OXFORD HANDBOOK ON INTERNATIONAL ARBITRATION

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Arbitral Jurisdiction

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I. INTRODUCTION

1. The concept and source of arbitral jurisdiction

The term 'jurisdiction' has a wide range of meanings in a variety of legal contexts. In the context of arbitration it typically refers to the 'power' or 'authority' of the arbitral tribunal. But even this simple definition raises difficult preliminary questions. A decision about whether a tribunal has jurisdiction will frequently be made by the tribunal itself, but that decision is not and cannot be a *source* of its jurisdiction, and cannot be a definitive determination of that jurisdiction, because the authority of that decision depends on the very question under review. A degree of priority may be given to the tribunal's determination of these questions by national courts, as will be explored further below, but self-evidently a tribunal may not confer authority on itself. So where does the jurisdiction of a tribunal come from?

An arbitral tribunal does not (at least typically) have 'power' in a conventional, practical sense – unlike a national court, it cannot directly command the seizure of the person or the property of any party. The 'power' of a tribunal comes more indirectly from two sources. First, the cooperation of national courts, which may readily recognise and enforce arbitral awards and may also act in support of arbitration in various other ways, such as by freezing assets or making other forms of provisional order. Second, the potential reputational consequences of non-compliance with an arbitral award, which may lead a party to comply with it voluntarily. The 'jurisdiction' of an arbitral tribunal is thus ultimately a question for these two communities, which represent the real source of its power. A tribunal will have jurisdiction to the extent that a court or the parties themselves will view its exercise of power as legitimate and requiring compliance. Naturally enough, the view of the parties (and, at least to some extent, the arbitrators) will generally be based on the position they would expect a national court to take, as it is a national court which would ultimately have the coercive power to enforce the orders of the tribunal, and the question of whether the tribunal exercised its power 'lawfully' in the eyes of national courts will be a significant determinant of whether there would be a reputational cost for non-compliance with its orders. So in most cases a tribunal will be viewed as having jurisdiction where the parties would anticipate a national

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court taking the position that the tribunal has 'lawful' authority, or a national court has indeed taken that position.

The legal framework for arbitration applied by most national courts is of course set out in the New York Convention 1958, and this remains a key basic source of the standards which are applied to determine when an arbitral tribunal is considered to have jurisdiction. For the many questions which remain unanswered or unclear under this Convention, however, different national legal systems may take different views. Where (as in this chapter) we are dealing with an 'international' arbitration, where the parties, the dispute, and/or the dispute settlement process have connections to more than one territory, the issue of 'lawful' authority thus raises a further fundamental question: *which* national legal system's view of the jurisdiction of the tribunal counts? The law governing the arbitration agreement? The law of the seat of arbitration? The law of the place of enforcement of the arbitral award? Or should some non-national standard of law be applied instead? As we will see below, this is a highly complex issue which must be confronted not only by national courts (which will not necessarily apply their own law to these issues) but also by the arbitral tribunal itself.

2. The agreement to arbitrate

It is trite but true to observe that the jurisdiction of an arbitral tribunal depends on the consent of the parties, usually expressed in a contract, in the form of an arbitration agreement.[1] This is an essential feature of the question of arbitral jurisdiction, regardless of the context or the legal order in which the issue is being reviewed.[2] In the words of Lord Hope in the House of Lords:

> As everyone knows, an arbitral award possesses no binding force except that which is derived from the joint mandate of the contracting parties. Everything depends on their contract, and if there was no contract to go to arbitration at all an arbitrator's award can have no validity.[3]

The US Supreme Court has similarly observed that 'arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'.[4] Most of the issues which arise concerning the jurisdiction of a tribunal are therefore issues of contract law, as explored further below. However, this simple observation masks

[1] See generally eg Andrea M. Steingruber, *Consent in International Arbitration* (OUP, 2012); Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd edn, 2014) ('Born, *ICA*'), 225 ('The foundation of almost every international arbitration – and of the international arbitral process itself – is an international arbitration agreement.'); *Redfern and Hunter on International Arbitration* (OUP, 6th edn, 2015) ('*Redfern and Hunter*'), [2.01] ('The agreement to arbitrate is the foundation stone of international arbitration.').
[2] 'Arbitration' mandated by statute, which is perhaps better considered not to be arbitration at all, is not considered in this chapter.
[3] *Fiona Trust v. Privalov* (reported as *Premium Nafta Products Ltd v. Fili Shipping Company Ltd*) [2007] UKHL 40, [34].
[4] *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960)

two complex further dimensions, which are related to the question of the source of arbitral jurisdiction discussed above.

The first is that an arbitration agreement is not an ordinary contract, because it is not concerned with the substantive rights and obligations of the parties. It is a contract through which parties agree on a mechanism to resolve legal disputes which arise between them, as a substitute for national courts, and thereby to determine their substantive rights and obligations. While an arbitration agreement may be viewed as an 'extension' of freedom of contract, it has long been understood that it is therefore importantly distinct from, for example, a contract for mediation or conciliation, which does not establish a binding determination of the rights and obligations of the parties. Consent to arbitration may take a contractual form, but in effect, it involves opting in to an alternative justice system – a system which exists alongside that of national courts.[5] While the foundations of arbitration lie in private law, the function of arbitration is a private replication of the public functions of courts. This has a number of important implications, as explored below.

The second complexity is the question of whether the contract is the *ultimate* basis of arbitration. Should the contract itself be viewed as the foundation of the tribunal's jurisdiction, or should the legal system (or legal systems) which give effect to the contract be considered this foundation? As a general matter, where a contract does not have cross-border connections it is relatively intuitive (although not incontrovertible) to say that the agreement between the parties is only given effect because it is recognised by the local legal system. If that legal order views the agreement as invalid, the parties do not have obligations arising from it; if it is valid, the precise nature of their obligations is also a matter for that legal order. To put this another way, at least conventionally a 'contract' must have a system of law behind it; without a governing law to give it the status of a contract, it is, to paraphrase the House of Lords, merely a 'piece of paper'.[6] Where a contract has connections with more than one state, however, this question becomes more complex. Different legal orders connected with the contract may answer these questions differently; a contract may be valid in one legal order and invalid in another, or it may be interpreted to establish different legal obligations in different contexts. This can make it difficult for parties to know what their obligations are, since they may not know in advance where their disputes are likely to be litigated, or indeed which system of law will be applied. The development of international commercial arbitration might be viewed, at least in part, as a response to these difficulties – ensuring that parties can agree on a single 'neutral' forum to resolve their disputes, so that the inconvenience of having different answers from different national courts can be avoided. But the same issues may arise in relation to arbitration agreements, at least on a traditional analysis – an arbitration agreement may be valid under one legal order and invalid in another.

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[5] See classically, for example, Kenneth S. Carlston, 'Theory of Arbitration process' (1952) 17 Law and Contemporary Problems 631; Heinrich Kronstein, 'Arbitration is Power' (1963) 38 New York University Law Review 661; Philip J. McConnaughay, 'The Risks and Virtues of Lawlessness: A 'Second Look' at International Commercial Arbitration' (1999) 93 Northwestern University Law Review 453.

[6] *Amin Rasheed Shipping Corporation Appellants v. Kuwait Insurance Co* [1984] AC 50, 65 (per Lord Diplock: 'Contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law').

This may make the situation complex for the parties and their arbitrators, as they may not know in advance in which legal order or orders the lawfulness of their actions will be evaluated. To say that an international arbitration derives its authority from a contract therefore raises an additional foundational question – does the status of 'contract' given to an arbitration agreement depend on a system of national law, and if so, which one?

As will be discussed further below, this is far from a simple question, and it goes to the heart of the nature of international commercial arbitration. Gaillard has described three different 'structuring representations' of arbitration, each of which suggests a distinct response to these concerns.[7]

The first is to view arbitration as a replication of the judicial function which is authorised by the legal system of the seat of arbitration, thereby giving priority to the law of the seat. This approach, perhaps most closely associated with FA Mann,[8] is referred to as 'monolocal' by Gaillard[9] and has also been described by Paulsson as the 'territorialist' thesis.[10] Its main criticism is that it does not capture the more complex modern reality of the internationalism of arbitration or of the practice of arbitrators, which readily crosses a variety of national borders and whose validity cannot be derived from or ascribed to a single national legal order. It is indicative of these complexities that the concept of the 'seat' of the tribunal is itself no longer considered a question of fact (the place where the tribunal 'sits' to hold hearings), but rather a 'juridical' question[11] (essentially, identifying the legal order which provides the default and/or non-derogable procedural law for the tribunal, sometimes referred to as the *lex arbitri*) – it is now uncontroversial that the venue (or venues) for tribunal hearings may not be the same as the seat.[12]

Given these complexities, a second perspective is to see arbitration as anchored in 'a plurality of national legal orders'. In Gaillard's terminology this is a 'multilocal' approach;[13] Paulsson has similarly described this as the 'pluralistic' thesis, under which 'arbitration may be given effect by more than one legal order, none of them inevitably essential'.[14] This approach would suggest simply accepting the complexities of different potentially applicable legal orders, acknowledging that 'the powers, duties, and jurisdiction of an arbitral tribunal arise from a complex mixture of the will of the parties, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place in which recognition

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[7] Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010) ('Gaillard, *Legal Theory*'). See also Emmanuel Gaillard, 'The Representations of International Arbitration' (2010) 1 Journal of International Dispute Settlement 271 ('Gaillard, *Representations*').
[8] F A Mann, 'State Contracts and International Arbitration' (1967) 42 British Yearbook of International Law 1; F A Mann, 'Lex Facit Arbitrum', in Pieter Sanders (ed), *International Arbitration—Liber Amicorum for Martin Domke* (Martinus Nijhoff, 1967).
[9] Gaillard, *Representations*, 279.
[10] Jan Paulsson, 'Arbitration in Three Dimensions' (2011) 60 ICLQ 291 ('Paulsson, *Three Dimensions*'; Jan Paulsson, *The Idea of Arbitration* (OUP, 2013), Chapter 2.
[11] *Dicey, Morris and Collins on The Conflict of Laws* (Sweet and Maxwell, 15th edn, 2012), [16–035].
[12] For discussion see eg *Shagang South-Asia (Hong Kong) Trading Co Ltd v. Daewoo Logistics* [2015] EWHC 194 (Comm); *Bay Hotel and Resort Ltd v. Cavalier Construction Co Ltd* [2001] UKPC 34.
[13] Gaillard, *Representations*, 279.
[14] Paulsson, *Three Dimensions*, 292.

or enforcement of the award may be sought'.[15] The unsatisfactory aspect of this approach is that the meaning and validity of an arbitration agreement and arbitral award may vary between legal orders, which may undermine the effectiveness of arbitration.

The third 'representation' of arbitration suggested by Gaillard (and the approach which he endorses) conceives instead of international arbitration as functioning in an autonomous 'transnational' realm, rather than part of one or more national legal orders: 'the juridicity of arbitration is rooted in a distinct, transnational legal order, that could be labeled as the arbitral legal order, and not in a national legal system, be it that of the country of the seat or that of the place or places of enforcement'.[16] An arbitration may apply national law, but that does not mean that national law is the source of its authority, and under this view it may therefore equally be open to a tribunal to apply non-national sources of law.[17] Paulsson similarly describes this approach as postulating that 'arbitration is the product of an autonomous legal order accepted as such by arbitrators and judges'.[18] The source of the authority of the tribunal may thus be viewed as the 'contract' itself, existing independently from the endorsement of any system of national law. According to Gaillard, this representation 'corresponds to the international arbitrator's strong perception that they do not administer justice on behalf on any given State, but that they nonetheless play a judicial role for the benefit of the international community'.[19] As will be explored further below, every international arbitration faces this fundamental question of the potentially transnational character of arbitration, and although it is not always expressly dealt with by tribunals or the leading authorities on arbitration it has a major impact on questions of arbitral jurisdiction.

3. Outline

An important preliminary point, examined in section II, is the need to distinguish between questions of jurisdiction and admissibility. The former are concerned with the powers of the tribunal, while the latter are concerned with whether arbitral proceedings are properly commenced – and will thus ordinarily be left to a tribunal to determine. There are then two main categories of legal issue which may arise concerning limitations on the jurisdiction of an arbitral tribunal. The first follows from the fact that, as discussed above, the foundations of arbitral jurisdiction lie in the agreement to arbitrate. The most important limitations thus

[15] *Redfern and Hunter*, [5.02].
[16] Gaillard, *Legal Theory*, 35.
[17] See further eg Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (OUP, 2014); Ralf Michaels, 'Roles and Role Perceptions of International Arbitrators', in Walter Mattli and Thomas Dietz (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence* (OUP, 2014), 52 ('If the arbitral award is denationalized, then, functionally, the same is true for the arbitrator: he ceases to be part of a national state and instead becomes integrated in a 'global adjudication system.' The arbitrator is no longer obliged toward his or any other national state, nor only toward the parties themselves. Instead, he adopts a transnational role within a transnational system into which he is integrated.').
[18] Paulsson, *Three Dimensions*, 292. Paulsson also describes a fourth approach under which 'arbitration may be effective under arrangements that do not depend on national law or judges at all' (*ibid.*). This is not entirely distinguishable from the third approach, although he argues that in practice it collapses into the second (pluralistic) approach, as non-national law is simply another form of legal ordering.
[19] Gaillard, *Legal Theory*, 35.

concern the validity and effectiveness of the arbitration agreement, and six distinct issues will be examined in turn in section III below. The second, which will be considered in section IV below, is the existence of subject matter limitations on the possibility of arbitration, often referred to as the question of arbitrability – whether certain types of disputes may not be capable of settlement through arbitration. Although this may also be understood as concerned with the question of the validity of the arbitration agreement, it is distinctive because it is not focused on the parties and whether they have reached agreement but on external legal constraints on the possibility for them to do so. Each of these questions potentially raises two general problems, which are (as already noted above) pervasive concerns relating to arbitral jurisdiction: (i) who should decide, and (ii) what rules they should apply. These general problems are discussed in sections V and VI below respectively, before section VII concludes.

II. JURISDICTION AND ADMISSIBILITY

The concept of 'admissibility' – sometimes also referred to as 'conditions precedent to arbitration', or (particularly in the United States, and perhaps slightly unfortunately) as the question of 'procedural arbitrability'[20] – is related to the concept of jurisdiction, and drawing a distinction between the two sometimes raises difficulties in practice.[21] As discussed above, the question of jurisdiction concerns the power of the tribunal. The question of admissibility is related to the claim, rather than the tribunal, and asks whether this is a claim which can be properly brought. In particular, it considers the question of whether there are any conditions attached to the exercise of the right to arbitrate which have not been fulfilled. Those conditions might be, for example, a limitation period applicable to the right to commence arbitration,[22] or a requirement to mediate and/or negotiate before arbitral proceedings may be commenced[23] (variously referred to as 'cascading', 'waterfall', or 'multi-tier' dispute resolution clauses).[24]

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[20] See *Howsam v. Dean Witter Reynolds, Inc.*, 573 U.S. 79, 83-86 (2002); for criticism of this terminology see Jan Paulsson, 'Jurisdiction and Admissibility', in Gerald Aksen *et al* (eds), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC publishing, 2005).

[21] For a general practically-oriented guide to this distinction, see eg Chartered Institute of Arbitrators, 'International Arbitration Guidelines 2015/2016: Jurisdictional Challenges' (available at http://www.ciarb.org/guidelines-and-ethics/guidelines/practice-guidelines-protocols-and-rules). See further Gary Born and Marija Šćekić, 'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'', in Caron, Schill, Smutny, and Triantafilou (eds.), *Practising Virtue: Inside International Arbitration* (OUP, 2016), 227; Laurent Gouiffès and Melissa Ordonez, 'Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?' (2015) 31 Arbitration International 109; Jan Paulsson, 'Jurisdiction and Admissibility', in Gerald Aksen *et al* (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005).

[22] See further Andrew Tweeddale and Keren Tweeddale, 'Commencement of Arbitration and Time-Bar Clauses' (2009) 75 Arbitration 480.

[23] See eg *HIM Portland LLC v. DeVito Builder*s, *Inc.*, 317 F.3d 41 (1st Cir. 2003); *Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002); *Channel Tunnel Group v. Balfour Beatty Construction Ltd* [1993] AC 334.

[24] See generally Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses' (2010) 27 Journal of International Arbitration 551; Doug Jones, 'Dealing with Multi-Tiered Dispute Resolution Process' (2009) 75 Arbitration 188; Alexander Jolles, 'Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement'

There are a range of issues which may arise relating to such conditions. Requirements which are not sufficiently clearly defined may not be legally effective,[25] and care must also be taken to distinguish those clauses which merely create alternative options, rather than conditions precedent.[26] Issues may also arise as to whether such conditions have been fulfilled, and if not, whether the requirement may have been waived by the conduct of the other party. Limitation periods in the context of arbitration may be contractual as well as statutory, and contractual limitation periods may not always be enforced by the courts.[27] Particularly complex issues may arise where a limitation period operates under a cascading dispute resolution clause – a prior period of mediation may or may not count toward the limitation period for arbitration.[28] Difficulties may also arise concerning when an arbitration has actually been commenced for limitation period purposes; the English courts judge this question flexibly and do not adopt a strict and technical approach.[29]

The most important consequence of the distinction between issues of jurisdiction and admissibility is that the latter are usually considered not to provide a challenge to the general authority of the parties' agreement to arbitrate. As a result, while a tribunal's decision on jurisdiction cannot be decisive concerning whether such jurisdiction exists (although as discussed below it may be given a degree of deference), the determination of a tribunal on questions of admissibility should generally be considered decisive, where a valid arbitration agreement exists.[30] An arbitral tribunal will therefore normally need to establish its jurisdiction as a precondition for making any decision on admissibility. As a further consequence of this, the general approach is that (on the assumption that the arbitration agreement is exclusive[31]) an arbitral tribunal should be considered to have the exclusive authority to consider questions of admissibility – that these are questions which fall within the purview of the agreement to arbitrate, whose validity is itself not in question, and should not be addressed by a court.[32] The converse principle is also usually followed, which is to say

(2006) 72 Arbitration 329; Dyala Jiménez Figueres, 'Multi-Tiered Dispute Resolution Clauses in ICC Arbitration' (2003) 14 ICC Bulletin 71.

[25] *Sulamerica CIA Nacional De Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ 638, [22] ('An undertaking to negotiate, or an agreement to strive to settle a dispute amicably, is too uncertain to be enforced, because the court has insufficient objective criteria to decide whether one or both parties have complied with or breached such a provision.'); *Wah (aka Alan Tang) v. Grant Thornton International Ltd* [2012] EWHC 3198 (Ch), [57]; but compare *HSBC Institutional Trust Services (Singapore) Ltd v. Toshin Development Singapore Pte Ltd* [2012] SGCA 48; *Holloway v. Chancery Mead Ltd* [2007] EWHC 2495 (TCC), [81]; *Cable & Wireless Plc v. IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).

[26] See eg *NB Three Shipping Ltd v. Harebell Shipping Ltd* [2004] EWHC 2001 (Comm).

[27] This is reflected in eg section 12 of the Arbitration Act 1996 (UK). This power is in practice exercised sparingly as it amounts to non-enforcement of the contractual agreement between the parties: *Harbour & General Works v. Environment Agency* [2000] 1 W.L.R. 950; *Thyssen Inc v. Calypso Shipping Corp SA* [2000] 2 All E.R. (Comm) 97.

[28] See further eg *Wholecrop Marketing Ltd v. Wolds Produce Ltd* [2013] EWHC 2079 (Ch).

[29] See further *Seabridge Shipping AB v. AC Orsleff's EFTS A/S* [2000] 1 All E.R. (Comm) 415; Arbitration Act 1996 (UK), s.14.

[30] Jan Paulsson, 'Jurisdiction and Admissibility', in Gerald Aksen *et al* (eds), *Global Reflections on International Law, Commerce and Dispute Resolution* (ICC publishing, 2005).

[31] See further section III.5 below.

[32] See eg *BG Group plc v Republic of Argentina*, 134 S. Ct. 1198 (2014); *Howsam v. Dean Witter Reynolds, Inc.*, 573 U.S. 79, 83-86 (2002); but see *Wah (aka Alan Tang) v. Grant Thornton International Ltd* [2012] EWHC 3198 (Ch).

that a national court decision concerning a question of admissibility arising under a valid exclusive arbitration agreement will not necessarily be recognised by an arbitral tribunal, on the basis that such a decision has been made contrary to the arbitration agreement. By contrast, an arbitral tribunal is much more likely to defer to the decision of a court (particularly the courts of the seat of arbitration) concerning questions of arbitral jurisdiction, because (as explored below) that determination, going to the very authority of the tribunal, may legitimately be made by both courts and arbitral tribunals, and the power of the tribunal may ultimately depend on judicial enforcement.

III. THE ARBITRATION AGREEMENT: SIX QUESTIONS

This section focuses on issues relating to the validity or effectiveness of an arbitration agreement. (Strictly speaking we should probably refer to an 'apparent' or 'alleged' arbitration agreement, but for the sake of simplicity the term 'arbitration agreement' will be used here even when its existence or validity is contested.) In the United States these issues are sometimes referred to as 'substantive gateway questions',[33] to distinguish them from the procedural gateway questions which are discussed above under the label of 'admissibility' issues. The key point of distinction is that the issues discussed in this section cannot be answered exclusively by the arbitral tribunal (which, as discussed below, is not to say that the tribunal cannot answer them at all), because they go to the very authority of that tribunal.

Perhaps the most important general principle here is that of separability (sometimes also referred to as severability), which requires that the validity or effectiveness of the arbitration agreement be determined separately from that of any contract as part of which it may have been agreed. Challenges to the other contractual terms between the parties will thus not necessarily affect the arbitration agreement, and may thus be matters which should be determined by an arbitral tribunal. The implications of this principle are discussed further in section V.3 below.

1. Has an arbitration agreement been reached?

The first and perhaps simplest question which must be asked is whether an arbitration agreement has been reached. This is, at least traditionally, analysed as a question of contractual formation – considering, for example, whether there has been an offer which has been accepted. It may therefore be dependent on the determination of the law applicable to this question, as discussed below. Pursuant to the doctrine of separability, as noted above, we are only concerned here with the question of whether there is an agreement to arbitrate, not whether a substantive contract has been formed. Only challenges which go to the validity of the arbitration agreement may affect the jurisdiction of the tribunal. In many cases such

[33] *Howsam v. Dean Witter Reynolds, Inc.*, 573 U.S. 79, 83 (2002). The terminology is, however, somewhat contested: for clarification see George Berman, 'The 'Gateway' Problem in International Commercial Arbitration' (2012) 37 Yale Journal of International Law 1.

questions may be straightforward, but difficult issues may also be raised, such as where an offer may have been accepted by conduct, or where an offer refers to one party's standard terms and conditions, which include an arbitration agreement. In the first case, the issue may be characterised as whether an agreement has been formed at all, while in the second case the issue may be characterised as whether a validly formed contract incorporates the arbitration agreement. (It is also possible that a failure to incorporate standard terms would invalidate the contract as a whole, because important contractual terms have not been agreed, although a preliminary and incomplete agreement potentially containing an arbitration agreement may also be recognised as valid even if other substantive terms remain to be negotiated.[34]) Different legal systems may take different approaches to the question of how much notice is required before terms can be successfully incorporated by reference into a contract, and may even single out arbitration clauses for special treatment in this regard because they involve a waiver of any entitlement to commence judicial proceedings. The recent practice of the English courts tends to apply the general rules on the incorporation of contractual terms, without any special reference being required to the arbitration agreement,[35] although an exception may apply for charterparty clauses in bills of lading.[36]

Arbitration agreements may be concluded in advance of a dispute arising, typically where they are negotiated as part of the formation of a contractual relationship, or retrospectively, typically where they may form part of *ad hoc* dispute settlement negotiations.[37] In the latter case, it is possible for an arbitration agreement to be established by conduct as well as through an express agreement (analogous to the concept of submission as applied to the jurisdiction of a court), if an arbitration is commenced by one party and the other party accepts through participating in the proceedings (other than to dispute jurisdiction).[38] Submission by conduct is unusual in the context of arbitration, although an agreement to arbitrate may effectively be formed where two parties have attempted to enter into an express agreement, but unknowingly failed to do so successfully, and have subsequently arbitrated on the basis of this mutual mistake.[39]

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[34] See eg *RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14; *Pagnan SpA v. Feed Products* [1987] 2 Lloyd's Rep. 601.
[35] *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* [2010] EWHC 29 (Comm).
[36] *Caresse Navigation Ltd v. Zurich Assurances Maroc (The Channel Ranger)* [2014] EWCA Civ 1366; *Sea Trade Maritime Corp v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Athena)* [2006] EWHC 2530 (Comm), [65]; *AIG Europe (UK) Ltd and others v. The Ethniki* [2000] 2 All ER 566, [37]. See generally Melis Ozdel, 'Enforcement of Arbitration Clauses in Bills of Lading: Where Are We Now?' (2016) 33 Journal of International Arbitration 151.
[37] See further eg Born, *ICA*, [2.02]; *Redfern and Hunter*, [2.119ff].
[38] *Gulf Import & Export Co v. Bunge* [2008] 1 Lloyd's Rep. 316; *Baird Textiles Holdings v. Marks & Spencer* [2001] EWCA Civ 274.
[39] *The Amazonia* [1990] 1 Lloyd's Rep. 236.

2. Is the arbitration agreement valid?

The second (and closely related) question which may be raised concerning an arbitration agreement is whether it is 'valid'. Arbitration agreements may raise issues of both formal and substantive validity.[40]

Formal validity is concerned with any conditions which relate to how arbitration agreements may be formed, such as requirements that they be in writing or signed. As is well known, the New York Convention 1958 requires that arbitration agreements be in writing.[41] In practice, the trend is to interpret this requirement flexibly, in line with developments in communications technology.[42] The requirement for writing under the New York Convention also does not necessarily mean that unwritten agreements are invalid. Some national laws may require arbitration agreements to be in writing to be valid, but others may recognise the validity of unwritten agreements (by either enforcing such agreements or enforcing arbitral awards made pursuant to such agreements) – the trend is perhaps in this direction, pursuant to the UNCITRAL Model Law 2006.[43] Arbitrations conducted pursuant to unwritten agreements will simply not have the benefit of the New York Convention enforcement obligations,[44] like entirely domestic or non-commercial arbitrations. Section 5 of the Arbitration Act 1996 (UK) appears to require an arbitration agreement to be in writing (albeit interpreting this requirement flexibly), however oral arbitration agreements may still be enforced pursuant to the common law under section 81(1)(b). In the United States, an arbitration agreement must be in writing to fall within the Federal Arbitration Act, otherwise its effectiveness is a matter of state law.[45]

The issue of substantive validity can encompass a range of concerns. The New York Convention provides limited guidance here by permitting non-enforcement of an arbitration agreement where it is 'null and void' (Article II). This encompasses traditional considerations which relate to the validity of any contract – challenges which may undermine the genuineness of the (apparent) consent to the agreement, such as those of mistake, misrepresentation, fraudulent inducement, lack of capacity, duress, or undue influence. An arbitration agreement may also be considered to be contrary to public policy – generally such

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[40] See generally eg Born, *ICA*, Chapter 5; *Redfern and Hunter*, Chapter 2.
[41] Article II(1) and (2).
[42] See eg UNCITRAL Model Law 2006, Article 7.
[43] Compare Options I and II of Article 7, UNCITRAL Model Law 2006. One example is the French Code of Civil Procedure, Article 1507 ('An arbitration agreement shall not be subject to any requirements as to its form.'), but contrast Article 1443 for domestic arbitration ('In order to be valid, an arbitration agreement shall be in writing.'). See further Born, *ICA*, 706-7.
[44] Although the text is unclear, the better view is that the writing requirements in Article II apply equally to enforcement proceedings under Articles III, IV, and V – see eg Born, *ICA*, 664-6. But note the UNCITRAL 'recommended interpretation' of Articles II and VII, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html, which suggests that the scope of the New York Convention may be extended by more favourable national laws.
[45] It is, however, unclear whether the writing requirements under the FAA are the same as those under the New York Convention: see eg S. I. Strong, 'What Constitutes an 'Agreement in Writing' in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act' (2012) 48 Stanford Journal of International Law 47. See further eg *Sphere Drake Ins. v. Marine Towing*, 16 F.3d 666 (5th Cir. 1994); *Kahn Lucas Lancaster, Inc. v. Lark International Ltd*, 186 F.3d 210 (2d Cir. 1999).

considerations would fall under the heading of subject matter limitations on jurisdiction discussed in section IV below,[46] but this is not necessarily the case. (For example, a racially discriminatory arbitration agreement is likely to be viewed as contrary to public policy even if otherwise valid.) As noted above, pursuant to the doctrine of separability we are only concerned here with challenges which affect the validity of the arbitration agreement, not those which might invalidate the substantive contract but leave the arbitration agreement itself untouched. The latter would not affect the jurisdiction of the arbitral tribunal, nor would (for similar reasons) a finding that the main contract has been repudiated, frustrated, or otherwise ceased to operate.

For issues of both formal and substantive validity, the most difficult question may be the choice of law question – what legal standards are to be applied to resolve these issues – discussed further in section VI below.[47] These standards typically depend at least in part on the law governing the arbitration agreement. Another key consequence of the doctrine of separability is that the arbitration agreement may be governed by a different applicable law than that which governs the substantive terms of the contract in which it is found.

3. Is the arbitration agreement binding?

A third question which may arise concerning the arbitration agreement is whether it is binding on the relevant parties.[48] The issue may arise particularly in one of three main ways. First, the arbitration agreement may be entered into by a party acting as an agent for another party. Thus, the signatory may bind an (apparent) third party. This is perhaps most common in the context of corporate groups, where a subsidiary may be in reality acting on behalf of a parent company. The principle has sometimes (more controversially[49]) been extended by viewing an arbitration agreement as being entered into on behalf of a corporate group as a whole where there is a (perceived) common intention that any entity in the group is to be bound by (and also entitled to invoke) the arbitration agreement.[50] The issue is not, however,

[46] Like those considerations, public policy challenges to the validity of an arbitration agreement are not concerned with the genuineness of the consent of the parties to arbitration, and so raise distinct issues.
[47] See further generally Julian D. M. Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause', in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series, vol 9, Kluwer Law International, 1999).
[48] See further eg Born, *ICA*, Chapter 10; *Redfern and Hunter*, [2.42ff]; Stavros L Brekoulakis, *Third Parties in International Commercial Arbitration* (OUP, 2011); William W. Park, 'Non-Signatories and International Arbitration', in Lawrence W Newman and Richard D Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (Juris Publishing, 3rd edn, 2014); Bernard Hanotiau, 'Non-Signatories in International Arbitration: Lessons from Thirty Years of Case Law', in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, vol 13, Kluwer Law International, 2007), 341.
[49] See eg *Peterson Farms Inc v. C&M Farming Ltd* [2004] 1 Lloyd's Rep 603.
[50] See eg *Dow Chemical* arbitration, ICC Case No. 4131, (1984) 9 Yearbook of Commercial Arbitration 131; Stephan Wilske, Laurence Shore, and Jan-Michael Ahrens, 'The 'Group of Companies Doctrine' – Where is it heading?' (2006) 17 American Review of International Arbitration 73.

confined to the context of a corporate group, and may arise in any context in which an agency relationship (or comparable common intention) might be considered to exist or arise.[51]

Second, there are a range of circumstances in which one party may become entitled to assert another party's contractual rights, and may become bound by its contractual obligations. Perhaps most obviously, the rights and obligations of a party under an arbitration agreement may be assigned or novated to a third party.[52] Even without novation, an assignment of rights to a third party may be conditional on their acceptance of the obligations under the contract, including a consent to arbitration – in effect, a new contract containing an arbitration agreement may arise through the assignee's acceptance of the assignment. Another context in which a party may become entitled to assert the contractual rights of another party is subrogation, such as by an insurer of the rights of an insured party. In these cases a difficult issue may arise as to whether the party asserting its right of subrogation is bound by an arbitration agreement in an underlying contract. This was a key issue in the well-known *West Tankers* litigation saga.[53]

The third scenario in which an arbitration agreement may extend beyond the immediate parties to the contract containing it is where the contract is for the benefit of a third party. Many legal systems allow third parties to enforce contracts entered into in their favour, but the enforcement of such benefits may be made subject to procedural conditions such as an arbitration agreement.[54] In effect, a third party who has taken the benefit of contractual rights may be required to take (or estopped from denying) the burden of the arbitration agreement.[55]

Once again, the choice of law issues, discussed in section VI below, may be critical to the resolution of each of these questions, because their treatment is likely to be significantly variable in different national legal orders.

4. What is the scope of the arbitration agreement?

The existence of a valid arbitration agreement binding on the parties does not necessarily imply that the dispute at hand is covered by that agreement – an arbitration clause is generally understood to apply only to a 'defined legal relationship'.[56] Issues may thus arise determining the scope of application of the arbitration agreement, particularly as to whether it would encompass challenges to the validity rather than just the performance of a contract, and where

[51] See eg *Dallah Real Estate and Tourism Holding Company v. Gov't of Pakistan* [2010] UKSC 46 (considering whether the government of Pakistan was party to an arbitration agreement entered into by a trust established as a separate legal entity under the law of Pakistan, but finding that this argument did not succeed on the facts); *Egiazaryan v. OJSC OEK Finance* [2015] EWHC 3532 (Comm).
[52] Issues may also arise concerning whether an arbitration agreement survives a merger: see eg *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).
[53] See eg *Allianz SpA v. West Tankers Inc* [2009] EUECJ C-185/07; *West Tankers Inc v. Ras Riunione Adriatica Di Sicurta Spa* [2005] EWHC 454 (Comm).
[54] See eg the *Contracts (Rights of Third Parties) Act* 1999 (UK), section 8; *Fortress Value Recovery Fund I LLC v. Blue Skye Special Opportunities Fund LP (A Firm)* [2013] EWCA Civ 367.
[55] See eg *American Bureau of Shipping v. Tencara Shipyard*, 170 F 3d 349 (2nd Cir. 1999).
[56] UNCITRAL Model Law, Art.7(1).

non-contractual claims arise which may be directly or indirectly related to the performance of the contract.[57] An arbitral tribunal does not have 'general jurisdiction', only the specific jurisdiction derived from the consent of the parties. This question is therefore one of contractual interpretation – determining what range of disputes the parties intended to encompass within their arbitration agreement.

Some courts have traditionally approached this issue as an ordinary question of contractual interpretation, leading to fine distinctions being drawn based on the wording of the arbitration agreement. For example, an arbitration agreement purporting to cover disputes 'arising under' the contract has been interpreted more narrowly than one purporting to cover disputes 'relating to' the contract.[58] In England, this traditional approach was famously rejected by the House of Lords in *Fiona Trust v. Privalov* (2007). The Court considered that a 'fresh start' should be made on the issue, and held that:

> the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.[59]

The Lords noted that this change brought the English courts more in line with the approach in the United States,[60] Germany,[61] and Australia.[62] The new rule is undoubtedly more supportive of arbitration, and means that an arbitral tribunal is to be presumed to have jurisdiction over non-contractual claims relating to the contract containing the arbitration agreement, as well as claims concerning the validity of that contract. This is broadly unobjectionable – perhaps the only query which may be raised is whether it is genuinely reflective of the presumptions of 'rational businessmen' (the court was not relying on empirical evidence for this point), and thus a subjective rule of interpretation based on the presumed intention of the actual parties, or whether it is rather an objective rule adopted as a matter of policy in support of arbitration.[63]

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[57] See generally *Redfern and Hunter*, [2.63]-[2.70]; Born, *ICA*, Chapter 9.
[58] See eg *Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63, 67.
[59] *Fiona Trust v. Privalov* (reported as *Premium Nafta Products Ltd v. Fili Shipping Company Ltd*) [2007] UKHL 40, [13], per Lord Hoffmann.
[60] *AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), 650; *Threlkeld & Co Inc. v. Metallgesellschaft Ltd (London)*, 923 F 2d 245 (2d Cir. 1991).
[61] *Bundesgerichtshof's Decision of 27 February 1970* (1990) 6 Arbitration International 79.
[62] *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* [2006] FCAFC 192, [165].
[63] There is a whiff of circularity about the decision – it might be thought that well informed 'businessmen' would expect only that the law, whatever it happened to be, would be applied, and so their 'expectations' would be satisfied by any clearly stated and correctly applied rule of law. If the practice of the courts were to distinguish between the meaning of differently worded arbitration agreements, the adoption of particular wording by sophisticated parties would arguably indicate their intention better than any broader presumption: see eg *Mediterranean Enterprises v. Ssangyong Corp.*, 708 F.2d 1458, 1464-65 (9th Cir. 1983).

In the *Fiona Trust* case, the contract was governed by English law and the seat of arbitration was in London, and there was no doubt that the arbitration agreement was itself governed by English law. Although the court did not focus on the question of applicable law, the ruling of the House of Lords should therefore probably be understood to be a determination only regarding the interpretation of arbitration agreements governed by English law. The interpretation of an arbitration agreement remains a question of contractual interpretation to be determined through application of the law governing the arbitration agreement; *Fiona Trust* simply adds a new rule of contractual interpretation to the canon of interpretative principles in English commercial law. The question of the scope of an arbitration agreement will thus be highly dependent on the applicable law question, discussed further in section VI below.

5. Is the arbitration agreement exclusive or non-exclusive?

The interpretation of an arbitration agreement encompasses a further question – whether it is intended that the agreement be exclusive (precluding recourse to courts for any matter falling within the scope of the agreement) or non-exclusive (giving one or both parties the option of initiating arbitration, but not the obligation). This issue is unlikely to trouble an arbitral tribunal, because once a tribunal has been established it is generally of no concern to the tribunal whether other means of dispute resolution could have been pursued in the alternative. It is, however, an issue which could readily arise where, despite the existence of an arbitration clause, proceedings are commenced in a court which would ordinarily have jurisdiction over the claim before an arbitration has been initiated – the court should ordinarily stay its proceedings if and only if the clause is exclusive. It might be expected that such clauses would be rare, and in case of ambiguity courts are perhaps unlikely to find that an arbitration clause is non-exclusive because such a provision goes against the legal certainty which commercial parties are generally presumed to desire, although a countervailing presumption may arise that 'clauses depriving a party of the right to litigate should be expected to be clearly worded'.[64] Parties who desire greater flexibility in the available modes of dispute resolution could well intentionally adopt a clause under which the parties 'may', at their option, submit disputes either to arbitration or court proceedings.

Although it is evident that parties will generally not contemplate proceedings arising in both forms in parallel (as part of the *Fiona Trust* principle discussed above),[65] complex questions may arise regarding the hierarchical relationship between these dispute resolution options. They may operate as genuine alternatives under which the party who initiates proceedings can choose the forum,[66] or alternatively, it might be concluded that the non-exclusive

[64] *Anzen Limited and others (Appellants) v. Hermes One Limited (Respondent) (British Virgin Islands)* [2016] UKPC 1, [13].
[65] See further eg *Deutsche Bank Ag v. Tongkah Harbour Public Company Ltd* [2011] EWHC 2251 (Comm).
[66] It is an interesting question whether, in such circumstances, a discretionary stay such as that under the *forum non conveniens* test in the English courts could be used to stay proceedings in favour of an arbitral tribunal (as an available and clearly more appropriate forum to resolve the dispute), pursuant to an optional arbitration agreement.

arbitration clause is hierarchically superior, such that the respondent party in court proceedings can force them to be stayed by initiating and/or electing arbitration.[67] If a non-exclusive arbitration agreement is to be adopted parties would be well advised to deal with these issues expressly.

6. Is the arbitration agreement enforceable?

The sixth and final question which may be raised concerning the arbitration agreement concerns its enforceability. An arbitration agreement may become unenforceable for a variety of reasons. Some reasons pertain to the party seeking to rely on the arbitration agreement. That party may have waived their rights under the agreement (such as by entering an appearance on the merits in judicial proceedings), or may be estopped by their words or conduct from relying on the arbitration agreement.[68] They may have entered into a settlement agreement, or some other form of dispute resolution clause which renders the arbitration agreement inapplicable, or they may have already arbitrated or litigated their dispute.

The New York Convention provides that an arbitration agreement may be refused enforcement where it is 'inoperative or incapable of being performed' (Article II). There is some debate concerning what degree of difficulty in performing the arbitration agreement would justify a refusal to enforce it. The mere fact that a party would find it too expensive to arbitrate would not be sufficient.[69] Defects in the arbitration agreement which are capable of being corrected by the courts of the seat of arbitration, by the arbitral institution nominated in the agreement, or by the arbitrators themselves should not be considered to render the arbitration agreement inoperative or incapable of being performed. Thus, if the arbitrator named in an arbitration agreement refuses to act, and the courts of the seat have the power to order a substitute, that power should be exercised. Similarly, a failure to specify the seat of arbitration would not ordinarily prevent the arbitrators from choosing such a seat. If it were impossible to find any arbitrator willing to serve then the arbitration agreement would evidently be incapable of being performed.

IV. SUBJECT MATTER LIMITATIONS: ARBITRABILITY

The existence of a valid and effective arbitration agreement is not the only consideration in determining whether an arbitral tribunal has jurisdiction. A further issue is whether, in the words of the New York Convention, the dispute concerns 'a subject matter capable of settlement by arbitration'.[70] This is often referred to as the question of 'arbitrability'. The term 'arbitrability' is also sometimes used (particularly in the United States) to refer to the

[67] *Anzen Limited and others (Appellants) v. Hermes One Limited (Respondent) (British Virgin Islands)* [2016] UKPC 1; *Union Marine v. Government of Comoros* [2013] EWHC 5854 (Comm); *NB Three Shipping Ltd v. Harebell Shipping Ltd* [2004] EWHC (Comm) 2001.
[68] See eg *Downing v. Al Tameer Establishment* [2002] EWCA Civ 721.
[69] *Paczy v. Haendler and Natermann GmbH* [1981] 1 Lloyd's Rep. 302 (CA).
[70] Article II(1); see similarly Article V(2)(a).

broader question of whether a dispute can be arbitrated, which includes considerations of whether there is a valid and effective arbitration agreement, as well as sometimes issues of admissibility.[71] The narrow sense of arbitrability, adopted here, may then be referred to as 'subject matter arbitrability', or 'objective arbitrability', to be distinguished from questions which essentially concern the validity and effectiveness of the arbitration agreement, including the capacity of a party to enter into such an agreement (sometimes referred to as 'subjective arbitrability').[72] Considerations of subject matter arbitrability are most closely analogous not to questions of jurisdiction in general but to the narrow question of 'justiciability'. In national courts this refers to the issue of whether the dispute is a proper question for a court to deal with, or whether it is, for example, a question that should be left to a foreign court, to politics, or even to the institutions and practices of international law and international relations.[73] The issue here similarly concerns the question of whether there are some disputes which arbitration, by its nature, is considered incapable of resolving satisfactorily.

Different legal systems take a variety of different approaches to the question of the capabilities of arbitration, and thus the appropriate limitations on arbitrability.[74] For this reason, the choice of law question discussed below – *which* legal standards are applied to determine the limits of subject matter arbitrability – can be critical in this context. In general terms, however, it may be stated that disputes are usually considered non-arbitrable for one of two reasons. First, because they involve weaker parties, and it may be considered that, compared with national courts, arbitration might not provide as much procedural protection to such parties, and arbitrators may be less inclined to apply national mandatory rules which protect weaker parties (such as statutes which may invalidate unfair contractual terms). For this reason, some legal systems view consumer, employment or insurance disputes as non-arbitrable.[75] Other legal systems, however, positively encourage arbitration of at least some such disputes because it is believed that arbitration is more accessible and thus improves access to justice for weaker parties, or otherwise resolves disputes more efficiently (including potentially because of the specialist expertise of arbitrators).[76]

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[71] See eg George A. Bermann, 'The 'Gateway' Problem in International Commercial Arbitration' (2012) 37 Yale Journal of International Law 1, 10.

[72] For further analysis see eg *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); Laurence Shore, 'The United States' Perspective on 'Arbitrability'' in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009); L. Yves Fortier, 'Arbitrability of Disputes', in Gerald Aksen *et al* (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005) 269-70.

[73] See generally eg Campbell McLachlan, *Foreign Relations Law* (CUP, 2014), Chapter 6.

[74] See further generally Born, *ICA*, Chapter 6; *Redfern and Hunter*, [2.124ff]; Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 Australian Year Book of International Law 193; Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009).

[75] See eg Alexandra Johnson Wilcke and Isabelle Wildhaber, 'Arbitrating Labor Disputes in Switzerland' (2010) 27 Journal of International Arbitration 631.

[76] See eg Thomas Carbonneau, 'Liberal Rules of Arbitrability and the Autonomy of Labor Arbitration in the United States' in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009), 144; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 650 (1986) (the 'presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective bargaining

The second reason why disputes may be considered non-arbitrable is because the issues involve significant public interest considerations, or have significant impacts on third parties (who may not be permitted to intervene in arbitral proceedings without the consent of the arbitrating parties, but could potentially do so in court). Criminal and other public law proceedings are, in general, considered non-arbitrable for this reason, as are family law disputes.[77] Article 2060 of the French Civil Code provides, for example, that 'One may not enter into arbitration agreements in matters of status and capacity of the persons, in those relating to divorce and judicial separation, or on controversies concerning public bodies and institutions and more generally in all matters in which public policy is concerned.' Some disputes which fall within the realm of private law are nevertheless often considered to engage sufficient public interests to be considered non-arbitrable, such as, for example, competition law disputes (even those brought through private actions) or intellectual property disputes.[78] However, the trend is probably toward viewing more disputes as arbitrable.[79] In the US, for example, competition law proceedings were historically viewed as non-arbitrable,[80] but the modern position is that many such disputes can be arbitrated, in part because the courts are likely to have an opportunity to take a 'second look' at any public policy issues in the context of proceedings to set aside or enforce the award.[81] A similar development has taken place in the European Union,[82] including the United Kingdom,[83] while the position remains contentious in other jurisdictions such as Australia.[84] Intellectual property disputes are also similarly tending to be increasingly viewed as capable of settlement through arbitration.[85] Certain types of claims may also be excluded from arbitration not because of subject matter arbitrability, but because they do not fall within the

agreements' – although note that in this case the Court did not distinguish clearly between subjective and objective 'arbitrability'); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

[77] See eg Dragor Hiber and Vladimir Pavić, 'Arbitration and Crime' (2008) 25 Journal of International Arbitration 461.

[78] See generally eg William Grantham, 'The Arbitrability of International Intellectual Property Disputes' (1996) 14 Berkeley Journal of International Law 173.

[79] See generally eg Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 Australian Year Book of International Law 193.

[80] See eg *American Safety Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

[81] *Mitsubishi Motors Co. v. Solar Chrysler-Plymouth*, 473 U.S. 614 (1985); see further eg Laurence M. Smith, 'Determining the Arbitrability of International Antitrust Disputes' (1986) 8 Journal of Comparative Business and Capital Market Law 197; James Bridgeman, 'The Arbitrability of Competition Law Disputes' (2008) 19 European Business Law Review 147.

[82] In *Eco Swiss China Ltd v. Benetton International NV* [1999] ECR I-3055, however, the ECJ held that national courts must set aside an arbitral award as contrary to public policy if it is contrary to certain provisions of EU competition law. Georgios Zekos, 'Antitrust/Competition Arbitration in EU versus U.S. Law' (2008) 25 Journal of International Arbitration 1; Julian Lew, 'Competition Laws: Limits to Arbitrators' Authority' in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, 2009), 252; Sotiris Dempegiotis, 'EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003' (2008) 25 Journal of International Arbitration 365; James Bridgeman, 'The Arbitrability of Competition Law Disputes' (2008) 19 European Business Law Review 147.

[83] See eg *ET Plus SA v. Welter* [2005] EWHC 2115 (Comm).

[84] Colette Downie, 'Will Australia Trust Arbitrators with Antitrust? – Examining the Challenges in International Antitrust Arbitrations to Develop a Competition Arbitration Model for Australia' (2013) 30 Journal of International Arbitration 221.

[85] See eg *Desputeaux v. Éditions Chouette (1987) inc.* [2003] 1 S.C.R. 178 (in which the Canadian Supreme Court permitted arbitration of a copyright dispute, and more generally favoured a narrow interpretation of arbitrability limitations).

scope of a contractual arbitration agreement (meaning that the *parties* did not contemplate this type of dispute being arbitrated – see section III.4 above), although these two distinct considerations are not always distinguished clearly in practice.[86]

V. WHO DECIDES ON THE JURISDICTION OF AN ARBITRAL TRIBUNAL?

This chapter has thus far identified the major issues which can arise concerning the jurisdiction of an arbitral tribunal. There remain two general questions for consideration. This section considers the first, the question of 'who decides' on the jurisdiction of the tribunal, while the following section considers the second, the question of what law or laws govern the jurisdiction of the tribunal.

The question of who should decide on the jurisdiction of an arbitral tribunal is one which raises perennial difficulties.[87] A decision about the jurisdiction of an arbitral tribunal may be made by three different 'actors', each of which is considered in turn below: the parties, an arbitral tribunal, and national courts. As noted above, one key principle which must be observed is that the arbitral tribunal itself cannot have the *final* word on its own jurisdiction (as opposed to issues of admissibility), because that goes to the very power of the tribunal. Depending on the circumstance, the jurisdiction of the tribunal will thus need to be confirmed either by the parties or by national courts.

1. Parties

In many situations, the parties will not challenge the validity or effectiveness of their arbitration agreement, but will simply accept that it applies and participate in the arbitration. This may be the case even if there are reasons why the arbitration agreement may be invalid or ineffective. Both parties may decide that it would nevertheless be convenient to proceed with arbitration – the reasons which led them to agree (or attempt to agree) to arbitration in their contract will often still apply when a dispute arises. An arbitral tribunal may formally ask the parties to confirm that the tribunal has jurisdiction, particularly if the arbitrators have some doubt about the validity or effectiveness of the arbitration agreement, and such confirmation can act as a conferral of jurisdiction to the extent that any such concerns actually existed. Even without such formal confirmation, the participation by the parties in the merits of the arbitration without challenging the jurisdiction of the tribunal is likely to constitute submission, which will be viewed itself as providing a foundation for the tribunal's

[86] See eg *Clough Engineering Limited v. Oil & Natural Gas Corporation Ltd* [2007] FCA 881, [39] and [41]; *ET Plus SA v. Welter* [2005] EWHC 2115 (Comm), [51].

[87] See eg Steven H. Reisberg, 'The Rules Governing Who Decides Jurisdictional Issues: *First Options v. Kaplan* Revisited' (2009) 20 American Review of International Arbitration 159; John J. Barcelo III, 'International Commercial Arbitration – Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective' (2003) 36 Vanderbilt Journal of Transnational Law 1115; William W. Park, 'Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators' (2000) 9 Arbitration and Dispute Resolution Law Journal 19.

jurisdiction. If the parties have accepted the jurisdiction of the tribunal in one or more of these ways, the validity of the arbitration agreement is very unlikely to be rejected by the tribunal or by any national court, and so effectively the decision of the parties to accept the validity of the arbitration agreement is determinative.[88]

The more difficult issue concerns what effect a decision by the parties should have on issues which do not concern the validity or effectiveness of their consent, such as those of subject matter arbitrability. If the parties agree to arbitrate a matter which is, under at least one potentially applicable legal order, considered not capable of settlement through arbitration, and neither party objects to the arbitral proceedings, it is not entirely clear what the arbitral tribunal should do. It is clear that the agreement of the parties to arbitrate would not be enforced if the issue were litigated in a court which would apply the law under which the subject matter is non-arbitrable – the arbitration agreement and any arbitral award would simply be invalidated. There is, therefore, an argument that at least in some circumstances an arbitral tribunal should take into account questions of subject matter arbitrability in deciding whether to exercise their jurisdiction, even if these have not been raised by the parties, as part of their duty to render an enforceable award.[89] This is, however, contentious territory – as long as there would be one national court that would view the subject matter of the dispute as arbitrable, it is difficult to say that the award would be futile. Indeed, it is possible that the parties might agree to comply voluntarily with the arbitral award (without the need for judicial proceedings), in which case no national court may ever review the determination, and no issues of arbitrability may ever be considered by anyone other than the parties themselves. If, however, the arbitral award is not complied with voluntarily, the decision of the parties that a certain dispute arising between them should be arbitrated clearly cannot itself be determinative when it comes to questions of arbitrability.

In many cases, of course, the party which does not initiate the arbitration *will* contest the proceedings – disputing the validity or effectiveness of the arbitration agreement or the arbitrability of the dispute, or simply refusing to participate in the proceedings. In such circumstances, a decision on the jurisdiction of the tribunal will also therefore need to be made by the arbitral tribunal and potentially by one or more national courts.

2. Arbitral tribunal

One of the foundational principles of international arbitration is 'competence-competence'.[90] This principle has two fundamentally distinct components. The first component, uniformly

[88] See eg Arbitration Act 1996 (UK), s.73.
[89] See generally eg Martin Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (2003) 20 Journal of International Arbitration 307; Günther J. Horvath, 'The Duty of the Tribunal to Render and Enforceable Award' (2001) 18 Journal of International Arbitration 135; *Redfern and Hunter*, [11.11].
[90] See generally eg Born, *ICA*, Chapter 7; *Redfern and Hunter*, [5.105ff]; *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 15th edn, 2012), [16-013]; William W. Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction', in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, vol 13, Kluwer Law International, 2007), 55; *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35; *Dallah Real Estate*

adopted in any jurisdiction which accepts arbitration, is the rule of 'positive competence-competence', which simply provides that an arbitral tribunal has the power to rule on its own jurisdiction.[91] In some legal systems (including the United Kingdom[92]) this rule may, however, be departed from by agreement of the parties. The second component is an additional rule of 'negative competence-competence'.[93] The negative aspect of competence-competence does not provide that *only* the arbitral tribunal has the power to rule on its own jurisdiction[94] – if the tribunal does not have jurisdiction, then no decision made by the tribunal as to its own jurisdiction can be effective to determine that it does. Instead, the effect of the adoption of negative competence-competence is that courts are required (at least in some circumstances) to give the tribunal the *first* opportunity to determine its own jurisdiction. Negative competence-competence is discussed in the next part of this chapter, dealing with the role of the courts in determining the jurisdiction of an arbitral tribunal.

It is generally considered good practice for an arbitral tribunal to rule on its own jurisdiction as a preliminary matter, for the sake of the efficient resolution of the dispute between the parties, although where jurisdictional and merits issues are intertwined this may not be practicable.[95] It is also considered good practice (if possible) for the tribunal's decision on jurisdiction to itself be issued as a preliminary 'award' so that it gains the benefit of the rules on recognition and enforcement under the New York Convention.[96] In unusual cases, arbitral proceedings may be commenced in parallel, and a dispute may arise over which arbitral tribunal has jurisdiction. Since no hierarchy exists between the decisions of the two tribunals, the better view is that the tribunal first seised should generally be given the first opportunity to determine its own jurisdiction, as a matter of 'arbitral comity'.[97] Such considerations would, however, need to be weighed against questions of procedural efficiency and the

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and Tourism Holding Company v. Gov't of Pakistan [2010] UKSC 46 ([84]: 'the principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction is no doubt a general principle of law'); UNCITRAL Model Law, Article 16; Arbitration Act 1996 (UK), s.30.

[91] See eg Arbitration Act 1996 (UK), s.30.

[92] Arbitration Act 1996 (UK), s.30(1) ('Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction...').

[93] See generally eg Emmanuel Gaillard and Yas Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators', in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008).

[94] This proposition, sometimes described as 'definite' or 'real' competence-competence, was at one time adopted under German law, but has apparently been abandoned: see Born, *ICA*, [7.01]. It is sometimes argued that this doctrine, giving the final word on jurisdiction to an arbitral tribunal, forms part of other legal systems, at least if the parties have agreed to it. (See eg William W. Park, 'Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law' (2007) 8 Nevada Law Journal 135.) This proposition suffers, however, from a logical limitation – the agreement that the validity of the arbitration agreement is unreviewable by a court must *itself* be subject to review by a court.

[95] See further John Yukio Gotanda, 'An Efficient Method for Determining Jurisdiction in International Arbitrations' (2001) 40 Columbia Journal of Transnational Law 11.

[96] See eg Chartered Institute of Arbitrators, 'International Arbitration Guidelines 2015/2016: Jurisdictional Challenges' (available at http://www.ciarb.org/guidelines-and-ethics/guidelines/practice-guidelines-protocols-and-rules), 18; Lawrence Boo, 'Ruling on Arbitral Jurisdiction-Is that an Award?' (2007) 3 Asian International Arbitration Journal 125.

[97] See further eg Chartered Institute of Arbitrators, 'International Arbitration Guidelines 2015/2016: Jurisdictional Challenges', op cit., 7; Filip De Ly and Audley Sheppard, 'ILA Final Report on *Lis Pendens* and Arbitration' (2009) 25 Arbitration International 3.

obligation to enforce the agreement between the parties, and it would potentially be open to a second seised tribunal which views the jurisdiction of the first tribunal as manifestly invalid to adopt a different approach.

3. Courts

The jurisdiction of an arbitral tribunal may, finally, be a matter determined by a national court. As noted above, the primary principle here is that of separability – the court should determine the validity and effectiveness of the arbitration agreement as a separate contract.[98] If a challenge to the validity of the contract does not affect the validity of the arbitration agreement, the court should leave consideration of merits questions to the tribunal. As also discussed above, issues which concern the admissibility of the claim, rather than the jurisdiction of the arbitral tribunal, should similarly be left for the tribunal. By contrast, if a challenge goes specifically and directly to the arbitration agreement itself, it is clear that a court may consider the question, subject to the qualifications set out below. The more difficult issue is what a court should do if an issue is presented which affects the validity of the contract as a whole, including the arbitration agreement, but is not specifically directed at the arbitration agreement. Practice is somewhat variable, but the better view is that the court should also review the validity question in those circumstances – a challenge to the validity of the arbitration agreement is no less critical because it also affects substantive contractual terms.[99]

The courts of the seat of the arbitration are those most likely to hear challenges to the jurisdiction of the arbitral tribunal, or be required to consider such issues if asked to appoint an arbitrator or even to make an order restraining the arbitration from being commenced or continued. These issues may, however, equally fall to be decided by *any* court in which substantive proceedings are commenced, where the arbitration agreement may be raised as a jurisdictional 'defence', or by any court in which recognition and enforcement of an arbitral award is pursued, where the invalidity or ineffectiveness of the arbitration agreement may be raised as a defence to enforcement. It is a much debated question whether decisions on arbitral jurisdiction made by the courts of the seat of arbitration should be given greater authority than those of other courts. In practice, arbitrators may decide to continue with an arbitration notwithstanding the finding of a non-seat national court that the tribunal lacks jurisdiction, if the arbitrators take the view that the courts of the seat or the courts of the

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[98] See eg Born, *ICA*, Chapter 3; *Redfern and Hunter*, [5.100ff]; Arbitration Act 1996 (UK), s.7; *Fiona Trust v. Privalov* (reported as *Premium Nafta Products Ltd v. Fili Shipping Company Ltd*) [2007] UKHL 40; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006); French Code of Civil Procedure, Article 1447; Philippe Leboulanger, 'The Arbitration Agreement: Still Autonomous?', in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, vol 13, Kluwer Law International, 2007), 3; Alan Scott Rau, 'Everything You Really Need to Know About 'Separability' in Seventeen Simple Propositions' (2003) 14 American Review of International Arbitration 121.

[99] But see further discussion in Philippe Leboulanger, 'The Arbitration Agreement: Still Autonomous?', in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, vol 13, Kluwer Law International, 2007), 22ff.

likely place of enforcement of the arbitral award would disagree. It would be much less likely that arbitrators would continue with an arbitration despite an order from the courts of the seat not to do so. Courts may indeed compel arbitrators not to do so, although the effectiveness of such compulsion is likely to depend on whether the arbitrators are physically present in the territory – as noted, the venue of an arbitration may (unusually) be distinct from its legal 'seat'. A similar issue may arise after the award has been rendered – an arbitral award set aside by the courts of the seat of arbitration may be viewed by some other national courts as thereby nullified (although the point is highly debated), but the courts of the seat of arbitration are unlikely to view themselves as bound by an equivalent determination by another court.[100]

Another key issue is whether a court should allow full hearing of challenges to the jurisdiction of the arbitral tribunal, or allow the tribunal to determine the issue first, under the doctrine of 'negative competence-competence' (as noted above). Negative competence-competence may be adopted as a rule of national procedural law – under French law it is even a non-derogable procedural law.[101] Alternatively, national law may leave it open to the parties whether such an approach is adopted, by enabling the parties to make use of what is commonly known as a '*Scott v Avery* clause'.[102] Under such clauses, each party agrees not to commence proceedings before a court until the arbitral tribunal has rendered its award (which will of course be after also determining its own jurisdiction). Completion of the arbitral process is thereby made a condition precedent to the jurisdiction of the courts.[103] The effect of such clauses is thus equivalent to the adoption of a strong doctrine of negative competence-competence – the arbitral tribunal is given authority to make the *first* decision regarding its jurisdiction, and to proceed to render an award on the basis of that decision. Careful drafting is necessary if such clauses are to be adopted – some *Scott v Avery* clauses may be interpreted as also precluding application to the court for ancillary relief in support of the arbitration (such as an asset-freezing order), which would risk weakening rather than supporting arbitration.[104]

Negative competence-competence reduces the risk of arbitral and judicial proceedings running in parallel, and thereby reduces the scope for court proceedings to interfere with the efficient conduct of the arbitration. It also, however, raises the risk that an arbitral tribunal's award may be denied recognition or enforcement after lengthy and costly arbitral

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[100] See further eg *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2012] EWCA Civ 855; Alex Mills, 'The Principled English Ambivalence to Law and Dispute Resolution Beyond the State', in J. C. Betancourt (ed), *Liber Amicorum for the Chartered Institute of Arbitrators: Selected Topics in International Arbitration* (OUP, 2016); Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?' (2014) 29 ICSID Review 263; Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) 14 ICSID Review 16.

[101] French Code of Civil Procedure, Article 1448.

[102] From *Scott v. Avery* (1856) 10 ER 1121. See generally eg Andrew Tweeddale and Keren Tweeddale, '*Scott v Avery* Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' (2011) 77 Arbitration 423.

[103] In *Scott v. Avery* itself, the clause went further, providing that no substantive *cause of action* could arise until the arbitrator had given their decision, to avoid falling foul of the nineteenth century rule which prohibited parties from precluding the jurisdiction of the courts. This is, however, not likely to be necessary under modern law.

[104] See eg *B v. S* [2011] EWHC 691 (Comm).

proceedings, should one or more national courts ultimately disagree with the tribunal's determination of its own jurisdiction. The threshold for the operation of negative competence-competence – whether a court should refer questions to the arbitral tribunal in all cases, or whether it can refuse to do so cases where the arbitration agreement appears invalid or ineffective – is critical in striking the balance between these competing policy considerations.

Perhaps the strongest version of negative competence-competence is provided for in French law.[105] Even if an arbitral tribunal has not yet been established, the French courts must nevertheless refuse to determine the validity of the arbitration agreement unless it is manifestly void or inapplicable[106] – as noted above, this rule cannot even be derogated from by agreement of the parties. (The courts may, however, award provisional or protective relief in support of the prospective arbitral proceedings.[107]) If an arbitral tribunal has been established, the courts are required to submit any dispute concerning the jurisdiction of the tribunal to the tribunal itself for determination. There is no possibility for the court to refuse to do so even if it views the arbitration agreement as manifestly invalid, although it remains open to the court to consider these questions if proceedings are brought to enforce or set aside an award. In England, the courts have by contrast traditionally tended to insist on a full hearing of questions concerning the validity of the arbitration agreement when deciding whether to stay proceedings,[108] although recent case law emphasises that the court has the power to stay its own determination of the validity of the arbitration agreement, and in many cases should do so in favour of giving the arbitral tribunal the first opportunity to review this question.[109] The position in the United States is perhaps less clear, although it has been argued that courts in practice adopt a similarly intermediate approach, distinguishing between 'gateway' issues (which ought to be reviewed by the courts if and when they arise) and 'non-gateway' issues (which should at least initially be left to arbitral tribunals). This essentially means applying negative competence-competence selectively depending on the jurisdictional

[105] French Code of Civil Procedure, Articles 1448, 1455 and 1465. See eg Emmanuel Gaillard and Yas Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators', in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008). See also similarly *Shin-Etsu Chemical Co Ltd v. Optifibre Ltd*, (2005) Supp (3) S.C.R. 699 (India); *Pacific Int'l Lines (Pte) Ltd v. Tsinlien Metals & Minerals Co.*, [1993] 2 H.K.L.R. 249 (Hong Kong).

[106] See eg Cour de cassation, 1e civ, 12 Feb. 2014, 13-18.059; Cour de cassation, 1e civ., 18 May 2011, 10-11.008; Cour de cassation, 1e civ, 12 Nov. 2009, 09-10.575; Cour de cassation, civ, Chambre commerciale, 25 Nov. 2008, 07-21.888; Cour de Cassation, 1e civ, 11 Jul. 2006, 03-11.768; Cour de Cassation, 1e civ, 7 Jun. 2006, 03-12.034.

[107] French Code of Civil Procedure, Article 1449.

[108] See eg *Law Debenture Trust Corporation Plc v. Elektrim Finance BV* [2005] EWHC 1412 (Ch). Under English law, a party that has participated in arbitral proceedings may not refer the question of the validity of the arbitration agreement to the courts without the permission of the other party or the tribunal, although they may do so indirectly by commencing substantive proceedings, requiring the court to consider whether the proceedings should be stayed: see Arbitration Act 1996 (UK), s.9, s.32 and s.72(1).

[109] *Fiona Trust v. Privalov* [2007] EWCA Civ 20, [34] ('it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute').

issue which is raised and, perhaps most critically (by contrast with the French approach), whether the intention of the parties was for the jurisdictional issue to itself be arbitrated.[110]

VI. WHAT LAW OR LAWS GOVERN QUESTIONS OF JURISDICTION?

The analysis above has highlighted a range of different legal questions which may arise for both arbitral tribunals and courts concerning the jurisdiction of an arbitral tribunal. For each of these questions, a decision needs to be made about which law to apply. It would be impossible for this chapter to deal with these issues comprehensively,[111] so the focus will be on two of the most important and typical issues: the validity and interpretation of the arbitration agreement, and the subject matter arbitrability of the dispute.

1. The law governing the validity and interpretation of the arbitration agreement

Issues concerning the validity and interpretation of an arbitration agreement are generally a matter for its governing law. Pursuant to the doctrine of separability, as noted above, an arbitration agreement is viewed as separate from any contract as part of which it may have been entered into. This also means that the law governing the arbitration agreement has to be determined independently from the law governing the remainder of the contract.[112] If the parties have directly agreed the law which governs the arbitration agreement – through a specific choice of law clause – then all arbitral tribunals and the vast majority of national courts will recognise that choice.[113] The more difficult question is what law to apply where, as is frequently the case, a contract does not have a specific choice of law clause for the arbitration agreement.

Whenever a court is asked to interpret or determine the validity of an arbitration agreement, it faces a choice of law question and must apply the choice of law rules which form part of the law of the forum. Those choice of law rules may derive from or be influenced by regional or international rules.[114] The New York Convention provides that the enforcement of an arbitral award may be refused if the arbitration agreement is invalid 'under the law to which the

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[110] See eg George A. Bermann, 'The 'Gateway' Problem in International Commercial Arbitration' (2012) 37 *Y*ale Journal of International Law 1; *Rent-a-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010).
[111] For more detailed treatments see eg Horacio A. Grigera Naón, 'Choice-of-law problems in international commercial arbitration' (2001) 289 Recueil des Cours 9; Klaus Peter Berger, 'Re-examining the Arbitration Agreement Applicable Law: Consensus or Confusion?', in Albert Jan van den Berg (ed.), *International Arbitration 2006: Back to Basics?* (ICCA Congress Series, vol 13, Kluwer Law International, 2007), 301; Gary B. Born, 'The Law Governing International Arbitration Agreements: An International Perspective' (2014) 26 Singapore Academy of Law Journal 814; Born, *ICA*, Chapter 4; *Redfern and Hunter*, Chapter 3.
[112] See eg *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 15th edn, 2012), [16-011ff].
[113] See eg Cindy G. Buys, 'The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration' (2012) 79 St. John's Law Review 59.
[114] It may be noted in passing that arbitration agreements are, however, excluded from the scope of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) in the European Union. The choice of law rules are thus to be found in the national law of EU Member States, including the common law in England.

parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.[115] No such rule is set out for questions of validity which arise before an award has been rendered, although there would be little sense in adopting a different approach. This rule still, however, leaves national legal systems with a considerable degree of latitude in identifying situations in which the parties are considered to have implicitly subjected their arbitration agreement to a particular system of law – this is an issue which must be resolved by national choice of law rules, but practice on the point is variable.

There are two main candidates for the law which should govern an arbitration agreement before national courts. First, the law which governs the substantive obligations between the parties, which is to say (at least generally) the law governing the contract as part of which the arbitration agreement was entered into. Second, the law of the seat of arbitration (the default rule suggested by the New York Convention). Each of these approaches has something to recommend it – it might be argued that parties are likely to assume, unless they clearly indicate otherwise, that their whole contract is governed by a single system of law;[116] but it might also be argued that parties agreeing to arbitrate in a particular place would expect the law of that place to govern all issues concerning the arbitration (not just procedural matters).[117] The approach recently adopted in the English courts in the *Sulamérica* decision is something of an intermediate position. On the one hand, the court found that there is a rebuttable presumption that if the parties have chosen a law to govern their contract they will have made an implied choice of the same law to govern the arbitration agreement: 'In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate'.[118] On the other hand, the court also held that if the presumption of an implied choice is rebutted,[119] the arbitration agreement 'has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective'.[120] A similar analysis applies where the parties have not chosen a law to govern their substantive contract – no presumption arises, and the objectively most closely connected law to the arbitration agreement is likely to be the law of the seat of the arbitration[121] (although obvious difficulties arise under this approach if the parties have not chosen a seat and the validity of the arbitration agreement must be determined before the arbitration has been commenced). Some

[115] Article V(1)(a).
[116] See eg *Arsanovia Ltd v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm).
[117] See eg *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd* [2014] SGHCR 12 (Singapore).
[118] *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWCA Civ 638, [26]; *Arsanovia Ltd v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm); see further Ardavan Arzandeh, 'The Law Governing Arbitration Agreements in England' [2013] Lloyd's Martime and Commercial Law Quarterly 31; Sabrina Pearson, 'Sulamérica v. Enesa: The Hidden Pro-validation Approach Adopted by the English Courts with Respect to the Proper Law of the Arbitration Agreement' (2013) 29 Arbitration International 115.
[119] In *Sulamérica* the courts found that the presumption was rebutted because the substantive applicable law would have rendered the arbitration agreement unenforceable – essentially adopting a presumption in favour of the effectiveness of the arbitration agreement. As a result, there was no implied choice, and the court had to apply the objective choice of law rule, looking to the system of law with which the arbitration agreement had its 'closest and most real connection'.
[120] *Sulamérica*, [32].
[121] See eg *Habas Sinai Ve v. VSC Steel Company Ltd* [2013] EWHC 4071 (Comm).

other legal systems do not prioritise either the law of the seat or the law of the substantive contract, but rather the validation of the arbitration agreement, finding that the arbitration agreement only needs to be valid under one potentially applicable law.[122]

When the question of the interpretation or validity of an arbitration agreement arises before an arbitral tribunal, the analysis is significantly different. The arbitral tribunal has no 'law of the forum', and thus no directly applicable choice of law rules. National arbitration laws rarely give the tribunal clear and prescriptive guidance on this point, and arbitral tribunals do not always analyse the issues precisely. A choice of law by the parties which specifically applies to the arbitration agreement will, however, almost always be viewed as binding the tribunal contractually.[123] Because of the doctrine of separability, it is less clear whether a general choice of law clause in a contract should be viewed as governing the arbitration agreement, or only the substantive contractual terms – as noted above, the law of the seat of arbitration may be considered to have a stronger claim because it is the place of performance of the arbitration agreement. An arbitral tribunal may also give effect to a choice by the parties of non-state law to govern their arbitration agreement – such a choice is permitted under the UNCITRAL Model Law.[124] Many national legal systems will not permit a choice of non-state law under their choice of law rules, although it is notable that a different position was adopted in the Hague Principles on Choice of Law in International Commercial Contracts, a model law adopted in 2015, and that arbitral awards based on the application of non-state law are commonly enforced by national courts.[125]

In the absence of a party choice of law for the arbitration agreement, an arbitral tribunal will need some mechanism to determine the governing law – often, to choose between the law of the seat and the law of the substantive contractual terms. Three approaches may be adopted by the tribunal.

First, it may apply national choice of law rules, most likely those of the seat of the arbitration, in order to determine which national substantive law governs the arbitration agreement. Thus, for example, if the seat of arbitration is England, the tribunal may follow the English case law noted above. The application by an arbitral tribunal of the choice of law rules of the seat was strongly advocated by adherents of the 'territorialist' thesis, such as FA Mann (as discussed in section I.3 above).

Second, the tribunal may apply 'transnational' choice of law rules, which is to say choice of law rules which are not derived from any particular national legal system but from the common practice of arbitration, and use those to determine the governing law for the

[122] See eg the Swiss Law on Private International Law, Article 178(2).
[123] This raises a further complex choice of law question which is beyond the scope of this chapter – what law should govern the validity of the choice of law clause itself. See eg Article 10 of the Rome I Regulation. Arbitration agreements, as noted previously, are excluded from the Regulation (Art 1(2)(e)), but choice of law clauses are not.
[124] Article 28(1).
[125] See further eg Alex Mills, 'The Principled English Ambivalence to Law and Dispute Resolution Beyond the State', in J. C. Betancourt (ed), *Liber Amicorum for the Chartered Institute of Arbitrators: Selected Topics in International Arbitration* (OUP, 2016).

arbitration agreement.[126] The UNCITRAL Model Law perhaps supports this approach, in directing that 'Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'.[127] The Hague Principles on Choice of Law in International Commercial Contracts, noted above, may serve as such a transnational 'model' law. This approach may be most closely associated with the 'pluralist' thesis on the nature of arbitration (discussed in section I.3 above), as it acknowledges arbitration's international character but requires the tribunal to identify itself which system of national law should be applied, out of the variety of connected legal orders.

Third, the tribunal may reject the choice of law process altogether, and apply 'transnational' substantive law to govern the arbitration agreement (and perhaps also the substantive contractual obligations between the parties).[128] This approach is evidently most closely associated with those (such as Gaillard) who view arbitration as constituting an autonomous international legal order, as also discussed in section I.3 above. The rules of substantive law which are applied under this order may be found in the uncodified practice of arbitral tribunals, or in an international codification such as the UNIDROIT Principles of International Commercial Contracts. This third option has, somewhat remarkably, also been adopted as part of French national law – in the absence of a choice of national law by the parties, French courts view arbitration agreements as bound not by any national law but by the rules and principles of 'transnational' arbitration practice.[129]

An arbitral tribunal may also consider a fourth source of national law to be potentially relevant. As noted above, it is commonly considered that arbitrators have a duty to render an enforceable award, and thus should take into account the law that would be applied to the question of the validity of the arbitration agreement by the courts of the predicted place of enforcement of the arbitral award. In cases in which the parties potentially have assets in multiple jurisdictions, however, that is unlikely to be viewed as a strong justification for the application of any particular law.

2. The law governing arbitrability

As analysed in section IV above, the question of arbitrability presents a distinct issue to other questions of jurisdiction concerning the validity of the arbitration agreement. The law governing the arbitration agreement does not, therefore, necessarily govern the question of arbitrability, although it is one possible law which a court or tribunal could consider. The question of arbitrability could, indeed, also be analysed as an issue relating to the validity of the arbitration agreement – not an issue which goes to the genuineness of the (apparent)

[126] See generally eg Renato Nazzini, 'The Law Applicable to the Arbitration Agreement: Towards Transnational Principles' (2016) 65 International and Comparative Law Quarterly 681.
[127] Article 28(2) – this provision is not directly concerned with the jurisdiction of the tribunal, but with the merits of the claim. See also eg the Arbitration Act 1996 (UK), s.46(3).
[128] See further eg *Redfern and Hunter*, [3.156ff]; Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Kluwer Law International, 2nd edn, 2010).
[129] See eg Cour de Cassation, 1e civ., 3 Mar. 1992, 90-17.024; Cour de Cassation, 1e civ, 7 Jun. 2006, 03-12.034.

consent to the agreement, but one focused on whether the agreement is contrary to public policy. The question is, of course, which 'public policy' should be brought to bear on this issue. As also noted in section IV above, different national systems take a variety of different approaches as to what types of disputes are capable of settlement through arbitration, for example, permitting or excluding consumer, employment, insurance, or competition law claims, and so the selection of the applicable law may be critical.

There are a number of different laws which could potentially be applied by a court or tribunal to this question.[130] The law of the seat of the arbitration is once again a candidate – it might be argued that an arbitration should not be conducted if the law of the place of the arbitration, which normally provides its procedural law, would not view the subject matter as arbitrable. If a national system excluded consumer or employment claims from arbitration, for example, this might lead it to offer more limited procedural protection for weaker parties in its arbitration law, which could suggest that consumer or employment claims should not be arbitrated under that law. The courts of the seat of arbitration are particularly likely to look to their national law for the applicable limits on arbitrability.[131] As noted in section V.3 above, however, a decision by the courts of the seat of arbitration setting aside an arbitral award may not always be recognised by other national courts, who may instead recognise and enforce the arbitral award if it complies with their own standards of arbitrability.

Another option is the law governing the arbitration agreement, which might be applied on the basis that it is normally the putative applicable law which governs questions of the validity of a contract.[132] Issues of validity might be viewed as encompassing questions of subject matter arbitrability for an arbitration agreement, although as noted above these may be better viewed as having a distinctive public character.

A third option would be the law governing the merits of the dispute – typically the law governing the substantive contract between the parties, which may (as noted above) be different from the law governing the arbitration agreement. There is at least an argument that the substantive legal order would have the greatest impact on questions of subject matter arbitrability – if, for example, the substantively applicable contract law offers strong protections for consumers or employees, then it might be argued that this limits any concerns about the arbitrability of disputes involving these parties. A complication with this approach is that an arbitration may, however, involve both contractual and non-contractual claims, which may be governed by different systems of law, and it would not be desirable for different legal standards to apply to the question of arbitrability.

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[130] See generally eg Bernard Hanotiau, 'The Law Applicable to Arbitrability' (2014) 26 Singapore Academy of Law Journal 874; Bernard Hanotiau, 'The Law Applicable to Arbitrability', in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series, vol 9, Kluwer Law International, 1999).

[131] Note UNCITRAL Model Law, Article 34(2)(b)(i), permitting an award to be set aside if 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State' (meaning the law of the seat of arbitration).

[132] See, for example, Article 10 of the Rome I Regulation.

A fourth national law which could be applied by a court or arbitral tribunal would be the law of the (likely) place of enforcement of the arbitral award, on the basis that the place of enforcement is unlikely to recognise an arbitral award in respect of subject matter which is viewed within its legal order as incapable of settlement by arbitration. Indeed, Article V(2)(a) of the New York Convention expressly provides that an award may be refused recognition in a Contracting State if 'the subject matter of the dispute is not capable of settlement by arbitration under the law of that country.'[133] This may, however, be better viewed as a distinct or additional consideration on the basis of public policy rather than arbitrability *per se* – as Böckstiegel has observed, 'Legal rules restricting arbitrability need not necessarily be part of public policy'.[134] In other words, a state need not refuse enforcement of a foreign arbitral award merely because the subject matter would not be considered arbitrable locally, although there is likely to be a strong mutual influence between the two doctrines.[135] While this rule may be easy for a national court to apply, it may frequently (as noted above) be difficult for arbitrators to determine where an arbitral award is likely to be enforced.

Each of these national legal orders has at least an arguable claim to regulate questions of subject matter arbitrability, but none appears to have a clearly overriding interest, and each may apply widely varying standards. In the face of this complexity, it is no surprise that some arbitral authorities and tribunals prefer (once again) to look to transnational standards rather than any particular national law, applying principles of 'transnational public policy'.[136] While this may appear to simplify the choice of applicable law task for the tribunal, the identification of such standards may itself be extremely difficult, particularly as different national legal orders evidently take different approaches.

VII. CONCLUSIONS

The issue of arbitral jurisdiction is foundational to the legitimacy and effectiveness of arbitration, and raises a series of complex concerns. The analysis above should not, however, be taken to suggest that arbitrators commonly analyse these issues in great technical depth, or that the practice of arbitrators is consistent or even strongly aims at consistency. This is partly inevitable, partly desirable, and partly problematic.

It is inevitable in the sense that many arbitrations will raise few if any of the issues examined above. The reasons why parties chose arbitration in their contract will often lead them to

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[133] Note also UNCITRAL Model Law, Article 36(1)(b)(i), permitting a court to refuse recognition or enforcement of an award on the basis that 'the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State' (meaning the law of the state where recognition or enforcement is sought).

[134] Karl-Heinz Böckstiegel, 'Public Policy and Arbitrability', in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series, vol 3, Kluwer Law International, 1986) 182.

[135] See eg Abby Cohen Smutny and Hansel T. Pham, 'Enforcing Foreign Arbitral Awards in the United States: The Non-Arbitrable Subject Matter Defense' (2008) 25 Journal of International Arbitration 657.

[136] See eg Michael Pryles, 'Reflections on Transnational Public Policy' (2007) 24 Journal of International Arbitration 1; Pierre Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (ICCA Congress Series, vol 3, Kluwer Law International, 1986).

continue to accept arbitration once a dispute arises, and the reputational and legal costs of challenging an arbitral award on contested grounds may lead parties to accept and comply with arbitral awards. Many disputes will, in addition, centre on the resolution of factual rather than legal issues. Detailed technical analysis of the legal issues may not be necessary or in the interests of the parties.

It is desirable in the sense that one of the traditional attractions of arbitration is that it offers a more flexible and informal mode of dispute resolution than litigation. As long as the arbitrators apply an approach which is principled and pragmatic, many parties are unlikely to have great concerns about whether the approach is analysed in a detailed and technical way which is consistent with general practice. An approach which favours reasonableness and common sense over detailed technical legal analysis may be what parties believe themselves to be contracting into with commercial arbitration.

It is, however, also potentially problematic, because the complexity of these issues and the lack of clarity around the best approach on various points leaves arbitrators with a great deal of discretion as to how issues of arbitral jurisdiction are resolved. Even if arbitrators exercise this discretion in a pragmatic and sensible way, this uncertainty is likely to affect the attractiveness of arbitration itself in two ways. First, even a party who accept the outcome of the arbitration might find that the approach of the tribunal to determining the validity and scope of its jurisdiction was less than satisfactory, and this may dissuade them from entering into future arbitration agreements. Commercial parties value certainty and predictability as well as practical common sense. Second, a party might challenge the jurisdictional approach of an arbitral tribunal in a court, whether through proceedings to set aside the award or as a defence to enforcement of the award. The approach of national courts to these issues tends to be more technical – with national courts having more clearly defined choice of law rules to determine what law should govern various jurisdictional issues. If a national court rejects the approach adopted by the arbitral tribunal, the time and money invested in the arbitration may effectively be wasted. This is again likely to lead some parties to avoid arbitration in future.

This last point suggests, rightly, that there would be great benefits if national courts and arbitral tribunals had a consistent practice both between themselves and internationally on issues of arbitral jurisdiction. But this is not a realistic prospect in the short term. This is not just because of different national laws and judicial practices and the lack of binding precedent in arbitration. It is also because the different approaches to these issues reflects a number of competing theoretical conceptions of arbitration itself. As Gaillard has argued, 'It is precisely because there are several visions, several competing representations of international arbitration, that the controversies on a number of apparently purely technical topics remain so vivid.'[137] Those who view arbitrators as exercising power which is delegated by the national legal order in which the arbitration takes place are likely to view the authority of the tribunal as at least principally derived from that legal order, and thereby favour the application of the law of the seat to questions of arbitral jurisdiction. Those who view arbitrators as exercising primarily a contractual authority which may engage with a variety of different national legal

[137] Gaillard, *Representations*, 272.

orders are more likely to view the jurisdiction of the tribunal as at least principally derived from the legal order establishing that contractual relationship, and thereby favour the application of the law governing the arbitration agreement to questions of jurisdiction, and also favour the determination that this law is (in the absence of a clear choice to the contrary) the law governing the parties' substantive relationship rather than the law of the seat. Finally, those who view arbitration as transnational and autonomous in character, free-floating above or aside national legal orders, are likely to suggest that the answers to the questions regarding arbitral jurisdiction cannot be satisfactorily derived from any national law, but ought to be found in transnational principles and practice. Put simply, the contested issues of arbitral jurisdiction are unlikely to be resolved easily, because they are a reflection in miniature of the major continuing uncertainties surrounding the identity and character of international arbitration itself.