series, p. 155, 1983), Yearbook Comm. Arb., X, (1985), p. 520.

110 Id.
With regard to arbitrability, a question arises as to what system of law applies. The New York Convention resolves the question only in enforcement proceedings, where the law of the forum state applies. In arbitral proceedings, will an international arbitrator apply the law of the country where arbitration is being conducted or the law of the home country of either of the parties? The laws of these countries may all have an impact on the issue of arbitrability.

Arbitrability is first and foremost governed by the law of the seat of arbitration. If that law prohibits certain matters to be referred to arbitration, they are not arbitrable within the territory of that state. Where the law of the home county of either of the parties imposes certain limitations on arbitrability, then matters beyond the limited scope may render the arbitration agreement invalid. In ICC Case No. 4132, the South Korean defendant contended that the contract and the arbitration clause were unenforceable on the basis of Korean public law (antitrust law, price law and fair trade law). The tribunal distinguished between the private law governing the contract and other rules of public law that may be applicable to the contract. The tribunal felt empowered to apply national public law insofar as the enforceability of the contract is concerned. It was not satisfied with the defendant's proof about the extent of application of Korean public law to the case and held that Korean private law governed the contract and that the disputes in question were arbitrable.

National rules on arbitrability are mandatory and must be observed in formulating the scope of disputes and conducting an arbitration. Inarbitrability of certain disputes under either the law of

111 Art. V (2) (a), New York Convention.

the place of arbitration or the law of the home country of either of the parties may render the arbitration wholly or partly invalid.

2.2.3. Appointment of Arbitrators

The parties should agree on the way the arbitral tribunal is to be organized. If the arbitration agreement refers to a set of procedural rules, the arbitral tribunal will be constituted in accordance with the applicable procedural rules, which always have provisions regarding the appointment of arbitrators. In ICC arbitrations, unless the parties have agreed or special circumstances require otherwise, the Court of Arbitration shall appoint a sole arbitrator from a country other than those of which the parties are nationals. Under the Uncitral Arbitration Rules, in the absence of an agreement to the contrary, three arbitrators are to be appointed: one by each party and the third appointed by the two party-appointed arbitrators. If the two arbitrators cannot agree on a third arbitrator, the latter may be appointed by the appointing authority agreed upon by the parties or, in the absence of agreement of the parties on the appointing authority, the same may be appointed, upon request, by the Secretary-General of the Permanent court of Arbitration at the Hague.

Parties may avail themselves of the right to the appointment of arbitrators in their arbitration agreement. They may decide on the number, the procedure of appointment and the qualifications of arbitrators. The important thing is to prevent any impasse in the appointment process. For example, if the parties have named an arbitrator in the agreement, they must make sure that the so named arbitrator will accept the appointment. Otherwise, problems will arise when the named arbitrator

113 Art. 2 (5) (6), ICC Rules.

114 Arts. 5, 6, 7, 8, Uncitral Arbitration Rules.
refuses to accept the appointment or unable to perform because of illness or death. They may agree on an appointing authority to appoint arbitrators on their behalf in case their agreed procedure does not work. In this case they should also be certain that the appointing authority will be willing to perform the appointment.\textsuperscript{115}

2.2.4. Rules of Procedure

Arbitral procedure rules are designed to provide the arbitrators with a code of rules governing the procedure of arbitration. Arbitration rules generally provide an initial stage, an appointment stage, a hearing stage and a decision-making stage. At the initial state, documents such as application for arbitration, statement of claims and defence are produced and exchanged. At the appointment stage, parties appoint arbitrators to constitute the arbitral tribunal. At the hearing stage, the arbitral tribunal hears the evidences and presentations of the parties for their cases. The final decision-making stage provides the issuance of an arbitral award by the arbitral tribunal.

The parties may take advantage of a set of rules in their arbitration agreement. These rules will afford them a great degree of predictability and certainty as to the various steps in an arbitral procedure. The parties may also stipulate their own rules of procedure to supplement the procedural rules they have chosen. In ICC practice, the ICC Rules of Arbitration itself permit parties or the

\textsuperscript{115} In National Enterprises Ltd. v. Racal Communications Ltd., (1974) 2 W.L.R. 733, the named appointing authority declined to appoint arbitrators simply because they did not consider it their function to appoint arbitrators: see C.M. Schmitthoff, "Defective Arbitration Clauses", Journal of Business Law, 1975, p. 9; also see "Preliminary Award Made in Case No. 2321 in 1974", S. Jarvin and Y. Derains, Collection of ICC Arbitral Awards 1974-1985, Kluwer, 1990, p. 8, where the named appointing authority other than the ICC Court of Arbitration refused to appoint an arbitration "saying that he considered that the Court should appoint the arbitrator", id., p. 9.
arbitrators to settle on any rules to fill any gaps of the Rules. Under the Uncitral Arbitration Rules, the parties may modify the rules to tailor their own needs.

Some arbitration agreements may neglect the selection of any procedural rules, for example, "arbitration in the city of London". In such a case, the place of arbitration is selected and the law of that place governs the procedure and fills in the gap of the arbitration agreement.

2.2.5. Applicable law

Parties should always be cautious about the issue of applicable law, since the validity of the arbitration and even the speed of the process may turn on which law applies to the arbitration. First and foremost, we should distinguish between the law applicable to the substance of the case and the law governing the procedure of the arbitration. The former is the law that the arbitrators rely on in determining the substantive rights and obligations between the disputing parties; the latter involves the manner in which the arbitral proceedings develop and the roles of the forum country's court in the arbitral process.

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116 Art. 11, ICC Rules.

117 "Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the Uncitral Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing" (emphasis added): Art. 1 (1), Uncitral Arbitration Rules.


119 There is also a law applicable to the arbitration agreement, which may be different from either the substantive law or the procedural law: see infra Sect. 2.3.1.
Second, parties are entitled to agree on the applicable law of their contract, and they should consider the choice of applicable law in their contract. Where they have chosen a law applicable to the merits, the arbitrators must respect and apply the law so chosen; where the parties fail to choose such a law, the arbitrators will decide the applicable law according to the conflict of laws rules which they consider applicable. In all cases, they shall take account of the terms of the contract and usages of the trade. Some arbitrators even go further by applying lex mercatoria, or the law of the merchant.

As to the law applicable to the arbitral procedure, similarly, if the parties have made an express choice in their contract, the arbitrators shall follow the procedural law so chosen. But they

120 Whitworth Street Estates (Manchester) Ltd. v. James Miller and Partners Ltd. [1970] A.C. 583, 603 per Lord Reid.


123 In ICC Award NO. 3131 concerning a dispute between a Turkish company and a French company, the arbitrators concluded: "Faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international lex mercatoria."

must examine the *lex arbitri* so fixed with regard to its compatibility with mandatory rules at the place of arbitration, if the place is not in the country whose procedure law is chosen.\(^{124}\)

If the parties merely have selected a place of arbitration\(^{125}\) and left open the procedural law, the latter will be the *lex loci arbitri*, i.e., the law of the place of arbitration; if the parties have chosen neither the procedural law nor the place of arbitration, the law of the place where arbitration actually takes place will govern.\(^{126}\)

2.3. **Enforceability of Arbitration Agreement**

Enforceability is an inherent feature of the arbitration agreement. The Geneva Protocol was the first international instrument that addressed the issue of enforceability. The Protocol called for the Contracting States to recognize the validity of an agreement referring existing or future disputes


\(^{125}\) Parties are free to agree upon the place of arbitration; failing such agreement, the place is either decided by the arbitration institution (as in ICC arbitration) or the arbitral tribunal (as in Uncitral Rules): see Art. 12, *ICC Rules* and Art. 16, *Uncitral Arbitration Rules*.

\(^{126}\) The New York Convention assumed the law of the place of arbitration as the applicable law where there is no choice by the parties. One ground for non-enforcement of an arbitral award reads: "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": Art. V 1 (d), *New York Convention*. 
to arbitration\textsuperscript{127} and required the tribunals of the Contracting States, when seized of a dispute of a contract containing an arbitration agreement, to refer the parties to the decision of the arbitrators.\textsuperscript{128}

Being a convention on recognition and enforcement of foreign arbitral awards, the New York Convention, nonetheless, confirmed the spirit of the Geneva Protocol and further imposed an obligation on the court of a Contracting State to refer the parties to arbitration unless the arbitration agreement is null and void, inoperative and incapable of being performed.\textsuperscript{129}

2.3.1. Law Applicable to Arbitration Agreement

As to the law applicable to the arbitration agreement, there seems to be no uniform rules. The New York Convention provides in connection with the enforcement of the arbitral award that the law applicable to the arbitration agreement is "the law to which the parties have subjected it or, failing any indication thereon, ... the law of the country where the award was made". Two questions follow: first, is the law applicable to the whole contract also applicable to the arbitration agreement? Second, if the parties have not chosen any law governing the contract or the arbitration agreement, how is the law applicable to the arbitration agreement to be decided at the time of enforcement of the arbitration agreement when the place of the award to be rendered is still undetermined?

\textsuperscript{127} Art. 1, \textit{Geneva Protocol}.

\textsuperscript{128} Art. 4, id.

\textsuperscript{129} Art. II (3), \textit{New York Convention} reads: "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".
For the first question, the answer is not necessarily positive. The arbitration agreement may be in the form of a submission which is separate in form from the contract. It is conceivable that the parties indicate one law to govern the contract and later another law to apply to the arbitration agreement. In case the arbitration agreement is a clause of the underlying contract, it is arguable that the parties had wished to have a uniform system of law to govern the whole body of the contract. Because of the autonomy of the arbitral clause, factors related to a determination of the applicable law of the arbitration agreement might be different from those for the contract. For example, as to the arbitration agreement, an arbitrator may consider to apply the law "which the judge who would normally have been competent would have been obliged to apply", while, as for determination of the law applicable to the substance of the contract, the arbitrator may apply "those rules of conflict of laws which coincide in the places of domicile of both parties". In the famous Dow Chemical arbitration, the arbitrators held:

"[T]he source of law applicable to determine the scope and the effects of an arbitration clause providing for international arbitration do not necessarily coincide with the law applicable to the merits of a dispute submitted to such arbitration. Although this law or these rules of law may in certain cases concern the merits of the dispute as well as the arbitration agreement, it is perfectly possible that in other cases, the latter, because of its autonomy, is governed -- not only as to its scope, but also as

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132 Id.
to its effects -- by its own specific sources of law, distinct from those that govern the merits of the dispute. This is particularly the case -- unless the parties have expressly agreed otherwise -- with respect to an arbitration clause referring to the ICC Rules.\textsuperscript{133}

As to the second question, i.e., how to determine the law applicable to the arbitration agreement when the award has not yet been made, some commentators consider that such an agreement is governed by the law of the country where the award \textit{will be made}.\textsuperscript{134} Under this view, it is submitted that, where the parties have not selected a place of arbitration, the solution would be the application of the conflict of law rules of the forum.\textsuperscript{135}

This view is shared by the German courts in the above \textit{Rugs} case,\textsuperscript{136} where the German Court of first instance held that the parties themselves were free to determine the law applicable to the arbitration agreement and failing any indication thereon, the law of the country in which the award will be made ("ergehen soll") will apply.

However, in the U.S., the prevailing approach is that the law of the forum governs the arbitration agreement, in the absence of choice of the parties. In \textit{Ferrara S.p.A. (Italy) \& Fratelli Moretti Cereali S.p.A. (Italy) v. United Grain Growers Ltd. (Canada)}, the U.S. District Court for the Southern District of New York held:

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\textsuperscript{135} Id.

\textsuperscript{136} Supra footnote 95.
"Unlike Art. V of the Convention, which governs the recognition and enforcement of arbitral awards, Art. II does not indicate which law is to govern enforceability of an arbitral agreement, but it appears that the drafters intended to impose on the ratifying States a 'broad undertaking' to give effect of such an agreement unless it offends the law or public policy of the forum. (...) This result is consistent in these cases with the view that enforceability of an agreement to arbitrate relates to the law of remedies and is therefore governed by the law of the forum" (emphasis in text).\(^{137}\)

In *Becker Autoradio U.S.A. Inc. (U.S.) v. Becker Autoradiowerk GmbH (F.R. Germ.) et al.*\(^{138}\) the U.S. Court of Appeals (Third Circuit) held:

"Thus, the question of whether, in contracts involving commerce, there is an agreement to arbitrate an issue or dispute upon which suit has been brought is governed by federal law. Concomitantly, questions of interpretation and construction of such arbitration agreements are similarly to be determined by reference to federal law."\(^{139}\)

The European Convention has adopted a compromise position. It provides that the law of the country where the award is to be made applies to cases where the parties have not made a choice of law; on the other hand, the conflict of law rules of the forum state may also be used to determine the applicable law in all other cases:


\(^{139}\) Id., p. 273.
"In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions

(a) under the law to which the parties have subjected their arbitration agreement;
(b) failing any indication thereon, under the law of the country in which the award is to be made;
(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute." ¹⁴⁰

Whatever law applies to the arbitration agreement, an emerging consensus seems to be that the law applicable to the arbitration agreement is not necessarily the law which applies to the contract. Parties may choose a law to apply to the contract and another to the arbitration agreement. Once they have chosen a law applicable to the contract, they should not take it for granted that the same law will apply to the arbitration agreement. Rather they should explore the possibility of choosing a specific system of law to govern the arbitration agreement. In the absence of parties' choice, the law applicable to the arbitration agreement may be determined in the circumstances of each case, which may, none the less, be a different law from that applicable to the contract.

2.3.2. Effect of Arbitration Agreement

¹⁴⁰ Art. VI (2), European Convention.
It is generally recognized that a valid arbitration agreement establishes the jurisdiction of the arbitrators and excludes the competence of ordinary courts. This is true in Germany as the Court reasoned in the above Rugs case. The German Code of Civil Procedure provides that the court must dismiss an action which is brought before it in violation of a valid arbitration agreement and refer the parties to arbitration.¹⁴¹

The New York Convention calls for the court of a Contracting State to stay the court proceedings and refer the parties to arbitration unless the arbitration agreement is "null and void, inoperative or incapable of being performed".¹⁴² This position is also recognized in the United States,¹⁴³ France¹⁴⁴ and Austria.¹⁴⁵ In Canada, the arbitration statutes adopt the Model Law rule on enforcement of the arbitration agreement and so does the court seized of an application for stay of court proceedings.¹⁴⁶

¹⁴¹ Sect. 1027 a, German Code of Civil Procedure.

¹⁴² Art. II (3), New York Convention.

¹⁴³ Sect. 3, United States Arbitration Act United States Code, Title 9, Chaps. 1, 2 and 3; Sect. 2, Uniform Arbitration Act. In Fritz Scherk v. Alberto-Culver, the U.S. Supreme Court considered that a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is an almost indispensable precondition of the achievement of the orderliness and predictability essential to any international business transaction, and "a parochial refusal by the courts of one country to enforce an international arbitration agreement would frustrate these purposes": see Fritz Scherk (German) v. Alberto-Culver Company (U.S.) 417 U.S. 506, Yearbook Comm. Arb., I, (1976), p. 203.


¹⁴⁵ Intl Handbook on Comm. Arb. (Suppl. 1), Austria - 6.

The United Kingdom Parliament has added a fourth exception to the three conditions set out by the New York Convention. The court could refuse to order a stay of proceedings if it is satisfied "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred".147 In Nova (Jersey) Knit Ltd. (U.K.) v. Kammgarn Spinnerei GmbH (F.R.Germ.) 148, where, faced with the issue whether there was a dispute as to the claim on bills of exchange, the House of Lords reversed the decision of the Court of Appeal, holding inter alia that there was no dispute as far as the bills of exchange were concerned and refused a stay of proceedings.149

The Chinese position is that the parties are barred from taking the case to the court if there is an arbitration agreement concluded between the parties.150 But there are no provisions on stay of court proceedings in case that one party, in breach of an arbitration agreement, takes action in a court. The Chinese courts seem to be obligated to order a stay of proceedings under the New York Convention to which China acceded in 1986. To the contrary, one case illustrates that an arbitration clause may not bar the Chinese court from exercising jurisdiction. The dispute arose from a sales


149 Cf. ICC Case No 4705 (unpublished, but discussed by S. Jarvin), where the respondent did not dispute the sum claimed and the interest thereon, the arbitrator defined the issue to be determined as "the manner in which the admitted debt and interest should be discharged". See S. Jarvin, "The Arbitrator's Powers", op. cit., p. 55.

contract and involved a foreign party as the defendant. Regardless of the arbitration clause in the contract, the Shanghai Intermediate People's Court held:

"The defendant, through a series of fraudulent acts, used the device of a contract to defraud plaintiff of payment for goods. This act constitutes a tort and therefore, the case is no longer a contractual dispute. Accordingly the arbitration clause in the contract does not apply and because the locus delicti is Shanghai, this court has jurisdiction by virtue of Articles 185 and 22 of the PRC Civil Procedure Law (Tentative Trial)."151

The court based its decision on tort grounds. If there had been no fraudulent acts in the case,152 the court would probably have decided differently. On the other hand, if the court were more supportive of international arbitration, it would not have difficulty in finding a basis for upholding arbitration. It would well rely on the New York Convention to give effect to the parties' intention to arbitrate.153


152 Cf. Prima Paint v. Flood & Conklin 388 US 395, 18 L Ed 2d 1270, 87 S Ct 1801 (1967), where the Supreme Court of the United States held that a broad arbitration clause encompasses arbitration of the claim that the contract itself was induced by fraud unless fraud was directed to the making of the arbitration clause itself.

153 Cf. a recent English case involving similar allegations of fraud: Cunningham-Reid and Another v. Buchanan-Jardine [1988] 1 W.L.R. 679 (C.A.). In this case, the defendant had contracted to carry out refurbishment work in the plaintiffs' home. Purchases and services were to be billed to the plaintiff according to invoices. The contract contained an arbitration clause. The plaintiff alleged that the defendant had been guilty of fraud in arranging for invoices to be made out by suppliers which showed a larger sum was payable than was in fact due and on the basis of such fraud, the plaintiff opposed a stay of proceedings. Under Section 24 (2) of the English Arbitration Act of 1950, the
To sum up, an arbitration agreement which serves as the source of arbitral jurisdiction must be valid under the law applicable to it in order for it to be enforced. Determination of the validity of the agreement enables a national court to take control of the practice of arbitration. In this connection, arbitral procedure seems to be dependent upon the support of the national courts. But if the parties have carefully drafted the arbitration agreement and selected an autonomous law applicable specifically to the arbitration agreement at the very beginning, they may avoid many uncertainties and reduce unnecessary litigations over the arbitration agreement.

High Court has discretion to rule that an arbitration agreement shall cease to have effect where a dispute involves a question of fraud. The case turned on the circumstances under which the court should exercise that discretion. The court held that, on the application of the party charged with fraud, a stay of proceedings normally would be granted so that the matter could be arbitrated, unless a good reason against arbitration existed, and that even strong prima facie evidence of fraud would not by itself be a sufficient reason for refusing a stay. Woolf L.J. stated at p. 688:

"There is no difficulty in this day and age in appointing an arbitrator who is well capable of properly determining and trying an issue of fraud of this sort".

The judgment represented a restrictive English judicial approach in exercising the statutory discretion. The court should give effect to the intention of the parties who are, in the words of Bingham L.J., "entitled by virtue of the agreement to arbitrate unless good reason exists against that course" (at p. 690).
CHAPTER 3: JURISDICTION AS TO JURISDICTION

In arbitral practice, challenges occur frequently as to the jurisdiction of the arbitral tribunal, particularly in cases where the defendant anticipates an unfavourable award. Decisions on such challenges must be taken at an appropriate time during the procedure. Who is going to make that decision, the arbitral tribunal or the court? Who has the final say on arbitral jurisdiction?

This chapter discusses answers to these questions. We will examine the principle of competence of competence from different perspectives and discuss its impact on the relationship between the arbitral tribunal and the court.

3.1. Who Is to Determine the Competence of the Arbitrators?

Once arbitration commences, the respondent cannot stop the proceedings simply by default or any other dilatory means. The proceedings will continue, subject to judicial orders to the contrary, until the arbitral tribunal makes a final decision. The respondent is put in no position of negating its own written promise. The only way to back out would be to challenge the legal validity of the arbitration agreement. For this purpose, the respondent may file suit, seeking an injunction to restrain the arbitration from proceeding, or he may challenge the arbitral jurisdiction before the arbitrators, claiming, e.g., that the contract in which the arbitration clause is contained is invalid or has terminated and as a result the arbitration agreement has no effect.
The question arises as to who is to decide these jurisdictional challenges. In the scene of arbitration, there are at least three decision makers: the court, the arbitral tribunal and the arbitration institution in institutional arbitrations. Let us examine the role of each of these decision makers.

(1) The national court is the primary organ of justice administration and the final decision maker of arbitral jurisdiction. The competence of the courts is the rule, and the competence of the arbitrators the exception for resolving disputes. Being a public judicial organ established by the state, the court is empowered to exercise judicial powers to resolve disputes and administer justice within the territory of the state. Legal problems are thus reserved to the court.

For example, in England, traditionally the jurisdiction of the court could not be ousted. The major concern might be: first, arbitration used to be conducted by arbitrators who were business elite but possibly laymen in terms of legal knowledge and experience, and as a result their decisions were not highly trusted by court judges; second, English law is essentially common law based on court precedents, if people other than judges were allowed to administer justice and render decisions freely, it would be more difficult for the public to follow the law and for the state to seek uniformity of law over the territory.

For these concerns, a doctrine of ouster was developed in history under English law. The doctrine means that the jurisdiction of the ordinary courts on questions of law arising from the

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reference cannot be excluded by agreement of the parties. It was as early as 1746 that the doctrine came into being and was fully established by the end of the 18th century.\textsuperscript{156}

This English model later experienced reforms. The Arbitration Act of 1950 provided a special case procedure, whereby an arbitrator, when directed by the High Court, shall state any question of law arising from the course of the reference in the form of a special case for the decision of the High Court.\textsuperscript{157} The jurisdiction of the arbitrator is a question of law and the arbitrator should state a special case. In \textit{Windsor R.D.C. v. Otterway \& Try Ltd.}, Devlin J. felt that "he [the arbitrator] could not [state a case] if he has no jurisdiction; if he has jurisdiction there would seem to be no reason why he could not remove doubts by stating a case about it."\textsuperscript{158}

Under the Arbitration Act of 1979, no application may be made to the court with respect to a question of law if the parties to the reference have entered into an agreement in writing which excludes the right of appeal.\textsuperscript{159} In order for the High Court to have jurisdiction to determine any questions of law arising in the course of reference, consent must be had from either the arbitrator or all of the parties to the reference.\textsuperscript{160}

By abolishing the special case procedure, the traditional supervisory jurisdiction of the court is less real. The traditional aversion to arbitrators' decision on their jurisdiction remains at least in the

\textsuperscript{156} Id.

\textsuperscript{157} Sect. 21, \textit{Arbitration Act 1950}.


\textsuperscript{159} Sect. 3 (1) (c), \textit{Arbitration Act 1979}.

\textsuperscript{160} Id., Sect. 2 (1).
domestic context. In international cases, since a stay is mandatory under the Arbitration Act 1975, jurisdictional questions are first left to the arbitrators.

(2) The arbitrators appointed under the arbitration agreement may decide their own jurisdiction, subject to the law applicable to the arbitration. For example, in Germany, "(a)ccording to the case law of the German Federal Court, the parties may vest the arbitrators with the power to rule in a binding way on the issues of their own jurisdiction."163

The rule was expounded by one opinion of the German Federal Supreme Court of March 3, 1955, where the Court acknowledged the authority of an arbitral tribunal to rule on the scope of its own jurisdiction and its ruling would be final and binding on the court.165 By this opinion, an arbitrator sitting in Germany is not only to rule on the scope of the arbitration agreement and hence

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161 In Willcock v. Pickfords, [1979] 1 Lloyd's Rep. 244 (Court of Appeal), Roskill LJ observed: "One thing is clear in this branch of the law. It has been clear ever since the decision in Heyman v. Darwin... An arbitrator cannot decide his own jurisdiction. Therefore whenever a question arises whether or not there has been a submission to arbitration, an arbitrator cannot in English law decide that issue. The only tribunal to decide it is the Court." Id., p. 245.

The case concerned primarily with a domestic dispute or even a consumer dispute and a stay of court proceedings was not mandatory: see Peter Gross, "Competence of Competence: An English View", Arbitration International, Vol. 8, No. 2, 1992, p. 209.


his own jurisdiction but also to decide the issue in a final and binding manner. Once the arbitrator has
his word on the arbitration jurisdiction, the court cannot review or vacate the arbitrator's decision.

Under English law, arbitrators are entitled to examine their own jurisdiction in a provisional
manner. In Christopher Brown, Mr. Justice Devlin observed:

"They [arbitrators] are entitled to inquire into the merits of the issue whether they
have jurisdiction or not, not for the purpose of reaching any conclusion which will be
binding upon the parties -- because that they cannot do -- but for the purpose of
satisfy themselves as a preliminary matter whether they ought to go on with the
arbitration or not. If it became abundantly clear to them, on looking into the matter,
that they obviously had no jurisdiction as, for example, it would be if the submission
which was produced was not signed, or not properly executed, or something of that
sort, then they might well take the view that they were not going to go on with the
hearing at all. They are entitled, in short, to make their own inquiries in order to
determine their own course of action, and the result of that inquiry has no effect
whatsoever upon the rights of the parties."167

This observation represents judicial recognition of the concept of competence of competence
in English law and is taken as "binding authority, supporting the general rule in English law on the
power of arbitrators to reach provisional decisions on their own jurisdiction."168

168 See Peter Gross, "Competence of Competence: An English View", Arbitration International,
(3) Arbitration institutions have varied degrees of power in determining arbitral jurisdiction. In ICC arbitration, the Court of Arbitration has the power to examine the validity of the arbitration agreement on a prima facie basis. Any decision as to arbitral jurisdiction shall then be taken by the arbitral tribunal.\footnote{Art. 8 (3), ICC Rules.} In some other institutional arbitrations the institution decides arbitral jurisdiction on an exclusive basis. In Poland, the Court of Arbitration at the Polish Chamber of Foreign Trade reserves to itself the power to decide on the jurisdiction of the arbitral tribunal. Its rules provide:

1. If the respondent is pleading that the Court of Arbitration lacks jurisdiction, the plea shall be ruled upon by the Presidium of the Court.

2. If the arbitral tribunal has doubts as to the - not questioned by the parties - jurisdiction of the Court of Arbitration, the presiding arbitrator shall request the Presidium of the Court to rule upon the jurisdiction of the Court.\footnote{Para. 17, Rules of the Court of Arbitration at the Polish Chamber of the Foreign Trade in Warsaw, cited by M. Rubino-Sammartano, \textit{International Arbitration Law}, op. cit., p. 330.}

Similarly, China International Economic and Trade Arbitration Commission ("CIETAC") has implemented the institutional power to determine arbitral jurisdiction. According to the Arbitration Rules of CIETAC, the arbitration commission has power to decide on the validity of the arbitration agreement and the jurisdiction over arbitration cases.\footnote{Art. 2, para. 3, CIETAC Arbitration Rules.}

The institutional reservation of the power to decide arbitral jurisdiction is justified to some extent. Normally jurisdictional challenges are raised before the submission of statement of defense. At this stage, the arbitral tribunal has not yet come into existence, particularly when the defendant
delays appointing an arbitrator. Any challenges as to the validity of the agreement and jurisdiction of the arbitration institution are justifiably left to the decision of the institution.

This reservation raises questions such as whether, once constituted, the tribunal has the power to decide its own jurisdiction, and whether the tribunal should refer any jurisdictional issues arising in the course of arbitration back to the institution for a decision. If the arbitration institution upholds the arbitration agreement and decides that the case shall proceed regardless of the challenge, does this decision bind the arbitral tribunal? Further, if pleas concern excess of jurisdiction by the arbitral tribunal, should the tribunal report such pleas to the arbitral institution? The answers to these questions obviously demand that arbitrators themselves should be vested the power to decided their own jurisdiction. Otherwise, arbitrators may have to depend upon the arbitration institution for jurisdictional decisions. In this regard, the ICC practice may be more appropriate: the institution may examine the jurisdiction on a prima facie basis, subject to the final decision of the arbitral tribunal.

In the efforts to answer the question who has the power to decide arbitral jurisdiction, a principle of competence of competence has been developed. This principle gives the arbitral tribunal, rather than the court or the arbitration institution, the power to make a decision as to arbitral jurisdiction.

3.2. Competence of Competence

By competence of competence, or Kompetenz-Kompetenz in German and Competence de la compétence in French, arbitrators may examine and rule on any jurisdictional issues raised before
them. Simply put, arbitrators have jurisdiction to decide their own jurisdiction. The principle seems to derive from public international arbitration.

3.2.1. As an International Legal Principle

The principle of competence of competence was created in international arbitration dealing with matters relating to state affairs. The Alabama Arbitration (1872) was taken as the starting point of the rule that gives arbitrators the power to determine their own jurisdiction. In this case, to which the United States and Great Britain were parties, the dispute was whether the arbitration provision, included in the Treaty signed by and between the parties on May 8, 1871 at Washington, should cover, apart from the direct losses, the indirect losses suffered by the United States as a result of the destruction of vessels and their cargoes by insurgent cruisers. The arbitration provision reads:

"It shall be competent for the Commissioners conjointly, or for the arbitrator or the umpire, if they differ, to decide in each case whether any claim has or has not been duly made, preferred, and laid before them, either wholly or to any and what extent, according to the true intent and meaning of this Convention."

The dispute was finally determined through a process of proposals and counter-proposals between the parties and subsequent notification to the arbitrators, who merely declared their decision on the basis of the consensus that indirect losses be wholly excluded. According to the arbitration


173 Id., p. 17 and note 2.

174 Id., p. 18.
provision, it seems that the arbitrators had the authority from the parties to determine whether the claim fell within their jurisdiction.

Although the Alabama case did not establish a clear-cut rule that the arbitrators have power to determine their own jurisdiction, the trend continued and influenced subsequent arbitrations. For example, in the Walfish Bay Boundary case of 1911, the arbitrator observed:

"(I)t is a constant doctrine of public international law that the arbitrator has power to settle questions as to his own competence by interpreting the range of the agreement submitting to his decision the question in dispute." (emphasis added)\(^{175}\)

The Alabama Arbitration was also taken as a precedent by the International Court of Justice in adjudication of conflicts between states. In the Nottebohm case, when confronted with the jurisdictional challenge of the court, the judges observed:

"Since the Alabama case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern the jurisdiction."\(^{176}\)

This rule has been followed by arbitrators sitting for international commercial arbitrations, since they have, not infrequently, made references to the general principles of international law. For example, in ICC Case No. 1512, the arbitrator held:

\(^{175}\) Award of Prida, arbitrator in the matter of the Southernmost Boundary of the Territory of Walfish Bay (Germany v. Great Britain), id., p. 22, note 4.

\(^{176}\) Nottebohm Case (Preliminary Objection), Judgment of 18 November 1953, I.C.J.Reports (1953), pp. 111, 119.
"Whereas, in international arbitration, the arbitrator's power and duty to decide on the question of his own jurisdiction is firmly established in law..."177

By reference to the international principle of competence of competence, in practice arbitrators in international commercial arbitration feel no doubt to decide their own jurisdiction.178 But in theory whether their decision making power derives from the private agreement or is inherent in arbitration remains a question to be answered.

3.2.2. As an Inherent Jurisdiction

When discussing the principle of competence de la competence in public international law, Sir Fitzmaurice questioned the soundness of the principle. He argued that arbitrators cannot be judges in their own cause and further claimed that the power of the tribunal to determine any questions of jurisdiction, either raised by one of the parties or by the tribunal proprio motu, is hardly consistent with the fundamental principle that the jurisdiction of an international tribunal is derived from and depends on the will of the parties, for "if the tribunal determines a jurisdictional issue itself, it will in most cases do so contrary to the expressed views and wishes of at least one, and possibly both, of the parties".179


178 See Partial Award of March 17, 1983, ICC Case No. 4402, id., p. 154.

His conclusion is in support of the inherent power of international tribunals to determine their competence:

"In the absence of any hierarchical system, or of special agreement, there is no other method by which any judicial determination of jurisdictional issues -- which are after all legal issues -- can be obtained, if not from the tribunal itself."180

In theory, two arguments have been made in favour of the principle of competence of competence in public international law. One is that the principle is inferred from the agreement of the parties. According to this argument, a power could not be exercised by the tribunal if the parties reserve it to themselves or to another organ.181 The other argument looks at the nature of the arbitral tribunal, i.e., the power is inherent in the arbitral jurisdiction and necessary for the mere functioning of the tribunal.182

These two views support the principle from different perspectives. These perspectives are closely linked. Without an agreement to arbitrate, there would be no arbitral tribunal and it would be pointless to speak of any inherent power of the arbitral tribunal. For the inherent power to take effect, there must be an arbitration agreement and the arbitral tribunal must be properly constituted on the basis of the arbitration agreement. Once it is so constituted, it is inherently entitled to decide its own jurisdiction. Though the arguments are proposed differently, they join in the conclusion that in international arbitration the arbitrators are empowered to decide their own jurisdiction.

180 Id.
In the context of international commercial arbitration, where exists ultimate judicial control from the national courts, the argument for the principle of competence of competence may be sought from a different point of view. The analogy with arbitration in public international law may not help to answer the question why arbitrators should be judges in their own cause. This is because in public international arbitration "the supervisory jurisdiction of a national court is absent."183

In international commercial arbitration, the principle of competence of competence was fostered by rather practical considerations.184 One feature of arbitration is its efficiency and economy. If any jurisdictional issues were reserved for the national court and if the arbitrators had to suspend or terminate the arbitral proceeding each time a challenge of their jurisdiction is confronted, the goals of international commercial arbitration would be defeated. As Justice Devlin observed in Christopher Brown:

"It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which has power to determine it. They might then be merely wasting their time and everybody else's."185


185 [1954] 1 QB 8 at 12.
A question that follows is how to reconcile the realization of the goals of international commercial arbitration with a certain degree of court control. Particularly when the validity of the whole contract in which the arbitration agreement is contained is called into question, should the arbitral tribunal decide the issue of the validity of the contract and that of the arbitration agreement?

To solve this problem, a doctrine of separability was created in international commercial arbitration.

3.2.3. In Relation to the Doctrine of Separability

The separability doctrine was developed with respect to the relationship between the arbitration agreement and the underlying contract. It means that the arbitration agreement is separable from the main contract out of which the dispute has arisen.

It is easy to understand the separability of a submission agreement because it is written in a separate form from the contract. The parties reach the submission agreement to refer to arbitration the existing disputes in connection with the contract. The time of conclusion of the submission agreement differs from that of conclusion of the contract. The validity of the contract and the validity
of the submission agreement are clearly two separate issues. The arbitrator is able to rely on the submission agreement to examine the validity issue of the contract.

In the case of an arbitration clause inserted in the contract, the situation is different. The arbitration clause is included in and forms part of the contract. A question often raised is whether the arbitration clause survives the main contract when the latter is determined to be invalid. In other words, can the arbitrator rely on the arbitration clause to look into and decide on the validity of the contract?

This question was solved by case law. In English law, the doctrine of separability of arbitration clause dates back to Heyman v. Darwins. In France, the French Cour de Cassation declared in the Gosset case in 1963 that the arbitration clause included in the contract was separate

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186 Redfern and Hunter distinguished between partial challenge and total challenge in the case of a submission agreement:

"An arbitral tribunal which derives its authority from a submission agreement is unlikely to face a total challenge to its jurisdiction. The purpose of a submission agreement is to give the arbitral tribunal jurisdiction to determine disputes between the parties. It would be perverse indeed if, having signed such an agreement, one of the parties then launched a total challenge to jurisdiction; the only issue of jurisdiction likely to arise in such circumstances will be as to whether or not a particular item of claim (or counterclaim) is within the scope of the submission agreement."


from the contract and, only when the validity of the main contract affects that of the arbitration clause, will the arbitration clause then become void.\textsuperscript{189} Later in 1967, the same doctrine was also adopted by the United States Supreme Court in \textit{Prima Paint v. Flood & Conklin}.\textsuperscript{190} A rule has been created under the Model Law, providing that any decisions that render the contract null and void shall not entail \textit{ipso jure} the invalidity of the arbitration clause.\textsuperscript{191}

The doctrine of separability of the arbitration agreement not only streamlines the relationship between the arbitration clause and the contract in which it is inserted and of which it forms part, but it also establishes the relationship between the arbitral tribunal and the national court in terms of jurisdiction. If the arbitration clause terminates or becomes null and void with the main contract, it means that the disputes arising from the main contract will naturally fall within the jurisdiction of the national court. The arbitrators would have no power to decide the disputes on the basis of a terminated or invalid arbitration agreement. If the arbitration clause contained in the contract is considered to be independent of the contract or severable from the other terms of the contract, the arbitrators relying upon the arbitration clause can still decide on the validity of the contract unless the arbitration clause itself is invalid.

The separability doctrine functions to solve the issue of the validity of the contract in which an arbitration clause is contained. The scope of the doctrine of separability was considered in

\textsuperscript{189} Julian DM Lew, "Determination of Arbitrators' jurisdiction and the Public Policy Limitation on That Jurisdiction", op. cit., p. 76.

\textsuperscript{190} \textit{Prima Paint v. Flood & Conklin} 388 US 395 (1967).

\textsuperscript{191} Art. 16 (1), \textit{Uncitral Model Law}. 

192 In this case, the allegation was that the contract which contained an arbitration clause was illegal. The court considered that the scope of separability of the arbitration agreement only arises for consideration where the challenge is directed at the contract. In the case of a submission agreement, where it was made after the contract was concluded but before a dispute had arisen, or where a written contract and a separate written arbitration agreement contained in the separate documents were executed at the same time, an arbitrator appointed in each case would be entitled to decide issues relating to the initial invalidity or illegality of the contract, provided that the arbitration agreement was widely drawn. The court also considered the issue of ab initio invalidity of the contract and held that the initial invalidity of the contract and subsequent avoidance of contracts for innocent or negligent misrepresentation, undue influence or duress could be referred to arbitration. However, the court was bound by case law that an issue of initial illegality of the contract was always beyond the jurisdiction of an arbitrator. The application for a stay was dismissed.

There seems to be a consensus that disputes directed at the validity or existence of the contract can be referred to arbitration on the basis of the separability doctrine. Claims such as there has never been a contract, the contract has been terminated, frustrated and abandoned because

193 Id., p. 85, 86.

194 Id., p. 91.

195 Lord MacMillan observed the logic:
"If there has never been a contract at all, there has never been as part of it an agreement to arbitrate; the greater includes the less."

the claims are time barred by statute,\textsuperscript{197} or the contract was induced by fraud,\textsuperscript{198} should be referred to arbitration if they are directed at the contract. In cases where the disputes are directed at the validity or existence of an arbitration agreement, the court retains its power to decide the issue. The guideline should remain that the courts send the parties to arbitration unless the arbitration agreement is, in the words of the New York Convention and the Uncitral Model Law, "null and void, inoperative and incapable of being performed".

The provisions for enforcement of arbitration agreements under both the New York Convention and Uncitral Model Law involve an assumption that national courts retain power to decide the validity of an arbitration agreement, and that if the arbitration agreement is "null and void, inoperative and incapable of being performed", a national court is not bound to send the parties to arbitration. But these provisions should be read to mean that sending parties to arbitration where there are arbitration agreements is the rule and refusal to stay court proceedings is an exception. It is submitted that international arbitrators should be empowered to decide the validity of the arbitration agreement, unless the parties have reserved such a decision to the court. The separability doctrine enables the arbitral tribunal to examine the validity of the whole contract in which the arbitration clause is contained. The principle of competence of competence functions for the arbitral tribunal to examine the validity and scope of the arbitration agreement itself, and its own jurisdiction, with an assumption that the tribunal is inherently empowered to decide the issue once it is properly constituted.


\textsuperscript{197} Cie Europeene v Tradax [1986] 2 Lloyd's Rep 301 (Q.B. (Com.Ct.)).

\textsuperscript{198} ODC Exhibit Systems Ltd. v Lee et al 41 B.L.R. 287 (B.C.S.C., 1988).
3.2.4. In Relation to the Arbitrators' Impartiality

Arbitrators are chosen from disinterested third parties in international commercial arbitration. They are expected to remain neutral in conducting the arbitration and making decisions.

Arbitration laws and conventions consider impartiality so important that they invariably provide that, upon proof of bias, an award shall be set aside. For example, the British Columbia International Commercial Arbitration Act provides that an arbitrator shall, when approached for a possible appointment, disclose any circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Parties may challenge those who conduct the process in a partial manner. Suspicion of partiality may lead to the setting aside of the arbitral award.


200 In Canadian common law, the test for disqualification of arbitrators is "reasonable apprehension of bias" established by the Supreme Court of Canada in Szilard v. Szasz (1955), S.C.R. 3, [1955] 1 D.L.R. 370 (S.C.C.), where the court held:
"It is the probability or the reasoned suspicion of biased appraisal and judgement, unintended though it maybe, that defeats the adjudication at the threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgement on him and his affairs".
"[It] is sufficient if there is the basis for a reasonable apprehension of so acting".

The New York Convention of 1958 and the Washington Convention of 1965 also require impartiality in the conditions for enforcement of arbitral awards.\textsuperscript{202} The Uncitral Model Law expressly demands that arbitrators shall give the parties equal treatment.\textsuperscript{203}

Arbitration rules likewise attach great importance to the requirement of impartiality on the part of arbitrators. They establish qualifications and contain provisions for vacating the office when bias is evident.\textsuperscript{204} The ICC rules require a party-appointed arbitrator to be independent of the party appointing him.\textsuperscript{205}

The purpose of these rules is to ensure that international arbitrators are disinterested and impartial in treating the parties and the case at hand. The statement that arbitrators are judges of their own cause involves an assumption that they are impartial. They are properly appointed and remain independent of the parties and free of partiality. In this connection, Professor Schmitthoff noted:

"I see no magic in the phrase that a person cannot be a judge in his own cause. The true meaning of this rule is that an arbitrator should not deal with a matter in which he conceivably or potentially may have a personal interest because this may cast a doubt on his impartiality."\textsuperscript{206}

Thus if arbitrators are independent of the parties appointing them, and if parties endow the arbitrators the power to deal with any controversy or difference arising from the contract, the wishes

\textsuperscript{202} Art. V 1 (b), New York Convention; Art. 52 (1) (c), ICSID Convention.

\textsuperscript{203} Art. 18, Uncitral Model Law.

\textsuperscript{204} See, e.g., Arts. 6, 7, SCC Rules; Arts. 9, 10, Uncitral Arbitration Rules; Art. 3.7, LCIA Rules.

\textsuperscript{205} Art. 2 (4), ICC Rules.

\textsuperscript{206} Schmitthoff, "The Jurisdiction of the Arbitrator", op. cit., p. 292.
of the parties should be respected, provided that the arbitrators exercise their power in good faith.\textsuperscript{207} If the arbitrators deliberately abuse this power to decide their own jurisdiction, by assuming jurisdiction when there is in fact no jurisdiction or rejecting it when there is jurisdiction, their abuse of power would result in a setting aside of the award. If they have some interests in the case, either personal or financial interest, they can be disqualified for lack of impartiality.\textsuperscript{208} The parties' interests are nonetheless sufficiently protected.\textsuperscript{209}

What happens if, out of their professional orientation, the arbitrators are prejudiced against court proceedings and unconsciously favour arbitration when they decide their own jurisdiction? First, arbitrators must observe the fundamental rule that their power derives from the consensus of the parties. If their decision amounts to \textit{ultra vires} assumption of jurisdiction, it will be subject to a setting aside procedure. If, for some reason, their decision leads to a suspicion of partiality towards the party who advances arbitration,\textsuperscript{210} the same consequence will follow. The court will have an opportunity to review the arbitral decisions in these cases.

On the other hand, it should be pointed out that, by arbitrating, arbitrators do not deprive the parties' legitimate right to court proceedings. It is the parties who choose arbitration, not the

\begin{footnotes}
\item[207] Id., p. 293.
\item[208] For example, in \textit{L.U.D.E. v. Saguenay-Kitimat Co.} [1956] 6 D.L.R. (2nd) 156 (B.C.S.C.), an arbitrator had personal interest connected with one of the parties, the B.C. Supreme Court held that "if it appears that the interest revealed, however small, was sufficient to put a reasonable suspicion in the minds of the parties as to the partiality of the arbitrator, then he must be disqualified".
\item[209] Schmitthoff, "The Jurisdiction of the arbitrator", op. cit., p. 293.
\item[210] For the requirement of impartiality, it is a test for the appearance of partiality, not its actual presence: see generally "The Independence and Neutrality of Arbitrators", \textit{Arbitration International} Vol. 9, No. 4, December 1992, pp. 31-42.
\end{footnotes}
arbitrators. The latter merely performs the arbitrating function in accordance with the parties' own wishes.

It should also be noted that arbitrators generally are known for their commercial integrity and professional reputations. They are concerned about their own integrity in the business community. They are aware of the consequences of deliberate abuse of jurisdiction. They would rather take caution in deciding jurisdictional problems and endeavour to see that their award be enforceable at a court of law.211

3.3. The Nature of the Decision on Arbitral Jurisdiction

The principle of competence of competence has become widely accepted as a general principle in international commercial arbitration. Even in England where traditionally any questions of law arising in the course of the reference were reserved for the discretion of the court, the Arbitration Act of 1979 allowed parties to exclude the judicial review of the award.212 If the parties are permitted to exclude judicial review of the award completely, they must a fortiori be able to let arbitrators decide their own jurisdiction.213

211 In ICC arbitrations, the Rules of Arbitration call for the Court of Arbitration and the arbitrators to "make every effort to make sure that the award is enforceable at law". See Art. 26, ICC Rules.


213 Schmitthoff, "The Jurisdiction of the Arbitrator", op. cit., p. 293, where it is pointed out that a future arbitration act should permit an exclusion agreement to exclude the application of the rule that the arbitrator has no power to determine his own jurisdiction.
The first convention that implements the principle of competence of competence appears to be the European Convention, where it expressly is provided that the arbitral tribunal, when seized of pleas as to lack of jurisdiction, shall decide its own competence subject to any subsequent court review under the law of the place of arbitration. Later, the ICSID Convention adopted the principle in a clear-cut manner: "The Tribunal shall be the judge of its own competence". The Uncitral Model Law confirmed the principle.

As for national statutes that empower arbitrators in international cases to determine their own jurisdiction, Canadian, German and Swiss laws may be taken as examples. French law goes even further:

"If the arbitral tribunal has not been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null".

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216 Art. 16 (1), Uncitral Model Law.

217 Canadian arbitration acts in the international context are based on the Uncitral Model Law, accepting, inter alia, the principle of competence of competence: see, e.g., Art. 16, British Columbia International Commercial Arbitration Act.

218 Section 1037 of Zivilprozessordnung (Civil Code of Procedure), ZPO, reads:
"The arbitrators may proceed with arbitration and render an award, even if it be claimed that arbitration proceedings are inadmissible; in particular, even if it be claimed that no valid agreement to arbitrate exists, that the arbitration agreement does not refer to the dispute submitted or that an arbitrator is not qualified to act in that capacity."

219 See Art. 186 1, Chapter 12, Swiss Private International Law Act.

With regard to rules and practices of arbitration institutions, the American Arbitration Association International Arbitration Rules provide emphatically that the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.221

The nature of the arbitrators' decision is not expressly indicated in these laws and rules. The German case law that expounds a binding decision of the arbitrators may not be followed by other German courts since Germany does not have a system of binding precedents.222 The question remains to be of value as to the nature of the arbitrators' decision on their own jurisdiction. Assuming that an arbitral tribunal has given a decision affirming its jurisdiction, is this decision final and binding on the parties?

To answer this question, we can envision three situations. First, the validity of the arbitration agreement is not in dispute and the arbitral tribunal is properly constituted, the challenge relates to the scope of arbitral jurisdiction only. Under this situation, the arbitrators' decision on their scope of jurisdiction is not final in its true sense because it is clearly subject to court review.223 A universal rule under the New York Convention is that, if the decision goes beyond the scope of the arbitration agreement, the arbitral award may wholly or partly be refused enforcement.224 Under the ICSID system, if the arbitral tribunal "has manifestly exceeded its powers", its award may be annulled by an

221 Art. 15 (1), AAA International Rules
223 For court reviews of arbitral jurisdiction, see infra Sect. 5.2.
224 Art. V 1 (c), New York Convention.
"ad hoc committee of three persons". The German Federal Court's view has been criticised on the ground that by allowing so extensive a power to arbitral tribunals, arbitrators would be pulling themselves up by their own bootstraps. They would be denying the court's judicial power over the practice of arbitration.

The second situation is that the validity of the arbitration agreement is not in dispute, but the constitution of the arbitral tribunal itself is at issue. Can the arbitral tribunal decide such challenges as to its own composition in a binding manner?

The current practice seems that the arbitral tribunal may decide such challenges, but its decision is subject to judicial review at the place of arbitration. Under the Model Law, if the decision were against the challenge, the challenging party may request the court to decide the issue, which decision is final and subject to no appeal. In ICC arbitration, e.g., decisions of the Court of Arbitration as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final. Such final institutional decisions seem to be reviewable by the court in setting aside or enforcement proceedings if the constitution of the tribunal is not in conformity with the parties' agreement to arbitrate. But court reviews should be limited to questions of procedure, such as


226 See Karl Heinz Schwab, op. cit., p. 306.

227 Art. 13 (2) (3), Uncitral Model Law.

228 Art. 13, ICC Rules.

229 Art. V 1 (d), New York Convention.
whether the institutional decision was made in conformity with the procedural rules chosen by the parties.\textsuperscript{230}

The third situation is that the arbitral tribunal itself is constituted properly, but the challenge goes to the validity of the arbitration agreement. In this case, on the basis of its inherent power the arbitral tribunal may rule on its own jurisdiction.

As to the nature of such rulings, the Uncitral Model Law seems to recognize the preliminary character of the rulings. The arbitral tribunal may rule on the validity of the arbitration agreement either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that the arbitration agreement is valid and it has jurisdiction, any party may, within a specified period of time, request the national court to decide the matter.\textsuperscript{231}

Arbitrators may wish to decide the jurisdictional issues in the award which is final and binding, so as to avoid the possibility of concurrent court proceedings.\textsuperscript{232} The jurisdiction of the courts is not ousted even by issuance of the final award.\textsuperscript{233} A party may, within a reasonable time after the


\textsuperscript{231} Art. 16 (3), Uncitral Model Law.

\textsuperscript{232} The concern was noted in the discussions of the Draft Model Law: "The parties should not be deprived of the possibility of objecting to the prolongation of the arbitral proceedings if they believed the tribunal had no jurisdiction...", Article 16 (3) should therefore be amended to read: "on the request of a party, the arbitral tribunal should be obliged to render a preliminary decision on the question of jurisdiction, so that immediate recourse to the court would become possible": see United Nations Commission on International Trade Law (UNCITRAL), Summary Record of its Eighteenth Session, 316th meeting, June 10, 1985, A/CN.9/SR. 316, p. 3, in Uncitral Model Law on International Commercial Arbitration Legislative History Vol. 2.

\textsuperscript{233} Rio Algom Ltd. v. Sammi Steel Co. 47 C.P.C. (2d) 251 (Ont. Court of Justice, General Division, 1991) at 256.
rendition of the arbitral decision, move the court to set aside the arbitral tribunal's preliminary ruling or final award.

In practice, arbitrators usually settle the jurisdictional problem in a partial award. A partial award is a final award for the issues decided. Their status as final is similar to other final awards, subject to court scrutiny only in the setting aside or enforcement proceedings.

This analysis demonstrates that arbitral tribunals have the first word on arbitral jurisdiction. Their decision is conclusive for the purpose of proceeding the arbitration, subject only to attack by the parties at the national court. The Model Law's approach that the decision, if it is made as a preliminary issue, may be attacked immediately at the local court involves a possibility of court intervention, because it opens the way to court proceedings in the course of arbitration. The rule may be improved by postponing judicial review of arbitral jurisdiction to the time after the final award is rendered, even when the tribunal decides its jurisdiction as a preliminary issue. Such postponement would preclude interruption of the arbitration by court proceedings on arbitral jurisdiction.

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"The issue of jurisdiction over a party to an Arbitration is a classical setting for a partial award. It can be clearly separated from the other issues in the actual case and easily be disposed of by the Tribunal without going into the merits of the case. It is clear that a decision of the question of jurisdiction is helpful for all parties involved in the Arbitration. At last it is obvious, that the economic advantages call for an early decision on the question who is a proper party to the case" (p. 155).

235 Id., p. 154.

236 Art. 16 (3), UNCITRAL Model Law.

It is submitted that international arbitrators have the inherent power to deal with their own jurisdiction, unless this power is expressly reserved to some other organs. For that purpose, they may decide the validity of an arbitration agreement. Their decision is conclusive for the arbitral proceedings and may only be attacked at a court when the award is rendered.
CHAPTER 4: SCOPE OF ARBITRATION JURISDICTION

Based on the principle of competence of competence, an international arbitral tribunal examines the arbitration agreement and makes sure that it has jurisdiction. Questions arise as to what factors account for arbitral jurisdiction and to what extent the arbitral jurisdiction is effective. An arbitral tribunal has to decide personal as well as subject matter jurisdiction, i.e., its jurisdiction over 1) the parties and 2) the disputes.

4.1. Considerations about the Disputants

A fundamental rule of international commercial arbitration is that the procedure takes place between the parties to an arbitration agreement. Outside persons, natural or legal, can hardly invoke an arbitration agreement in which they have no interest. Because of the favour for arbitration, experience shows that jurisdictions are decided in view of the factual circumstances of the case, the relationship between parties, the extent of interest which outsiders may have in the dispute and the need of international commerce. Thus the arbitration-between-parties rule may be extended in its application.

4.1.1. Parties to the Arbitration Agreement

In most arbitrations, it is easy to identify the parties to an arbitration agreement. It usually is clear from the contract itself. If a party signs the contract, it becomes party to the arbitration clause
contained in the contract. It is not always so simple in practice. In some cases, the arbitral tribunal has to determine whether the lack of a signature may still entitle a party to arbitrate.

For example, in ICC Case No 3779 the third contract was not signed, and before shipment was effected, it was cancelled by the Respondent Dutch buyer who complained that the goods delivered under the first two contracts were defective. The Swiss seller claimed damages against the buyer in respect of the cancellation of the third contract. The Dutch buyer counter-claimed in respect of its losses under the first two contracts.

The issue here was whether the third contract was valid because it was not signed. Incidentally, the arbitrator determined whether the Respondent assented to the arbitration clause included in the contract. While noting that the third contract was not signed, the ICC arbitrator pointed out that it was not protested against within a reasonable time either. The arbitrator further considered the business relationship of the parties:

"Although the contracts are independent from one another from a juridical point of view, the three contracts form a group from an economic point of view."

"If, in principle, silence does not mean acceptance, this meaning is, however, attributed to it in view of the circumstances, in particular, the previous business relations of the parties." ...

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"Consequently, within the context of their juridical relation and according to their obligations of good faith, the exception of incompetence does not apply."\textsuperscript{239}

The arbitrator declared himself competent and ordered the Respondent to pay damages for the cancellation of the third contract. The fact that the Respondent did not sign the third contract (including the arbitration clause) was not the only decisive factor. The intention of the parties to arbitrate was examined in view of the previous business relations of the parties, as well as the Respondent's lack of prompt protest.

4.1.2. Capacity and Nationality

The issue of capacity of the parties is so important that the New York Convention singles it out as one factor affecting the validity of the arbitration agreement. If the parties "were, under the law applicable to them, under some incapacity",\textsuperscript{240} the validity of the arbitration agreement is called in question and the arbitral award may be refused recognition and enforcement.

A typical example that illustrates the capacity of the parties is a Chinese company which is not legally empowered to deal with foreign trade, but does business and concludes an arbitration agreement with a foreign company. The current Chinese foreign trade system does not allow every company to do business with foreign partners. Companies that wish to conclude international business transactions must first be approved by the government. Without such an approval, no

\textsuperscript{239} Id., p. 139.

\textsuperscript{240} Art. V (1) (a) of the New York Convention provides that enforcement of the arbitral award may be refused if "the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."
companies or individuals can legitimately engage in direct trading with foreign businesses.\textsuperscript{241} If a non-
authorized company enters into arbitration with foreign partners, it is conceivable that the arbitration
agreement would be tainted with some invalidity and a defense may be made against the arbitral
award on the basis of such invalidity.

The issue of capacity is often related to the ability of international arbitral tribunals to subject
a sovereign state to its jurisdiction. The question is whether the principle of sovereign immunity
applies to international arbitration. Under international law, the principle of sovereign immunity is
based on equality between sovereign states. No sovereign state shall be subjected to the jurisdiction
of the courts of another state, unless otherwise consented.\textsuperscript{242} Since arbitral jurisdiction is based on
the agreement of the parties, when a sovereign state enters into an arbitration agreement, it should
be implied in the arbitration agreement that the state voluntarily accepts the jurisdiction of
international arbitration. The state acts as a private person and waives its right to immunity.\textsuperscript{243}

Waiver of sovereign immunity is presumed under the ICSID Convention. The ICSID
Convention provides that when the parties, including the state party or any constituent subdivision
of the state, have given their consent to arbitrate in the International Centre for Settlement of

\textsuperscript{241} "The Chinese parties to international commercial arbitration are always Chinese legal entities,
i.e., the Chinese foreign trading corporations, enterprises and business organizations which have the
right to do international business" (emphasis added). See Tang, "The PRC Example", op. cit., p. 47.


198; also see SPP Arbitration Award of February 16, 1983 in ICC Case No. 3493, Jarvin & Derains,
111-115, where the Arab Republic of Egypt was held party to a joint venture agreement and bound
by the arbitration clause contained in the joint venture agreement.
Investment Dispute (ICSID), no party may withdraw its consent unilaterally.\textsuperscript{244} Waiver of sovereign immunity is irrevocable and the state party is barred from raising pleas of immunity in the context of ICSID arbitration.

Under the European Convention on International Commercial Arbitration, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude valid arbitration agreements.\textsuperscript{245} It is also assumed that a state waives its sovereign immunity by entering into an arbitration agreement.

The rule of waiver of immunity has entered into national legislations on international arbitration. For instance, the Swiss Law on International Arbitration provides:

"If a party to the arbitration agreement is a state or an enterprise or organisation controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement".\textsuperscript{246}

By concluding an arbitration agreement, a state party should be considered as having waived its immunity from suit and execution, because an implied term of an arbitration agreement is that the parties voluntarily will perform the arbitral award. The state party cannot revoke its own promise to arbitrate or to execute an arbitral award.

Another issue concerns the nationality of the parties. If the parties to an arbitration agreement are of the same nationality and the transaction does not go beyond their national border, can an

\begin{flushleft}
\textsuperscript{244} Art. 25 (1), ICSID Convention.
\textsuperscript{245} Art. 11 (1), European Convention.
\textsuperscript{246} Art. 177 (2), Swiss Federal Private International Law Act relating to International Arbitration.
\end{flushleft}
international arbitration institution assume jurisdiction? The ICC essentially deals with disputes of an international character, however, the Court of Arbitration may also take cases between of a non-international nature by virtue of an arbitration agreement. The issue was raised in Japan Time v. Kienzle Frame, where the French Court of Appeal reviewed an ICC award, considered the allegation that the ICC should not have accepted jurisdiction since both parties were French and the arbitration was not international, and dismissed the recourse as not founded.

In CIETAC arbitration, disputes that are submitted must have foreign related interest. Two standards are used: one is that the place of business of parties is in different countries; the other is that the subject matter of the transaction is of transnational nature. In the latter case, even if both

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247 "The function of the court is to provide for the settlement by arbitration of business disputes of an international character in accordance with the rules" (emphasis added): Article 1. ICC Rules.

248 "The Court of Arbitration may accept jurisdiction over business disputes not of an international business nature, if it has jurisdiction by reason of an arbitration agreement": see Art. 1, Internal Rules of the Court of Arbitration.


250 Cf. The British Columbia International Commercial Arbitration Act expressly provides, in Art. 1 (3), the scope of international arbitration: "An arbitration is international if

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states.

(b) one of the following places is situated outside the state in which the parties have their places of business:

i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

ii) any place where a substantial part of the obligations of the commercial relationship is to be performed;

iii) the place with which the subject matter of the dispute is most closely connected, or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state".
parties are Chinese parties, the dispute is still capable of settlement by CIETAC arbitration if it arises from a transnational transaction.\textsuperscript{251} Disputes between two Chinese parties which are related to foreign interests are within the CIETAC jurisdiction.\textsuperscript{252}

Early international conventions were oriented towards disputes between parties of different nationalities.\textsuperscript{253} Conventions in more modern times either leave the nationality issue open, or adopt, instead, the criterion of place of business.\textsuperscript{254} Thus, disputes between two or more parties of the same nationality can be settled through international arbitration, provided that mandatory rules on national court jurisdictions are not derogated from. Such arbitrations usually involve some extent of foreign related interest, e.g. the subject matter of the dispute, performance or enforcement of the arbitration agreement is closely connected with other countries.\textsuperscript{255}

4.1.3. Group of Companies

\textsuperscript{251} Nanjing Qiche Zhengyi An [Nanjing Automobile Arbitration Case] (unpublished), where both disputants are Chinese foreign trade entities but the dispute arose from delivery of automobiles to a construction plant in a Mid-Eastern country.

\textsuperscript{252} Art. 1, \textit{CIETAC Arbitration Rules}.


\textsuperscript{254} See Art. 1, \textit{European Convention}; Art. 1, \textit{Uncitral Model law}.

\textsuperscript{255} Sect. 202 of the U.S. Arbitration Act provides in part: "An agreement or award arising out of such relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states". For a case involving such foreign interests, see \textit{Fuller Company (U.S.A.) v. Compagnie Des Bauxites de Guinee (U.S.A.)} 421 F. Supp. 938 (1976) (U.S. District Court, Western District Pennsylvania), \textit{Yearbook Comm. Arb.}, III, (1978), p. 287.
Transnational corporations are vertically integrated into a group of companies in order to gain greater competitive power and meet the needs of global business. In making business deals, such groups of companies may be represented by one of the companies and the business contracts thus signed might, prima facie, not reflect the agreement of the whole group to submit to arbitral jurisdiction.

In the Dow Chemical Case,\textsuperscript{256} four claimants requested ICC arbitration against a French company. The four claimants, the U.S. parent Dow Chemical Company and its daughter and granddaughter companies in France and Switzerland, were companies within one group. The contracts that contained ICC arbitration clauses were signed by the two subsidiaries in Swiss, but the parent company as well as the French subsidiary participated in the negotiation, performance and termination of the transactions. The tribunal considered the law applicable to the contracts as well as the arbitration agreement, examined the facts about the negotiation, performance and termination of the contracts, distinguished the case at hand with a previous ICC award in which the arbitral tribunal refused to extend an arbitration clause signed by one company to another company of the same group,\textsuperscript{257} and referred to other international arbitral awards.\textsuperscript{258} As to the arbitration clause, the tribunal held:


\textsuperscript{257} Case No. 2138 of 1974, \textit{Journal du droit international} 1975 934. The refusal of extension is based on the factor "that it was not established that company X would have accepted the arbitration clause if it had signed the contract directly": see Jarvin & Derains, p. 152.

\textsuperscript{258} See infra US award.
"Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise."(emphasis original)\textsuperscript{259}

The arbitrators were concerned particularly with the mutual intention of all parties to the arbitration proceedings and the needs of international commerce in declaring jurisdiction. The tribunal was of the view that "rules of international arbitration should be responsive to the needs of international commerce."\textsuperscript{260}

The tribunal also examined the validity of their decision under French law and found that their decision "contradicts no principle nor any of international 'public policy' in particular, that of the French legal system."\textsuperscript{261}

In the U.S. arbitration to which the arbitrators referred,\textsuperscript{262} the arbitrators took into account the interest of the sister company in the dispute. The disputes between an owner and a charterer involved claims of the charterer under a charter party. One of the two questions decided by the arbitrators was:

\textsuperscript{259} Jarvin & Derains, op. cit., p. 151.

\textsuperscript{260} Id., p. 152

\textsuperscript{261} Id.

partial award was whether the charterer was entitled to introduce the claims of the sister companies of the same family in the proceedings. The charter party contained an arbitration clause as follows:

"Any dispute arising during execution of this charter party shall be settled in New York Owners and Charterers each appointing an Arbitrator - Merchant or Broker - and the two thus chosen, if they cannot agree, shall nominate a third arbitrator - Merchant or Broker - whose decision shall be final. Should one of the parties neglect or refuse to appoint an Arbitrator within twenty one days after receipt of request from the other party, the single Arbitrator appointed shall have the right to decide alone and his decision shall be binding on both parties. For the purpose of enforcing awards, this agreement shall be made a Rule of Court".263

This arbitration clause governs disputes between the owner and the charterer only. In deciding that the charterer could bring forward claims on behalf of its sister companies, the tribunal examined the connection of interest and held:

"It has been argued by some that the charter party arbitration clause simply provides for the adjudication of disputes between Owner and Charterer and that no other party may enter the proceedings unless it does so with the express consent of the two so named. This is surely so as respects third parties not in any way associated with the parties to the Charter party. However, it is neither sensible nor practical to exclude the claims of companies who have an interest in the venture and who are members of the same corporate family. The practicality of such an approach is apparent. The major shipping organizations often charter through a subsidiary company, ship their

263 Id., p. 152.
cargoes through another and sometimes consign them to other related companies. To consider the arbitration clause as one which limits the right to arbitrate to the chartering subsidiary and to no other company within the same corporate family involved in the ventures is to narrowly restrict the parties apparent intention to arbitrate their differences. 

The considerations about the customs of international trade for the purpose of assumption of arbitral jurisdiction have received support of some national courts. The interim award of ICC Case No 4131 in the Dow Chemical arbitration was upheld, when contested before the Court of Appeal in Paris by the defendant. Particularly, inter alia, the Court held:

"Following an autonomous interpretation of the agreement and the documents exchanged at the time of their negotiation and termination, the arbitrators have, for pertinent and non-contradicted reasons, decided, in accordance with the intention common to all companies involved that Dow Chemical France and Dow Chemical Company have been parties to these agreements although they did not actually sign them and that therefore the arbitration clause was applicable to them as well."

The concept of group of companies will have repercussions on the future development of international commercial arbitration in respect of transnational corporate practice. The concept is a new invention and needs to be substantiated. What constitutes a group is unsettled and to what extent the concept can be applied is unknown. But the approach of the arbitrators to the

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264 Id., p. 153.
265 Jarvin & Derains, Collection of ICC Arbitral Awards, p. 146.
266 Id.
interpretation of the intention of the relevant parties should be appreciated. They look to the objective link of the relevant parties to the arbitration agreement in issue, their degree of participation and interest in the venture as well as the need of international business practice. By facing the complex reality of transnational trade and investment and meeting the needs of international business, the concept may represent a trend toward a broader interpretation of an arbitration agreement and the intention of the relevant parties.

4.1.4. Multi-Respondents

Arbitration may take place between several claimants and one respondent and also between one claimant and several respondents. These respondents may be parties to the original underlying contract, e.g., in a joint venture contract involving several partners; they may also become parties to the contract in the performance of the contract, as, e.g., in an assignment of contract. The rule that international arbitrators follow in determining the standing of the respondent parties is whether they consent to arbitration.

ICC Case No. 4402 involved two Defendants: First Defendant (F.D.), a French company, and Second Defendant (S.D.), parent of F.D. The dispute arose from an operation agreement concerning the exploration and exploitation of certain oil fields in a Central American Country. For these operations, S.D., the parent company, especially had created F.D. who signed the Operation Agreement which contained an arbitration clause referring the ICC Arbitration.

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The Claimants contend that this behaviour of S.D. and the contractual relationships between themselves and S.D. at the time when the Operating Agreement and some other documents were signed, constitute enough evidence for an implicit agreement to arbitrate under the ICC Rules. The three arbitrators did not resort to the concept of group of companies but held that "such relationships are not sufficient to overcome the requirement of an actual signature to the agreement containing the arbitration clause."\textsuperscript{268} They denied jurisdiction as far as S.D. is concerned and decided that the arbitration proceedings will continue between the claimants and F.D. only.\textsuperscript{269}

In this case, the arbitrators did not take into consideration the conduct of the S.D. in the negotiation or performance of the contract, or the need of international commerce. The arbitrators sitting in Geneva looked to the applicable law, the law of Switzerland, found that a written document containing either a compromise or an arbitration clause is mandatory under the Swiss law, and laid emphasis on the actual signature of the parties to the arbitration agreement.

In other situations such as partnerships, successions, merger or assignment, the strict rule of a signed-up party may not apply. In another ICC arbitration,\textsuperscript{270} the arbitrators were faced with a question whether the four founding states of a supranational organization (A0I) were bound by the arbitration clause included in a "Shareholders Agreement" between the organization and a U.K.

\textsuperscript{268} Id., p. 141.

\textsuperscript{269} It is interesting to note that the Chairman of ICC's Court of Arbitration had made an urgent decision before the case went to the Arbitrators. The decision was in the affirmative that there was a prima facie agreement to arbitration also for S.D., parent of F.D. \textit{(Yearbook Comm. Arb., VIII, (1983), pp 204-206)}. Under the ICC Rules, such a prima facie decision is subject to the decision of the arbitrators as stated in Art. 8, para 3 of the ICC Rules of Arbitration.

company by which they created a "joint stock company". The arbitrators determined the nature of A0I as a supra-national organization and akin to a general partnership. The arbitrators looked into the substance of the relationship between the organization and the founding states and held:

"In certain circumstances, those who have not signed an arbitration clause are nevertheless bound by it [...]. This is true for the successor in title or any other successor, [...] or for an assignee. A partner is bound by the arbitral clause entered into by a general partnership of which he is a partner, and the contracting party may rely upon the arbitration clause if he brings his action against the partner instead of bring it against the partnership."

"It does not follow from the requirement of the written form that the clause must be concluded in the name of the party to the proceedings."

This is true because the obligations under the substantive law of the partnership agreement are obligations not only of the partnership, but also obligations of each of the partners. The partners are bound by the obligation to arbitrate.

It is the same in a case of total assignment. Generally the assignee undertakes all the substantive obligations of the contract including the obligation to arbitrate. If the assignment is not duly effected, the assignor might be held liable to arbitrate. For example, in a sales dispute before

The assignment appeared to have been effected when a tri-partite agreement was signed to change the seller to another company. The tribunal found that the agreement did not constitute an assignment but merely an arrangement for obtaining the necessary export permits. The original seller was held liable for the non-delivery of the contracted goods.

4.1.5. Joinder of Parties

A single international transaction may be so closely connected with other transactions that its performance is subject to those other transactions. In a back-to-back sale of goods, for instance, the buyer who was going to resell the goods had to depend on the seller's performance before he could make deliveries to his buyer. The transaction was arranged with two contracts between the person in the middle, his downstream buyer and upstream seller respectively. These two contracts usually have identical clauses except price, time of delivery and names of the parties. The person in the middle makes profit out of the price difference between the two contracts. Other transactions that are likely to attribute disputes to third parties include construction transactions, leasing transactions and charter parties. In construction cases, disputes might arise from the contractual relationship between the owner and the prime contractor or the separate relationship between the constructor and the sub-contractors. All these cases may involve third parties liabilities.

In cases involving third parties, the question whether the third party is subject to the jurisdiction of an arbitral tribunal over the main dispute will depend upon the consent of the third party.

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party and the other parties. If all three parties agree upon arbitration by one single tribunal, the tribunal's jurisdiction is effectively founded. If there is no agreement by the third party or the other parties, the tribunal lacks the power to join the third party in the arbitration proceedings. This is due to the nature of international arbitral jurisdiction. Voluntary submission will be valid only when the submission is consensual. There should be no element of compulsion. A non-voluntary submission would result in an invalid arbitral award.\footnote{273}

In practice, this rule generally is followed. In an ICC arbitration,\footnote{274} claimant A and defendant B entered into a contract whereby B undertook to supply A with a certain amount of ladies boots. On the same date, B entered into an identical contract with a Romanian State trading enterprise C, who was to supply the same quantity of boots to B. When C defaulted, A instituted arbitration proceedings against B demanding damages for late delivery and defective goods. B sought to join C into the arbitration. The arbitrators rejected B's request partly on grounds that B was not C's agent.

Legally speaking, the contract between A and B is separate from and independent of the contract with B and C, but, commercially speaking, these contracts form a closely connected string that is complementary.\footnote{275} Obviously without C's full performance, the middle person B cannot fulfil its obligation to perform under its contract with A.\footnote{276} B's liability is actually attributable to the third party C. B wishes to turn to C for damages, but it has to subject its claims to the stipulations of its

\footnote{273} Art. V (1), \textit{New York Convention}.  
\footnote{274} ICC Case No. 3880, Jarvin & Derains, \textit{Collection of ICC Arbitral Awards}, pp. 159-161.  
\footnote{275} Id., p. 161.  
\footnote{276} However such non-performance of third parties does not generally constitute force majeure, id., p. 160.
contract with C. If the contract also contains an arbitration clause, it may institute separate arbitral proceedings; if the contract has selected another forum, it has to base his proceedings upon the forum selected; if the contract is silent as to dispute resolution methods, it might have to sue in a foreign country.

Even if the contract contains an arbitral clause identical with that contained in the first contract with A, B faces the problem whether the arbitral tribunal will consist of the same person(s). With two different tribunals, B faces the risk of inconsistent fact-findings and different conclusions on the same or related questions of law because different tribunals may form different views on the same issues. Further, B may face difficulties of time when its case with C is contingent on the result of its case with A. In any event, with two proceedings, B has to incur more expenses for the pursuit of actions.

The difficulty with third parties in arbitral proceedings has not been solved fully under national laws or international practices. In U.S. case law, the inability of the arbitrators or national courts to join third parties in an arbitration is mainly based on the principle of consensualism. Since arbitration is a creature of contract, the court cannot bring third parties to the privately arranged procedure


278 Id. For a case whether pendency of another arbitration renders an arbitrator incompetent, see ICC Case No 2272, Jarvin & Derains Collection of ICC Arbitration Awards, p. 11, where the agreement between A & B provided for ICC arbitration, while the agreement between B and C provided for arbitration by the Brussels Trade Tribunal. A sought ICC arbitration against B, B sought Brussels Trade Tribunal arbitration against both A and C and challenged ICC arbitrator's jurisdiction on grounds of pendency of Brussels Tribunal case. The ICC arbitrator rejected B's contention and decided that there cannot be pendency unless the two proceedings take place between the same parties, concerning the same facts and for the same purposes. When those condition are met, it is the first judge before whom the case is brought shall be competent.

279 Id., Mustill & Boyd, p. 110.
without consent of the parties to the proceedings.\textsuperscript{280} Unless the law of arbitration develops to break through the four corners of the parties' agreement and permit joinder of parties by arbitrators, third parties remain outside the jurisdiction of international arbitrators.\textsuperscript{281}

4.1.6. Consolidation of arbitrations

The same difficulty exists in the case of consolidation of arbitrations, whereby two or more arbitral proceedings are united into one proceeding. For consolidation to take place, in theory, the parties to two or more proceedings must agree to have one arbitration by one arbitral tribunal. In English common law, the arbitrators cannot order consolidation without the consent of all the parties:

"The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the disputes shall be heard or determined concurrently with or even in

\textsuperscript{280} See \textit{Weyerhaeuser Co. v Western Seas Shipping Co.}, 743 F 2d 635 (9th Cir. 1984), Cert. denied, 469 US 1061 (1984); also see \textit{Ore E Chemical Corp. v. Stinnes Interoil, Inc.}, 606 F. Supp. 1510 (S.D. N.Y. 1985).

\textsuperscript{281} The new Dutch Arbitration Act allows a third party to request to join the arbitral proceedings and permits the party who claims to be indemnified by a third party to serve a notice of joinder on the third party, but in both cases the tribunal may only permit this third party to participate if he accedes, with written agreement with the parties, to the arbitration agreement: see Art. 1045 (2) (3), \textit{Netherlands Arbitration Act}. See generally, P. Sanders, "The New Dutch Arbitration Act", \textit{Arbitration International}, Vol. 3, No. 3, July 1987, p. 200.
consonance with another dispute, however convenient that course may be to the party seeking it and however closely associated the disputes in question may be.\textsuperscript{282}

In practice, this traditional theory of non-consolidation is compromised by the need to consolidate arbitration. In the United States, the court may order consolidation of arbitrations where the parties are not the same if the issues are substantially the same and if no substantial right is prejudiced.\textsuperscript{283}

Under some national legislations, consolidation may be ordered by the court, but regard must be had to the agreement of the relevant parties. For example, the B.C. International Commercial Arbitration Act provides in Article 27 (2):

"Where the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the followings:

(a) order the arbitrations to be consolidated on terms the court considers just and necessary;

(b) where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 11 (8);


(c) where all the parties cannot agree on any other matter necessary to
conduct the consolidated arbitration, make any other order it
considers necessary." (emphasis added)

The practice in Hong Kong presents a different approach. The court is clearly empowered
to consolidate arbitrations. The court may order consolidation if in two or more arbitrations it finds:

"(a) that some common question of law or fact arises in both or all of
them, or

(b) that the rights to relief claimed therein are in respect of or arise out of
the same transaction or series of transactions, or

(c) that for some other reason it is desirable to make an order under this
section."

The Court may order the arbitrations to be heard at the same time, or one immediately after
another, or may order any of them to be stayed until after the determination of any other of them.

The power of the Court to consolidate arbitrations is provided under the provisions governing
domestic arbitrations. This power extends to international arbitrations if (and only if) the parties
agree in writing to be governed by the provisions for domestic arbitration. Otherwise an
international arbitration is governed by the UNCITRAL Model Law.

The new Netherlands law of arbitration adopts a more permissive approach:

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284  *Hong Kong Arbitration Ordinance*, Chapter 341, Part II, Sect. 6B. (1).
285  Id.
286  Id., Sect. 2M.
287  Id., Sect. 34A (1).
"If arbitral proceedings have been commenced before an arbitral tribunal in the Netherlands concerning a subject matter which is connected with the subject matter of arbitral proceedings commenced before another arbitral tribunal in the Netherlands, either party may, unless the parties have agreed otherwise, request the President of the District Court in Amsterdam to order a consolidation of the proceedings." (emphasis added)\(^{288}\)

The approach seems to be based on the need of consolidation rather than the mere consent of all the parties to the arbitral proceedings. Although the Uncitral Model Law does not include provisions on consolidation because of the consensus of "no real need" to make such an inclusion,\(^{289}\) the need to consolidate arbitrations sometimes seems manifest. The concerns are two-fold. First, two or more proceedings inevitably will incur more time and incur more expense. This can hardly serve the purpose of a speedy settlement. Second, these separate proceedings with different tribunals likely will result in divergence in the decisions on the rights and obligations of the parties concerned.\(^{290}\) These concerns should be dealt with by national legislations. If national laws provide consolidation procedures, parties involved in a chain of international businesses may submit to consolidated arbitral proceedings. Where the tribunal is the same in the two or more arbitral proceedings, it should be

\(^{288}\) Art. 1046 (1), Netherlands Arbitration Act 1986.


allowed to consolidate the proceedings. Where the tribunals are different, the national court should assist the constitution of the tribunal in the absence of the parties' agreement.

4.2. Considerations about the Claims

4.2.1. Preliminary Institutional Examinations

Under some systems of international institutional arbitration, the institution conducts a preliminary examination of the arbitral jurisdiction before constitution of the arbitral tribunal. The ICC practice shows that in determining the issue of prima facie agreement to arbitrate, the court's review is limited to contractual documents or the written arguments submitted by the parties. The Court is not in a position to determine whether a claim submitted to the Court comes within the arbitration agreement. Nor does it have authority to hear such arguments as to whether the agreement is defective, non-existent, lacks the consent of the parties. Such matters are to be decided by the arbitral tribunal.

In CIETAC arbitration, when the claimant files an application for arbitration with the Secretariat of CIETAC, the latter will, as a matter of practice, examine whether: there is an arbitration clause included in the contract or a special submission; the claimant and the purported respondent are parties to the contract and/or the arbitration agreement; the application for arbitration is properly signed by the claimant or its attorney; the parties have provided detailed addresses and

other administrative matters.292 These examinations are prima facie. The secretary does not go into each item of a claim and determine whether arbitral jurisdiction exists. Such work is left entirely to the arbitrators.

The Stockholm Chamber of Commerce provides a similar practice. If it is obvious that arbitral jurisdiction is lacking, the claimant's request for arbitration will be dismissed; if it is not obvious that jurisdiction is lacking, the request will then be communicated to the respondent.293

Other arbitral institutions, especially in common law countries, seem to proceed without a preliminary institutional examination. The Rules for International Commercial Arbitration and Conciliation Proceedings of BCICAC require that the notice of request for arbitration include, among other things, "a reference to the arbitration clause or separate arbitration agreement relied upon, a reference to the contract out of or in relation to which the dispute has arisen, the general nature of the claim and an estimate of the value of the dispute and the remedies sought".294 Arbitral proceedings commence on the date on which the notice of request for arbitration is received by the respondent.295 Under the AAA International Rules, the administrator will, upon receipt of the notice of arbitration, further acknowledge the commencement of the arbitral proceeding.296 The London

293 Arts. 10, 11, SCC Rules.
294 Art. 17 (3) (c) (d) (e) (d), Rules for International Commercial Arbitration and Conciliation Proceedings in the British Columbia International Commercial Arbitration Centre ("BCICAC Rules").
295 Id., Art. 17.(2).
296 Art. 2 (3), AAA International Rules.
Court of International Arbitration also does not examine the *prima facie* agreement. Any objection with respect to the existence or validity of the arbitration agreement is to be decided by the tribunal.\(^{297}\)

No matter whether there is any preliminary institutional examination, arbitrators appointed under the arbitration agreement examine the claims at hand in view of the parties' agreement to arbitrate.

### 4.2.2. Terms of Reference

It is the arbitrator's task to examine the specific items of a claim and see whether they fall under the agreement. The ICC arbitration is characterized by the so-called "terms of reference" in determination of the extent of claims.\(^{298}\)

This document will record, *inter alia*, a summary of the parties' respective claims and a definition of the issues to be determined.\(^{299}\) The document shall be signed by both the parties and the arbitrators; if one party refuses to sign the document, the Court of Arbitration may approve the document and the arbitration may proceed.\(^{300}\)

\(^{297}\) Art. 14, *Rules of London Court of International Arbitration* (adopted to take effect from 1 January 1985) ("LCIA Rules").


\(^{299}\) Art. 13 (1) (c) (d), *ICC Rules*.

\(^{300}\) Art. 13 (2), id.
The Terms of Reference is analogous to a submission agreement to refer existing disputes to arbitration in the sense that both defines the extent of disputing issues. The difference lies in the timing and formalities of the document. While the submission agreement is an arbitration agreement to refer existing disputes to arbitration, drawn up solely between the disputing parties at the time when existing disputes cannot otherwise be solved, the Terms of Reference is a procedural document signed by both the arbitrator and the parties to frame the issues, either substantive or procedural, to be decided by the arbitrator. It is not an arbitration agreement in its true sense. Should there be no arbitration agreement in the first place, there would be no Terms of Reference for the Court of Arbitration would have refused the request for arbitration at the initial stage.

In common-law arbitral practice, instead of the Terms of Reference, a procedure of pre-trial conference is adopted. For example, the AAA Commercial Arbitration Rules provide:

"At the request of any party or at the discretion of the AAA, an administrative conference with the AAA and the parties and/or their representatives will be scheduled in appropriate cases to expedite the arbitration proceedings."

However, one view considers the Terms of Reference as having the nature of an arbitration agreement: "The Terms of Reference, drafted in compliance with the arbitration agreement, may at the same time state the agreement of the parties or amend or complete the arbitration agreement": see ICC Case No. 4304 (1986), cited by M. Rubino-Sammartano International Arbitration Law, op. cit., p. 333; also see ICC Case No. 6531 (1991), Yearbook Comm. Arb. XVII (1992), pp. 221-225, where it is considered that the Terms of Reference constitutes an agreement to arbitrate.

"Where there is no prima facie agreement between the parties to arbitrate or where there is an agreement but it does not specify the International Chamber of Commerce, and if the Defendant does not file an Answer within the period of 30 days provided by paragraph 1 of Article 4 or refuses arbitration by the international Chamber of Commerce, the Claimant shall be informed that the arbitration cannot proceed": Art. 7, ICC Rules.

Art. 10, AAA Commercial Arbitration Rules (March 1, 1986). Also see Art. 20, BCICAC Rules for Domestic Commercial Arbitration Proceedings: "The parties shall meet the arbitrator within
For international arbitration, the rules in common-law countries do not provide such a pre-arbitration procedure, but they generally give discretion to the arbitrators who usually conduct the proceedings in whatever manner they think fit, provided that the parties are treated with equality.\textsuperscript{304}

With this discretion, the arbitral tribunal may proceed directly to the hearings. It may also arrange a pre-arbitration meeting to define the issues or determine the procedure to be followed. For that purpose, the tribunal may invite the parties to write an agreement to the same effect as the Terms of Reference. Flexibility is achieved.

4.2.3. Extent of Claims

In determining the extent of claims, the arbitrators are concerned with the arbitrability of the submitted disputes\textsuperscript{305} and their scope of authority. In cases where arbitrable and non-arbitrable disputes are intertwined and hardly can be separated, particular caution must be exercised by the arbitrators. For instance, in disputes involving joint ventures, claims may include, among other things, a request for dissolution of the joint venture. Should the arbitral tribunal decide the issue of liquidation and order the commencement of liquidation proceedings?

\textsuperscript{304} See Art. 19, BCICAC for International Commercial Arbitration and Conciliation Proceedings; Art. 5, London Court of International Arbitration Rules; Art. 16, AAA International Rules.

\textsuperscript{305} For the issue of arbitrability, see supra Sect. 2.2.2.
This is a practical question that has arisen in CIETAC arbitration. According to the Law of the PRC on Joint Ventures Using Chinese and Foreign Funds and the Implementing Rules of that law, liquidation is a matter to be handled by the board of directors. When the joint entity is terminated, the board of directors shall propose liquidation procedures and principles, select liquidators and report to the competent authorities for examination and supervision. In practice, such liquidation proceedings are rarely so organized because the board of directors has fallen apart and one party, especially the breaching party, may take no interest in liquidation.

In view of this situation, the CIETAC arbitrators usually render an interim award to the effect that the enterprise be dissolved and liquidation proceedings commence according to the Joint Venture Law. They are not prepared, however, to appoint the liquidators or to oversee the liquidation proceedings.

Some claims are so closely related to issues beyond the arbitral competence, that they can hardly be clarified without consideration of the related issues. This is particularly true in transactions involving third party guarantees, e.g., performance loans or bank guarantees, for these guarantees are issued by a third party in favour of one of the parties to the transaction.


307 Cf. Under the British Columbia Company Act, winding up is divided into voluntary winding up, which is done by special resolution of the company, and court ordered winding up, in which the liquidator is appointed by the court: see Arts. 291, 294, 295 and 298, British Columbia Company Act, R.S.B.C. 1979, C. 59.

308 Art. 103, Implementing Rules of the PRC Joint Venture Law.
In considering these issues, arbitrators usually are cautious about their own authority and may acknowledge their limitation of authority in their decisions. For example in ICC Case No. 3267,\textsuperscript{309} the issue arose as to whether performance bonds should be considered as remaining in force. The arbitrators made conclusions based on an extensive review of the factual circumstances. Their conclusions were qualified as *prima facie*,\textsuperscript{310} without prejudice to the rights and obligations under the guarantee bonds.

4.2.4. New and Counter Claims

Amendment of claims commonly happens in practice either because the original claim was framed, in race of time, in a general manner or because the factual circumstances have changed from the time of application for arbitration to the hearing.\textsuperscript{311} The same may apply to new claims and counter-claims.

The arbitral tribunal has to consider whether the amended claims, new claims or counter-claims fall within its jurisdiction. This is particularly true in ICC arbitration where the Terms of Reference which defines the necessary claims to be decided might impose a limitation as to the scope of claims.\textsuperscript{312} These claims, if allowed, mean an extension of the arbitrator's jurisdiction.\textsuperscript{313} Caution

\textsuperscript{309} Partial award made (June 4, 1979) in Case No.3267, Jarvin & Derains, op. cit., pp. 76-87.

\textsuperscript{310} Id., p. 86; also see Partial Award of December 23, 1982. Case No 3896 (Original in French), id., pp. 161-164, where the arbitrator considered calls under performance guarantee by defendant during arbitral proceedings.

\textsuperscript{311} E.g. in the prominent ICC Case No 1803, the situation changed almost daily after the terms of reference were formulated; accordingly, amendment was made to the application: see Award made in ICC Case No. 1803 in 1972, Jarvin & Derains, op. cit., p. 42.

\textsuperscript{312} Art. 16, ICC Rules.
must be had to deal with these claims when challenges arise. The party who objects them may have
good legal grounds for the objection and "is unlikely to agree to extend the jurisdiction of the arbitral
tribunal, however much he may be pressed to do so".

Mention should be made of the effect of counter-claims in cases where the respondent
challenges the validity of the arbitration agreement. By definition, a counter-claim is a claim made
against the claimant for the purpose of setting off the obligation the counter-claimant owes to the
claimant or seeking other relief. One of the purposes of a counter-claim is to dispose of substantive
rights and obligations under a certain legal relationship. A counter-claim most likely will subject the
counter-claimant to the jurisdiction of the arbitrator even in cases where she has made express
reservations.

The situation differs from the case of defense only. If a respondent makes a defense on the
substance while protesting the arbitral jurisdiction, it might risk being held as having waived the right
to object and hence losing its case subsequently in either the setting aside or the enforcement
proceedings. The case is still arguable that the defense is made passively in order to protect his own
interest. In case of counter-claims, the mere fact of counter-claiming may be considered as voluntary
submission.

313 Redfern & Hunter, op. cit., p. 211.

314 For an example of how arbitrators treat counter-claims cautiously, see ICC Case No 3540,
where a Yugoslav defendant raised an incidental counter-claim, seeking an interim award to be
effective provisionally. The arbitrators dealt with both objections: the exceptio nonadimpleti
contractus, and, subsidiarily, a set-off: see Award made October 3, 1980, Case No 3540 (Original
in French), Jarvin & Derains, op. cit., p. 105.

315 Redfern & Hunter, op. cit., p. 211.
4.2.5. Withdrawal of Claims

Most arbitration rules seem to leave open the issue of withdrawal of claims, but it is dealt with in the CIETAC Arbitration Rules. When a settlement is reached by the parties themselves, the claimant should apply for withdrawal of the claims. If the withdrawal application is made before the tribunal is established, the decision will be made by the chairman of the commission, otherwise the decision will be made by the tribunal.\(^{316}\)

Withdrawals take place either upon settlement or through other mutual agreement. The issue concerns arbitral jurisdiction in the remote situation where a withdrawn case is brought afresh to the arbitration institution. For example, in an ICC arbitration involving five contracts between a Belgian enterprise and an Iranian factory, the Iranian defendant took part in the procedure with reservations on the competence of the arbitrator. After the first hearing, both parties agreed to withdraw from ICC jurisdiction and to start a new ad hoc procedure with the same tribunal. The agreed time for the tribunal to render a decision was three months, which could be prolonged four times. When informed of this change, the ICC Court of Arbitration deleted the case from its registry. However, the prolongation was not agreed formally upon and the tribunal's mandate expired under Iranian law. Subsequently the claimant sought a new arbitration before the ICC Court of Arbitration, based on the original agreement. The sole arbitrator considered the respondent's protest that there was no existing agreement to arbitrate, and the appointment of a sole arbitrator was contrary to the original arbitration agreement. The arbitrator found that he had been duly appointed, but he held that the establishment of the ad hoc arbitral tribunal had superseded the original arbitration clause referring to ICC, that the withdrawal from ICC arbitration had both parties' unreserved approval, and

\(^{316}\) Art. 31, CIETAC Rules.
"that the ICC Court of Arbitration, drawing the logical conclusion from this renunciation, removed the case from its calender in its session of January 1977, ending therewith officially its jurisdiction over the dispute of the parties.\textsuperscript{317}

Accordingly, the arbitrator declared that no valid arbitration clause existed at the time and he was incompetent to hear the claim.

Two observations can be made from this case. First an arbitration agreement superseded by a subsequent arbitration agreement no longer exists and cannot be relied upon to institute new arbitration proceedings, and second, a withdrawal without reservation might deprive a party of the right to rely on the original arbitration agreement. The decision in this case was made by the arbitrator appointed by the ICC Court of Arbitration. Obviously the Court of Arbitration must have admitted the case on the basis of the original arbitral agreement, otherwise the case would not have been dealt with by the arbitrator in question. This case also illustrates that the arbitral tribunal is the organ to decide its jurisdiction.

To sum up, an arbitral tribunal must base its jurisdiction upon the agreement of the parties. In examining the scope of arbitral jurisdiction, the tribunal should take into consideration the intention of the relevant parties to the arbitration agreement for the purpose of establishing personal jurisdiction, and the extent and types of claims in order to establish its subject matter jurisdiction. Both the personal and subject matter jurisdiction shall come within the boundary of the arbitration agreement. The rule may have to be extended to adapt to the needs of international commerce, but such extension shall not be unqualified. For a party to be subjected to an arbitration agreement, there

\textsuperscript{317} Award made October 26, 1979 in ICC Case No. 3383, Jarvin & Derains, op. cit., p. 105.
must be consent, either express or implied. The trend appears to allow arbitrators to read the consent of the relevant parties from their conduct and degree of interest in the case. Unless the law changes, arbitrators cannot join outsiders into the arbitral proceedings.
CHAPTER 5: JUDICIAL REVIEW OF ARBITRAL JURISDICTION

One of the limitations of arbitral jurisdiction is its inability to be divorced from national judicial review. Efforts have been made in this century to limit the scope of court review of arbitral awards, but exclusion of judicial review of arbitration in toto seems impractical and is controversial.

This Chapter considers the pros and cons of judicial review of arbitral jurisdiction. The context of judicial review in general will be set out so as to bring the issue into perspective.

5.1. Judicial Review In General

In litigation, judicial review is a recourse to a higher court against decisions of a lower court. Questions of both substance and procedure may be the subject of review. The result may be setting aside of the decision or a remission. Since commercial arbitration involves a judicial element, it follows that arbitral decisions are subject to judicial review to ensure that justice is properly done.

5.1.1. Dual System of Judicial Review

International arbitral awards are subject to judicial reviews at the place of arbitration and the place where enforcement of the arbitral award is sought, resulting in a dual system of judicial review. This dual system is recognized by international conventions on arbitration agreements or arbitral awards.

The Geneva Protocol of 1923 was the first international convention dealing with international arbitration through the recognition of arbitration clauses. This protocol does not deal with attacks
on arbitral award, but provides for the enforcement of an arbitration agreement subject to one exception:

"Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative".318

Thus the Geneva Protocol recognizes the power of the state courts to take back the arbitrator's jurisdiction when the agreement is ineffective.

The Geneva Convention was the first international attempt to create uniform rules on the enforcement of foreign arbitral awards. The convention provides positive requirements that a foreign arbitral award must meet for the purpose of enforcement. It also provides negative requirements that, upon proof, a foreign arbitral award can be refused enforcement. The burden of proof rests upon the party who is seeking enforcement of the arbitral award.

The Geneva Convention permits judicial review in the country of the seat of arbitration and requires:

"that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending".319

This provision imposes a finality requirement on the arbitral award on the assumption that the state court in the seat of arbitration retains the power of judicial review regarding arbitral awards

319 Art. 1 (d), Geneva Convention.
rendered within the country. This assumption is further recognized in Article 2 which provides, among other things, that recognition and enforcement of the award shall be refused if the court is satisfied:

"that the award has been annulled in the country in which it was made".  

Through these rules, the Geneva Convention recognizes judicial review of arbitral awards in the country of origin. The non-final nature of the arbitral award or the annulment of the arbitral award in the country where the award was made will result in non-recognition and non-enforcement of the award in the foreign states.

The New York Convention shifts the burden of proof to the party against whom enforcement is sought, but follows the same assumption in respect of judicial review. If it can be proved that the award is not binding or has been set aside by the country of origin, enforcement of the award may be refused.

The New York Convention also permits the enforcing court to examine ex officio the subject matter arbitrability of the dispute and compatibility of the award with public policy under its own law. The dispute must be arbitrable under the law of the enforcement country, and enforcement of the award must not be contrary to the public policy of that country.

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320 Art. 2 (a), Geneva Convention; Article 2 (b) is concerned with proper notice of arbitration and capacity of party to present the case, (c) deals with excess authority of the arbitral tribunal.

321 Art. V (1) (e), New York Convention.

322 Id., Art. V (2).
While the Geneva Convention and the New York Convention do not regulate judicial review in setting aside procedures, the European Convention and the Uncitral Model Law expressly provide grounds for setting aside arbitral awards in the country of origin.

Under the European Convention, grounds for judicial review are similar to those of the New York Convention in enforcement proceedings. Setting aside procedures may take place in the country in which the award was made or under the law of which the award was made. There are four reasons for setting aside an award: (1) invalidity of the arbitration agreement; (2) violation of due process; (3) excess of authority by the arbitrators; and (4) irregular composition of the arbitral tribunal or the arbitral procedure. For Contracting States of the European Convention that are also parties to the New York Convention, Article V (1) (e) of the New York Convention applies solely to setting aside on the above four grounds. These grounds limit judicial review primarily to procedural matters.

Similar to the European Convention, the Model Law provides in Article 34 a setting aside procedure as a sole recourse against the arbitral award. The setting aside procedure takes place on the limited grounds which are a recreation of Article V of the New York Convention.

Legislative history of the Model Law suggests that a variety of additional grounds were offered for the setting aside procedure, including, e.g., discovery of new facts or evidence. These grounds were rejected by the Working Group. Instead, the grounds listed under Article V of the New York Convention were adopted for setting aside under the conclusion that "[t]hat solution would

323 Art. IX (1), European Convention.

324 Art. IX (2), European Convention. Art. V (1) (e) of the New York Convention allows non-recognition and non-enforcement of the arbitral awards on the ground that the award has not become binding or has been set aside or suspended in the country of origin.
facilitate international commercial arbitration by enhancing predictability and expeditiousness and would go a long way towards establishing a harmonized system of limited recourse against awards and their enforcement.\footnote{Third Working Group Report" A/CN.9/233 (28 March 1983) in Holtzmann and Neuhaus A Guide to Model Law, op. cit., p. 936.}

The relationship between setting aside and enforcement can be easily discerned. Once an award is set aside in the country of origin, it becomes a nullity and can no longer be relied upon for enforcement purposes in any other countries. The setting aside procedure has a far-reaching global effect on the enforcement procedure.

A question arises as to where the award should be set aside, or which court can set aside an award. In \emph{Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.},\footnote{Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd. 4 B.L.R. (2d) 108 (Ontario Court of Justice, General Division, 1992).} the applicant KYK, a Japanese corporation, sought recognition and enforcement of an award rendered in Japan against Can-Eng Ltd., an Ontario corporation. The respondent challenged the recognizability and enforceability of the award and also requested setting aside of the award before the Ontario Court of Justice (General Division). The court rejected both the challenge and the request and ordered recognition and enforcement. With respect to the request for setting aside, the court seems to consider that Article 34 of the Model Law applies to the request.\footnote{The Ontario International Commercial Arbitration Act, 1988, S.O. c. 30, incorporates into the law of Ontario the Uncitral Model Law on International Commercial Arbitration adopted by the United Nations Commission of International Trade Law: id., p. 119.} The court actually applied Article 34 (3) when it rejected the request based on the lapse of the limitation, i.e., "more than three months
have elapsed since the respondent received the award." 328 This application seems to be incorrect because under the Model Law as adopted by Ontario International Commercial Arbitration Act Article 34 applies only if the place of arbitration is in the territory of Ontario. 329

A correct reading of the Model Law is found in Schreter v. Gasmac Inc., 330 where, in considering recognition and enforcement under the Model Law of an arbitral award rendered in the State of Georgia, the court held:

"The Model Law applies to international commercial arbitrations conducted in Ontario or elsewhere, but the only articles which apply to arbitrations conducted outside Ontario are arts. 35 and 36, as well as arts. 8 and 9 which deal with other court functions where there is an arbitration agreement." 331

328 Id., p. 123. Art. 34 (3) of the Model Law reads: "An application for setting aside may not be made after three months have lapsed 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".

329 Art. 1 (2) of the Model Law reads: "The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State". The four exceptions are Article 8, providing reference to arbitration in a matter governed by a valid arbitration agreement, Article 9, providing for the compatibility of a request for interim measures of protection with the agreement to arbitrate, and Article 35 and 36 dealing with recognition and enforcement of arbitral awards.


331 Id., p. 370.
Thus setting aside proceedings may take place only in the place of arbitration or under the law under which the arbitration has taken place. The enforcing court is not in a position to set aside a foreign award.332

Another question remains as to the extent to which an arbitration award should be judicially reviewed. Should the court re-visit the merits of the case and substitute its decision for the arbitration award? This question brings us to the issue of the scope of judicial review.

5.1.2. Judicial Review on the Merits Excluded

International conventions that deal with judicial review of arbitration either in setting aside or enforcement proceedings do not allow re-opening of the merits of the arbitration case. Instead, they provide judicial remedies against irregular arbitral procedures.

Under national laws, it is also recognized that in the context of international arbitration the merits of the case is not to be reviewed by the court. While domestic arbitration awards often may be reviewed on the substance, international arbitral awards generally are immune from substantive review by the court.333

332 In a case where a Danish award is sought to be enforced in Germany, the German party defended against enforcement and also requested the setting aside of the award. Enforcement was refused based on various grounds under the New York Convention, but the request for setting aside was turned down. The Court of Appeal held that in F.R. Germany a foreign arbitral award can only be refused recognition, and that it cannot be set aside. A setting aside decision would mean an impermissible interference with foreign arbitration: see F.R. Germany No. 14, Oberlandesgericht Koln, June 10, 1976, Yearbook Comm. Arb., IV, (1979), p. 258; also see F.R.Germany No. 12, Bundesgerichtshof, 12 February 1976, Yearbook Comm. Arb., II, (1977), p. 242, where the German Supreme Court reversed an annulment decision of the Court of Appeal, holding that setting aside does not apply to awards made in other states under other than German law.

For example, in British Columbia domestic commercial arbitration is regulated by the Commercial Arbitration Act, S.B.C. 1986, c.3, while international commercial arbitration is governed by the International Commercial Arbitration Act, S.B.C. 1986, c. 14. Under the Commercial Arbitration Act, arbitral rulings or awards are not subject to the Judicial Review Procedure Act, but they are subject to substantive judicial review in the absence of an exclusion agreement. Any party may, with consent of the other parties or with leave of the court, take the arbitrated case to the court on any question of law arising out of the arbitral award. The court may grant leave for appeal in cases where

"(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice, (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or (c) the point of law is of general or public importance".

The International Commercial Arbitration Act incorporates the provisions of the Uncitral Model Law and limits judicial review to the setting aside procedure on the listed procedural grounds, excluding substantive review of questions of law.

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334 Art. 31.1, Commercial Arbitration Act, S.B.C. 1986, c. 3.

335 The Act provides that parties may, after an arbitration has commenced, effectively exclude in writing the jurisdiction of the court to determine questions of law or review an appeal: Art. 34.

336 Art. 31 (2), Commercial Arbitration Act.
This rule of non-judicial review on the merits of the arbitration case is recognized internationally. For example, in AB Gotaverken (Swedish) v. General National Maritime Transport Company (Libya)\textsuperscript{337}, the Swedish Supreme Court held:

"Under Sect. 6 of the Foreign Arbitration Agreements and Awards Act [which implements the New York Convention in Sweden] a foreign arbitral award shall be valid in this country subject to certain conditions. These conditions concern various procedural irregularities. Consequently, when a request for enforcement of a foreign arbitral award is considered, there should, in principle, not be a review of the substance of the award". \textsuperscript{338}

Thus the extent of judicial review of arbitral decisions is limited. The court is not to second guess or step in the substantive decision of the arbitrators. Extensive judicial review will frustrate the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings.\textsuperscript{339} However, the court is available to double check the arbitral procedure at both the place of arbitration and the place where the enforcement of the award is sought.

5.1.3. Judicial Review on Procedure


\textsuperscript{338} Id., p. 240.

The majority of nations maintain a limited extent of judicial review of the arbitral procedure. Under French law, for instance, less demanding standards are designed for judicial review of international arbitral awards. There are only five grounds under which international arbitral awards can be set aside. These five grounds are similar to the list of grounds for enforcement of foreign arbitral awards under the New York Convention, with the exception of the express provision of "international public policy".

In English law, the question whether there is an exclusion agreement affects in principle the extent of judicial review of arbitral awards. Under the 1979 Arbitration Act, the right of appeal on any question of law arising out of an award can in some circumstances be excluded by an exclusion agreement. As far as international arbitration is concerned, an exclusion agreement is effective when it is made either before or after the arbitration has begun, unless it falls under the special category of arbitrations. Where there is an effective exclusion agreement, no appeal to the court


341 See infra Sect. 5.2.3.


343 The special category of disputes include those arising out of shipping, insurance or commodity contracts, in which case an exclusion agreement is valid when it is made after the commencement of the arbitration proceedings or the questions of law are governed by a law other than English law: Sect. 4.

344 It has been held that, by referring to ICC arbitration, Art. 24 (2) of the ICC Arbitration Rules operates as an effective exclusion agreement: see Arab African Energy Corp Ltd. v. Olieproduktene Nederland BV [1983] 2 Lloyd's Rep. 419; Marine Contractors Inc. v. Shell Petroleum Development Co. of Nigeria Ltd. [1984] 2 Lloyd's Rep. 77 (C.A.). Art. 24 (2) of the ICC Rules reads: "By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made".
on a question of law may be made except with the consent of all the parties to the arbitration.345 Where there is no exclusion agreement, the arbitral award is subject to appeal to the High Court with consent of all the other parties to the arbitration or with leave of the court.

On the determination of such appeals, the English court may by order "(a) confirm, vary or set aside the award; or (b) remit the award to the reconsideration of the arbitrator or umpire together with the court's opinion on the question of law which was the subject of appeal".346

In the United States, federal statutes generally provide that a court has power to set aside an award only where it was procured by corruption or fraud, where there was evidence of an arbitrator's partiality, where the arbitrator refused to hear pertinent evidence, postpone a hearing upon good cause shown or where otherwise guilty of misconduct prejudicing the rights of the parties, or finally, where arbitrators exceeded their powers or so imperfectly executed them that a final and definite award was not made.347

The US courts have also refused to review any questions of law or findings of facts.348 The "Manifest disregard of law" defense349 will not be construed as a license to review the record of

345 Sect. 3 (1).
arbitral proceedings for errors of fact or law in international arbitration. Errors of fact or law are not grounds for setting aside an award.

The model of limited judicial review accepts the need of judicial review of arbitral awards; on the other hand, such review is restrictive in scope. Most often the review is targeted at the fairness of the procedure. The court examines whether there is a valid arbitration agreement, the tribunal is constituted properly; due process has been respected; the arbitrators assumed their jurisdiction properly; and public policy is observed. All these elements are related primarily to the procedure of the arbitration. The purpose is to ensure that justice is not miscarried on a procedural basis.

5.1.4. No Judicial Review

An extreme pattern under national laws is the exclusion of judicial review of international arbitral awards. Belgium is an example. The Belgium Judicial Code provides:

"The Belgian Court can take cognizance of an application to set aside only if at least one of the parties to the dispute decided in the arbitral award is either a physical person having Belgian nationality or residing in Belgium, or a legal person formed in

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351 "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes, it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside from error, either in law or fact": Burchell v. Marsh, 58 U.S. (17 How.) 344 at 349.
Belgium or having a branch (une succursale) or some seat of operation (un siege quelconque d'opération) there". 352

The main argument for this pattern is that international arbitrations frequently take place in a neutral state which, under an "interest analysis", often has less interest in an international arbitral award rendered in its territory than the jurisdiction in which enforcement of the award is sought. 353 Consequently, judicial review, which is often used for purely dilatory purposes, should be excluded in the country of origin with respect to a completely international arbitral award.

The Belgian model has posed much concern in the international arbitral community. Under one extreme view, such international awards which cannot be set aside by courts of the country of origin are "stateless" awards and do not fall under the New York Convention for the enforcement of foreign awards. 354

Under another more moderate view, shifting judicial control to the court of enforcement may go against the goal of international arbitration which aims at a fair settlement of disputes in a neutral place. Exclusion of judicial control at the place of arbitration may increase the probability that judicial control will be exercised in enforcement proceedings by a court sharing the nationality of one of the parties. "This is because enforcement will be sought in jurisdictions where the losing party has assets


and there is a strong probability that a party's assets will be located either in his home or in the home jurisdiction of the winner".355

Proponents of non-judicial review at the place of arbitration would argue that such awards as rendered in Belgium are enforceable under the New York Convention. The New York Convention applies to awards without judicial review.356 Though it does imply that an award is to be made under the law of the seat of arbitration,357 it does not imply that an award must be first reviewed by the country in which it was made. Arbitrations taking place in Belgium are, in the absence of choice of procedure law, subject to the Belgian Judicial Code, which a priori operates to the effect of non-judicial review in cases involving no Belgian interests.

Further, with respect to judicial assistance of arbitral proceedings, under the Judicial Code, the Belgian courts are still able to render assistance in the context of appointment of arbitrators, taking of evidence or granting provisional measures.358 The only difference seems to be that the New York Convention Article V (1) (e) which addresses setting aside or suspension will no longer be a ground of defense in the enforcement of arbitral awards rendered in Belgium.359


357 Art. V (1) (a) reads in part: "... or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"; Art. V (1) (e) reads: "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".


359 Except in one rare situation where the parties have chosen a procedural law other than that of Belgium and the chosen procedural law allows setting aside of awards rendered under it: see J. Paulsson, op. cit., p. 69, footnote 8.
The approach of lifting judicial control at the seat of arbitration seems feasible from the economic point of view, provided that the arbitral tribunal does justice properly. A dual system of judicial review would increase litigations over arbitral awards and incur more expense and legal costs.

Where the arbitral award involves a manifest miscarriage of justice, the injured party may be subject to unreasonable risks and difficulties in order to defend against enforcement of the award wherever the winning party seeks enforcement. Injustice cannot be repaired, for the award cannot be set aside by the enforcement court. The Belgian model may create more problems than it solves.

The Belgian system is not the only one that excludes judicial review. The Chinese system also excludes judicial review of arbitral awards, though the motive of the legislation is different. An arbitral award rendered in China is subject to judicial review not for the purpose of setting aside, but for the purpose of enforcement. If it can be proved, e.g., that there is no arbitration agreement or no proper notice of arbitration proceedings, the court will deny enforcement.  

The Chinese court does not set aside or vacate arbitral awards. The theory is that once an award is rendered, it is final and binding, subject to no judicial review. No party may bring any action before a court or bring an appeal for revision of the arbitral award before any other organization. The parties must execute the award within the period provided for in the award; if the award does not provide for a period of performance, it must be performed immediately.  

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360 Art. 260, PRC Civil Procedure Law.
361 Art. 259, PRC Civil Procedure Law.
362 Art. 36, CIETAC Arbitration Rules.
363 Art. 38, id.
The court may only refuse enforcement of the award subject to conditions. An award rendered in China would be legally valid after it is issued. The same risks and difficulties as in the Belgian case would arise where justice is miscarried.

If judicial review is wholly excluded, realistically speaking, it is not helpful for the proper conduct of international arbitration, for a loophole is to be created for any injustice which cannot be cured.

5.2. Review of Arbitral Jurisdiction

With respect to judicial review of arbitral jurisdiction in particular, a national court seized of an application for judicial review will examine such questions as whether the jurisdiction is valid, whether there is excess of jurisdiction and whether such jurisdiction is contrary to the public policy of the state.

5.2.1. Validity of Arbitral Jurisdiction

Arbitral jurisdiction operates on the assumption that the parties have validly agreed to arbitrate. This assumption enables a national court to review the validity of jurisdiction by examining the validity of the arbitration agreement.

The court is to decide the ultimate issue whether the parties have truly agreed to arbitrate. If they have not, then the agreement is tainted. The assumption is defeated and arbitral jurisdiction consequently is invalid.
This approach is provided by the New York Convention, whereby any incapacity of the paries or any invalidity of the arbitration agreement is a ground for defence against enforcement of the arbitral award.\(^{364}\) It is also a ground for setting aside an award under the European Convention and the Model Law.\(^{365}\) Accordingly, in situations where there is no arbitration agreement, or where the arbitration agreement is not duly concluded or does not meet formal requirements, the award either may be set aside or refused enforcement. The SPP case,\(^{366}\) which marks the first widely reported successful challenge to an international award made by ICC arbitrators in France under the New Code of Civil Procedure,\(^{367}\) shows how the issue of the validity of the agreement to arbitrate affects arbitral jurisdiction.

In a joint venture project between SPP, a Hong Kong company, and EGOTH, an Egyptian company, the contract was approved by the Egyptian Ministry of Tourism with the word following the Minister's signature "approved, agreed and ratified by the Minister of Tourism". The project was later cancelled by the Egyptian government. SPP sought ICC arbitration against both the Arab Republic of Egypt and EGOTH according to the arbitration clause in the contract. The ICC arbitrators held by a majority that the Egyptian Government was a party to the contract, and therefore was bound by the arbitration clause included in the contract and awarded that the Egyptian Government pay damages to SPP.

\(^{364}\) Art. V (1) (a), New York Convention.

\(^{365}\) Art. IX (1) (a), European Convention; Art. 34 (2) (a) (i), Uncitral Model Law.


\(^{367}\) Redfern & Hunter, op. cit., p. 328.
In a later action to set aside the award before the Court of Appeal in Paris, the Egyptian Government contended that it was not a party to the contract and that the signature of the Minister was merely administrative, approving the project. The French court agreed and set aside the ICC award.368

This case illustrates that there can be no valid arbitral jurisdiction if there is no agreement to arbitrate. The arbitrators’ holding that there is arbitral jurisdiction can be vacated by the court.

5.2.2. Excess of Arbitral Jurisdiction

In case there is a valid arbitration agreement, the reviewing court will, upon request, examine whether an arbitral tribunal exceeds its mandate by dealing with matters not submitted to it or whether the tribunal fails to deal with all the issues referred to it. In the first situation, if the finding is yes, the award may in whole or in part be set aside or refused enforcement, depending upon whether those part of the award which exceed the jurisdiction of the tribunal can be separated from those which fall within the arbitral jurisdiction.369

In the second situation, failure of the arbitral tribunal to deal with all the issues submitted generally will not result in the award being annulled or refused enforcement since the issues dealt with in the award are within the authority of the arbitrator. Under many arbitration rules there is an


369 Art. V (1) (c), New York Convention; Art. 34 (2) (a) (iii), and Art. 36 (1) (a) (iii), Uncitral Model Law.
immediate remedy for the tribunal, upon request, to make an additional award to cover the left-over claims.\textsuperscript{370} Here we are concerned with the issue of excess of arbitral jurisdiction.

Excess of jurisdiction often is raised as a defense against recognition and enforcement. The issue is subject to the discretion of the reviewing court. For example, a contractual clause saying "any claim for arbitration formulated after 6 months from the date of arrival of the goods at the final station or port of destination is null" may be interpreted as meaning any submission to arbitration has to be made within six months after arrival of the goods; therefore after this period, an arbitral tribunal is no longer competent.\textsuperscript{371} It may also be viewed as not \textit{expressis verbis} excluding the competence of the arbitral tribunal.\textsuperscript{372}

This brings us to the question of how a national court should interpret contractual terms with respect to the authority of arbitrators. Facing a contractual clause limiting damages and the arbitrators' decision granting damages, should a court examine the soundness of the arbitrators' decision on the basis of excess of authority? The answer should be negative because the defense of excess of authority should be narrowly construed. In \textit{Parsons} the contract provides that "[n]either party shall have any liability for loss of production", the arbitrators, nevertheless, awarded damages for loss of production.\textsuperscript{373} The US Court of Appeals held that the defense of excess of authority

\textsuperscript{370} See, e.g., Art. 37, \textit{Uncitral Arbitration Rules}.

\textsuperscript{371} See F.R.Germany No. 12, Bundesgerichtshof, 12 February 1976, \textit{Yearbook Comm. Arb.}, II, (1977), p. 242, where the Court of Appeal refused enforcement of a Romanian award on the ground that the arbitrators had exceeded the terms of arbitration agreement.

\textsuperscript{372} Id. This is the view of the German Supreme Court, which remitted the case to the Court of Appeal on this ground.

should be construed narrowly and "a narrow construction would comport with the enforcement-facilitating thrust of the Convention". The Court then considered that it was "not apparent" that the arbitral tribunal ignored this contractual limitation; rather, "the arbitration court interpreted the provision not to preclude jurisdiction on this matter", and rejected this defense.

In *Fertilizer Corporation of India et al. (India) v. IDI Management, Inc. (U.S.)*, the parties had clearly excluded consequential damages, but the arbitrators found fundamental breach on the part of IDI, concluded that in such a situation the limitation of damages no longer applied, and rendered a large award based almost exclusively on consequential damages. The District Court stated:

"Without engaging in an in-depth analysis of the law of contract in the United States, we cannot say with certainty whether a breach of contract found to be material or 'fundamental' would abrogate an express clause limiting damages to those other than consequential. The answer, however, is irrelevant. The standard of review of an arbitration award by an American court is extremely narrow..."

Relying on the rule of limited judicial review, the court concluded that it would not substitute its judgment for that of the arbitrators.

374 Id.


376 Id., p. 388.
This narrow judicial review of the authority of arbitrators is also affirmed in the Canadian judicial context. In *Quintette Coal*, Quintette sought to have an unfavourable award set aside on the ground that the arbitral tribunal had exceeded its power. The Court of Appeal set the standard for judicial review in this case:

"The 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes' spoken of by Blackmun J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet [sic] therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case."378

According to this standard, the Court of Appeal affirmed the rejection decision of the lower court and refused to set the award aside.

If the award manifestly goes beyond an express limitation of the arbitral clause, the Canadian courts are not reluctant to refuse recognition. This is the case in *Aamco*.379 The arbitration took place under a franchise agreement which included an arbitral clause as follows:

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378 Id., p. 217.

"All disputes...shall be settled by binding arbitration...except for termination by AAMCO which is based in whole or in part, upon the fraudulent acts of Franchisee or Franchisee's failure to deal honestly and fairly with any customer of the center or Franchisee's failure to accurately report his gross receipts to AAMCO..."380  

The franchise was terminated by the franchiser, Aamco, because of the franchisee's failure to file business reports and pay franchise fees. In confirming the chambers judge's unreasoned decision to refuse registration of the award, the Saskatchewan Court of Appeal was of the view that "the franchiser drew the contract and must now accept the clear words of it and is also subject to ambiguities being resolved contra proferentem".381  Enforcement was refused because the issues in the award were held beyond the scope of arbitration and therefore not arbitrable.  

The burden to prove excess of jurisdiction lies with the party who rejects enforcement. The rejecting party must prove to the satisfaction of the court that arbitral jurisdiction has been exceeded. In Schreter v. Gasmac Inc.,382 the claim for indemnity for product liability insurance and the acceleration of the royalty payments were allegedly beyond the submission because the insurance was required under a separate agreement in which there was no arbitration clause, and the royalty, payable over an extended period under the contract, was alleged not to be accelerated. The Ontario court considered that these issues were decided by the arbitrator under the law of the State of Georgia. The court held that the defendant has not discharged its burden of proof that under the applicable Georgia law the arbitral tribunal was incorrect in its conclusion.

380 Id., p. 6.  
381 Id., p. 7.  
It follows from the reasoning in this case that if the parties had proved to the satisfaction of the court that the arbitral decision was incorrect under the applicable law, the court would have to deny the enforcement of the award. Consequently, it would be hard for the court to draw a distinction between examination of jurisdiction and substantive review of the arbitral decision. The court would have to re-visit the merits of the case.

In reviewing the scope of arbitral jurisdiction, a court should distinguish such review from a substantive review of the award. Review of excess of jurisdiction focuses on whether the tribunal has exceeded its mandate rather than the substantive correctness of the tribunal's decision.

5.2.3. Public Policy in Relation to Arbirtral Jurisdiction

The concept of public policy varies from one state to another. It is difficult to give a uniform definition of public policy because the concept involves a varying degree of public interest of each state. Some states may take its basic interest as embodied in the concept; others may refer to general principles of honesty, fairness and natural justice. Public policy considerations may even extend to the validity of the agreement to arbitrate and the requirement of arbitrability.

For example, the German court is of the view that the validity of the arbitration agreement is part of German public policy. In a case between a German shipping company and a Japanese shipyard, the German party sought damages against the Japanese party on tortious grounds. The latter challenged the court's jurisdiction based on the arbitral clause in the shipbuilding contract. In a decision in favour of arbitration, the German court considered whether the arbitration agreement
which was valid under foreign law corresponded to German public policy.\textsuperscript{383} The court considered the provision of Sect. 1025 (2) of the German Code of Civil Procedure as part of German public policy.\textsuperscript{384}

The requirement of arbitrability is distinguished from public policy under the New York Convention in Article V (2). However, arbitrability may also pertain to public policy, as in the case of Andi-NSU Auto Union A.G. (F.R.Germany) v. S.A. Adelin Petit & Cie (Belgium).\textsuperscript{385} This case was decided before the amendment of the Belgian Judicial Code. The dispute arose from an exclusive distributorship agreement for the distribution of German cars in Belgium and Luxembourg. Before the end of the contract term, Audi terminated the exclusive agreement and initiated arbitration in Zurich pursuant to the arbitration clause in the agreement. Petit started an action in a Belgian court. Audi challenged the jurisdiction of the court on the basis of the arbitration clause and also requested enforcement of the arbitral award rendered in Zurich. Both the challenge and request were rejected. On appeal, the court of appeal affirmed the lower court's decision on grounds that according to the Belgian Law of July 27, 1961 (as modified on April 13, 1971) concerning the Unilateral Termination of Concessions for Exclusive Distributorship of an Indefinite Time, disputes arising therefrom cannot be submitted to arbitration before the end of the contract, and that recognition would be contrary to

\begin{itemize}
\item \textsuperscript{383} F.R.Germany No. 34, Hanseatisches Oberlandesgericht (Court of Appeal), Hamburg, 17 February 1989, \textit{Yearbook Comm. Arb.}, XV, (1990), p. 455.
\item \textsuperscript{384} Art. 1025 (2) of the German Code of Civil Procedure reads: "The arbitration agreement is not valid if one of the parties has used any superiority it possesses by virtue of economic or social position in order to constrain the other party to make this agreement or to accept conditions therein, resulting in the one party having an advantage over the other in the procedure, and more especially in regard to the nomination or the non-acceptance of the arbitrator."
\end{itemize}
Belgian public policy. An appeal was further made to the Supreme Court (Court of Cassation). Audi asserted that the appeal decision lacked precision since it did not make clear whether the refusal to recognize the award in question was based on an incompatibility with Belgian public policy or on the non-arbitrability of the dispute. The Supreme Court affirmed the refusal on seemingly the same two grounds as non-arbitrability and violation of public policy.386

Public policy may operate to prevent an award or part of it from being recognized and enforced if the recognition would violate the statutory or customary rules of the state. If an award orders one of the parties to do an act prohibited by the local law, enforcement may be denied.387 If an arbitral tribunal sitting in a civil law state awarded, for the purpose of encouraging the debtor to pay within the prescribed period, an increase of the rate of interest payable after the specified period of time from the date of the award, such a decision would be considered as an impermissible penalty and would not be recognized in common law countries.388

Following the distinction between domestic arbitration and international arbitration, there has been a distinction between public policy at the domestic level and public policy at the international level. The latter is more narrowly construed in its application.

386 Cf. In Parsons, the U.S. Court of Appeals held that "the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable": Parson & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (Rakta) 508 F.2d 969 (1974, US Court of Appeals, Second Circuit), p. 975.


For example, in U.S. judicial pronouncements, public policy defense under the New York Convention is construed narrowly. Enforcement of foreign arbitral awards may be denied on public policy ground "only where enforcement would violate the forum state's most basic notions of morality and justice". Public policy should not be read as "a parochial device protective of national political interests", but should be viewed as having a "supranational" nature.

The French jurists went further to a concept of "international public policy". This concept has entered into the New French Code of Civil Procedure. An international arbitral award rendered in France shall be set aside if it is contrary to international, instead of domestic, public policy. Likewise, in enforcement of foreign arbitral awards the public policy is not the domestic public policy, but "the public policy of international law of the State where the decision is invoked".

What is "international public policy" or what is "public policy of international law" remains unclear. A number of states would rather favour a narrow construction of the local public policy in the context of international arbitration. For example, a limited concept of public policy in the interest of international trade applies to the recognition of foreign arbitral awards in Germany. "From the viewpoint of German procedural public policy, the recognition of a foreign arbitral award can

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389 See Parsons, op. cit., p. 974.


391 Id., Arts. 1502 and 1504.

therefore only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions".\textsuperscript{393}

In Canada, it is also the local, rather than international, public policy that the court takes into consideration. Imposition of public policy on foreign arbitral awards is, in the words of Feldman J., "to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts". (emphasis added)\textsuperscript{394}

This local public policy would not authorise the court to have an extensive review of arbitral awards. If the court is to reopen the merits of the arbitral case under the guise of ensuring conformity with the local public policy, the enforcement procedure under the New York Convention or the Model Law would be brought into disrepute.\textsuperscript{395} A court should use restraint in considering public policy under local law.

By reviewing the validity of the arbitration agreement, the scope of arbitral jurisdiction, the regularity of the arbitral procedure and the compatibility with the narrowed concept of public policy, a national court retains control over the practice of international commercial arbitration taking place


\textsuperscript{395} Id.
at home and abroad. This control necessarily guarantees justice in the commercial world done by international arbitrators.
CONCLUSION

We can draw three conclusions for this paper:

(1) International arbitral jurisdiction operates in an autonomous manner. Based on such principles as separability of the arbitration agreement and competence of competence, international arbitrators effectively may determine their jurisdiction and exercise such jurisdiction within the scope of the arbitration agreement. Even in cases where challenges of their jurisdiction exist, arbitrators may decide their own jurisdiction and proceed to an award.

Although arbitral jurisdiction is limited to the agreement of the parties, the trend represented by such concept as "group of companies" emphasizes the intention of the relevant parties reflected in their course of dealings and give effect to such intention. The trend clearly shows that international arbitrators not only resolve disputes, but also make important contributions to the development of international commerce and international law. They uphold the customary rules of the business world, respect the need of international commerce and even create rules in their awards.

(2) If viewed from outside the arbitral procedure, international arbitral jurisdiction is not completely autonomous. It is subject to the scrutiny of national courts. International arbitrators have only the first word on their jurisdiction, not the last. If they wish to make an award which is valid and enforceable under law, they have to be certain that their jurisdiction over both the parties and disputes is valid.

Since the purpose of international commercial arbitration is a speedy and fair settlement of disputes, both international arbitrators and national courts should cooperate to meet that purpose. A complete arbitral autonomy free of any court intervention would seem unwise because it does not
take advantage of the coercive power of the state to facilitate and uphold arbitration and to guarantee fairness and justice. On the other hand, if any jurisdictional question arising in the course of arbitration should first be litigated in the national courts, it would defeat the true purpose of arbitration.

The trend towards narrower judicial review and minimum court intervention in arbitration helps to reduce litigation over arbitration agreements and awards. A wise approach is to push for a more autonomous system of international commercial arbitration with the national laws to fill in the gaps and the national courts to facilitate and support the arbitral proceedings.

With respect to filling in gaps of arbitration, national laws as well as international conventions should develop to deal with such common-place problems as multi-party arbitrations, so as to serve the needs of modern international business practices and meet the purpose of international arbitration. Such gaps as joinder of parties and consolidation of arbitrations may well be filled, in the absence of the parties' agreement, by national legislators and national courts.

(3) Efforts should be made at the very beginning of arbitration, i.e., at the time when the arbitration agreement is designed, in order to foster a more autonomous system of arbitral jurisdiction, and to minimize court intervention of arbitration. If the agreement is free of any invalidity under its own applicable law, international arbitrators appointed under such agreement can exercise their jurisdiction and conduct the procedure in a speedy manner and with a minimum court intervention.
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