

LL.M. THESIS

**“THE VALIDITY OF THE ARBITRATION
AGREEMENT IN
INTERNATIONAL COMMERCIAL ARBITRATION”**

by

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TABLE OF CONTENTS

ABSTRACT (p. 6)

I. INTRODUCTION (p. 8)

1. *PRELIMINARY REMARKS* (p. 8)

2. *THE THEORETICAL FRAMEWORK* (p. 14)

(a) The International Approach

(b) The Transnational Conception

3. *METHODOLOGY AND STRUCTURE OF THE THESIS* (p. 17)

II. STATE COURTS AS GUARDIANS OF THE ARBITRATION PROCESS (p. 22)

1. REVIEWING THE ARBITRATION AGREEMENT IN THE PRE-AWARD PHASE (p. 22)

(a) Introduction

(b) The Legal Framework

(c) The Different Standards of Review

(d) The Question of the Form of the Agreement

2. REVIEWING THE ARBITRATION AGREEMENT IN THE POST-AWARD PHASE (p. 48)

(a) Introduction

(b) The Standard of Review in the Phase of Enforcement

(c) Determining the Applicable Law

3. CONCLUSION (p. 60)

III. ARBITRAL TRIBUNALS BETWEEN AUTONOMY AND UNDERSTATEMENT (p. 63)

1. THE VALIDITY OF THE ARBITRATION AGREEMENT UNDER THE MOST INFLUENTIAL ARBITRATION RULES (p. 63)

(a) Introduction

(b) Procedural Facets

(c) The Arbitrators' Decision on the Validity of the Arbitration Agreement

2. THE ARBITRATORS' DECISION AND THE RECOURSE UNDER ARTICLE 16(3) OF THE MODEL LAW (p. 70)

(a) Introduction

(b) The decision to Retain Jurisdiction

(c) The decision to Decline Jurisdiction

3. CONCLUSION (p. 84)

IV. CONCLUSION: THE VALIDITY OF THE ARBITRATION AGREEMENT AS A MATTER OF ALLOCATION OF POWER BETWEEN STATE COURTS AND ARBITRATORS (p. 86)

GENERAL BIBLIOGRAPHY (p. 92)

ABSTRACT

The arbitration agreement is the founding source of international arbitration. The determination of the conditions of its enforcement necessarily entails an analysis of the allocation of jurisdiction between state courts and arbitral tribunals.

The thesis will show that issues of validity of the agreement to arbitrate are usually treated as jurisdictional matters: state courts and national arbitration acts will tend to prioritize the arbitrators' decision in these cases, by intervening only in the post-award phase. This circumstance underlines the existence of an autonomous arbitral order, in which state courts, national legislators, and arbitrators are all called to contribute.

RESUMÉ

La convention d'arbitrage est la source principale de l'arbitrage international. L'évaluation des conditions de validité nécessaires à son exécution implique une analyse de l'allocation du pouvoir juridictionnel entre cours étatiques et arbitres.

La thèse indiquera que la validité de la convention d'arbitrage est liée à la compétence des arbitres. Les cours étatiques et les lois nationales d'arbitrage laisseront préalablement place à ces derniers pour l'administration de la procédure. Elles n'interviendront que par la suite, une fois que la sentence arbitrale a été rendue. Cette circonstance confirme l'existence d'un ordre arbitral autonome, auxquels participent en même temps les cours étatiques, les législateurs, et les arbitres.

I. INTRODUCTION

1. *PRELIMINARY REMARKS*

Ongoing globalization and the contemporary market economy are rendering the concepts of “nation” and “borders” obsolete and anachronistic. Law, like every other social artifact, is not immune. In this context, the constraints of state justice and the opacity of national legal systems have increasingly been perceived as obstacles to economic exchanges. At an impressive rate, modern global actors are resorting to international arbitration in order to resolve commercial disputes.¹ Leaving aside the political implications of such a phenomenon—which will not be discussed here—commercial justice has become a private matter, ultimately based on a contractual agreement entered into by the parties to a present (or future) dispute. Arbitration agreements display a combination of contractual and procedural facets, giving them a hybrid nature² and thereby intertwining the foundational principles governing contract law and civil procedure.

Simply put, the agreement to arbitrate is a contract—or a clause contained therein—allowing the parties to resolve their present or future disputes through a private process of adjudication, known as arbitration. This definition is uncontroversial and has recently been reaffirmed in a sound judgment of the Federal Supreme Court of Switzerland (a jurisdiction that has historically been a place of arbitration of paramount importance):

¹ For a broad analysis concerning the role of international arbitration in the process of economic globalization, see Katherine Lynch, *The Force of Economic Globalization: Challenges to the Regime of International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) 37-76.

² Klaus P 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 No 13) (The Hague: Kluwer Law International, 2007) 301. Along the same lines, see CA Paris, 8 octobre 1998, *Sam v Perrin*, Court of Appeal (1999) Rev arb 2, 350; Mauro Rubino-Sammartano, *International Arbitration* (2ed), (The Hague: Kluwer Law International, 2001) at 196.

An arbitration clause must be understood as an agreement by which two or more determined or determinable parties agree to be bound to submit some existing or future disputes to an arbitral tribunal to the exclusion of the original jurisdiction of the state courts, according to a determined or undetermined legal order. It is essential that the parties should express the intention to let an arbitral tribunal, *i.e.* not a state court, decide certain disputes.³

In light of the above, such an agreement is both theoretically and practically the founding pillar of international arbitration, for there cannot be an arbitration without a prior agreement to arbitrate.

As far as the terminology is concerned, it should be noted that “arbitration agreement” stands both for “submission agreement” (*compromis*) and for “arbitration clause” (*clause compromissoire*). The *compromis* is a contract entered into by the parties in order to settle existing disputes, whilst the *clause compromissoire* is a clause contained in a contract addressing potential future disputes.⁴ The conceptual distinction reflects practical differences, namely with respect to length and detail. Submission agreements are, in practice, much longer, and contain more details, in order to tailor arbitration proceedings to the needs of the existing dispute; arbitration clauses, in contrast, are usually based on model clauses, and are—at the moment of the conclusion of the contract—more or less considered as a formality, in the hope that disputes between the parties will never arise.⁵

³ Georg von Segesser & Elisabeth Leimbacher, “FC X. v. Y., Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 17 January 2013” (A contribution by the ITA Board of Reporters, Kluwer Law International) [references omitted].

⁴ An example of this distinction may be found in articles 807 and 808 of the Italian *Code of Civil Procedure* (as amended by the *Decree 40 of 2 February 2006*).

⁵ Alan Redfern & Martin Hunter, *On International Commercial Arbitration* (The Hague: Kluwer International Law, 2009) at 86.

If these two types of agreement are conceived for clearly separate purposes, it should be pointed out that the dichotomy between arbitration clauses and submission agreements also has a historical origin. At the dawn of arbitration, only submission agreements were considered valid and enforceable.⁶ The modernization of arbitration legislation rendered both types of agreement equally enforceable.

Arbitration agreements should be—except in certain isolated cases—analyzed primarily in light of their content. Therefore, the language used by the parties is not considered to be a preponderant factor in the enforcement of an arbitration agreement.⁷ Courts will usually be satisfied with a general—yet unequivocal—sign of the parties’ intention to enter such an agreement. Consistently, whilst the mere heading “arbitration” employed in a contractual clause has been deemed sufficient proof of the parties’ intent,⁸ the absence of the term “arbitration” has not constituted a bar to the examination of the substance of the clause, which may still lead to the finding of a valid arbitration agreement.⁹

⁶ For instance, this was the case for French domestic arbitration until the 1925 reform. See Matthieu De Boissésou, *Le droit français de l'arbitrage interne et international* (Paris : GLN Joly, 1990) at 19. This in part explains the origin of the current version of article 23 of the 2012 ICC *Arbitration Rules* (online: International Chamber of Commerce <<http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/>>), which addresses the so-called “Terms of Reference”.

⁷ Spain No 55, *Rederij Empire CV (Netherlands) v Arrocerías Herba, SA (Spain)* (2002), 32 YB Comm Arb 567 at para 5 (Tribunal Supremo [Supreme Court], Civil Chamber). The clause indicated in the contract was the following: “Arbitration: Arbitration, if any, or general average, if any, shall take place in London and in accordance with English law.” The court held: “In order to derogate from [the jurisdiction of] the national courts, the arbitration agreement should not be null and void [or] inapplicable and must in any case be effective. This is not the case here, since this is clearly an unsatisfactory clause that, because of its imprecision and vagueness, does not comply with the basic requirements for being taken into consideration and applied.”

⁸ US No 549, *Harco National Insurance Company (US) v Millenium Insurance Underwriting Limited* (2005), 31 YB Comm Arb 1236 (D Ill).

⁹ US No 570, *Sheridan Schofield v International Development Group Co, Ltd* (2006), 31 YB Comm Arb 1414 at para 11 (D Tex). In this case, the parties “selected a neutral third party, John Crider, to serve as the ‘independent auditor’, they gave him the authority to determine the amount, if any, Plaintiff was owed, they specified how the neutral was to reach his decision, they provided that the auditor’s decision should be issued in writing, they agreed that the decision of the independent auditor would be final and binding, and they agreed to limit the court’s

As it has emerged from the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*,¹⁰ the agreement to arbitrate constitutes the cornerstone of the arbitration process shaped by the international community. In this respect article II of the convention states:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.¹¹

The arbitration agreement thus creates a duty to resort to arbitration “to the exclusion of the primary jurisdiction of the state courts,”¹² unless said agreement is severely flawed¹³ with respect to the applicable law.¹⁴

Consequently, given the practical and theoretical importance of the topic, this thesis aims to carry out an exhaustive analysis of the conditions required for its validity. This will entail a focus on the issue of the applicable law, as well as a thorough theoretical reflection on the coexistence of two fora for the enforcement of arbitration agreements—that is, state courts and arbitral tribunals.

remaining jurisdiction to (a) any orders of attachment remaining in force, and (b) converting the award of the independent auditor into a final judgment (footnote omitted). Giving the terms of this contract their plain and ordinary meaning, the Court is of the opinion that the parties intended to submit their dispute for final determination through binding arbitration.”

¹⁰ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38, 21 UST 2517 [*New York Convention*].

¹¹ *Ibid*, article II(1).

¹² Switzerland No 43, *X Holding AG v Y Investments NV*, *Bundesgerichtshof* (2010), 36 YB Comm Arb 343 at para 10 [*X Holding*].

¹³ See the formulation contained in article II(3) of the *New York Convention*: “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

¹⁴ *X Holding*, *supra* note 12 at para 10.

So far, the law applicable to the arbitration agreement in the absence of an explicit choice of the parties can rightly be considered a “monstre sacré”. During an important conference held in Montreal in 2006, Klaus Berger—a well-regarded authority on international commercial arbitration—concluded his intervention, “Re-examining the Arbitration Agreement”,¹⁵ by stating, “[T]oday there is more consensus than confusion.”¹⁶ To many, I think, these words clearly resounded as an ominous prophecy.

Even in the best families, there is always a relative with a certain infamy. He or she may be known for having had secret lovers or problems with the law. When the family gathers for Christmas, the older members cautiously avoid recalling his or her vicissitudes. Nevertheless, whenever the younger members are not listening, the conversation between the elders will likely shift to this subject. It is a source of disquiet, and in order to protect the reputation of the family, it is transformed into a taboo.

This brief analogy describes the general aura surrounding the topic of this thesis: arbitration agreements are infamous—yet important—relatives, and the issue of applicable law is one of their vicissitudes that one may rather not recall. This fact is disappointing, as arbitration agreements constitute the essence of international commercial arbitration. They affect both theory and practice in a significant way. The scope of this contribution is thus to strive against the neglect of such an important topic and to challenge two different orthodoxies¹⁷ that refuse to consider the complexity of the issues involved.

The first orthodoxy, the international approach, contends that the question of the governing law of the arbitration agreement—absent an explicit choice by the parties—always consists of the

¹⁵ Berger, *supra* note 2.

¹⁶ *Ibid* at 321.

¹⁷ I use the term “orthodoxy” in order to indicate that each of these views is generated by embracing a theoretical representation of international arbitration unconditionally. These two different representations are analyzed in Part I(b).

rules enacted by the place of arbitration: “[T]he juridical seat of the arbitration plays a dominant role as a connecting factor for the determination of the law applicable to the formal and substantive validity of the arbitration agreement.”¹⁸ This view relies strongly on the discourse of private international law—namely a logic of conflict of law rules, and on concepts such as “relevant connecting factors” to a given jurisdiction. Here, the foundational theoretical assumption is that the legal order is “decentralized among a plurality of sovereign or autonomous authorities, asserting jurisdiction each within a defined territory over activities that concern their respective subjects.”¹⁹ It thus follows that the arbitration agreement is governed by the national rules enacted by the state where the arbitration proceedings take place.

The second orthodoxy adopts an opposite view and contends that the arbitration agreement should be governed by transnational legal rules.²⁰ This would be so because states themselves—the argument goes—have expressly recognized, in the absence of the parties’ agreement, the power of the arbitrators to determine the rules governing the arbitration procedure.²¹

Under this approach, the rules do not belong to a single jurisdiction but rather result from an extrapolation of the norms contained in different legal systems and restated in authoritative commentaries, international texts, or judicial decisions. In such a fashion, the agreement would no longer be affected “by the idiosyncrasies of local law.”²²

¹⁸ Berger, *supra* note 2 at 321.

¹⁹ Hessel Yntema, “The Historic Bases of Private International Law” (1953) 2:3 Am J Comp L 297 at 297.

²⁰ Emmanuel Gaillard & John Savage, eds, *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at 232; Maria Hook, “Arbitration Agreements and Anational Law: A Question of Intent?” (2011) 28:3 J Int’l Arb 175 at 184.

²¹ See e.g. art 1511, *Code de procédure civile* (France) (“Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu’il estime appropriées. Il tient compte, dans tous les cas, des usages du commerce”); *ibid*, art 1509(2) (“Dans le silence de la convention d’arbitrage, le tribunal arbitral règle la procédure autant qu’il est besoin, soit directement, soit par référence à un règlement d’arbitrage ou à des règles de procédure”).

²² Gaillard & Savage, *supra* note 20 at 232.

The following section will describe in greater detail the respective theoretical stances taken by the two aforementioned orthodoxies in regard to the guiding principles that should apply in the determination of the law governing the arbitration agreement.

2. THE THEORETICAL FRAMEWORK: INTERNATIONAL COMMERCIAL ARBITRATION AS A (QUASI) INDEPENDENT LEGAL ORDER

Unlike state justice, which derives its binding nature from the authority of the state, the robust contractual roots of international arbitration are undeniable. In the words of a learned author:

The contractual nature of arbitration requires the consent of each party for an arbitration to happen. State courts derive their jurisdiction either from statutory provisions or a jurisdiction agreement. In contrast, the arbitration tribunal's jurisdiction is based solely on an agreement between two or more parties to submit their existing or future disputes to arbitration.²³

Therefore, in this alternative form of dispute resolution, the autonomy of the parties serves as a hallmark of the discipline. Nevertheless, the degree to which such a principle should apply—as well as the extent of the consequences—is a controversial question dividing the two orthodoxies. The following parts (I(b)(i) and I(b)(ii)) address the antipodal positions taken in this respect.

(a) The International Approach: International Arbitration as a Functional Equivalent of State Courts

²³ Julian DM Lew et al, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003) at 98.

Under this approach, the legitimacy of international arbitration derives “from all legal orders that are willing, under certain conditions, to recognize the effectiveness of the award.”²⁴ The entire arbitration process is thus validated in a retrospective way. In the context of international sources, the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* reflects this very philosophy.²⁵ In this respect, “[N]obody disputes the fact that a State will recognise or enforce an international award only if it does not contradict that State’s international public policy.”²⁶ Here, the concept of international public policy indicates a set of principles that are considered—by the state of recognition or enforcement—to be the expression of “basic notions of justice and morality”.²⁷ As a result, the autonomy of the parties may never infringe such basic principles of justice.²⁸

Therefore, the contractual nature of arbitration is well acknowledged: article II of the *New York Convention* recognizes that the source of the arbitration process is the arbitration agreement. Nevertheless, the principle of party autonomy is placed under a sword of Damocles—namely, the concept of international public policy in the state enforcing the award. International arbitration is thus acknowledged as a functional equivalent of state courts; the state legal system will retain a discretionary power allowing courts to intervene, under certain conditions, in the arbitration process.

²⁴ Emmanuel Gaillard, *Legal Theory of International Arbitration* (London, UK: Martinus Nijhoff, 2010) at 24.

²⁵ Similar considerations surround the national provisions dealing with the annulment of the award (e.g., article 34(2)(a)(i) of the *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006* (Vienna: UNCITRAL, 2008) [*Model Law*]).

²⁶ Bernard Hanotiau & Olivier Caprasse, “Public Policy in International Commercial Arbitration” in Emmanuel Gaillard & Domenico Di Pietro, eds, *Enforcement of Arbitration Agreements and International Arbitral Awards* (London, UK: Cameron May, 2008) 787 at 796.

²⁷ Nigel Blackaby et al, *Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press, 2009) at 658; Gaillard & Savage, *supra* note 20 at 996.

²⁸ In the United States: *MGM Productions Group Inc v Aeroflot Russian Airlines*, 2004 WL 234871 (2d Cir); In Switzerland: *KS AG v CC SA* (1995), 20 YB Comm Arb 762.

(b) The Transnational Conception: International Commercial Arbitration as an Autonomous Order

The advocates of the transnational view have contributed in an essential way to detaching international arbitration from the parochialisms of national jurisdictions, by supporting the development of a new legal culture vis-à-vis this method of dispute resolution. This detachment was essentially achieved through the application of transnational rules, sometimes referred to using the broad term of *lex mercatoria*,²⁹ other times referred to as “trade usages”.³⁰ The peculiarity of these rules consists in the fact that they do not belong to a single jurisdiction but rather result from an extrapolation of the norms contained in different legal systems and restated in authoritative commentaries or decisions. This view thus asserts the transnational nature of international arbitration, in light of the application of such transnational rules. As Emmanuel Gaillard explains:

[T]he representation according to which international arbitration is structured as a regime possessing all the attributes of a true legal order is reflected in the arbitrators’ use of the transnational rules method.³¹

²⁹ The roots go back to the debate that originated in the work of Bertold Goldman (“Frontières du droit et ‘lex mercatoria’” [1964] 9 Archives de philosophie du droit 177) and the critique of Clive Schmitthoff (*The Sources of the Law of International Trade* (London, UK: Stevens & Sons, 1964) at 3). The debate later continued with the works of Ole Lando (“The Lex Mercatoria in International Commercial Arbitration” (1985) 34:4 ICLQ 747 at 748), Thomas Carbonneau (“The Remaking of Arbitration: Design and Destiny” in Thomas Carbonneau, ed, *Lex Mercatoria and Arbitration* (New York: Transnational Juris Publishing, 1990) 1), and F.A. Mann (“Lex Facit Arbitrum” in Pieter Sanders, ed, *Arbitration: Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967) 157).

³⁰ Clive M Schmitthoff, “International Trade Usages”, *Institute of International Business Law And Practice Newsletter*, Special Issue, ICC Publ.440,4 (1987); Eric Loquin, *La réalité des usages du commerce international* (Paris: RIDéco, 1989) at 136; Roy Goode, “Usage and Its Reception in Transnational Commercial Law” (1997) 46:1 ICLQ 1 at 7.

³¹ Gaillard, *supra* note 24 at 53.

In this context, the agreement of the parties is interpreted as the exclusive basis for international arbitration, and its validity is to be determined solely by reference to “rules that are generally endorsed at a given time by the international community.”³² The principle of party autonomy is thus paramount.

3. METHODOLOGY AND STRUCTURE OF THE THESIS

The orthodox views described in the previous parts may be criticized in several ways.

On the one hand, the international approach relies heavily on a state-centric notion of the legal system. Therefore, the use of the concept of international public policy entails a limitation of the normative role of actors other than state courts (the arbitral tribunals *in primis*), which are ultimately perceived as holding delegated powers emanating from the state. Legal pluralist research has shown that normativity and enforcement power are not confined to the macro legal dimension of the state.³³ In this respect, the transnational approach acknowledges the normative value of international arbitration, but it perceives this system as a replica—albeit autonomous—of a centralized legal system: the only difference concerns the *cives*, the actors that are operating in this community. Consequently, transnationalism still envisages a reified conception of law as an “external object”³⁴ of knowledge. In this context, the agreement to arbitrate—in the absence of an express choice of governing law by the parties—is exclusively subject to the substantive rules of international arbitration (identified through the transnational rule method).³⁵

³² *Ibid* at 37.

³³ Michael Reisman, *Law in Brief Encounters* (New Haven: Yale University Press, 1999); Daniel Jutras, “The Legal Dimension of Everyday Life” (2001) 16:1 CJLS 45.

³⁴ Martha-Marie Kleinhans & Roderick A Macdonald, “What is Critical Legal Pluralism?” (1997) 12:2 CJLS 25 at 37.

³⁵ Gaillard, *supra* note 24 at 53.

Nonetheless, some authors consider this point problematic, as it leads to the paradox of a self-validating agreement (i.e. an agreement setting out the conditions required for its validity).³⁶

In order to overcome the limits of the existing views, the thesis will focus on the normative power of the legal actors involved in the field of international arbitration. This novel approach thus considers the interactions between international arbitration and state courts as a normative site, essentially sharing “architectural continuities”.³⁷ In this scenario, the legal actors are not considered separately (with the state on one side and arbitrators on the other) but rather jointly. This interpretation further suggests a logic of “dialogue”,³⁸ since the production of norms becomes a matter of discourses between global actors (namely, the arbitral tribunals and state courts). The normative system is thus understood as a “multiplicity of diverse communicative processes in a given social field” that observe social actions in a normative light.³⁹

If we take this theoretical background and transpose it, applying it to the topic of the validity of the arbitration agreement, what results is that these very rules are not (only) substantive—addressing the validity of the arbitration agreement—but also and perhaps most importantly, concerned with the coexistence of two fora, namely state courts and arbitral tribunals.

From a methodological standpoint, Chapter II will first address the state courts’ perspective on the enforcement of arbitration agreements. The inquiry will be based on a comparative analysis of the case law⁴⁰ that has developed regarding the relevant provisions of the 1958 *New York*

³⁶ Ralf Michaels, “The True Lex Mercatoria: Law Beyond the State” (2007) 14:2 *Ind J Global Legal Stud* 447 at 450. *Contra* Gunther Teubner, “Global Bukowina: Legal Pluralism in the World Society” in Gunther Teubner, ed, *Global Law Without a State* (Dartmouth: Brookfield, 1997) at 14 [Teubner, “Global Bukowina”].

³⁷ Jutras, *supra* note 33 at 63.

³⁸ For a recent contribution, see Chris Thornhill, “National Sovereignty and the Constitution of Transnational Law: A Sociological Approach to a Classical Antinomy” (2012) 3:4 *TLT* 394.

³⁹ Teubner, “Global Bukowina”, *supra* note 36 at 13.

⁴⁰ I refer here to the decisions reported in the *Yearbook of Commercial Arbitration*, the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, the *UNCITRAL Case Law on UNCITRAL Texts (CLOUT)*, and the *McGill Model Arbitration Law Database (MALDB)*.

Convention and the 1985 UNCITRAL *Model Law* (as amended in 2006).⁴¹ The first part of the chapter will focus on the review of the arbitration agreement in the pre-award phase, whereas the second part will deal with its review in the post-award phase (either during enforcement or the annulment proceedings). The third part will address some specific aspects of the interpretation of the arbitration agreement by state courts and issues of arbitrability.

Consequently, Chapter III will deal with the arbitrators' perspective. The analysis will be focused on article 16(3) of the *Model Law* (and the national provisions implementing it). This provision addresses the appeal of the arbitrator's decision to uphold the arbitral jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. This *modus operandi* will be supported by a doctrinal methodology, developed through a critical assessment of the views expressed by prominent arbitration scholars. Moreover, arbitral awards will be considered in order to highlight the different doctrines applied by arbitrators in order to cope with the absence of an explicit choice by the parties regarding the governing law of the agreement.

Finally, Chapter IV will investigate the findings resulting from the precedent chapters in light of the theoretical tools set out by critical legal pluralist scholarship. In particular, I will suggest that state courts and arbitral tribunals have developed autonomous rules governing the coexistence of these two fora. Such rules are to be found operating, *inter alia*, in the co-operation over the management of disputes concerning the enforcement of arbitration agreements. Accordingly, the rules applicable to the validity of the arbitration agreement are not exclusively substantive rules

⁴¹ *Supra* note 25.

focused on this particular legal issue, but also “rules of conduct”⁴² governing the interactions between state courts and arbitral tribunals.

⁴² I use this expression in order to emphasize the fact that these rules are basic norms regulating a behaviour. Chapter IV will further discuss such rules in details.

II. STATE COURTS AS GUARDIANS OF THE ARBITRATION PROCESS

1. REVIEWING THE VALIDITY OF THE ARBITRATION AGREEMENT IN THE PRE-AWARD PHASE

(a) Introduction

This chapter will deal with the different standards of review that are adopted by state courts in determining the validity of an arbitration clause. These standards are related to one essential point: the coexistence of two different fora, namely the arbitral forum and the national one. In fact, as explained in Chapter I, if on the one hand, the power of the arbitrators lies in the existence of an arbitration agreement, the invalidity of the agreement would undermine the whole arbitration process (including the power of the arbitrators to determine the validity of such an agreement). On the other hand, blocking access to the arbitration proceedings—the forum chosen contractually by the parties—whenever one of the parties decides to challenge the arbitration agreement would contradict the principle of party autonomy. This circular dilemma is avoided by relying on the principle of competence-competence (frequently seen in its German form, “kompetenz-kompetenz”)⁴³ that is usually contained in modern arbitration acts.⁴⁴ According to such a principle, arbitrators have the power to rule on challenges to the validity and existence of the arbitration agreement.⁴⁵

⁴³ Gary Born, *International Arbitration: Law and Practice* (The Hague: Kluwer International Law, 2012) at 51.

⁴⁴ This will be the case for every piece of legislation based on the UNCITRAL *Model Law*, which provides at article 16(1) that “the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.” For a landmark application of this principle in England, see: *Fiona Trust & Holding Corp v Privalov*, [2007] 1 All ER (Comm) 891 (CA), *aff’d*, [2007] UKHL 40 HL (Eng) [*Fiona Trust*].

⁴⁵ Lew et al, *supra* note 23 at 332. The only precluded area to the arbitrators, concerns the determination of their own fees: “[Switzerland] *A. SA, B. SA and others v. L., M. LLC*, Bundesgericht, I. Zivilrechtliche Abteilung, 4A_399/2010; 4A_391/2010, 10 November 2010” in Matthias Scherer, ed, *ASA Bulletin*, 29:9 (2011) 110.

Despite this apparently clear principle, national courts will still accept applications from parties challenging the arbitration agreement.⁴⁶ This will typically happen in two distinct situations: in cases of stay of proceedings (also known as motions to compel arbitration) and in proceedings for the enforcement of an award (or analogously, in cases of the annulment of the award). In the former case, a party is challenging the validity of an arbitration agreement in front of a national court (either before or during arbitration) in order to resolve the dispute without the arbitrators' intervention. In the latter case, the plaintiff is enforcing an arbitral award rendered in his favour, and the defendant is challenging it on the basis of one or more grounds available under the *New York Convention* (or alternatively, when a party is requesting that the court of the place of arbitration set aside the award). Part II.1 will focus on challenges to the arbitration agreement in the pre-arbitration phase, while Part II.2 will deal with the post-arbitration phase (i.e., regarding the enforcement of the award or its annulment). These two phases of review shall thus be examined separately, as they differ with respect to the question of the degree of intervention by courts—that is, in which situations the courts will “invade” the jurisdiction of the arbitral tribunals.

The following parts (II.1(b)) will provide a description of the applicable legal framework and an analysis of the standards in the pre-award phase (II.1(c)).

(b) The Legal Framework

The present section aims to sketch the legal framework in which the analysis described in the introduction will take place. In doing so, two legal instruments will be taken into account: the

⁴⁶ Art 1448 (1) *Code de procédure civile* (France) (as modified by article 2 of the *Decree No 2011-48* (13 January 2011)): “Lorsqu’un litige relevant d’une convention d’arbitrage est porté devant une juridiction de l’État, celle-ci se déclare incompétente sauf si le tribunal arbitral n’est pas encore saisi et si la convention d’arbitrage est manifestement nulle ou manifestement inapplicable.” According to article 1506, this provision also applies to international arbitration cases.

1958 *New York Convention*,⁴⁷ and the 1985 UNCITRAL *Model Law* (as amended in 2006).⁴⁸

The former is an international convention dealing with the recognition and enforcement of arbitral awards, and also applies to matters related to the enforcement of the arbitration agreement (article II). The latter is a soft law instrument drafted by the United Nations Commission on International Trade Law and is intended to harmonize the divergence between state laws by providing a clear and intelligible example of an arbitration act.⁴⁹

Both instruments recognize that the arbitration agreement creates an exclusive forum for the resolution of the disputes covered by its scope. Through such an agreement, the parties agree to refer their disputes to the arbitrators, who become vested with a jurisdictional power to resolve such disputes, including challenges to the validity of the arbitration agreement.⁵⁰ To protect the exclusivity of the forum, and to ensure that the parties will honour the agreement, national arbitration acts (as well as the *New York Convention*) prohibit the intervention of state courts in disputes covered by the said agreement.⁵¹ The aforementioned exclusivity is recognized and enacted in the *New York Convention* (article II(3)), which states:

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

The same principle is to be found in article 8(1) of the *Model Law*:

⁴⁷ For a commentary, see Albert J van den Berg, ed, *50 Years of the New York Convention* (The Hague: Wolters Kluwer, 2009).

⁴⁸ *Supra* note 25.

⁴⁹ UN General Assembly Resolution 40/72 (11 December 1985).

⁵⁰ These are known as the “positive effects” of the arbitration agreement. See Gaillard & Savage, *supra* note 20 at 381.

⁵¹ These are referred to as the “negative effects”. See Gaillard & Savage, *supra* note 20 at 402.

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

There are some corollaries to this general rule. First, the courts cannot declare *ex officio* their lack of jurisdiction as a result of the existence of the arbitration agreement. Second, referral to arbitration is precluded—thus allowing the intervention of the courts—if the agreement to arbitrate is null and void, or incapable of being performed.

Let us proceed in order. Before discussing the exceptions to the principle of the exclusivity of the arbitral forum, the issue of the applicability of each one of the aforementioned provisions should be first addressed.

i. *The Scope of Application of Article II(3) of the New York Convention and Article 8(1) of the Model Law*

First off, it has to be noted that both legal texts have specific provisions related to their respective scopes of application. According to article I(1), the *New York Convention* applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement is sought, as well as to arbitral awards not considered as domestic by the forum state. However, the norm is silent on its scope of application with respect to the enforcement of arbitration agreements, since it makes exclusive reference to the enforcement of the arbitral award. Therefore, the question remains regarding what the grounds

should be for applying the *New York Convention* to the enforcement of arbitration agreements, as opposed to awards.

The answer is quite unanimous: the requirements contained in article I(1) should be applied by analogy.⁵² Accordingly, where the place of the arbitration is in a state other than the forum, or where the forum will consider the award to be international, article II (as well as the national provisions implementing it) will apply to arbitration agreement.⁵³ The same can be said if the nationality of the future award is indeterminable, yet it shows the kind of international elements that will likely make it fall under the scope of the *New York Convention*.⁵⁴ Conversely, if the place of arbitration and the forum coincide, article II will not find application; the enforcement of the arbitration agreement will therefore be submitted exclusively to the national arbitration act of the forum (i.e., the national equivalent of the *Model Law*).⁵⁵

A peculiar position has been adopted by US courts, which have developed a specific test to identify whether the award will be international or not and therefore whether the arbitration agreement will be enforced under article II of the *New York Convention*. The criteria used in this test (which assumes the existence of a valid arbitration agreement) are that the agreement must provide for arbitration in the territory of a contracting state, and that “a party to the agreement is not an American citizen, or the commercial relationship has some reasonable relation with one or

⁵² Dorothee Schramm, Elliot Geisinger & Philippe Pinsolle, “Article II” in Herbert Kronke et al, eds, *Recognition and Enforcement of Foreign Arbitral Awards* (The Hague: Kluwer Law International, 2010) 37 at 41. This argument is frequently based on the drafting history of the convention: Reinmar Wolff, “Article II” in Reinmar Wolff, ed, *New York Convention: Commentary* (Oxford: Hart, 2012) 100; Jean-Francois Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (London, UK: Sweet and Maxwell, 2007) at para 489.

⁵³ It is open to the parties to agree to the direct application of the *New York Convention* or of a national law giving force to the convention: Singapore No 8, *Car & Cars Pte Ltd (Singapore) v Volkswagen AG (Germany)* (2009), 34 YB Comm Arb 783 (High Court).

⁵⁴ See also Albert J Van den Berg, “Field of Application” (2003) 28 YB Comm Arb 605 at paras 214-16. Among the very few cases, see Germany, BGH, NJW-RR 2011, 548, 549 para 25 (unpublished); Italy No 112, *Paolo Donati v Lupalu (HK) Ltd* (1992), 17 YB Comm Arb 539 (Tribunale [Court of First Instance], Milan).

⁵⁵ See e.g. *Loi fédérale Suisse sur le droit international privé (LDIP) du 18 décembre 1987* art 176(1).

more foreign states.”⁵⁶ Therefore, national laws have filled the lacunae in the *New York Convention* by addressing the enforcement of arbitration agreements with specific provisions.⁵⁷

A second issue relating to applicability touches upon the procedural and substantive conditions, set forth by article II(3) of the *New York Convention* and article 8(1) of the *Model Law*, under which a court shall refer the parties to arbitration.

ii. The Procedural Conditions

According to both provisions, referral to arbitration is a measure that may be taken only on the basis of an explicit request—that is, when one of the parties raises an objection as to the jurisdiction of the state court.⁵⁸ Consistently, courts are deprived of an *ex officio* power to decline jurisdiction. This consequence seems to be an efficient one, for if both parties do not wish to proceed to arbitration, they can merely refrain from raising an objection to the jurisdiction of the state court; this will amount to a new (implied) agreement, which should thus not be disturbed by an order forcing them to resort to arbitration.

⁵⁶ US No 766, *Potenciano L Aggarao, Jr v MOL Ship Management Company, Ltd* (2012), 37 YB Comm Arb 381 at para 4 (4th Cir). The present test is a refined version of the one applied by the Court of Appeals for the First Circuit in its 1982 decision in US No 50, *Sylvian Ledee v Ceramiche Ragno* (1983), 9 YB Comm Arb 471.

⁵⁷ See e.g. *Arbitration Act 1996* (UK), c 23, s 9(1): “A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.” Section 9(4) further states that: “On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.”

⁵⁸ *Kolinker Industrial Equipment Ltd v Longhill Industries Ltd*, [2004] HKDC 65, online: HKLII <<http://www.hklaii.hk/eng/hk/cases/hkdc/2004/65.html>>; CLOUT Case No 508, *United Laboratories, Inc v Abraham*, [2002] CanLII 17847 (Ont Sup Ct), online: CanLII <<http://canlii.ca/t/1cl2h>>.

As it has been held in several cases, the court should not be concerned with the procedural form of such request, but rather with the manifestation of an unequivocal objection.⁵⁹ From the perspective of article II(3), it is thus immaterial whether the objection has been raised during an oral or written pleading. At the same time, it is inevitable that national legislators will step in, in order to provide some procedural constraints as to the time and manner of such an objection by introducing a specific provision in their own arbitration acts. This is also suggested by the *Model Law*. Article 8(1) makes clear that the defendant bound by an arbitration agreement with the plaintiff is required to raise a challenge to the court's jurisdiction "not later than when submitting his first statement on the substance of the dispute." Until such a challenge, a party retains the power to request that the court refer the parties to arbitration, unless the party has promised or assured that it would not apply for a stay of proceedings.⁶⁰

It is worth noting that, in practical terms, the defendant is the only party entitled to request a referral to arbitration. This is usually explained by relying on the time bar mentioned in article 8(1) of the *Model Law*. The plaintiff, by filing its statement of claim, will likely lose the right to raise a jurisdictional objection, unless the introductory document for commencing proceedings is not a statement "on the substance of the dispute."⁶¹ However, rather than overemphasizing the procedural aspect of the timeliness of the objection, the filing of the claim by the plaintiff should

⁵⁹ *UMS Generali Marine SpA v Clerici Agenti Srl* (2002) 30 YB Comm Arb 599 at 602 (Corte di Cassazione [Supreme Court of Italy]).

⁶⁰ Canada No 27, *Michelle Seidel v TELUS Communications Inc (Canada)* (2009), 34 YB Comm Arb 449 at para 61 (BCCA): "In the case at bar, there is no evidence that TELUS made a promise or assurance that it would not apply for a stay of proceedings on the basis of the arbitration clause. Ms. Seidel points to the fact that the list of defences provided by TELUS did not make mention of the arbitration clause. However, the provision of the list of defences did not constitute a promise or assurance that TELUS would never apply for a stay of proceedings. The list of defences cannot be construed in the circumstances to have been intended to be an exhaustive list. TELUS was entitled to supplement the list of defences in the same fashion as defendants normally have the ability to amend statements of defence."

⁶¹ *Chok Yick Interior Design & Engineering Co Ltd v Fortune World Enterprises Ltd*, [2010] HKCFI 84, online: HKLII <<http://hklii.hk/eng/hk/cases/hkcfi/2010/84.html>>.

be interpreted per se as an unequivocal waiver of the willingness to resort to arbitration, thereby precluding any subsequent change of mind.

With respect to evidentiary matters, it is clear that the party relying on the arbitration agreement bears the burden of proving its existence, as well as the fact that the dispute falls within the scope of such agreement.⁶² If these requirements are met, the burden shall then shift to the opposing party, who may consequently prove that the arbitration agreement is null and void, inoperative, or incapable of being performed.⁶³ In this respect, a great deal of litigation arises regarding when the dispute should be deemed to fall within the scope of the arbitration agreement. The answer, quite obviously, depends on the standard of interpretation that the court wishes to adopt. It is thus a matter of degree, which may entail a more or less restrictive spectrum.

The main argument in favour of a restrictive interpretation is that, given the importance of the right from which the parties have derogated (namely, the access to public justice), in case of doubt, the dispute should be considered to fall outside the scope of the arbitration agreement.⁶⁴ The majority of the jurisprudence has, however, adopted a different rationale. As Gary Born puts it: “[R]easonable business people contemplate that arbitration will provide a single, centralized mechanism for resolving their disputes when they enter into an international arbitration agreement, that this approach serves public interests in fairness and efficiency, as well as private

⁶² Schramm et al, *supra* note 53 at 102.

⁶³ *Turnoff US MJ in Lobo v Celebrity Cruises* (2006), 33 YB Comm Arb 820 at 831 (D Fla).

⁶⁴ Italy No 179, *Louis Dreyfus Commodities v Cereal Mangimi srl (Italy)* (2009), 34 YB Comm Arb 649 at para 2 (Corte di Cassazione [Supreme Court of Italy]) [*Louis Dreyfus*]. In the United States: *Daimler Chrysler Corp v Franklin*, 814 NE 2d 281 (Ind Ct App 2004).

ones, and that the law should therefore presume in favor of arbitrability.”⁶⁵ It thus follows that the agreements to arbitrate should be interpreted broadly.⁶⁶

In order to avoid dilatory tactics, article 8(2) of the *Model Law* (unlike the *New York Convention*) expressly allows parallel proceedings: “Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”

It is worth reflecting on the fate of the award issued in a dispute found by a state court not to be covered by the arbitration agreement. Here, the plaintiff—who (with the benefit of hindsight) rightly commenced proceedings in front of the state court—finds himself at a crossroads. If the award was rendered in his favour, nothing prevents him from enforcing it against the defendant, who—in turn—will be unable to challenge the award on the basis of article V(1)(c) of the *New York Convention* (i.e., when the award deals with a difference not contemplated or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration). The defendant is unable to do so because his challenge in a state court would contradict his previous conduct—namely, in the context of the national proceedings, to have referred the dispute to arbitration. This would violate the principle of *venire contra factum proprium*, which is accepted as a general principle of international law that also underlies the *New York Convention*.⁶⁷

A final aspect that should be addressed concerns the ability of courts to impose conditions on orders referring parties to arbitration.

⁶⁵ Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009) at 1067.

⁶⁶ *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985); Tribunal Fédéral [TF] [Swiss Federal Supreme Court] 19 May 2003, 22 ASA Bull 344, 348; Oberlandesgericht Munich [OLG München] 25 September 2006, 906; *Fiona Trust*, *supra* note 45; *Dalimpex Ltd v Janicki*, [2000] OJ No 2927 (Ont Sup Ct).

⁶⁷ Christinan Borris & Rudolf Hennecke, “Article V” in Wolff, *New York Convention: Commentary*, *supra* note 52, 239 at 255; Patricia Nacimiento, “Article V(1)(a)” in Kronke et al, *supra* note 53, 205 at 212.

National arbitration acts usually negate the power to impose conditions on the parties, and scholars support this choice.⁶⁸ Notably, the most relevant exceptions are to be found in Singapore⁶⁹ and Australia.⁷⁰ In both jurisdictions, the court seized of an application for the enforcement of an arbitration agreement may order the parties to arbitrate their dispute “upon such terms and conditions it may think fit.”⁷¹ Given the peculiarity of such an approach, and the implications arising therefrom, some words should be spent on a leading case in Singapore.⁷²

In *P.T. Tri—M.G. Intra Asia Airlines v. Norse Air Charter Limited*, the High Court of Singapore held that the discretion of the court to impose terms and conditions on arbitration is an unrestrained one, which should thus be exercised cautiously. This means that the courts should intervene whenever the pursuit of justice in the case at hand calls for it. In this case, the respondent failed to institute arbitral proceedings because the *bill of lading* containing the arbitration clause did not identify the relevant charterparty. The defendant invoked the limitation period contained in the arbitration clause, which constituted, in its view, a bar to the commencement of arbitration. Despite the proof of the existence of such limitation period, the court held:

⁶⁸ David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (London, UK: Sweet & Maxwell, 2005) at para 11.02; Stephan Wilske & Todd J Fox, “Article II(3)” in Wolff, *New York Convention: Commentary*, *supra* note 52, 152 at 191.

⁶⁹ *Arbitration Act* (Cap 143A, Sing), art 6(2) (as amended on 31 December 2002): “The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.”

⁷⁰ *Arbitration Act 1974* (Cth) (as amended by *Act No 5 of 2011*): “On the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.”

⁷¹ Singapore No 7, *PT Tri-M.G. Intra Asia Airlines (Indonesia) v Norse Air Charter Limited (Mauritius)* (2009), 34 YB Comm Arb 758 (Sing HC).

⁷² Singapore No 6, (2008) 34 YB Comm Arb 750 (Sing HC).

It would be wrong for the respondents to be subject to the defence of time bar in light of the uncertainty and confusion surrounding the identity of the charterparty referred to in the Bill of Lading. It would be unreasonable to expect the respondents to comply with an arbitration agreement found in a charterparty, the identity of which the appellants themselves were not certain of. In *The XANADU*, the presence of ambiguity *vis-à-vis* the arbitration agreement was one of the reasons expressed by Lai J as to why he would have imposed the condition of a waiver of the defence of time bar on the defendants. I would go further and say that it is a compelling reason when the ambiguity is egregious, as it was in the present case.

Based on the foregoing, I felt that the justice of this case demanded the imposition of the condition that the appellants waive the defence of time bar in the English arbitration proceedings. Counsel for the appellants submitted that there was room for the respondents to seek an extension of time for the commencement of arbitration via the arbitral process and Sect. 12 of the Arbitration Act 1996 (UK). However, in my view, justice had to be done (or ensured) in substance with the imposition of the condition that the appellants waive the defence of time bar.⁷³

In this case, it seems that an important weight was placed on the conduct of the defendant. Such conduct was ultimately considered as a lack of bona fides, aiming to avoid any kind of adjudication. In coming to this conclusion, the court considered in particular the number of unmeritorious applications filed by the defendant during the course of the proceedings.⁷⁴

⁷³ *Ibid* at paras 13-14.

⁷⁴ *Ibid* at para 16.

In conclusion, the principle of exclusivity of the arbitral forum has proven to be a highly controversial one. National courts, in fact, when seized of a matter covered by an arbitration agreement, will be compelled to refer the parties to arbitration unless the said agreement is null and void, inoperative, or incapable of being performed. Nevertheless, much of a quarrel exists regarding the standards applicable to the review of an arbitration clause, and the applicable law on which the court should base its decision.

(c) The Different Standards of Review in the Pre-award Phase

With respect to the applicable standards of review, a well-regarded scholar has contended that the issue is actually one of timing.⁷⁵ Arbitrators should have priority in the determination of their own jurisdiction, whereas national courts should have the final word later on, at the phase of enforcement of the arbitral award (or, alternatively, of the annulment).⁷⁶ Consistently, in the pre—award phase, the court should limit the scope of review of the arbitration agreement to cases of manifest invalidity:

[T]he Courts, when making a *prima facie* determination that there exists an arbitration agreement and that it is valid, leave it to the arbitrators to rule on the question and recover their power of full scrutiny at the end of the arbitral process, after the award is rendered by the arbitral tribunal.⁷⁷

This limited test (also known as the *prima facie* test) has been a long-standing rule endorsed by French courts: the Cour de Cassation is clear in stating that, unless proof is given of the manifest

⁷⁵ Emmanuel Gaillard & Yas Banifatemi, “Negative Effects of Competence-Competence: The Rule of Priority in Favour of the Arbitrators” in Emmanuel Gaillard & Domenico di Pietro, eds, *Enforcement of Arbitration Agreements and International Arbitral Awards* (London, UK: Cameron May, 2008) 257 at 258.

⁷⁶ For a discussion on article 8 of the *Model Law*, see Frédéric Bachand, “Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal’s Jurisdiction?” (2006) 22:3 Arb Int’l 259.

⁷⁷ *Ibid* at 261.

nullity or inapplicability of the arbitration clause, the parties shall be referred to arbitration.⁷⁸ The justification lies in the so-called “negative effect” of the arbitration agreement (i.e., the exclusion of the jurisdiction of states courts over the matters covered by the arbitration agreement).⁷⁹ Therefore, courts are prevented from deciding on the existence, validity, and scope of the arbitration clause before the arbitral tribunal has rendered a decision on the matter, unless the agreement is null or manifestly inapplicable.⁸⁰ Furthermore, such course of action is in line with a substantive rule of French law on international arbitration, which confirms the rule of priority in favour of the arbitrators, and the validity of the arbitration agreement, independent of any reference to a national law.⁸¹

In England, under the traditional position, a full review of jurisdictional questions has been preferred.⁸² However, recent decisions give the impression that the *prima facie* test is gaining momentum.⁸³

⁷⁸ France No 52, *Elham X v Mohammad Ben Laden* (2011), 37 YB Comm Arb 212 (Cour de Cassation [Supreme Court of France], First Civil Chamber)).

⁷⁹ France No 43, *HGL sas (France) v Spanghero SA (France); Horizon Meats New Zealand Ltd (New Zealand) v Blue Sky Marketing Ltd (New Zealand)* (2008), 33 YB Comm Arb 478 (Cour de Cassation [Supreme Court], First Civil Chamber) [*HGL*]. A recognition of this principle is usually also found in institutional arbitration rules. As expressed in article 23 of UNCITRAL *Arbitration Rules* (online: UNCITRAL <<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>>): “The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objection with reference to the existence or validity of the arbitration clause or of the separate arbitration agreement.”

⁸⁰ France No. 40, *Groupama Transport (France) v MS Regine Hans und Klaus Heinrich KG (Germany)* (2006), 32 YB Comm Arb 294 at para 2 (Cour de Cassation [Supreme Court], First Civil Chamber).

⁸¹ France No. 39, *Copropriété Maritime Jules Verne (France) v American Bureau of Shipping (US)* (2006), 32 YB Comm Arb 290 at para 2 (Cour de Cassation [Supreme Court], First Civil Chamber).

⁸² Gary Born, *International Commercial Arbitration*, (The Hague: Kluwer Law International, 2014) 1085; Amokura Kawharu, “Arbitral Jurisdiction” (2008) 23:2 NZUL Rev 247. See, e.g., *Law Debenture Trust Corp Plc v Elektrim Finance BV* [2005] EWCH 1412.

⁸³ The principle is enshrined in the *Fiona Trust* decision: *Fiona Trust & Holding Corp v Privalov*, [2007] 4 All ER 951. For a commentary, see Louis Flannery, “The English Statutory Framework” in Julian DM Lew, Harris Bor, et al, eds, *Arbitration in England, with chapters on Scotland and Ireland* (The Hague: Kluwer Law International, 2013) at 210.

English law takes the view that the arbitral Tribunal can rule upon its own jurisdiction, and this power is often referred to as the principle of ‘*kompetenz-kompetenz*’. When there is an application for a stay under the Arbitration Act 1996, the court will generally grant a stay to enable the Tribunal to make such a ruling (which is what the District Judge understood to be the effect of her order in this case).⁸⁴

In a similar fashion, Indian courts will refrain from intervening during the course of the arbitration, thereby waiting for the final award (or the partial award dealing with the objections to the validity of the arbitration agreement).⁸⁵ The same is true for the courts of Singapore.⁸⁶

Conversely, parallel proceedings are allowed in Sweden. In such a case, the arbitrators’ assessment does not prevent a state court from examining—at the request of a party—whether the arbitrators have jurisdiction.⁸⁷ In this scenario, the court’s judgment will settle, in a final way, the issue relating to the validity of the agreement to arbitrate, and such a decision will bind the arbitrators as well. It goes without saying that, in this case, the court will adopt a standard of full review of the arbitration agreement. When the state court opts for a full review, the validity of the arbitration agreement—in the absence of an explicit derogation by the parties—will likely be assessed with respect to the substantive law of the seat of arbitration.⁸⁸ This role for state law was severely criticized by Gary Born, who argued that the validity of the agreement should be

⁸⁴ UK No 88, *Accentuate Limited (UK) v Asigra Inc (Canada)* (2009), 35 YB Comm Arb 460 at paras 11-13 (QBD).

⁸⁵ *Shin-Etsu Chemical Co Ltd v M/S. Aksh Optifibre Ltd*, 12 August 2005, online: <<http://www.indiankanoon.org/doc/847271/>> (Supreme Court of India).

⁸⁶ *The Titan Unity*, [2013] SGHCR 28.

⁸⁷ Sweden No 8, *RosInvestCo UK Ltd v The Russian Federation, Högsta Domstolen* (2010), 36 YB Comm Arb 334.

⁸⁸ *X Holding*, *supra* note 12 at para 7; Piero Bernardini, “Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause” in Albert van den Berg, ed, *Improving Efficiency of Arbitration Agreements and Awards: 40 Years of the Application of the New York Convention* (ICCA Congress Series No 9) (The Hague: Kluwer Law International, 1999) 197 at 199.

determined in accordance with the requirements set out in article V(1)(a) of the *New York Convention*—namely, the substantive law of the place of arbitration.⁸⁹

Other jurisdictions have taken a nuanced position. On the one hand, Hong Kong courts alternate between the *prima facie* approach and a standard of full review, preferring the second one whenever matters of arbitrability are at issue.⁹⁰ On the other hand, since *Dell Computer Corp. v. Union des Consommateurs*, Canadian courts give priority to the arbitrators when dealing with a challenge to arbitral jurisdiction, unless the jurisdictional challenge is based on a question of law, or a question of mixed fact and law where the factual questions at issue require only superficial consideration of the evidence.⁹¹ Moreover, in *Michelle Seidel v. TELUS Communications Inc.*, the Supreme Court of Canada explicitly held that the test set out in *Dell* is not confined to the province of Quebec.⁹²

Swiss courts also take a peculiar position on the standard of review. An exception is in fact made where the seat of the arbitration is different from (or not determinable by) the Swiss one seized in the referral proceedings. In this case, a standard of full review is preferred to the *prima facie* one.⁹³

This brief comparative overview has shown that the *prima facie* test is not—in the pre-award phase—predominant. The strongest argument in support of such a limited review relates to the

⁸⁹ Born, *International Commercial Arbitration*, *supra* note 65 at 462.

⁹⁰ In favor of the *prima facie* test, see *Fai Tak Engineering Co Ltd v Sui Chong Construction & Engineering Co Ltd*, [2009] HKDC 141, online: HKLII <<http://www.hkii.hk/eng/hk/cases/hkdc/2009/141.html>> [*Fai Tak*]. *Contra Paquito Lima Buton v Rainbow Joy Shipping Ltd Inc*, [2008] HKCFA 30, online: HKLII <<http://www.hkii.hk/eng/hk/cases/hkcfa/2008/30.html>>.

⁹¹ *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34, 2007(3) Rev Arb, 593 (Annotation A Prujiner).

⁹² *Michelle Seidel v. TELUS Communications Inc.*, [2011] 1 SCR 531. Furthermore, it should be noted that according to the Ontario Court of Appeal, appeals from decisions that stay litigation proceedings in favour of arbitration are precluded, pursuant to the competence-competence principle: *Henri C. Alvarez, Ontario Medical Association v. Willis Canada Inc and Aviva Canada Inc*, [2013] ONCA 745.

⁹³ *X Holding*, *supra* note 12 at para 5: “Since it was argued that there was an agreement to arbitrate before an arbitral tribunal outside Switzerland, the court below appropriately reviewed the validity of the arbitration clause in full [mit voller Kognition].”

negative effects arising out of the competence-competence principle, according to which the arbitral tribunal is the competent forum for challenges to its own jurisdiction (which also include challenges to the validity of the agreement to arbitrate). The parties, by entering into an arbitration agreement, have conferred the jurisdiction over the disputes covered by its scope to the arbitral tribunal. Allowing state courts to perform a full review would frustrate the very purpose of such an agreement.

Another argument in favour of the prima facie test is that courts should not encourage ill-founded applications made by parties wanting to delay arbitration proceedings. This would inevitably occur in cases of full review, which necessarily brings about a great deal of litigation (written and oral pleadings, witnesses, experts, etc.), permitting the party seeking to create a delay to consume the opposing party's financial resources.

There is, however, a powerful argument against the prima facie test; that is, it risks permitting a temporary miscarriage of justice. An erroneous decision by a state court declaring the arbitration agreement valid would necessarily result in the party contesting the agreement being deprived of its right of access to state courts should such an agreement be found invalid in the later phase of enforcement or annulment. To this argument, one can reply that the decision of the *falsus* arbitrator would not be final, as the party invoking the invalidity of the agreement could challenge it in front of the state court (e.g., during the annulment phase per article 34(2)(a)(i) of the *Model Law*). It remains, however, that this party has been obliged to invest time and money without being able to have its case tried, to begin with, in the competent forum.

The choice between the two opposing standards thereby entails a policy choice. However, national legislators have cautiously avoided taking a clear stand in this respect, letting the courts deal with this delicate issue.⁹⁴

But there is more to consider: what are the effects of the interactions between the arbitral and national forum vis-à-vis the governing law of the arbitration agreement? The prima facie approach is *ictu oculi* incompatible with a review concerned with the substantive law applicable to the arbitration agreement. French courts have implicitly upheld this argument, by limiting their review to cases of invalidity “qui crèvent les yeux”. As Yves Stickler puts it:

Pour pouvoir écarter la clause d'arbitrage aux motifs de sa nullité ou de son inapplicabilité manifeste, le juge n'a pas à entrer dans les détails des éléments de l'espèce. Il n'a pas à démontrer en quoi et pourquoi la clause est inapplicable dans le cas qui lui est soumis, *mais à se prononcer sur une apparence*.⁹⁵

This strict interpretation pushes the principle of competence-competence to its maximum: the arbitration agreement is per se valid, unless it contains a legal monstrosity. This degree of review excludes an inquiry into the validity of the agreement in light of certain detailed substantive rules.

There is, however, a third position that provides a compromise between the prima facie and full review standards, combining efficiency and the rule of law. The court in this case will neither limit the review to blatant and manifest cases of nullity or non-applicability of the arbitration agreement, nor be concerned with the substantive law governing the agreement, but rather will

⁹⁴ See the concerns expressed in Stephen J Ware, “Is Adjudicating a Public Good? Overcrowded Courts and the Private Sector Alternative of Arbitration” (2013) 14:3 Cardozo Journal of Conflict Resolution 899 at 920.

⁹⁵ Yves Strickler, “Arbitres et juges internes” in Yves Strickler & Jean-Baptiste Racine, *L'Arbitrage : Questions Contemporaines* (Paris: L'Harmattan, 2012) 57 at 78 [emphasis added].

consider international principles of contract law and the public policy of the forum state.⁹⁶ The agreement would be thus null and void “only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (2) when it contravenes fundamental policies of the forum state.”⁹⁷

What has been said so far is subject to an exception concerning the formal validity of the arbitration agreement, which will be fully assessed by state courts despite the application of the prima facie test (unless the forum state does not impose a writing requirement for the agreement in question). Formal validity can thus be considered as a substantive rule of the *New York Convention*. The following section will illustrate this topic.

(d) The Question of the Form of the Agreement: Beyond the Prima Facie and Full Review Tests

The form of the arbitration agreement is a question that comes into play both at the pre-award phase and at the phase of enforcement or annulment of the award. Despite the different contexts in which the formal invalidity of the agreement can be invoked, as we shall later explain, the same rules apply invariably.

With respect to the form of the arbitration agreement, it should be noted that there is no unanimous consensus among national arbitration acts and legal scholars: a permanent and unresolved tension seems to exist between the imposition of a written form requirement versus a more flexible one by which either no form requirement is demanded or an external reference in

⁹⁶ *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v Lauro*, 712 F 2d 50 at 53 (3d Cir 1983).

⁹⁷ US No 776, *Technological Application and Production Company (Tecapro), Hcmc-Vietnam v Control Screening LLC* (2012), 37 YB Comm Arb 414 (3d Cir). As a commentator notes, the principle *in favorem validitatis* would mandate the invalidity of the agreement only in presence of one of the two options mentioned by the US court: Fabien Gélinas, “Favor arbitrandum et favor validitatis”, in Fabien Gélinas & Frédéric Bachand, eds, *D’une réforme à une autre: Regards croisés sur l’arbitrage au Québec* (Cowansville, QC: Yvon Blais, 2013) 29, at 40.

the contract to a written arbitration clause is considered sufficient. Different concerns drive these two views, and despite a tendency toward the de-formalization of arbitration agreements, a strong resistance is shown by several countries.

An important reason for imposing a written form requirement may be related to the importance of the consent given in arbitration agreements. In other words, the requirement is aimed at protecting the weaker party to a contract: it proves the awareness of a waiver of access to state justice.⁹⁸ Nevertheless, legitimate concerns related to preventing an excess of formalism stand in support of the freedom-from-form principle. It is a frequent matter—especially in cases related to the sale of movable goods—that the agreement between the parties makes reference to a document containing general terms and conditions that provide *inter alia* for an arbitration clause. It is clear that in such circumstances it would be unwise to nullify the reference made by the parties to such an arbitration clause. A counter-argument, which could be seen as the prevailing reason in favour of a—flexible—writing requirement, is the need to avoid possible abuses related to parties willing to unjustly commence arbitral proceedings with the sole purpose of consuming the financial resources of the opposing parties.

In order to present this topic, significant guidance may be found in international instruments, namely the *New York Convention*,⁹⁹ and in several influential arbitration acts (which will be examined in light of the *UNCITRAL Model Law*).¹⁰⁰ Let us examine them separately.

i. *The 1958 New York Convention*

⁹⁸ Born, *International Commercial Arbitration*, *supra* note 65 at 584.

⁹⁹ *Supra* note 10. The final version is available online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html>. For a commentary see: Gaillard & di Pietro, *supra* note 26.

¹⁰⁰ *Supra* note 25. For a commentary, see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (London, UK: Sweet & Maxwell, 2005). Summaries of judicial decisions concerning the *Model Law* appear on the UNCITRAL website: <http://www.uncitral.org/uncitral/en/case_law.html>.

Despite the fact that the original goal of the *New York Convention* was exclusively aimed at providing an international legal framework for the enforcement of arbitral awards, a late addition during the drafting has introduced a (minimal) definition of valid arbitration agreement to this body of norms.¹⁰¹ The expansion of the scope of this convention has therefore marked the end of the 1923 Geneva protocol on arbitration clauses in commercial matters.¹⁰² For this reason, we should now turn to article II(2):

The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

The *New York Convention*—given its nature as a public international law instrument—sets a minimal general obligation upon the contracting parties, who ultimately retain the power to decline it *in favorem*. This possibility is further confirmed by article VII(1), which states *inter alia* that “the provisions of the present Convention shall not deprive ... any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon” (here, the provision is applied by analogy to the writing requirement). In the past, however, this view has not been uncontroversial. Notably, Albert van den Berg argued that the *New York Convention* is a self-contained regime addressing single cases that deserve protection, and that

¹⁰¹ See New York Conference, 9th Mtg, E/CONF.26/SR.9 (1958) 9-13. For a discussion of the drafting history of this provision, Wolff, “Article II”, *supra* note 52 at 93 ff.

¹⁰² Article VII(2) of the *New York Convention* states that “[t]he Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between the Contracting States on their becoming bound and to the extent that they become bound, by this Convention.”

evading the writing requirement through article VII(1) would defeat the intentions of the drafters of the convention.¹⁰³

Conversely, others have expressed the view according to which the requirement addressing the formal validity of arbitration agreements imposed by the *New York Convention* is a substantive one, which the contracting states cannot modify with more stringent national provisions. In other words, “Article II(2) adopts a *maximum* standard for formal validity ... This standard is properly regarded as a hybrid choice of law and substantive rule of law, applicable only to the form of international arbitration agreements.”¹⁰⁴

This second line of reasoning has also been adopted, thus virtually closing the form requirements debate of the *New York Convention*, by the UNCITRAL’s recommendation of July 7, 2006. The relevant passage of the recommendation is the following:

1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive;

2. *Recommends also* that article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it

¹⁰³ Albert J Van den Berg, “The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas” in *The New York Convention 1958* (ASA Special Series No 9) (Geneva: Swiss Arbitration Association, 1996) 44 [Van den Berg, “The New York Convention”]. *Contra* Toby Landau, “The Requirement of a Written Form for an Arbitration Agreement: When ‘Written’ Means ‘Oral’”, in *International Commercial Arbitration: Important Contemporary Questions* (ICCA Congress Series No 11) (The Hague: Kluwer Law International, 2003) 19.

¹⁰⁴ Born, *International Commercial Arbitration*, *supra* note 65 at 536. See also Judgement of 5 July 1994, *DIETF Ltd v RF AG* (1996), 21 YB. Comm Arb 685 (Basel Court of Appeal). *Contra* Van den Berg, “The New York Convention”, *supra* note 104. In this sense, see Judgement of 21 March 1995 (1997), 22 YB Comm Arb 800 ([Swiss Federal Supreme Court]).

may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration Agreement.¹⁰⁵

For an exhaustive overview, we shall now turn to the most widely used definitions—and their current interpretations—found in various national jurisdictions. We shall do so by adopting, as point of departure, suitable for demonstrating the variety of approaches, the 1985 UNCITRAL *Model Law*.¹⁰⁶

ii. *The 1985 UNCITRAL Model Law and the Inconsistency in National Approaches*

This soft law instrument, which is intended to foster the harmonization of national arbitration acts, contains in article 7 (an isolated case, if we consider the rest of the provisions) two different options concerning arbitration agreements.¹⁰⁷ The first option (article 7 (“Option I”)), specifies that the agreement has to be in writing. This requirement is satisfied whenever the arbitration agreement is recorded in any form, despite the fact that it may have been concluded orally, by conduct, or by other means. Moreover, it can be contained in an electronic communication.¹⁰⁸ According to article 7(5), the arbitration agreement shall also be considered in writing “if it is contained in an exchange of statements of claim and defence in which the existence of an

¹⁰⁵ *Report of the United Nation Commission on International Trade Law*, 39th Sess, Supp No 17, UN Doc A/61/17, annex II, 61 [UNCITRAL 39th Session].

¹⁰⁶ For a commentary see: *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (Vienna: UNCITRAL, 2012).

¹⁰⁷ Option II is an addition resulting from the 2006 amendments made by UNCITRAL. See *UNCITRAL 39th Session*, *supra* note 106.

¹⁰⁸ Option I, article 7(4): “The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; ‘electronic communication’ means any communication that the parties make by means of data messages; ‘data message’ means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.”

agreement is alleged by one party and not denied by the other.” This evidentiary rule thus sets a presumption of law, and combines it with the implicit waiver of the opposing party, who becomes compelled to challenge the arbitration agreement in the statement of defence. Finally, article 7(6) confirms the formal validity of the arbitration agreements “by reference”, namely when the parties refer in a contract to a document containing an arbitration clause, provided that this reference is unequivocal.¹⁰⁹

Conversely, the second option of article 7 (“Option II”) does not set any form requirement and merely defines the content of such an agreement. It aligns therefore with a liberal approach, which has not yet been implemented in many jurisdictions.

As one can see, the two approaches demonstrate significant differences, which may further be traced to national arbitration acts. In line with option I of the *Model Law*, we find the Canadian *Commercial Arbitration Act*¹¹⁰ (section 7), the English *Arbitration Act*¹¹¹ (section 5), and the Italian *Code of Civil Procedure*¹¹² (articles 807 and 808). At the odds with this position, the French *Code of Civil Procedure*¹¹³ negates the writing requirement (article 1507), as does its German counterpart (article 1031).¹¹⁴

In 2009, the Frankfurt Court of Appeal—in an application for the enforcement of a foreign award where the claimant was not able to provide a written arbitration agreement—clarified this point by holding:

¹⁰⁹ Option I, article 7(6): “The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”

¹¹⁰ RSC 1985, c 17 (2d Supp.) (as amended on 1 April 2013).

¹¹¹ *Supra* note 58.

¹¹² See *supra* note 4.

¹¹³ See *supra* note 47.

¹¹⁴ *Zivilprozessordnung* [ZPO] [Code of Civil Procedure], 30 January 1877, Reichsgesetzblatt [RGL.] 83, as amended, § 1031(2)-(3).

[I]t cannot be deemed in the present case that there is an exchange of correspondence between the parties that meets the requirements of Art. II(2) second alternative Convention, because Defendant has not made any statement in writing. However, there is no need here of an arbitration agreement signed by both parties or a mutual exchange of correspondence, because of the more-favorable-right principle of Art. VII(1) Convention, Sect. 1061(1) second sentence ZPO. Claimant can namely rely on the less strict requirements in Sect. 1031(2)—(3) ZPO in respect of the coming into existence of a valid arbitration agreement [...] This Court likewise accepts a broad interpretation of the more favorable-right principle. The purpose of all multinational Conventions is to make the recognition of arbitral awards and arbitration agreements easier. Hence, no party shall be denied recognition of an arbitral award or arbitration agreement under such Conventions, if recognition would be possible according to domestic law on recognition.¹¹⁵

Conversely, in 2006, the Brazilian Supreme Court, in reviewing a foreign award in light of its public policy, refused its enforcement, given the lack of a written arbitration agreement. The discussion was centred on the lack of a written manifestation of intent by the defendant to accept the arbitration clause. This was considered as a violation of public policy (“in the present case there was no express manifestation [of intent] by the defendant as to the referral to arbitration”).¹¹⁶

¹¹⁵ Germany No 132, (2009), YB Comm Arb 377 at paras 7-9 (Oberlandesgericht [Court of Appeal], Frankfurt). See also Netherlands No 33, *Not indicated v Ocean International Marketing BV (Netherlands)* (2009), 34 YB Comm Arb 722 (Rechtbank [Court of First Instance], Rotterdam).

¹¹⁶ Brazil No 15, *Plexus Cotton Limited v Santana Têxtil S/A* (2012), 37 YB Comm Arb 169 at paras 9-10 (Superior Court of Justice of Brazil).

In other jurisdictions, the writing requirement is to some extent mitigated by enforcing arbitration clauses “by reference”, in a similar fashion to what article 7(6) of the *Model Law* provides.¹¹⁷

This approach has recently been expressed in a Hong Kong case, which, in its clarity, can serve as guidance.¹¹⁸ In this matter referred to the Hong Kong District Court, a contract was concluded between the parties, on the terms and conditions set out in a precedent letter of intent. In particular, these terms included the condition that the standard form of domestic subcontract published by the Hong Kong Construction Association would be used. In particular, clause 18 of this standard form also included an arbitration clause. Consistently, the court held:

The meaning of “a document containing an arbitration clause” as used in Article 7 (2) of the Model Law and in s.2AC(3) of the Ordinance has been held to be not limited to a document signed by the parties to the arbitration, but to include a contract made between one party and a third party, a contract between two strangers to the arbitration, or to an unsigned standard form of contract...Construing the correspondence exchanged between the parties against the relevant background in this case, and giving the relevant documents the meaning which would reasonably have been understood by a reasonable man to mean, I am satisfied that Fai Tak and Sui Chong have agreed to incorporate clause 18 of the Standard Form of Domestic Subcontract into the Sub-Contract made between them for the carrying out of the Works.¹¹⁹

¹¹⁷ See Domenico Di Pietro, “Validity of Arbitration Clauses Incorporated by Reference”, in Gaillard & di Pietro, *supra* note 26, 355.

¹¹⁸ *Fai Tak*, *supra* note 89.

¹¹⁹ *Ibid* at paras 39 ff [references omitted].

On a similar issue, the Italian Court of Cassation came to a different conclusion.¹²⁰ In this case, the plaintiff had entered a contract where one of the clauses made general reference to INCOGRAIN term number 12, which contains an arbitration clause. The court found that the written requirement in this case was not satisfied. In particular, the plenary session of the court distinguished between arbitration clauses *per relationem perfectam* (i.e., clauses contained in a separate act or document to which the contract makes an express and specific reference) and arbitration clauses *per relationem imperfectam* (i.e., in which the contract merely makes reference to a document or standard form containing an arbitration clause). In the first case, the arbitration clause is deemed to have been validly stipulated. In the second case, to the contrary, the formal requirements under the *New York Convention* are not met.¹²¹

In France—as briefly noted above—there are no requirements concerning the form of the arbitration agreement (article 1507 of the French *Code of Civil Procedure*).¹²² This principle also applies to chains of contracts transmitting property, where the arbitration clause is contained exclusively in the first of them, being an accessory to the right to act which is itself an accessory to the substantive right being transmitted.¹²³ An obvious corollary of the above is that the specifically agreed arbitration agreement prevails over an arbitration clause incorporated by general reference.¹²⁴

The precedent paragraphs have addressed the formal validity of arbitration agreements. The analysis has been conducted regarding the existing case law concerning the *New York*

¹²⁰ *Louis Dreyfus*, *supra* note 65.

¹²¹ *Ibid* at para 2.

¹²² Cass civ 1^e, 11 May 2012, n 10-25.620: “[E]n matière d’arbitrage international, la clause compromissoire par simple référence à un document qui la stipule est valable lorsque la partie à laquelle on l’oppose en a eu connaissance au moment de la conclusion du contrat et qu’elle a, fût-ce par son silence, accepté cette référence ; qu’il n’est pas nécessaire que cette clause figure de façon très apparente dans l’engagement de la partie à qui elle est opposée.”

¹²³ *HGL*, *supra* note 80.

¹²⁴ *Ases Havacilik Servis Ve Destek Hizmetleri AS v Delkor UK Limited*, [2012] EWHC 3518 (Comm).

Convention and several arbitration acts. The purpose was to show that, as far as the law applicable to the formal validity of arbitration agreements is concerned, we are in presence of a substantive rule dictated by the *New York Convention*. This rule thus applies both in the pre-award and post-award phases. In particular, the rule provides—albeit with some caveats—for a written arbitration agreement. Nevertheless, national jurisdictions (e.g., France) can decline this requirement by adopting more favourable rules.

After an overview of the standards of review and the rules applicable to the validity of the arbitration agreements in the pre-award phase, the following section will deal with review at the phase of annulment and enforcement of the arbitration award. This subsequent phase entails—with the exception of the formal validity requirement—different scenarios from pre-award enforcement with respect to the law governing the arbitration agreement.

2. *REVIEWING THE ARBITRATION AGREEMENT IN THE POST-AWARD PHASE UNDER THE NEW YORK CONVENTION*

(a) Introduction

The previous sections have shown a tendency to postpone a full review of the validity of the arbitration agreement. Since procrastination may not always be considered an effective strategy, this section attempts to depict what appears to be a quite chaotic scenario, where state courts intervene in the final outcome of the arbitration agreement: the award. It is in fact only at this later stage that the challenges to the arbitration agreements are fully reviewed, thus requiring courts to take a clear stand on the soundness of the arbitrators' work.

This *iter procedendi* is dictated by article V(1)(a) of the *New York Convention*, which states that the recognition and enforcement of the award may be refused, if the party against whom it is invoked furnishes proof that the parties to the arbitration agreement “were under some incapacity, or said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”. Article 36(1)(a)(i) of the *Model Law* contains an almost identical provision. The purpose of the *Model Law* is in fact to provide a “model” for international arbitration acts, and the choice made by UNCITRAL was to support the recognition of the *New York Convention*, which explains why the grounds for the refusal of enforcement are identical to those enacted in the Convention.¹²⁵ The only exception concerns the law applicable to cases of incapacities.¹²⁶

The identification of the governing law of the arbitration agreement thus becomes an issue of paramount importance: only after such determination will it be possible to review a lack of capacity of the parties or, alternatively, the invalidity of the arbitration agreement. Consequently, while section (b) will address the standard of review adopted by state courts, section (c) will deal with the question of the applicable law.

(b) The Standard of Review in the Enforcement Phase

¹²⁵ The *UNCITRAL 2012 Digest*, supra at note 106, at 173: “Although the grounds on which the recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention, the grounds listed in the Model Law are relevant not only to foreign awards but to all awards rendered in the sphere of application of the piece of legislation enacting the Model Law.”

¹²⁶ *Ibid.*, at 173: “Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention. However, the first ground on the list as contained in the 1958 New York Convention (which provides that recognition and enforcement may be refused if “the parties of the arbitration agreement were, under the law applicable to them, under some incapacity”) was modified since it was viewed as containing an incomplete and potentially misleading conflict-of-laws rule.”

Generally speaking, from a procedural point of view the enforcement of the arbitral award is governed by article IV of the *New York Convention*. In particular, according to article IV(1), the party who wish to rely on the award rendered in her favor, shall file an application before the competent court of state where the enforcement has to take place (usually the court of Appeal of the relevant district), and supply the original (or a certified) copy of the award and of the arbitration agreement (or, alternatively, the arbitration clause).¹²⁷ These formal requirements suffice for the enforcement of the award, thus clearly showing the spirit of *favor arbitrandum* enacted in the *New York Convention*.¹²⁸ In other words, the structure of the convention implies a presumptive validity and enforceability of the arbitral awards (and thus, of the arbitration agreements).

The party against whom the award is invoked may request a denial of recognition pursuant to article V of the same convention.¹²⁹ The respondent will thus bear the burden of proving the existence of one (or more) of the grounds for refusal of recognition and enforcement set out in article V(1).¹³⁰ Moreover, as a U.S. court puts it, the burden is a heavy one, as the court shall aim at a “summary confirmation”.¹³¹ Furthermore, it is worth noting that only in a handful of cases will the state court be able to deny the enforcement on its own motion. More precisely, according to the *New York Convention* these cases shall either amount to a question of non arbitrability

¹²⁷ The authentication and certification of the such documents are governed according to the law of the country where recognition or enforcement is sought: Maxi Scherer, “Article IV”, in Wolff ed, *supra* note 52 at 211.

¹²⁸ For a historical perspective: Paolo Contini, “International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1959) 8:3 AJCL 283.

¹²⁹ This would imply a “presumptive obligation to recognize international arbitral awards. See: Born, *International Commercial Arbitration*, *supra* note 65, at 2711. Courts frequently refer to the *favor arbitrandum*. See e.g.: *Yukos Capital S.A.R.L. v t OAO Samaraneftgaz*, No. 10-cv-06147-PAC, 6 August 2013.

¹³⁰ *Dardana Ltd v. Yukos Oil Co* [2002] 2 Lloyd's Rep 326 at para 10-12; Singapore No. 11, *Galsworthy Ltd v. Glory Wealth Shipping Pte Ltd* (2011), 36 YB Comm Arb 329 at paras 8-12 (High Court).

¹³¹ US No. 774, *Thai-Lao Lignite (Thailand) Co. Ltd. et al. v. Government of the Lao People's Democratic Republic* (2012), 37 YB Comm Arb 411 at para 3 (United States Court of Appeals, Second Circuit).

(article V(2) (a): “the subject matter of the difference is not capable of settlement by arbitration...” or to a breach of the public policy of the country of enforcement (article V(2)(b)). Among such grounds stems the one enshrined in article V(1)(a), which specifically deals with a case of invalidity of the arbitration agreement:

“The parties to the agreement referred to in article II were, under the law applicable to them. under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

We shall now turn to this specific aspect.

The standard of review in the phase of enforcement of the award is significantly different from the one adopted in the pre-award one. The limited (also known as *prima facie*) test is in fact abandoned in favor of a full review test: this means that the decision of the arbitral tribunal upon the validity of the arbitration clause should have limited bearing on the judgement of the state court during the enforcement proceedings.¹³² However, it should be stressed that the full review test concerns exclusively the validity of the arbitration agreement.

An influential judgement on this matter was rendered by the UK Supreme Court in 2011.¹³³

Dallah Real Estate points out that the arbitrator’s power to determine their own jurisdictions

¹³² *Contra: Aloe Vera of America, Inc. v. Asianic Food (S) Pte. Ltd. and another*, High Court, Singapore, 10 May 2006, [2006] 3 SLR 174 (206), paras. 61 and ff.

¹³³ *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan*, [2010] UKSC 46. For a commentary: Jacob Grierson & Dr. Mireille Taok, *Dallah*, “Conflicting Judgments from the U.K. Supreme Court and the Paris Cour d’Appel” (2011) 28:3 J. Int’l Arb. 407 – 422; François-Xavier Train, “L’affaire *Dallah* ou de la difficulté pour le juge anglais d’appliquer le droit français, note sous Paris, Pôle 1 – Ch. 1, 17 février 2011 et Cour suprême du Royaume-Uni, 3 novembre 2010” (2012) 12:2 Rev Arb 374 – 386. The same principle has been reaffirmed in: *Lisnave Estaleiros Navais SA v Chemikalien SeeTransport GmbH*, [2013] EWHC 338 (Comm), and *Arsanovia Ltd. and others v Cruz City 1 Mauritius Holdings*, [2012] EWHC 3702 (Comm). See also: Stefan M. Kröll, “The Arbitration Agreement in Enforcement Proceedings of Foreign Awards: Burden of Proof and the Legal Relevance of the Tribunal’s decision” in Stefan M. Kröll, Loukas A. Mistelis et al.,

(when affected by a plea of invalidity of the arbitration clause) may neither have a *res iudicata* effect over the decision of the state court, nor an evidentiary value. While the award shall be cautiously considered,

[t]he scheme of the New York Convention, reflected in ss.101—103 of the 1996 Act may give limited *prima facie* credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s. 103. But that is as far as it goes in law. Dallah starts with advantage of service, it does not also start fifteen or thirty love up.¹³⁴

The same principle, which confirms the above full review test, may be found in several other jurisdictions across Europe and North-America.¹³⁵

This wouldn't mean, however, that the party requesting the enforcement has to prove the validity of the arbitration agreement. According to an authoritative scholar, the overall mechanism put in place by the *New York Convention* would still place the burden of proving a lack of validity on the party resisting the enforcement.¹³⁶ While this is consistent with the scope of the convention, problems may arise when the contracting state has a more favorable provision allowing the enforcement of a unwritten arbitration agreement. Moreover there is a divergent case law with

eds, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (The Hague: Kluwer Law International, 2011) at 332.

¹³⁴ *Dallah Real Estate*, *supra* note 137 at paras 50-51.

¹³⁵ *Inter alia*: *China Minmetals Materials Import and Export Co., Ltd. v Chi Mei Corporation*, 334 F 3d 274 (3d Cir. 2003); *Mexico v Cargill*, 2011 ONCA 622; *Telestat Canada v Juch-Tech, Inc.*, 2012 ONSC 2785; *Imc Aviation Solutions Pty Ltd v Altain Khuder LLC As*, [2011] VSCA 248; *FC X. v. Y.*, (Federal Supreme Court of Switzerland), *supra* note 3; *Swiss Oil Corporation v Société Petrogab and Republic of Gabon* (1988), 16 YB Comm Arb 133 (Cour d'Appel de Paris); Germany No. 100, *Seller v. Buyer* (2007), 32 YB Comm Arb 328 - 341 (Bundesgerichtshof).

¹³⁶ Patricia Nacimiento, "Article V(1)(a)" in Kronke et al, *supra* note 53, 205 at 211. See also: Austria n. 18, Oberster Gerichtshof n. 3Ob141/07t, 33 YB Comm Arb 357 at para 5 and ff.; Madrid Court of Appeal, Spain, 4 March 2005, case No. 86/2005—52/2005.

respect to the proof of *existence* of the agreement (i.e. proof of its conclusion). While German courts favor the interpretation according to which the applicant requesting the enforcement has to prove the existence of the agreement, English courts place the same burden on the opposing party.¹³⁷

(c) Determining the Applicable Law

For the above reasons, during the phase of enforcement state courts might stumble into the delicate issue surrounding the determination of the governing law of the arbitration agreement.

Since the governing law does not affect any applicable mandatory rules,¹³⁸ the determination essentially boils down to two different scenarios where: (i) the parties have selected a governing law (either explicitly or implicitly); (ii) the parties have failed to give any indication. Each of them will be considered in turn.

i. The Parties' Choice of Law Scenario

Under the *New York Convention* (article V(1)(a)),¹³⁹ the parties are indirectly allowed to choose the law that will govern their agreement to arbitrate (or the arbitration clause). While this option is clearly available and no controversies have arisen either in theory or in practice, the parties will seldom opt for an explicit choice of the governing law of the arbitration clause. As Piero Bernardini puts it, “the law applicable to the arbitration clause receives no specific attention by

¹³⁷ Oberlandesgericht München, 19 January 2009, 35 YB Comm Arb (2010) 362; *Dallah Real Estate*, *supra* at note 137.

¹³⁸ Stephan Wilske & Todd J Fox, “Article V(1)(a)” in Wolff, *New York Convention: Commentary*, *supra* note 52, at 277.

¹³⁹ As well as under the equivalent provisions of national arbitration acts: e.g. article 34(2)(a)(i) of the *Model Law*.

the drafters of an international contract”,¹⁴⁰ either because time constraints direct the attention of the negotiators to other issues or, alternatively, during the negotiations it is not yet possible to determine what law will be better suited (mainly because the characteristics of the future dispute can hardly be foreseen).¹⁴¹ Consistently, in the vast majority of cases the contract will contain a single provision regulating the applicable law,¹⁴² usually in a straightforward way (e.g., “This agreement is governed by the laws of [country]”). This means that whenever such a clause is found in a contract, the arbitrators have to decide whether the choice of law extends to the arbitration clause. In other words, the central point revolves around the possibility of admitting an implicit choice of law for the arbitration clause.

The theory of implicit consent is well-known in other areas of the law (e.g. contract law; private international law). An authoritative example may be found in Article 3(1) of the EU Regulation n. 593/2008 on the law applicable to contractual obligations (hereafter, “*Rome I*”),¹⁴³ which states that the choice of law may be an implicit one, provided that it is clearly demonstrated by the terms of the contract or the circumstances of the case (e.g. the nationality of the parties or the type of contract).¹⁴⁴ Likewise, contract theory speaks of “implicit terms”, i.e. terms that are widely applied in a business, and as such, are capable of integrating the agreement of the parties.¹⁴⁵ The major obstacle to the recognition *sic et simpliciter* of an implicit choice of law for the arbitration clause, lies in the fact that the principle of separability dictates that the arbitration

¹⁴⁰ Bernardini, *supra* note 2 at 197.

¹⁴¹ *Ibid.*, at 197.

¹⁴² Born, *International Commercial Arbitration*, *supra* note 65 at 443.

¹⁴³ Regulation EC, *Regulation of the European Parliament and of the Council (EC) 593/2008 of 17 June 2008 on the law applicable to contractual obligations*, [2008] OJ, L 177/6, [*Rome I*].

¹⁴⁴ Tito Ballarino, *Diritto Internazionale Privato* (Padova: Cedam, 2011) at 233.

¹⁴⁵ Fabien Gélinas (ed), *Trade Usages in the Age of Arbitration* (Oxford: Oxford University Press, Forthcoming). For an application of this theory to contractual liability see: *Transfield Shipping v Mercator Shipping Inc.* (“The *Achilleas*”), [2008] UKHL 48, [2008] 2 Lloyd’s Rep 275.

clause is independent from the main contract, whenever the invalidity of such contract might entail the invalidity of the arbitration agreement.¹⁴⁶

The principle of separability was developed in order to avoid that the invalidity of the main contract could affect the arbitration clause, and thus the jurisdiction of the arbitrators.¹⁴⁷ In fact, the jurisdiction of the arbitrators lies in the arbitration clause, and the invalidity of the main contract would entail also the invalidity of the arbitration clause. As a result, every arbitration could be stopped by a claim of invalidity of the main contract, forcing the parties to seize a state court. However, an orthodox understanding of the separability principle (which should aim at the protection of the effectiveness of arbitration) leads to the paradox that the applicable law chosen by the parties to a contract cannot be extended to a clause of the very same contract (i.e. the arbitration clause). This creates uncertainty, and thus further litigation.¹⁴⁸ What solutions—if any—can redress this delicate situation?

A German decision addresses this very question:

Since the main contract and the arbitration agreement are separate contracts that must be examined separately, it is first necessary to clarify the question of the law applicable to the arbitration agreement.

The contract does not contain an express provision on this point. The main contract contains, however, a choice of law (the law to be applied is the law of the

¹⁴⁶ Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013) at 61. Unlike section 7 of the 1996 Arbitration Act, and article 6.9 of the ICC Arbitration Rules, it is worth noting that this *brocardum* is not expressly mentioned by the New York Convention. See also: *Beijing Jianlong Heavy Industry Group v (1) Golden Ocean Group Limited, (2) Golden Zhejiang Inc, (3) Ship Finance International Limited and (4) SFL Bulk Holding Limited*, [2013] EWHC 1063 (Comm) at para 24 and ff.

¹⁴⁷ Phillip Landolt, “The Inconvenience of Principle: Separability and Kompetenz- Kompetenz” (2013) 30:5 J. Int'l Arb. 511 at 512.

¹⁴⁸ For a critique: Pierre Mayer, “Les limites de la séparabilité de la clause compromissoire” (1998) 2 Rev Arb 359 at 368 : “La séparabilité est une bonne chose, mais sous le nom d'autonomie elle est devenue un mythe conduisant à des solutions caricaturales, et qu'il convient de dénoncer”.

Principality of Liechtenstein). This circumstance is a strong indication that the parties also intended to agree on a choice of law for the arbitration agreement (implied choice of law), and the Court so assumes [...].¹⁴⁹

Hence, according to the German court, the choice of law clause contained in the contract can be considered as a strong evidentiary element, as to the law applicable to the arbitration clause. This line of reasoning was also upheld by English courts.¹⁵⁰ Albeit similar with respect to the conclusions, the English cases—unlike the German one—underline the importance of prioritizing the potential implicit agreement of the parties over the residual rule set out in article V(1)(a) of the *New York Convention* (i.e. the law of the country where the award was made).¹⁵¹ Finally, it is worth mentioning that the implicit agreement over the applicable law is not limited to the content of the main contract. The parties can reach an agreement also at a later stage, for instance during the pleadings concerning the phase of enforcement, by relying during their respective pleadings on a certain law.¹⁵²

¹⁴⁹ Germany No 141, *Subsidiary Company of Franchiser v Franchisee* (2011), 37 YB Comm Arb 220 at paras 4-5 (Higher Regional Court of Thuringia).

¹⁵⁰ *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors*, [2012] EWHC 42 (Comm); *Abuja International Hotels Ltd. v Meridien Sas*, [2012] EWHC 87 (Comm) at 21: “As the Tribunal held, the arbitration agreement provides for arbitration in London and is implicitly governed by English law. It has its closest and most real connection with England because the seat of the arbitration is here. This was recognised and acknowledged by the parties in the signed Terms of Reference which provided that “the curial law applicable to the arbitration is English law”.

¹⁵¹ *Arsanovia Ltd. and others v Cruz City 1 Mauritius Holdings*, [2012] EWHC 3702 (Comm) at 18: “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. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract”

¹⁵² Hong Kong No. 19, *Shandong Textiles Import and Export Corporation (PR China) v Da Hua Non-ferrous Metals Company Limited* (2002), 31 YB Comm Arb 729 at para 6 (High Court of the Hong Kong Special Administrative Region).

ii. The Default Rules Scenario

Whenever the court is unable to find that the parties agreed either explicitly or implicitly over the governing law of the arbitration clause, this issue will fall under Article V(1)(a) of the *New York Convention*. This will be also the case for an arbitration agreement which never came into existence. In fact, even if the parties have elected the governing law, the lack of existence of the arbitration clause leads to the application of the default rule of the *New York Convention*.¹⁵³

Such provision introduces a default conflict of law rule, providing that the arbitration agreement is governed by the law of the country where the award was made. Despite the apparent straightforwardness of this rule, scholars disagree as to what should be regarded as the “law of the country”.¹⁵⁴ More specifically, the reference found in such an article could be interpreted either as a reference to the substantive law of the country or to its conflict of law rules. However, State courts do not seem to be concerned with this debate. A significant number of decisions simply omit to consider the twofold option represented by the substantive law and the conflict of law rules of the country where the award was made. Such judgments unequivocally hold that only the substantive law of the country will govern the arbitration clause in the absence of a choice of the parties.¹⁵⁵

¹⁵³ Netherlands No. 40, *Catz International B.V. v. Gilan Trading KFT* (2011), 37 YB Comm Arb 273 at para 7 (District Court of Rotterdam): “As Gilan disputes that an arbitration agreement came into existence between the parties, it cannot be determined whether the parties made a legally relevant choice of law and the question whether the parties concluded a valid arbitration agreement must be answered, pursuant to Art. V(1)(a) of the New York Convention, on the basis of the law of the country where the awards were rendered, thus English law”.

¹⁵⁴ Patricia Nacimiento, “Article V(1)(a)” in Kronke et al, *supra* note 53, 205 at 55; Loukas A. Mistelis & Domenico Di Pietro, “New York Convention, Article V”, in Loukas A. Mistelis, (ed), *Concise International Arbitration* (The Hague: Kluwer Law International 2010) at 15.

¹⁵⁵ *Inter alia*: Australia No. 37, *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*, 37 YB Comm Arb 163 at para 50 (Federal Court of Australia, New South Wales District Registry). The decision makes reference to “the relevant principles of construction of contracts under English law”; See also: *Dallah Real Estate*, *supra* note 137.

Article V(1)(a) of the New York Convention contains a second default rule, which expressly deals with issues of capacity. This provision states that the recognition and enforcement of the award may be refused “if the parties were, under the law applicable to them, under some incapacity”. Stendhal, who praised the clarity of the language used in the French civil code, would probably express some disappointment.

While it is clear that the incapacity must affect the parties to the arbitration agreement at the time of conclusion (and not the parties to the arbitration),¹⁵⁶ uncertainties may arise both with respect to the meaning of incapacity, as well as to the law applicable to the parties. Let us address each of these points in turn.

With respect to the definition of “incapacity”, Gary Born points out that such a requirement shall be interpreted broadly, as it covers general principles of contract defenses “going to capacity—such as incompetence and/or mental incapacity, minority, limitations in constitutive corporate documents and the like.”¹⁵⁷ The issue here lies in the absence of a common frame of reference as far as the applicable substantive law is concerned. In other words, while article V(1)(a) of the *New York Convention* refers to the “law applicable to the parties” to resolve any issue of capacity, courts cannot invariably apply the (sometimes parochial) requisites of a single jurisdiction. A well-reasoned judgment of the Italian *Corte di Cassazione* endorsed this interpretation:

“Although capacity in Art. 17 of the Preliminary Dispositions of the [Italian] Civil Code refers to the capacity of physical persons...the “incapacity” of the parties to the arbitration agreement in Art. V(1)(a), which generally concerns entities engaged in

¹⁵⁶ U.S. no. 690, *China National Building Material Investment Co., Ltd. v. BNK International LLC* (2009), 35 YB Comm Arb 508 at para 17-18 (United States District Court, Western District of Texas, Austin Division).

¹⁵⁷ Born, *International Commercial Arbitration*, *supra* note 65 at 628.

international commercial relations, has a broader meaning. In the [provision] at issue, capacity means not only capacity of a physical person to perform an act, but any capacity, both a legal capacity to perform an act...and the capacity of physical and legal persons.”¹⁵⁸

Therefore, despite the fact that the *New York Convention* does not contain a self-contained regime dealing with issues of incapacity, state courts should always proceed with caution, and adopt—as much as possible—a comparative analysis of the rules of incapacity applicable in the jurisdictions of the States parties to the convention. This means that also cases of lack of authority or power of the representative entering the agreement to arbitrate should fall in the scope of this provision (e.g. corporate officer or employee).¹⁵⁹

Similar considerations apply with respect to the identification of the law applicable to the parties. The case law shows different tendencies: courts have sometimes applied the law of the place of incorporation,¹⁶⁰ or—for issues of representation—the law of the country where the power of attorney were to take effect (that is “the law of the country in which the transaction is expected to take place”).¹⁶¹ Nevertheless, as Klaus Berger explains,¹⁶² many relevant connecting factors may be adopted for determining the applicable law. Such factors may include, for instance, the party’s nationality, the residence/domicile, or the place of business.

Given the inadequacies and gaps of the default rules contained in article V(1)(a), it is of no surprise that courts have attempted to pursue different venues. This is particularly true vis-à-vis the solutions developed by French courts, where *ad hoc* substantive rules (the so-called *règles*

¹⁵⁸ Italy no. 152, *Dalmine S.p.A. v M6M Sheet Metal Forming Machinery* (1997), 34 YB Comm Arb 709 at para 3 (Corte di Cassazione).

¹⁵⁹ Born, *International Commercial Arbitration*, supra at note 65, at 635.

¹⁶⁰ *X. v Y.* (2012), Federal Supreme Court of Switzerland (1st Chamber) no. 4A_50/2012.

¹⁶¹ Germany no. 75, *Buyer v Seller* (2003), 30 YB Comm Arb 528 at para 5 (Celle Court of Appeal).

¹⁶² Berger, supra at note 2, at 319.

materielles du droit de l'arbitrage international) have been developed to deal specifically (but not exclusively) with issues of validity of the arbitration agreements. These decisions, moreover, raise the point of submitting the arbitration agreement to a national rules of law.¹⁶³

The *Cour de Cassation* has constantly reaffirmed the principle expressed in the *Dalico* case,¹⁶⁴ according to which the validity of the arbitration agreement (or clause) shall not be examined by reference to a national law, but through “the application of a material rule derived from the principle of validity...based on the common intention of the parties, on good faith and on the legitimate belief in the power of the clause’s signatory to carry out an act of ordinary administration binding the company”.¹⁶⁵ The so-called validity principle thus combines elements of contract law, equitable principles and business practices.

3. CONCLUSION

In the present chapter we have tried to explain how state courts uphold the validity of the arbitration agreement.

¹⁶³ See: Hook, *supra* at note 20.

¹⁶⁴ Cour de Cassation 20 december 1993, *Municipalité de Khoms El Mergeb v. Société Dalico*, D, 91-16828 : “en vertu d’une règle matérielle du droit international de l’arbitrage, la clause compromissoire est indépendante juridiquement du contrat principal qui la contient directement ou par référence et que son existence et son efficacité s’apprécient, sous réserve des règles impératives du droit français et de l’ordre public international, d’après la commune volonté des parties, sans qu’il soit nécessaire de se référer à une loi étatique”.

¹⁶⁵ France no. 49, *Sociétés d’études et représentations navales et industrielles – Soerni et al. V Air Sea Broker Ltd – ASB* (2009), 35 YB Comm Arb 357 at para 4 (Cour de Cassation). See also: France No. 35, *Bargues Agro Industrie SA v. Young Pecan Company* (2004), 30 YB Comm Arb 501-502 at para 5 and ff. (Paris Court of Appeal): “According to a substantive provision of French international arbitration law, the parties’ intention suffices to validate an arbitration agreement. Hence, that agreement does not fall under a national law because it is fully autonomous, also with regard to form...[S]ince arbitration clauses are thus independent of national provisions, the lack of capacity of the representative of one of the parties to conclude an arbitration agreement is not evaluated pursuant to a national law, but rather directly by the court when examining the facts of the case, [in order to ascertain] whether the other party could legitimately and in good faith believe that this power was not lacking. Arbitration is the usual means of dispute settlement in international commerce. Signing the arbitral clause contained in the agent’s confirmation of order is an act of ordinary administration which binds Bargues. Hence, Bargues cannot rely on the lack of power of its sales manager to contest the validity of the arbitration clause.

Section 1 has shown that in the pre-award phase, state courts seem to prefer a *prima facie* test, which gives priority to the arbitrators, and postpones the decision on the validity of the arbitration agreement.

Once the award has been issued, as Section 2 explained, the courts will expand their power of review, as dictated by the *New York Convention*. Determining the validity of the arbitration agreement in the phase of enforcement of the award thus becomes an issue of interpretation of the said convention, which, unfortunately, fails to provide a clear framework, especially with respect to issues of incapacity. The general principle that seems to emerge is that the validity of the arbitration clause is strongly related to the law of the country where the award was made, that is, with the substantive rules of that country.

The only real solution for this unsatisfying scenario is to expand the implicit choice theory, by holding that whenever the parties have included a choice of law clause in the contract, the law indicated in that clause will also govern the validity of the arbitration agreement. The implicit choice should operate as a presumption of fact that may be disproven only by the party resisting the enforcement on grounds of invalidity of the agreement. This seems to be an effective solution, grounded on the common sense: most of the times the parties will naively believe that the choice of law clause will govern all the aspects related to the issues of applicable law. There are no good reasons to betray their belief, unless said law leads to the invalidity of the agreement. In this case, the court should opt for the default rule enacted in the *New York Convention*.

After focusing on state courts, the following chapter will examine the validity of the arbitration agreement under the arbitrators' perspective.

III. ARBITRAL TRIBUNALS: BETWEEN AUTONOMY AND UNDERSTATEMENT

1. THE VALIDITY OF THE ARBITRATION AGREEMENT UNDER THE MOST INFLUENTIAL ARBITRATION RULES

(a) Introduction

Arbitral tribunals approach issues of validity of arbitration agreements in an idiosyncratic fashion. In their eyes, such issues are considered as a matter of “jurisdiction”.¹⁶⁶ From the outside, this idiosyncrasy is upheld by state courts: the existence and validity of arbitration agreements would indeed be a matter of jurisdiction.¹⁶⁷

This is not, however, a modern epiphany of international arbitration. The identification of an arbitral tribunal as a “court” with an inherent jurisdiction goes back to more than sixty years ago, namely, to the 1955 Arbitration Rules of the International Chamber of Commerce (hereafter the “ICC”).¹⁶⁸ Since then, the principle has been endorsed in every modern arbitration rules. Article 23(1) of the 2010 Uncitral Arbitration Rules, for instance, states that “the arbitral tribunal shall have the power to rule on its jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.” Similar provisions are to be found in the rules adopted by leading arbitration centers such as the ICC and the London Court of Arbitration (hereafter, the “LCIA”) (e.g. Article 6(3) of the 2012 ICC Arbitration Rules; article 23(1) of the 1998 LCIA Arbitration Rules).

¹⁶⁶ This very term is mentioned at article 16(1) of the *Model Law*.

¹⁶⁷ See, e.g.: *PT Pratama Indonesia v Magma Nusantara Ltd.*, [2003] SGHC 204.

¹⁶⁸ Yves Derains & Eric A. Schwartz, *Guide to the ICC Rules of Arbitration* (The Hague: Kluwer Law International, 2005) 76.

While section 1(b) will review the procedural aspects related to issues of validity of the arbitration agreement, by addressing two sets of arbitration rules widely applied (namely the 2010 Uncitral Arbitration Rules, and the 2012 ICC Arbitration Rules), section 1(c) will discuss the specific rules developed by arbitrators. Section 2 will then address the form and the content of the jurisdictional decisions.

(b) Procedural Facets of Jurisdictional Objections

Arbitration rules often have strict procedural requirements for challenges to the jurisdiction of the arbitrators, and the respondent willing to proceed with a plea of lack of jurisdiction shall do so *in limine litis*.¹⁶⁹ This applies also to the claimant who wishes to object to a counterclaim or set-off of the opposing party. Pragmatic efficiency-based concerns—further enhanced by the high costs of arbitration—apply in fact in these cases. As a result, according to article 23(2) of the UNCITRAL Rules, the challenge shall be raised “no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of set-off in the [party’s] reply”.¹⁷⁰ What happens then if the Respondent doesn’t file a statement of defence? While the UNCITRAL Rules do not explicitly provide an answer, it is clear that an unjustified failure to submit such statement will result in a waiver of any jurisdictional objection. Under the Rules, the tribunal in fact has no discretion in admitting challenges at a later stage of the procedure. This circumstance also reminds us that international arbitration is—to a large extent—a written procedure.¹⁷¹

¹⁶⁹ Clyde Croft, Christopher Kee et al., *A Guide to the Uncitral Arbitration Rules* (Cambridge: Cambridge University Press, 2013) 257.

¹⁷⁰ The LCIA Rules (article 23(2), contain – albeit with minor modifications – an analogous provision.

¹⁷¹ Arbitration proceedings may be considered as a hybrid procedure drawing from the common law and the civil law tradition. On this topic see: Giacomo Marchisio, “A Historical Divergence: Shaping the Petitem in International Commercial Arbitration” 12:1 (2012) *Global Jurist* 1-28.

As far as the ICC Rules are concerned, the mechanism put in place is quite different. While article 5 and 6 provide that the Respondent has to raise a jurisdictional objection in the Answer to the Request for arbitration, article 6(3) adds that:

“If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).”

According to the above provision, the objections related to the existence, validity or scope of the arbitration agreement are to be decided by the arbitrators,¹⁷² unless the Secretary General decides to seize the Court of the ICC (an independent body of the International Chamber of Commerce which “administers the resolution of disputes by arbitral tribunals”¹⁷³). This decision will usually be taken in exceptional cases, either when there is no evidence of an arbitration agreement, or when one of the claims in the request for arbitration refers to a non-signatory party.¹⁷⁴ Similarly, cases involving pathological arbitration clauses should also be referred to the Court, especially when the arbitration requirement is contradicted by a forum selection clause which elects a

¹⁷² Andreas Reiner & Christian Aschauer, *ICC Rules*, in Rolf A. Schütze, (ed), *Institutional Arbitration* (Munich/Oxford: Beck & Hart Publishing, 2013) 52.

¹⁷³ See article 1(1) and 1(2) of the 2012 ICC Rules.

¹⁷⁴ Jacob Grierson & Annet van Hooft, *Arbitrating under the 2012 ICC Rules* (The Hague: Kluwer Law International, 2012) 106.

national court as the solely competent authority.¹⁷⁵ It has to be noted that in the previous version of the ICC Rules,¹⁷⁶ however, the decision of the Court was a mandatory requirement in case of a challenge to the tribunal's jurisdiction or of a party's default. While article 6(3) refers to matters of existence, validity, and scope of the arbitration agreement, article 6(4) specifies that the Court's purview is limited to a *prima facie* analysis of the *existence* and *scope* of the said agreement. This is so because the mere review of the parties' initial written submissions and documents does not allow for a standard of full review, which would also entail a decision on the merits of the case.¹⁷⁷ Outside of such exceptional cases the jurisdictional challenges will be heard by the arbitrators themselves.

It is worth mentioning that other institutions have a similar, albeit informal, mechanism. After the filing of the request for arbitration under article 1 of the 1998 LCIA Rules, the LCIA Registrar will screen the content of the arbitration agreement (which has to be attached to the request). If there are doubts as to the existence or scope of said agreement, the institution will invite comments from both the Claimant and the Respondent in order to clarify the apparent anomaly.¹⁷⁸ In general these comments will suffice, and the Registrar will refer the parties to the arbitral tribunal. However, in some exceptional cases where the flaws of the agreement are still evident and severe, the LCIA Court will refuse to initiate the procedure.¹⁷⁹

¹⁷⁵ See: Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge: Cambridge University Press, 2012) 43 and ff.

¹⁷⁶ See article 6(2) of the 1998 ICC Arbitration Rules.

¹⁷⁷ Derains & Schwartz, *supra* at note 172, at 78.

¹⁷⁸ Peter Turner & Reza Mohtashami, *A Guide to the LCIA Arbitration Rules* (Oxford: Oxford University Press, 2009) 31.

¹⁷⁹ *Ibidem*.

(c) The Arbitrators' Decisions on the Validity of Arbitration Agreements

i. Methodological Remarks

The rulings of the arbitrators on the validity of arbitration agreements are quite variegated. This is partially due to the fact that every arbitration is unique. Many variables (such as the seat of arbitration, the applicable arbitration rules, specific directions from the parties, etc.) may shape in a significant fashion the way the arbitration is conducted. A further element that ought to be taken into consideration is the lack of systematic publication of arbitral awards. This is mainly due to issues of confidentiality. At the same time, there is no possibility of controlling the actual content of the award, unless it reaches the phase of enforcement (or of setting aside) in front of a national court. These circumstances complicate the role of the observer, insofar as they may cast some doubts on the reliability—as well as relevance—of a given award, especially in a system that doesn't formally recognize a rule of precedent.

There are, nonetheless, many reasons that shed some light on these doubts. First, the bulk of the available awards are published by specialized institutions that enjoy a high degree of deference in the *milieu* of arbitration. The main sources—the ICC Bulletin, the ASA Bulletin (of the “Association Suisse de l'Arbitrage”), and the Yearbook of Commercial Arbitration—are in fact edited by professionals with a great deal of experience. These institutions, albeit for different reasons, also share the concern of publishing reliable decisions. Finally, even if from a formal point of view international arbitration lacks a rule on binding precedent, arbitration awards show the importance of referring to previous cases, especially those arbitrated under the auspices of the same arbitral institution, or rendered by authoritative and well-known arbitrators.¹⁸⁰ After this

¹⁸⁰ For further reflections, see: Gilbert Guillaume, “The Use of Precedent by International Judges and Arbitrators” (2011) 2:1 J. Int'l Dis. Settlement 5-23; Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or

short premise we may now turn to the analysis of the most relevant awards, which indicate, in my opinion, the most effective solutions as to the applicable law.¹⁸¹

ii. *The Different Rules of Law Applied to the Arbitration Agreement*

Whilst there are no doubts as to the arbitrators' acceptance of their role over jurisdictional matters affecting their competence,¹⁸² a thorough research of the available arbitral awards allows the observer to identify two distinct categories of decisions.

According to the decisions falling in the first category, which exclusively comprise ICC awards, the arbitration agreement wouldn't be governed by the law of the seat, but rather by the common intent of the parties.¹⁸³ These awards primarily refer to the French case law on the validity of arbitration agreement, by often relying on national judgments (e.g. *Dalico* case). Since we have already discussed in details the application of the so-called *règles matérielles de l'arbitrage international*, we focus our attention on the second category.

Under the second category, the arbitrators facing a challenge to the validity of the arbitration agreement will navigate towards the safe harbor provided by the conflict of law rules of the law of the seat of arbitration.

A possible explanation of this preference might be, of course, that such rules of conflicts are particularly efficient, and suit the sense of justice of the given case. Moreover, in light of the

Excuse?" (2007) 23:3 Arb. Int. 357-378; Mark C. Weidemaier, "Judging Lite: How Arbitrators Use and create Precedent" (2012) 90:4 N. C. Law Rev. 1091- 1045.

¹⁸¹ This means that the other solutions adopted by arbitrators will not be taken into account.

¹⁸² E.g.: AIA Final Award in Case 41/1992, (1993) 22 YB Comm Arb 171-178.

¹⁸³ *Inter alia*: ICC Final Award in Case 9302/1998, (2003) 28 YB Comm Arb 54-67; Final ICC Award in Case 5485/1987, (1989) 14 YB Comm Arb 156-173.

principle of separability the conflict of law rules contained in the law of the seat will apply also if the contract contains a choice of law clause.¹⁸⁴ Let us consider an example.

An ICC arbitral tribunal seated in Zurich held that the arbitrators would be bound to the conflict of law rules of the law of the seat, that is:

“the provisions of the 1987 Swiss Federal Law on Private International (Private International Law Act, “PILA”)...[and pursuant to] article 175 of the PILA, Swiss law is applicable if the place of arbitration is Switzerland and if at least one of the Parties is neither domiciled nor has its habitual residence in Switzerland”.¹⁸⁵

Such conditions being entirely fulfilled, Swiss law was found to govern the arbitration clause.

It is worth noting that despite this limpid and sound reasoning, the arbitrators felt the need to provide an alternative decision, had they decided differently with respect to the applicable law to matters of validity of the arbitration agreement.

In fact, the tribunal thoroughly explained that if the law governing the contract were preferred instead of the conflict rules of the seat, the arbitrators would have reached the same conclusions on the validity of the arbitration agreement.¹⁸⁶ In other words, the arbitrators tried to demonstrate that their decision was valid in different scenarios, by providing alternative arguments.

It is hard to say whether this *iter iudicandi* purely reflects the circumstances of the given case, or whether the arbitrators—many of them being seasoned practitioners—apply a lawyerly style of

¹⁸⁴ See also: *A UK Limited v B SPA Award*, *infra* at note 189, at para 47. *Contra*: ICC Final Award in Case 6379/1990, (1992) 16 YB Comm Arb 212-200, at para 10. In this case the contract contained a choice of Italian law, and the arbitrators extended the scope of this choice to matters of formal validity of the arbitration clause. However, according to the tribunal, Italian law would lead to the application of the form requirements contained in the *New York Convention* (article II), as a result of its ratification by the Italian Government.

¹⁸⁵ ICC Interim Award in Case 14144/2006, (2012) 23:1 ICC Bull 77, at para 141. See also: ICC Interim Award in Case 10818/2001, (2005) 16:2 ICC Bull 94; ICC Interim Award in Case 9781/2000, (2005) 30 YB Comm Arb 24, at para 2.

¹⁸⁶ *Ibidem*, at para 146 and ff. The same need to ground the decision on the validity of the agreement on the basis alternative arguments may be found in: *A UK Limited v B SPA Award*, (2007) 25:4 ASA Bull 763 at para. 65.

alternative arguments that lead to identical conclusions. Likewise it is not possible to take a stand on the possible outcomes of this reasoning in normative terms.

2. THE ARBITRATORS' DECISION AND THE RECOURSE UNDER ARTICLE 16(3) OF THE MODEL LAW

(a) Introduction

In principle, once the arbitration has been set in motion the arbitral tribunal will generally have an exclusive jurisdiction on challenges related to its own jurisdiction (i.e. challenges to validity, existence and scope of the arbitration agreement).¹⁸⁷ Delicate issues, however, surround the time and form of the arbitrators' decision on such jurisdictional matters. In particular, the dilemma concerns the choice between a preliminary award or a final award. In other words, the arbitrators may decide to deal with the jurisdictional objections *in limine litis* with a preliminary award, or postpone the decision on the jurisdiction to the final award, which would then cover also the merits of the dispute between the parties. Neither the current version of the 2010 Uncitral Rules, nor the 2012 ICC Rules, give priority to one of these alternatives.¹⁸⁸ The same is true for the LCIA Rules.¹⁸⁹ Therefore, unless the parties have reached an agreement dealing with the form of the decision, the arbitrators will be free to choose the most appropriate form.

Usually, when the challenge primarily concerns a pure question of law, the arbitral tribunal may be tempted to opt for a preliminary award. Likewise, should the arbitrators have serious doubts

¹⁸⁷ For a theoretical reflection, see: Frédéric Bachand, "Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism" (2012) 1:6 J. Disp. Res. 83-100. See also William W. Park, "Determining Arbitral Jurisdiction: Allocation of Tasks Between Court and Arbitrators" (1997) 8 Am. Rev. Int'l Arb. 133.

¹⁸⁸ Croft, Kee et al., *supra* at note 173, at 259; Grierson & van Hooft, *supra* at note 178, at 109.

¹⁸⁹ Turner & Mohtashami, *supra* at note 179, at 163.

as to the existence of their jurisdiction over the dispute, the preliminary award will be preferred. Conversely, when the jurisdictional objection is intertwined with the merits of the dispute, or it appears to be *prima facie* meritless, the arbitral tribunal will issue a final award addressing the said objection with the merits of the dispute.¹⁹⁰

The decision between a preliminary and final award should be kept strictly separated from the issues related to the content of such decisions. Regardless of the form of the decision, there are two options open to the arbitral tribunal: (b) retain jurisdiction, or (c) decline it. Each of them will be considered in turn.

(b) The Decision to Retain Jurisdiction

Every modern arbitration act provides that the arbitral tribunal's preliminary decision to retain jurisdiction may be challenged in front of the competent court of the state where the arbitration has its seat.¹⁹¹ Let us consider a notable example.

According to article 16(3) of the 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006)¹⁹²:

“[I]f the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no

¹⁹⁰ Derains & Schwatrz, *supra* at note 172, at 104.

¹⁹¹ See e.g.: section 3 of the International Arbitration Act of Singapore, which gives force of law in Singapore to the *Model Law*; section 16 of the Australian International Arbitration Act; Section 2 of the International Arbitration Act of Ontario; article 943(1) of the 2014 Code of Civil Procedure of Quebec. The competent court will be identified according to different national standards (see article 6 of the *Model Law*);

¹⁹² The *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006* (Vienna: UNCITRAL, 2008) [*Model Law*].

appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

Pursuant to the above provision, each party has a thirty day period for filing a challenge—which does not suspend the arbitral proceedings—against the interim award of the tribunal;¹⁹³ the state court will then issue a final decision, which is not subject to appeal.¹⁹⁴ Consistently, the expiration of this delay will preclude the party from filing a jurisdictional challenge in setting aside proceedings under article 34 of the *Model Law*,¹⁹⁵ but not—according to a judgement of the Singapore Court of Appeal—to resist enforcement.¹⁹⁶

This implies that the challenge before the state court is an anticipatory one, strictly limited to jurisdictional matters. The standard of review by the state court should thus follow the same criteria applied in setting aside proceedings, that is a full review of the decision rendered by the arbitrators.¹⁹⁷ This point is addressed by a well-reasoned judgment of the High Court of Singapore:

¹⁹³ The time period is mandatory: *TeleMates Pty Ltd v Standard SoftTelSolutions Pty Ltd* [2011] NSWSC 1365 (New South Wales Supreme Court, 11 November 2011).

¹⁹⁴ *Incorporated Owners of Tak Tai Building v Leung Yan Building Ltd* [2005] HKCA 67 (Hong Kong Court of Appeal, 22 February 2005, Tang JA and Sakharani J). An exception may be found in the 2012 Singapore International Arbitration Act, section 10(4).

¹⁹⁵ *Imprimerie Régionale ARL Ltée v George Ghanotakis* [2004] CanLII 23270 (QC CS); German Federal Court of Justice in Case No III ZB 83/02, SchiedsVZ 2003, 133; *China Nanhai Oil Joint Service Corporation Shenshen Branch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215. For a comparative overview, see also: Alan Uzelac, “Jurisdiction of the Arbitral Tribunal”, (2005) 5 Int’l Arb Law Rep 154-164.

¹⁹⁶ *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, at para 132: “Art 16(3) is neither an exception to the ‘choice of remedies’ policy of the Model Law, nor a ‘one-shot remedy’. Parties who elect not to challenge the tribunal’s preliminary ruling on its jurisdiction are not thereby precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Art 36(1)”.

¹⁹⁷ This interpretation is not unanimous. In favor see: *Québec Inc. v Perform Environment Inc.*, 18 August 2004, [2004] CanLII 7022 (QC CS); *Canadian Ground Water Association v Canadian Geoexchange Coalition*, 15 June 2010, [2010] QCCS 2597. *Contra*: *Ace Bermuda Ltd. V Allianz Insurance Company of Canada*, 21 December 2005, [2005] ABQB 975 (CanLII).

“[T]he court makes an independent determination on the issue of jurisdiction and is not constrained in any way by the findings or the reasoning of the tribunal. In the same way, parties are not limited to rehearsing before the court the contentions put before the tribunal but are entitled to put forward new arguments on the issue and the court is entitled to consider these.”¹⁹⁸

This doesn’t mean that the appeal in front of the state court should be a hearing *de novo* of the merits of the Tribunal’s decision on jurisdiction.¹⁹⁹ It rather means that the state court will have to ascertain whether or not the decision was correct. A recent judgment of the Ontario Court of Appeal sets out a more precise and convincing test, which deserves to be applied to the review of the arbitrators’ ruling:

“[T]he standard of review of the award the court is to apply is correctness, in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made...It is important, however, to remember that the fact that the standard of review on jurisdictional questions is correctness does not give the courts a broad scope for intervention in the decisions of international arbitral tribunals. To the contrary, courts are expected to intervene only in rare circumstances where there is a true question of jurisdiction.”²⁰⁰

Therefore, the ruling of the arbitrators ought to be reviewed according to the strict standard of correctness; that is, by undertaking a new analysis of the question, and deciding whether the determination was correct, without showing deference to the decision maker’s reasoning process.

¹⁹⁸ *PT Tugu Pratama Indonesia v Magma Nusantara Ltd.*, 10 September 2003, [2003] 4 SLR(R) 257, at para 18.

¹⁹⁹ *Bayview Irrigation District #11 v. United Mexican States*, 2008 CanLII 22120 (ON SC), at para 60.

²⁰⁰ *Mexico v Cargill Inc.*, 2011 ONCA 622 (CanLII), at para 42.

The review, moreover, shall be exclusively circumscribed to the jurisdictional aspects of the dispute between the parties.

(c) The Decision to Decline Jurisdiction

The arbitrators can decide to decline the jurisdiction with a negative jurisdictional ruling. In this case, the question becomes whether such decision can be challenged. The various arbitration acts, as well as scholars and courts, took very different positions, which may be summarized as follow.

i. A Glimpse of the Past: The Inadmissibility of a Challenge Against a Negative Ruling

According to the former version of the Singapore Arbitration Act, the negative rulings could neither be challenged under article 16(3), nor later on during setting aside proceedings under article 34 of the Model Law.²⁰¹ This interpretation was in line with the *travaux préparatoires* of the *Model Law*, which excluded this possibility by considering that it would be inappropriate to compel a tribunal which ruled that it lacked jurisdiction to continue the arbitration.²⁰² Accordingly, the language of article 16(3) makes an unequivocal reference to the case in which the arbitral tribunal has ruled “that it has jurisdiction.” The opposite contention—the argument goes—could lead to a situation where the arbitrators could systematically decline their jurisdiction in spite of the court’s ruling, thus creating a loophole in the system.

²⁰¹ Laurence G. S. Boo, “Ruling on Arbitral Jurisdiction – Is that an Award?” (2007) 3:2 Asian Int’l Arb J 125-141. Moreover, the provision was restrictively applied by the courts of Singapore. The leading case was: *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank S.A.*, 1 December 2006, [2007] SLR(R) 597.

²⁰² Official Records of the General Assembly, 14th Session, Supplement no. 17 (A/40/17), annex I, para 163. See also: Frédéric Bachand, “Kompetenz-Kompetenz Canadian Style” (2009) 25:3 Arb Int’l 439.

This position is still endorsed in Hong Kong²⁰³ and the Netherlands.²⁰⁴ Similarly, the setting aside of a negative jurisdictional rulings pursuant to article 34 of the *Model Law* is excluded. Under the former arbitration act, the Court of Appeal of Singapore held that a negative ruling does not qualify as an “award”, since the decision to decline the jurisdiction is not one related to the substance of the dispute.²⁰⁵ This would create—according to this interpretation—an obstacle to the application of article 34 of the *Model Law*, which solely applies to the annulment of “awards”.

Germany has an ambiguous position in this respect.²⁰⁶ The arbitrator’s negative ruling on the jurisdiction would in fact qualify as an award, thus allowing a challenge of the decision in setting aside proceedings.²⁰⁷ According to the German Supreme Court, however, while the challenge is admissible, it has to be rejected as it neither falls in any of the grounds listed in section 1059 ZPO (which mimics the grounds of annulment under article 34 of the *Model Law*), nor does it amount to a violation of the *ordre public*, given the fact that the rights of the parties are not affected (being still enforceable in front of a state court).²⁰⁸

The Teutonic reasoning might look grotesque. However, a systematic interpretation of the Model Law demonstrates that the negative jurisdictional ruling can certainly qualify as an award. The objection usually raised on this point is that an award has to refer to the merits of the dispute. This is contradicted by article 17(2) of the *Model Law*, which states that *interim* measures may

²⁰³ See section 34, of the 2011 Arbitration Ordinance, which re-enacts article 16(3) of the Model Law. See also: *Kenon Engineering Ltd. V Nippon Kokan Koji Kabushiki Kaisha*, 2 July 2003, [2003] HKCFI 568.

²⁰⁴ See article 1502(5) of the Dutch Code of Civil Procedure.

²⁰⁵ *PT Asuransi Jasa Indonesia*, *supra* at note 205, at para 65.

²⁰⁶ For a commentary, see : Stephan M. Kröll, “Recourse against Negative Decisions on Jurisdiction” (2004) 20:1 Arb Int’l 55-72.

²⁰⁷ BGH (German Supreme Court), III ZB 44/01 of 6 June 2002, Schieds VZ, 2003, 39.

²⁰⁸ Kröll, *supra* at note 137, at 56. Nevertheless, the author suggests the possibility to invoke the ground of *infra petita* pursuant to article 1059(2)(c) ZPO. *Contra*: Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell: London, 2007) 408.

take the form of an award.²⁰⁹ These temporary measures refer to the substance of the dispute only in an instrumental way, as much as an award on the jurisdiction would be instrumental to an award on the merits. Hence, there cannot be a discrimination *vis-à-vis* the jurisdictional decision. Therefore, as a matter of principle, a negative jurisdictional ruling could be challenged if resulting from one of the cases covered by the grounds of annulment set out in article 34 of the *Model Law*.

Nevertheless, while in theory the recourse under article 34 of the *Model Law* is admissible, the grounds for setting aside were clearly tailored for situations other than a wrongful decision to decline jurisdiction. Hence, for instance, the award can be annulled if the arbitration agreement is invalid or incapable of being performed—that is if the tribunal has wrongfully retained jurisdiction—yet the same ground cannot apply to the opposite situation. The only door that remains open is the violation of the public policy of the state of the seat.²¹⁰ This, however, would be an unlikely case, as the decision of the arbitrators does not affect the substantive rights of the parties, which will simply have to litigate in another venue. In other words, the right to resort to arbitration is not a fundamental right, rather a mere contractual one. The inadmissibility of negative jurisdictional rulings thus mimics a clear policy choice of the *Model Law*: while state courts may rule that the arbitrators *did not have* jurisdiction over the dispute (article 16(3)), they may not, on the contrary, rule that the arbitrators *have*—or *had*—jurisdiction.

Whilst this system will not tolerate that a party was illegitimately forced to resolve the dispute through arbitration, it is prepared to take a chance with respect to a violation of the right to resort to arbitration. This is so because, first, there is confidence that the arbitrators will decline

²⁰⁹ Such measures may have a very disparate content, and span from an order to seize assets, to a negative injunction ordering the defendant to refrain from entertaining a certain conduct.

²¹⁰ Bachand, *Kompetenz-Kompetenz*, *supra* at note 21, 443.

jurisdiction only in rightful cases²¹¹ and, second, holding otherwise would expose the system to the threat of a significant loophole, namely, a systematic refusal to abide by the court's ruling in favor of the arbitrators' jurisdiction, despite the negative ruling issued by the arbitral tribunal.

It is true that a court decision holding that the arbitrators have jurisdiction would probably cast away all the doubts that they might entertain, and reassure them to continue the proceedings. This would in fact prevent an annulment of the award, and thus protect their reputation. Although, we also have to consider a situation where the tribunal—for whatever reason it might be—is unwilling to continue the arbitration.

In common law jurisdictions, this situation could be overcome only with a mandatory injunction against the arbitrators. However, courts will generally use mandatory injunctions sparingly, as a lack of compliance would give rise to the quasi-criminal procedure of contempt of court.²¹² Likewise, damages in lieu would not be able to compensate the parties for the losses resulting from the lack of arbitration, and they would hardly be assessable.²¹³ At the same time, in civil law jurisdictions the arbitrators' contract could not obtain specific performance.²¹⁴ the party could merely claim damages against them, the assessment of which would amount to a *probatio diabolica*.

²¹¹ Jean-Baptiste Racine, "La Sentence d'incompétence" (2010) 4 Rev Arb 730: "Les arbitres ont une propension naturelle à s'estimer compétents."

²¹² Especially if we consider that the only means of coercion would be the quasi criminal procedure of "contempt of court". For an overview see: Stephen Smith, *Remedies* (Oxford: Oxford University Press, forthcoming); Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20:1 O.J.L.S. 28.

²¹³ In some jurisdictions this could be precluded by the immunity of arbitrators to civil claims concerning their services. In theory we could imagine an assessment similar to that of a party breaching the arbitration agreement.

²¹⁴ For a comparative overview, see: Henrik Lando & Caspar Rose, "On the Enforcement of Specific Performance in Civil Law Countries" (2004) 24:4 Int'l Rev Law & Econ 473-487.

The only alternative—which seems in line with the principle of *functus officio*, and with the interpretation of negative jurisdictional rulings as awards—²¹⁵ would be to constitute a new tribunal. However, the result could once again be unsatisfactory, turning out to be time consuming and highly expensive.²¹⁶

In conclusion, the policy enshrined in the *Model Law* suggests that in a balancing test between rights, the (contractual) right to resort to arbitration is destined to succumb *vis-à-vis* the possibility to resort to the machinery of the state, thus reinforcing a hierarchy between arbitral tribunals and state courts. Nonetheless, the recent trend admitting challenges against negative awards— which will be described in the following section – might suggest otherwise.

ii. *The Prevalent Trend: Challenges Against Negative Jurisdictional Rulings are Admissible*

Some scholars have observed a recent shift towards the admissibility of challenges against negative jurisdictional rulings.²¹⁷ This has either happened through legislative reforms, or through an expansive interpretation of article 16(3) of the *Model Law* provided by the courts of a given jurisdiction. Among the latter cases, it is worth mentioning the route followed in Canada by Quebec courts, which have interpreted the *Model Law* as allowing a review of negative decisions under article 16(3).²¹⁸ Such judgments rest on the unfairness that would stem from the lack of reviewability of the negative jurisdictional ruling, i.e. the need for the parties to bring their substantive dispute before a state court. However, it was correctly pointed out that the

²¹⁵ On the notion of *functus officio* in arbitration, see : Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009) 2512 and ff.

²¹⁶ This would mean that the parties will have to appoint a new tribunal, and pay the required the fees.

²¹⁷ Racine, *supra* at note 215, at 779.

²¹⁸ *RE/Max Platine Inc. v Groupe Sutton-Actuel Inc.*, 24 July 2008, [2008] QCCA 1405; *Télé Ltée v Société Hydro-Québec*, 17 April 1997, [1997] JQ No. 1431.

arbitrators' decision in this case was not intended to bear a *res judicata* effect, but simply to terminate the respective arbitral proceedings.²¹⁹ The manifest disregard of the wording of article 16(3) was rightly criticised,²²⁰ and the clear intent of the drafters of the *Model Law* suggests that the decision to admit challenges against negative jurisdictional rulings shall be a legislative one. The new arbitration act recently entered in force in Singapore constitutes a notable example of choosing legislative reform as the most appropriate course of action.²²¹ Section 10 of the 2012 International Arbitration act of Singapore reads:

Appeal on ruling of jurisdiction

10.

—(1) This section shall have effect notwithstanding Article 16(3) of the Model Law.

(2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.

(3) If the arbitral tribunal rules —

(a) on a plea as a preliminary question that it has jurisdiction; or

(b) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,

any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.

²¹⁹ Bachand, *Kompetenz-Kompetenz*, *supra* at note 206, 439. Conversely, it was held that if one were to uphold a lack of recourses against the negative ruling, it would be inevitable to recognize a *res judicata* effect – at least to matters of validity of the arbitration agreement – thus precluding a state court to hear a defence on the existence of an arbitration agreement covering the dispute filed by the claimant. See: Poudret & Besson, *supra* at note 29, at 407.

²²⁰ Bachand, *Kompetenz-Kompetenz*, *supra* at note 206, 440.

²²¹ *Singapore Arbitration Act 2013* (No 10/2012, Sing).

[...]

(6) Where the High Court, or the Court of Appeal on appeal, decides that the arbitral tribunal has jurisdiction —

(a) the arbitral tribunal shall continue the arbitral proceedings and make an award;
and

(b) where any arbitrator is unable or unwilling to continue the arbitral proceedings, the mandate of that arbitrator shall terminate and a substitute arbitrator shall be appointed in accordance with Article 15 of the Model Law. [*emphasis added*]

The above provision has no other equivalents in other *Model Law* jurisdictions. Here, the negative decision of the arbitrators may be challenged in front of the High Court, and the court's decision is further subject to appeal. Therefore, we have four potential steps: a decision of the arbitrators; a judgement of the High Court; a judgment of the Court of Appeal; and, finally, a new appointment of the arbitral tribunal (should the original arbitrator refuse to continue the arbitral proceedings). According to a recent judgement of the High Court of Singapore, this framework would defer the decision on the jurisdiction to the arbitral tribunal, yet “not to the extent where it is the sole arbiter of its own jurisdiction, but where it is the *first* arbiter of its own jurisdiction, with a recourse available for the parties to bring that dispute on jurisdiction...to the courts.”²²²

The legislative reform in Singapore followed the 2011 French Decree on Arbitration, which introduced a new provision in the code of civil procedure (article 1520, 1°) addressing the wrongful decision of the arbitrators to decline jurisdiction. The said provision states that an

²²² *Unknown v. Oceanic Shipping & Singapore Tankers* (The "Titan Unity"), [2013] SGHCR 28, at para 31.

award may only be set aside where “the arbitral tribunal wrongly upheld or declined jurisdiction.”²²³ It is worth noting that the *Cour de Cassation* had already interpreted former article 1502(1) —now replaced by article 1520(1)—which only referred to the wrongful decision to retain the jurisdiction, as allowing also challenges to negative decisions.²²⁴

Despite the admissibility in France of the *recours en annulation* against negative jurisdictional awards, the procedure is—if compared to the Singapore International Arbitration Act—profoundly different. While in both jurisdictions the parties may challenge the award within a thirty day period after having received notice of the ruling – and appeal the decision of the lower court – only in Singapore may the state court refer the dispute back to the same arbitrators who declined jurisdiction. Conversely, in France the annulment of the decision will simply allow the parties to commence a new arbitration.²²⁵

Finally, with respect to the applicable test for the review of the arbitrator’s award, the court faces two options: either a full review test, or a limited one. The Paris Court of Appeal held—in accordance with previous cases—²²⁶ that the standard will be one of full review, and also the High Court of Singapore seems in favor of the same criterion.²²⁷ This test of full review shouldn’t nevertheless be understood as a hearing *de novo* on the jurisdictional aspects of the

²²³ Art. 1520-1° CPC: “An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction;”.

²²⁴ Racine, *supra* at note 215, at 739. See also: Cour de Cassation, Première chambre civile, arrêt n° 816 du 6 octobre 2010 (08-20.563) [*Rev. arb.*, 2010.813, note F.-X. Train].

²²⁵ See, most recently: Cour d’Appel de Paris, Pôle 01 CH. 01 17 décembre 2013 N° 12/07231.

²²⁶ Cour de Cassation, 6 octobre 2010, *supra* at note 228.

²²⁷ Cour d’Appel de Paris, 17 décembre 2013, *supra* at note 46: « [L]e juge de l’annulation contrôle la décision du tribunal arbitral sur sa compétence, en recherchant tous les éléments de droit et de fait permettant d’apprécier l’existence et la portée de la convention d’arbitrage. *The Titan Unity*, *supra* at note 42, at para 31: “It is evident that the statutory framework of the IAA defers the decision on the arbitral tribunal’s jurisdiction to the arbitral tribunal itself – not to the extent where it is the sole arbiter of its own jurisdiction, but where it is the first arbiter of its own jurisdiction, with a recourse available for parties to bring that dispute on jurisdiction, which includes the determination of the existence of an arbitration agreement, to the courts only after having had the benefit of the arbitral tribunal’s ruling on that question.”

dispute. This means that the court shall exclusively verify—on the basis of the parties submission during the course of arbitration proceedings—²²⁸ whether or not the decision of the arbitrator was correct in the light of the law applicable to the arbitration agreement.

iii. Remarks on the Admissibility of Challenges Against Negative Rulings

The previous sections have highlighted the existence of two antithetical approaches to challenges against negative jurisdictional rulings. The inadmissibility of such challenges can be traced back in the authoritative *Model Law*. We have explained that – *inter alia* – recent reforms show a trend to uphold challenges against negative arbitral rulings. Likewise, this trend clears the air and avoids futile discussions on the qualification of such decisions—be they called “rulings” or “awards”—as they can be challenged in court. One final question should then be answered, that is, is this trend justified, and if so, why? I wish to suggest that, despite an original skepticism, there are good reasons to answer in the affirmative.

To understand the usefulness of a recourse in front of a state court against a decision to decline jurisdiction, we have to distinguish between its possible contents. If the decision states that the arbitrators do not have jurisdiction over the dispute because it falls outside the scope of the arbitration agreement, the recourse is useless. It is so as the party—in the absence of such recourse—could simply resume arbitral proceedings by constituting a new tribunal. We note in passing that this would be the same result stemming from a decision of the state court under section 10(6) of the Singapore International Arbitration Act, with the caveat that the challenge would introduce further delays and costs. The same goes for article 1520(1) of the French code of civil procedure.

²²⁸ This will obviously be mitigated by the applicable rules on evidence. That is to say that the parties will have to follow the rules of evidence that apply in the jurisdiction where the recourse against the negative award is filed.

Conversely, the recourse becomes particularly important for a final declaration of invalidity of the arbitration agreement.²²⁹ In this case, the arbitrators' rulings would not be able to impede the constitution of a further tribunal on the motion of the party disagreeing with the decision. To be fair, if the arbitration is an administered one there are good reasons to believe that the institution could refuse to commence a new arbitration. This would most likely be the outcome of a new application for arbitration under the 2012 ICC Arbitration Rules. Here, pursuant to article 6(3) the Court of the ICC—seized by the Secretary General—would rule that the arbitration cannot proceed.²³⁰ However, in case of an ad hoc arbitration, or of an institutional arbitration lacking a preliminary filter similar to article 6(3) of the ICC Rules, the party disagreeing with the arbitrators' decision would be forced to file a timely challenge in front of the competent state court, thus removing any possibility of abuse of the arbitration agreement. At the same, the fact that the negative ruling becomes an enforceable decision, allows the successful party to enforce against its opponent the part of the award related to costs.

²²⁹ The term “invalidity” should be here interpreted broadly, thus covering both issues of formal and substantive validity of the agreement.

²³⁰ For an overview of the ICC Court's decisions, see: Jacob Grierson & Annet van Hooft, *Arbitrating under the 2012 ICC Rules* (Alphen: Kluwer Law International, 2012) 103-111.

3. CONCLUSION

The analysis conducted in Chapter III has revealed that arbitrators approach issues of validity of the arbitration agreement as a jurisdictional matter. For this reason, the most influential arbitration rules set up several procedural requirements for the challenges to said agreements.

The arbitrators' decision on the validity of the agreement—after the preliminary screening run by the secretariat of the arbitration centers—will usually revolve around three alternatives: the application of the law of the contract chosen by the parties; the *règles matérielles de l'arbitrage international*; and the conflict of law rules of the law of the seat. Therefore, we did not encounter any inconsistencies with the approaches identified in the state courts' decisions.

The most interesting aspect, instead, concerns the possibility—in a growing number of jurisdictions—of immediately challenging the jurisdictional decision of the arbitrators in front of a state court. Given the fact that this possibility mimics an appeal procedure, we should then ask ourselves if it demonstrates a theoretical shift in the field. This is particularly true if we consider the admissibility of challenges against negative jurisdictional rulings.

This aspect, as well as the theoretical aspects concerning the *prima facie* test addressed in chapter II, will be considered in the following section.

IV. CONCLUSION: THE VALIDITY OF THE ARBITRATION AGREEMENT AS A QUESTION OF ALLOCATION OF POWER BETWEEN STATE COURTS AND ARBITRATORS

We highlighted that a comparative overview of the positive sources of international arbitration shows a trend according to which the arbitral tribunals are the first “arbiters” of their jurisdiction, yet not the sole ones. At the same time, we observed that asking the question “what is the law applicable to the arbitration agreement?” will rather turn into “who should decide upon the validity of such agreement?”. While the rules addressing the substantive and formal validity of the arbitration agreement are quite straightforward,²³¹ the same is not true with respect to the allocation of power on the decision concerning the validity of the arbitration agreement in the pre-award phase.²³² Despite this confusion, state courts and arbitral tribunals seem to have found an equilibrium: the state court will give priority to the arbitrators, unless the arbitration agreement is manifestly flawed (*prima facie* test); the arbitrators’ decision bears legal effects in the national legal system even if the arbitration clause is invalid, or if—for whatever reason—the arbitral tribunal has declined jurisdiction (admissibility of negative awards and negative jurisdictional challenges). In other words, the arbitrators enjoy a subsidiary jurisdiction grounded in something other than the arbitration agreement. State judges and arbitrators have become, in this limited scenario, peers.

²³¹ As far as formal validity is concerned, the comparative study has shown the existence of two rules: (a) written form (broadly interpreted by including also exchange of emails, and other electronic documents), (b) freedom of form. The state court will select one of these rules, according to the provisions of the arbitration act in force in its country. With respect to the substantive validity, we can observe three main rules: (a) the *lex contractu*, (b) the substantive law of the *lex loci arbitri*, (c) the *règles matérielles de l’arbitrage* or other international standards of validity.

²³² In the post-award phase the state court sought by the parties will apply the rules set out in note 238.

This section purports to address the weight that these insights (i.e. the *prima facie* test, and the admissibility of negative awards and negative jurisdictional challenges) bear on the theoretical understanding of international arbitration. It is worth doing so by addressing the ongoing discussion among two eminent scholars, namely Emmanuel Gaillard, and Jan Paulsson.²³³ While the former conceives of international arbitration as an autonomous transnational order,²³⁴ legitimized by the States' willingness to enforce the final decision of the arbitrators, the latter suggests an understanding of international arbitration as a legal order immersed in a pluralistic world of social orders. According to Paulsson, such orders would either cooperate in a horizontal dimension, or share authority within the same normative space (vertical dimension). Eventually, this would lead to an overlapping of these orders (the so-called dimension of depth).²³⁵

While the *prima facie* test that gives priority to the arbitrators in reviewing their jurisdiction fits well under Gaillard's theory, the challenge against a negative jurisdictional ruling seems problematic. There is something odd in conceiving an autonomous order if a state court at the seat of arbitration may order the arbitral tribunal to retain jurisdiction, disregarding their previous decision. To be fair, similar difficulties arise in case of annulment proceedings. In this instance, however, the obstacle is overcome by arguing in favor of the enforcement of an award annulled at the seat. The annulment of the award would thus amount to an incident that does not impede the circulation of the arbitrators' decision.

Conversely, Paulsson's view allows us to identify the *prima facie* test and the negative jurisdictional challenges as a case of distribution of authority among different legal orders—

²³³ See *supra* note 2 and 3, with references concerning their respective monographs. See also, for an embryonic discussion: Emmanuel Gaillard, "L'ordre juridique arbitral: réalité, utilité, et spécificité" (2010) 55 McGill L.J. 891; Jan Paulsson, "Arbitration in Three Dimensions" (2010) 7:1 Trans Disp Management 1.

²³⁴ Emmanuel Gaillard, *Legal Theory*, *supra* note 2, at 46.

²³⁵ Paulsson, *Three Dimensions*, *supra* note 74, 30-32. The author heavily relies on the notion of legal order. He embraces the definition of Santi Romano according to which a legal order is "a set of norms acknowledged by a social group as authoritative", *Ibid* at 28.

namely, the national order and the arbitral one—over the same normative space, i.e. the dispute between the parties. This theory, however, does not explain how they coexist. In the case of a challenge against the negative ruling—yet the same could apply to setting aside proceedings at the seat—the state and the arbitral “order” do not share a set of norms acknowledged as authoritative. They are not, therefore, part of a greater legal order that regulates their interactions. This is consistent with the fact that these orders cannot even form a “social group” *per se*.

In other words, while the theory of social/legal orders might explain their internal functioning, it cannot explain the external perspective concerning the interactions between them. While in theory there is of course the possibility that the stronger order—the state—will impose on the weaker one the rules governing their interactions, the history of international arbitration shows quite the opposite: both the national legal orders and international arbitrations have borrowed from each other. In this regard, I would like to suggest some ideas that might allow us to make sense of such fruitful *coexistence*.

The first idea consists in replacing Paulsson’s notion of legal order with the one of normative agent, according to which every individual—whether a physical or legal person—is a center of normativity.²³⁶ More precisely, every individual is a *normative agent*, that is an agent producing or modifying norms. If we abandon the logics of social group, and we embrace that of individual normative agents, the arbitrator and the court may be seen as standing on an equal footing. This means that there is no hierarchy between the two. The fact that a challenge against a negative ruling is admissible re-enforces this conclusion: the arbitrators’ decision is worth being subject to an appeal. If the decision can be reviewed even if the arbitration agreement was not valid, hence

²³⁶ A manifesto: Martha-Marie Kleinhans & Roderick A. Macdonald, “What Is a Critical Legal Pluralism” (1997) 12 Can. J.L. & Soc. 25; Roderick A. Macdonald & David Sandomierski, “Against Nomopolies” (2006) 57:4 NILQ 610. For an overview of pluralist theories, see: Emmanuel Melissaris, “The More the Merrier? A New Take on Legal Pluralism” (2004) 13 SLS 57.

excluding the jurisdiction of the arbitrators, it means that the arbitral tribunal enjoys a sort of subsidiary authority concerning these jurisdictional matters. Of course, this could be seen as an attempted absorption by the state order of the arbitral order. Conversely, if we endorse Paulsson's pluralist theory outlined in precedence, we may conclude that this is a sign of deference, proving that the arbitrators have arisen as a normative agent worth consideration despite the existence of a private agreement between two or more parties (i.e. the arbitration agreement). This leads to a further conclusion: the court, when reviewing the negative ruling should—at least in theory—show deference, and consider arbitrators as its peers. For this reason it seems—although some decisions went in a different direction—that the standard of review should be one of reasonableness, instead of correctness.

The second idea consists in underlining the importance of the use of the term *normative*, which allows us to think of patterns other than those expressed by *rules*, that is of normative structures that revolve around the paradigm “if *a* then *b*”.²³⁷ In particular, this shift sheds light on the importance of *principles* in the field of international arbitration, which may take a more or less solemn form, be that of a higher right, of a general principle of contract law. These principles bear a constitutional matrix, inasmuch they attempt to create a sense of *civitatis*—or, if you will, of belonging—amongst the various agents.²³⁸ All the agents that operate within the field thus share a sense of responsibility towards their normative role, and thus tend to comply with these principles. Not surprisingly, we may observe that the regulation of the interactions between the aforementioned normative agents is centered—at least as far as jurisdictional matters are concerned (but we suspect that the same could be true in other instances)—on the use of such

²³⁷ See: Ronald Dworkin, *Taking Rights Seriously* (New Heaven: Harvard University Press, 1978).

²³⁸ This theme – i.e. the existence of constitutional patterns outside the nation state - has been addressed, albeit under a different perspective in: Gunther Teubner, “Societal Constitutionalism: Alternatives to State-centered Constitutional Theory?”, in Christian Joerges et al., eds, *Constitutionalism and Transnational Governance* (Oxford: Oxford University Press, 2004) 3-28.

principles. Among the most notable examples, stems the principle of competence-competence, that leads to the give priority to the arbitrators in jurisdictional issues, and, as far as issues concerning the scope of the arbitration agreement are concerned, the principle that such agreements should be interpreted broadly, by looking at the will of the parties as well as their previous dealings.

In conclusion, within the space of coexistence constituted by the allocation of jurisdiction between state courts and arbitral tribunals, it appears that the two normative agents—the courts and the arbitrators—stand on an equal footing, and tend to comply with some overarching constitutional-like principles. This coordination, seems inspired by a sort of rectitude, of collective effort to achieve what Jan Paulsson has called “the idea of arbitration”, and Charles Jarrosson, “la notion d’arbitrage”.²³⁹ This sheds a new light on the changing nature of international arbitration, and in particular, on the emergence of new normative patterns.

²³⁹ See also Charles Jarrosson, *La notion de l’arbitrage*, (Paris: LGDJ, 1985).

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