ARTICLES

THE ROLE OF NATIONAL COURTS AT THE THRESHOLD OF ARBITRATION*

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I. INTRODUCTION

There is a broad consensus that national courts of the arbitral seat have some kind of role to play *during* the pendency of an arbitration, though the exact contours of that role may differ from jurisdiction to jurisdiction. Similarly, it seems clear that national courts have a role to play on a *post-award* basis. While jurisdictions may vary as to the extent of control in annulment actions, the New York Convention brings a high degree of consensus over the role of courts in the recognition and enforcement of foreign awards, even though the Convention may receive different interpretations in different countries.

By comparison, much less well-aligned is the role of national courts *prior* to arbitration, and more particularly in deciding whether, how, and to what extent to refer parties to arbitration in the face of resistance by one of them. And yet, this stage of judicial involvement in international arbitration is a vital one. Unless courts are willing to enforce arbitration agreements, there may be no arbitral proceedings to which national courts may lend assistance and no arbitral awards to be annulled or granted recognition or enforcement.

This all-important early stage in the relationship between courts and arbitral tribunals has simply not received the sustained attention it deserves. This is especially remarkable due to the fact that it is not just the courts of the arbitral situs that may decide whether or not to refer the parties to arbitration. The question whether to refer the parties to arbitration may come before *any* court, worldwide, and not only before the courts of the arbitral situs. Whenever a plaintiff institutes litigation – anywhere – the defendant may invoke an arbitration agreement as a basis for dismissal of the action in favor of arbitration in the arbitral situs.

II. ON WHAT GROUNDS MIGHT AN APPARENT ARBITRATION AGREEMENT BE DENIED ENFORCEMENT?

It is clear, upon reflection as well as upon reading the reported cases across jurisdictions, that agreements to arbitrate may be subject to a wide range of challenges. One need only imagine the common scenario in which the plaintiff

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institutes national court arbitration over a claim that the defendant considers to be subject to a prior arbitration agreement between the parties, and in which the defendant on that basis challenges judicial jurisdiction and moves to have the action dismissed. If the plaintiff is determined to have its claim remain in court, it may call into question the enforceability of the arbitration agreement, thus hoping to defeat the motion to dismiss. It is not difficult to imagine the arguments that the plaintiff might make to discredit the arbitration agreement or its enforcement.

The plaintiff may contend that no arbitration agreement was ever made, for example, on the ground that the offer to arbitrate was never accepted or even that the agreement itself is a forgery. The plaintiff may assert that, even if the agreement was made, it is not a party to it. (It will ordinarily point out that it is a non-signatory of the agreement and maintain that the law does not permit disregarding that fact). It may also, while admitting that an agreement to arbitrate was made, challenge its validity, and thus its enforceability. (It may also seek to challenge the validity of the main contract containing the arbitration clause, but the notion of severability may get in the way of having that challenge heard and decided at the threshold.) Again, it may concede that an arbitration agreement was formed and is valid, but maintain that the dispute in question falls outside the scope of that agreement, so that a tribunal resolving the dispute would commit an excess of arbitral authority by resolving it. Further, the dispute in question may be one that is legally incapable of being arbitrated under the applicable law, despite the parties having agreed to arbitrate it. Enforcement of an arbitration agreement that was admittedly entered into may also be deemed offensive to public policy.

There are still other reasons why a court might be persuaded to deny effect to an apparent agreement to arbitrate. The party invoking the agreement may have waived the right to arbitrate. (Most legal systems recognize waiver in this context.) It may have waited an unduly long time to commence arbitration, even possibly letting the statute of limitations pass. The party may have failed to comply with one or more conditions precedent to arbitration (such as mediation, conciliation or national court litigation for a specified period of time) and not be able to justify that failure. The dispute in question may already have been adjudicated by a court or arbitral tribunal so that it is *res judicata*. Other impediments to arbitration may well be imagined.

The purpose of this presentation is to shed further needed light on the role of courts on what we might call this panoply of "threshold" issues.

III. APPROACHES TO THE THRESHOLD ROLE OF NATIONAL COURTS

An examination of national practices shows that the role played by national courts at this early stage in the arbitral life-cycle varies widely across jurisdictions. The spectrum is a reasonably wide one. In the sections that follow, I set out the main positions that may be taken.

A. *Comprehensive Judicial Involvement at the Threshold*

At one extreme lies the possibility of comprehensive judicial involvement at the stage of enforcing an agreement to arbitrate. Under such an approach, parties would be entitled, should they request it, to a full judicial inquiry into the agreement's enforceability prior to the commencement of arbitration. Art. II of the New York Convention may be cited in general support of this approach, in that it requires national courts to refer parties to arbitration *unless they find the agreement to be "null and void, inoperative, or incapable of being performed*".[1] Some jurisdictions permit parties to broadly challenge the enforceability of agreements to arbitrate at the threshold, enable courts to decide those challenges fully independently, and draw no particular distinctions among the various challenges that may be advanced.[2]

Jurisdictions of this sort are by no means necessarily hostile to arbitration, or necessarily suspicious of it, but they do afford parties a right to have an arbitration agreement's enforceability determined initially and freely by a court. In so doing, they do not deny the *Kompetenz-Kompetenz* of the arbitral tribunal (that is, they do not dispute the authority of tribunals to determine their jurisdiction, if objections to their jurisdiction are raised), but they do not accord the tribunal what has come to be known as "negative" *Kompetenz-Kompetenz*, that is to say, a competence that excludes any competence of the courts on a pre-arbitration basis. Arbitral tribunals thus may determine their own jurisdiction and authority to adjudicate, but that authority does not operate to defeat the authority of courts to determine, if asked to do so, whether or not an arbitral proceeding may go forward.

Allowing plenary judicial review of an arbitration agreement's enforceability at the outset risks imposing serious costs. It gives parties resisting arbitration a constant incentive to seek out a judicial forum and, in so doing, a judicial determination that arbitration should not go forward. This could dangerously compromise some of arbitration's most essential rationales: speed, economy and avoidance of the procedural formalities associated with national court litigation.

B. *A "Hands-Off" Role for Courts at the Threshold*

At the other extreme lie jurisdictions that insist on a complete absence of judicial involvement prior to, or during the pendency of, the arbitral proceeding. Under this view, the courts have no, or an exceedingly small, role in determining whether an arbitration agreement is worthy of enforcement. Should a party resort to court for a finding that an agreement to arbitrate should not, for one reason or

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[1] Art. II, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 6, 1958, U.S.T. 2117, 330 U.N.T.S. 38.

[2] See, *e.g.*, BÜRGERLICHES GESETZBUCH [BGB][Civil Code], § 1032(2) (providing that "[p]rior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible.").

another, be enforced, it will be told that decisions of that sort are reserved to the arbitral tribunal, at least until after the proceedings are over and an award has been rendered. The tribunal enjoys *Kompetenz-Kompetenz* in all its positive dimensions and in all its negative dimensions as well.[3]

But it is difficult for any State that is party to the New York Convention to posit that a court has no role whatsoever in examining an arbitration agreement prior to arbitration, if asked to do so. As noted, Art. II allows a court to find an arbitration agreement to be "null and void, inoperative, or incapable of being performed".[4] The position I have described here appears to be maximally pro-arbitration in that it accords national courts no, or virtually no, opportunity to prevent an arbitration from going forward. In fact such a position is logically untenable because, before enforcing an agreement to arbitrate, a court must surely find that there is some reason to believe that the agreement proffered to it constitutes an arbitration agreement and that the party proffering it is a party to it.

Supporters of this approach maintain that it is absolutely essential to the efficacy of arbitration as a dispute resolution mechanism, especially since parties resisting arbitration may go to great lengths to delay and possibly derail the arbitration. There can be no doubt that this approach does in fact manage to expedite the arbitral process.

That a court adopts a fully "hands-off" policy does not of course mean that an arbitration will necessarily take place. There are many reasons why an arbitration may not go forward, but, under this approach, it will be entirely for the arbitral tribunal itself, and not a national court, to make that determination.

Similarly, that a legal system bars courts from preventing the enforcement of an agreement to arbitrate – and is to that extent "pro-arbitration" – does not mean that the arbitral proceedings and arbitral award necessarily escape judicial review entirely. A legal system may confer exclusive *Kompetenz-Kompetenz* on an arbitral tribunal prior to the arbitration, and yet still reserve to national courts broad authority, after the fact, to annul or deny enforcement of the resulting award.[5] The net effect is that agreements to arbitrate will virtually always be enforced even though the awards that result from the arbitral proceedings that follow will be subject to searching judicial review. Such a system may be regarded as "pro-arbitration", but it is certainly not highly "pro-award".

A "hands-off" policy is also not in all circumstances efficient. Clearly, a court may annul or deny enforcement of an award, after years have gone into an arbitral proceeding, on the basis of a ground (such as the invalidity of the arbitration

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[3] See Emmanuel Gaillard and Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE, (Emmanuel Gaillard and Domenico Di Pietro eds., 2008).

[4] Art. II, Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[5] This is the French approach. *See, e.g.*, Cour de Cassation [Cass.][supreme court for judicial matters] 1e civ., Fondation Joseph Abela Family, October 6, 2010, 2010 REVUE DE L'ARBITRAGE, 969.

agreement) that a court could have entertained at the outset; had a court upheld the challenge at the outset, the resources devoted to the arbitration would have been spared.

C. *Intermediate Positions on the Threshold Judicial Role*

Legal systems at both ends of the spectrum I have described prescribe for courts a highly well-defined role at the threshold of arbitration. This presents the advantage that parties to agreements to arbitrate know well in advance that courts, as the case may be, have an exceptionally robust or barely any role to play before an arbitration has gotten underway. These systems present manifest predictability advantages.

It is possible, of course, for courts to adopt an intermediate position, that is to say, a position that aims at maintaining arbitration's efficacy without completely denying courts a policing role in the period prior to arbitration.

There are broadly four intermediate approaches that courts might adopt with this purpose in mind, and they are actually quite different, the one from the others. As will be seen, the ease and readiness with which agreements to arbitrate are given effect by the courts of a jurisdiction depend on whether the jurisdiction lies at one or the other end of the spectrum I have described or whether it occupies what I have called an intermediate position.

1. Default rule and party autonomy

A first intermediate approach consists of positing that the positions lying at one or the other end of the spectrum constitute "default rules" only. Under this view, the law prescribes a particular role, or non-role, for the national courts at the threshold of arbitration, but recognizes the parties' contractual freedom to vary the arrangement.[6] An intermediate position is accordingly achieved not by finding a particular intermediate place on the spectrum, but by recognizing party autonomy to determine what that intermediate place is to be.

This approach seeks to achieve predictability, in the form of a default rule, tempered by a showing of substantial respect for party autonomy. I identify this as a showing of substantial respect for party autonomy, because one might well posit that the role of national courts at the threshold of arbitration is a matter of public policy that should not be susceptible of modification by agreement between the parties. To take the latter view is to allow parties to agree to arbitrate, as well as to design the procedural contours of their arbitration, but not to determine themselves the proper role of courts in deciding whether an arbitration agreement will or will not be given effect. An intermediate approach that posits a default rule but welcomes contractual departures from it essentially rejects that view.

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[6] *See LG Caltex Gas Co. v. China Nat'l Petroleum Co.*, [2001] EWCA Civ. 788 (Eng. Ct. App.) (permitting parties by contract to vest in tribunals final decisionmaking over the question of arbitral jurisdiction); Bundesgerichtshof [BGH][Federal Supreme Court] May 26, 1988, NEUE JURISTISCHE WOCHENSCHRIFT- RECHTSPRECHUNGS-REPORT [NJW-RR] 1526, 1527 (Ger.) (same).

Recognizing party autonomy to confer full authority on courts to determine the enforceability of arbitration agreements when they would ordinarily lack that authority, or to deprive courts of authority to determine the enforceability of arbitration agreements when they ordinarily enjoy plenary authority of that sort, means nothing more than that the position that a State has taken on that issue is not an unalterable one. But the fact remains that the State will have taken an extreme default position and that the parties bear the onus of altering it. It is questionable how often parties have this issue in mind at the time they insert an arbitration clause into the main contract.

2. Heightening the burden of proof for resisting arbitration

A second intermediate approach is to permit courts to address at the outset all challenges to enforcement of an arbitration agreement, but to place a very substantial burden on the party resisting arbitration to demonstrate that the agreement should not be enforced. This could be achieved by announcing a presumption in favor of enforcement, but allowing that presumption to be overcome, albeit with some difficulty. The challenge for jurisdictions of this sort is to articulate a well-understood standard of proof for defeating enforcement of an agreement to arbitrate, so as to maintain at least some semblance of predictability, at least as to how the courts will go about performing this task.

As is well known, French law gives the judicial inquiry that may be conducted at the outset an exceptionally narrow scope. A court may entertain a claim that an arbitration agreement is invalid or inapplicable, but in order for the challenger to prevail, the invalidity or inapplicability of the agreement must be "manifest".[7] It is widely conceded that, in the face of so high a standard of proof, arbitration agreements are scarcely ever denied enforcement in France and parties are therefore disincentivized to seek denial of enforcement in the first place. Again, this is not, of course, to say that objections to the arbitration agreement will not be entertained, but rather that they will be entertained at the threshold by the arbitral tribunal itself and, for all practical purposes, only by it.

Sometimes this intermediate approach is framed in looser terms. Thus, when Swiss courts conduct pre-arbitration examinations of agreements to arbitrate they do so on what is considered to be a prima facie basis only.[8] Presumably, even if it is not manifestly invalid or inapplicable, within the meaning of French law, it may still fail a test that requires a prima facie showing of enforceability.

The rationale in favor of an intermediate approach of this sort is that courts have a valuable function to perform in policing arbitration agreements prior to enforcing them, but that that function must operate within important limitations, lest agreements to arbitrate may be too easily frustrated and arbitration lose much of its appeal.

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[7] *See* Republic of France, Decree No. 2011-48 (Jan. 13, 2011).

[8] *See*, e.g., Swiss Fed. Trib., First Civil Law Court, Judgment of 6 August 2012, DFT 4A_119/2012, ¶ 3.2 (Aug. 6, 2012).

This intermediate approach has considerable appeal. Placing the burden of avoiding an arbitration agreement on the party seeking to avoid it, and making that burden a serious one, is a way for a State to adopt a basically pro-arbitration stance, but one that is less than categorical. The courts of that State need of course to establish a standard that captures this particular calibration, and then take care to employ it in a consistent and reasonably predictable fashion. That is not an especially easy task, but it can be done.

3. Immediate court review of arbitral rulings on jurisdiction

There exists a third intermediate approach that one can find in the legislation of certain jurisdictions. This consists of a very specific mechanism whereby the tribunal enjoys a first opportunity to determine the enforceability of an agreement to arbitrate, but its determination of that matter is subject to immediate "interlocutory" judicial review (indeed review within a relatively short limitations period) and a binding judicial determination of the matter. This approach is exemplified by the UNCITRAL Model Law.[9]

The appeal of this mechanism is clear. It gives only positive and no negative effect to the *Kompetenz-Kompetenz* principle in the first instance, but postpones judicial involvement until after the tribunal has made its determination on the matter. Such a mechanism presupposes a bifurcation of proceedings, in that the tribunal addresses the jurisdictional issue at the outset and renders a decision on that particular matter independent from any inquiry into the merits, but producing a ruling that is then in itself judicially challengeable.

If the limitations period is a short one and the court acts promptly, this mechanism should not raise serious problems of delay. More importantly, it avoids the serious problem, raised by the "hands-off" approach, of postponing any judicial ruling on a challenge to the arbitration agreement until after the possibly lengthy arbitral proceedings have concluded and an award has emerged, with the attendant waste of resources if the award is annulled or widely denied enforcement.

The challenge – and it is not an insuperable one – is determining the standard of review to be exercised by the courts on the occasion of this "interlocutory" review. Even UNCITRAL Model Law States differ in regard to the standard, with some taking the position that the court conducts full, i.e. de novo, review[10] and others permitting a prima facie review only.[11] States may also make the standard

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[9] Art. 16(1) of the UNCITRAL Model Law provides that "[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". However, Art. 16(3) provides that "any party may request, within thirty days after having received notice of that ruling, judicial review of the arbitrators' jurisdictional decision".

[10] *See* GARY B. BORN, *International Commercial Arbitration*, 1086 (2014) (citing judicial decisions in, among other jurisdictions, Australia, New Zealand, England, Austria and Spain).

[11] *See* BORN, supra fn. 8, at 1088 (citing judicial decisions in, among other jurisdictions, Canada, India and Hong Kong). *See also* Frédéric Bachand, *Does Article 8 of*

of review vary according to the particular challenge at hand, for example, by showing greater deference to tribunals on the question of the scope of the arbitration agreement than on the agreement's existence or validity.[12]

This brings us to a fourth intermediate approach.

4. Distinguishing among challenges to the arbitration agreement

Still another intermediate approach consists of distinguishing among all possible objections to enforcement of an arbitration agreement, according to their nature, and determining that some are worthy of judicial control prior to arbitration, while others are not. For jurisdictions of this sort, the challenge lies precisely in performing this delineation among challenges to the arbitration agreement and justifying why some of them warrant threshold judicial review, if sought by a party resisting arbitration, and others do not.

The rationale in favor of this approach is that the strength of the case for allowing pre-arbitration review of an agreement to arbitrate varies with the objection that the party resisting arbitration advances – that is to say, in effect, that some objections are more compelling than others. The former justifies early judicial involvement, if sought, while the latter does not.

Legal systems that choose to treat different challenges to the arbitration differently, in so far as early judicial involvement is concerned, must establish criteria for making such a distinction. Among legal systems, support has grown for a distinction between what have come to be known as "jurisdictional" and "admissibility" issues.[13]

Broadly speaking, a jurisdictional issue is one on which the legal authority of the arbitral tribunal depends. Because arbitration is founded on party autonomy, the notion of legal authority in this context is intimately connected with the notion of party consent. For that reason, jurisdictional issues are widely viewed as *contractual* in nature. They include the following: Did the parties agree to arbitrate? Is the arbitration agreement entered into by the parties valid? Does the dispute fall within the scope of the arbitration agreement to which the parties subscribed? Should a party that did not sign the arbitration agreement nevertheless be treated as contractually bound by it, so that it may be either a claimant or respondent in an arbitral proceeding based on that agreement?

While the legal authority of an arbitral tribunal presupposes a firm contractual basis, the contract in question must also be a *legal* one. Even if the parties choose to submit a category of disputes to arbitration, the law, for one reason or another, may not allow them to do so. Such disputes are considered to be "non-arbitrable".

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the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?, 22 ARB. INT'L 463 (2006).

[12] *See*, e.g., *Rio Algom Ltd. v. Sammi Steel Co., Ltd.*, XVIII ICCA YEARBOOK COMMERCIAL ARBITRATION 166 (Ontario Super. Ct. 1991).

[13] *See generally* Jan Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution*: *Liber amicorum in honour of Robert Briner* (ICC Publication no. 693, Nov. 2005).

Similarly, even if the law as such does not prohibit arbitration of a given category of disputes, enforcement of a particular arbitration agreement may be thought offensive to public policy. For these reasons, jurisdictional issues – i.e. issues of arbitral authority – may have both a contractual and a legal dimension.

By contrast, an admissibility, as distinct from a jurisdictional, challenge does not question the authority of an arbitral tribunal to hear and decide a case. Rather, it questions, whether a circumstance has arisen or failed to arise with the result that the tribunal should not exercise that authority. Some examples of admissibility are always, or nearly always, recognized as such. If a statute of limitations on the underlying claim has elapsed, the claim should not be entertained. If a party is found to have waived the right it now seeks to arbitrate, it is the exercise of arbitral authority that is challenged, not the authority itself. Much the same may be said about the failure of a party to satisfy certain preconditions to arbitration set out in the arbitration agreement itself. Arguably, *res judicata* is likewise an admissibility objection, since it raises a question about whether a claim should be heard, not about whether the arbitral tribunal has authority to entertain the claim.

Although in the United States, the Federal Arbitration Act is silent on the matter, the Supreme Court has largely supported the notion that parties are entitled to access to courts on a pre-arbitration basis in order to raise jurisdictional challenges (such as the invalidity of the arbitration agreement), but not admissibility challenges (such as the failure of a party to satisfy preconditions to arbitration).[14]

The distinction between jurisdiction and admissibility is not without its critics, however. For example, one might say that if the underlying contract bars arbitration of a claim without a certain precondition having been satisfied, the tribunal lacks authority to conduct that arbitration. Similarly, if the law imposes a limitations period on assertion of a claim, does a tribunal nevertheless have authority to entertain it? A similar argument may be levelled at the other objections commonly viewed as having an admissibility rather than a jurisdictional nature. Secondly, the immediate effect of a finding of inadmissibility is not all that different from a finding of lack of arbitral jurisdiction. In either case, the arbitration will not go forward.

Notwithstanding these critiques, there may be value in maintaining the jurisdiction-admissibility distinction for purposes of delineating those objections that courts will entertain if asked to do so prior to arbitration from those objections they will decline to entertain. In the first place, jurisdictional challenges, as noted, raise central issues of consent. Did the claimant and respondent enter into an arbitration agreement (or may a non-signatory, by virtue of the applicable law, be

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[14] *See*, e.g., *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (not employing the dichotomy between "jurisdictional" and "admissibility" issues, referring instead to issues of "substantive arbitrability" and "procedural arbitrability"). *See generally*, George Bermann, *The 'Gateway' Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012).

legally treated as having done so)? Is the agreement to arbitrate, though entered into by the proper parties, invalid under the applicable law – in which case the agreement cannot legally support a finding of consent? Also, though the parties may have consented to arbitrate, they did not consent to arbitrate every imaginable dispute arising between them; they consented to arbitrate only those disputes encompassed by the particular agreement being invoked. If one accepts that consent lies centrally at the legitimacy of arbitration, then courts properly examine the reality of that consent, if it is plausibly called into question.

Moreover, logically, a party should not be required, without possibility of judicial recourse, to submit the question of its consent to arbitrate to an arbitral tribunal whose very existence is based on a contract to which the resisting party allegedly never consented. There is good reason why a party raising a truly jurisdictional objection to arbitration should be entitled to have that objection addressed by an entity – a court – that would enjoy adjudicatory authority over the underlying claim if consent to arbitrate had never been given.

By contrast, a party may not be able to assert an obligation to arbitrate if it waited too long to initiate arbitration, or if it subsequently waived its right to arbitrate, or if the claim was already adjudicated in a binding fashion and subject to *res judicata*, but in none of these situations is there ordinarily any doubt that an agreement to arbitrate a covered dispute was validly made. The only admissibility issue that could justifiably be viewed as jurisdictional in nature is failure to satisfy preconditions to arbitration. But in order to reach that result, a court would need to find that satisfaction of the preconditions is an element of the "acceptance" of the agreement to arbitrate, such that the offer cannot be accepted until that condition is fulfilled, rather than a mere procedural feature of the arbitral process.

IV. THE CHALLENGES OF EXERCISING PRE-ARBITRAL JUDICIAL CONTROL

To whatever extent national courts conduct a threshold review of an agreement to arbitrate (whether that review covers all possible objections to the agreement's enforcement or only certain of the objections), a number of very important questions arise. These include (a) choice of law, (b) delegability, (c) waiver and judicial determination *sua sponte*, (d) effect on the tribunal's exercise of *Kompetenz-Kompetenz*, (e) effect of prior determinations of the presence or absence of grounds, and (f) timing of the judicial intervention. A legal system cannot properly invite judicial review at the outset without contemplating these issues. In principle, they can all be avoided – or postponed to the post-award stage – only if courts adopt the "hands-off" approach described earlier.

It is beyond the scope of this presentation to explore how different legal systems have gone about prescribing these ground rules for the early judicial interventions that are the subject of this paper. It is enough here to underscore that all of these dimensions of threshold judicial involvement are significant and warrant a legal system's careful consideration. It is interesting to note in passing, however, how many of these issues receive a clear answer in States that have

statutorily adopted a system of interlocutory judicial review of initial arbitral determinations, as described above. That may be reason enough to regard such a system as the best among the four intermediate alternatives that have been canvassed.

A. *Choice of Law*

We have assumed that a legal system may largely decide for itself the grounds for challenging an arbitration agreement that its courts may entertain on a pre-arbitration basis, if asked to do so. The New York Convention's Art. II reference to "null and void, inoperative or incapable of being performed" restricts States very little.[15] But there lurk potential choice of law issues. There are some grounds that genuinely call for a choice of law determination. Whose law governs the question whether an arbitration agreement came into existence, whether that agreement binds a non-signatory, or whether it is valid? It is difficult to see how a conscientious court can avoid making a choice of law inquiry when questions of that sort arise.

Where the ground in question has a clear counterpart in Art. V of the New York Convention, which establishes the bases on which a court may withhold recognition or enforcement from a foreign arbitral award, the applicable law may be borrowed from Art. V. This would mean, for example, applying to the validity of an arbitration agreement the law to which the parties subjected their agreement to arbitrate, failing which the law of the place of arbitration, just as Art. V(1)(*a*) expressly provides for purposes of post-award review.[16]

But even where a clear counterpart may be found in Art. V of the New York Convention, a court examining an arbitration agreement at the outset may not properly borrow Art. V's choice of law principle. Take, for example, arbitrability. Art. V(2)(*a*) refers the enforcing court to the arbitrability norms of the enforcement jurisdiction itself.[17] It seems doubtful that a court addressing arbitrability at the threshold of arbitration should apply the arbitrability norms of the jurisdiction to which the eventual award will be brought for enforcement. The identity of that jurisdiction will likely not yet even be known. The same may be said of Art. V(2)(*b*)'s public policy defense.[18]

A ground that has a counterpart in Art. V, but for which Art. V furnishes no choice of law, is the ground of excess of arbitral authority. This is largely unproblematic. Excess of arbitral authority is a ground that courts, whether before or after arbitration, are apt to apply without making *any* prior choice of law determination. At both stages, a court is likely just to look at the dispute and the arbitration clause, and make a judgment as to whether the former fits in the latter or not.

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[15] New York Convention, *supra* note 2, Article II(1)(3).
[16] New York Convention, *supra* note 2, Article V(1)(a).
[17] *Id.*
[18] New York Convention, *supra* note 2, Article V(1)(b).

Of course, some grounds for denying enforcement of an award under Art. V of course will not and cannot arise at the pre-arbitration stage. We cannot at that time yet know how the tribunal will be constituted or how the arbitral proceedings will be conducted, since the arbitration is yet to occur. Arts. V(1)(*b*)[19] and V(1)(*d*)[20] thus play no role at the threshold of arbitration.

Above all, many of the grounds that may be raised at the outset are ones absent from Art. V. These include waiver, statute of limitations, conditions precedent and *res judicata*. It may not be difficult for the court to identify an applicable law. (It may, for example, readily conclude that it should apply forum law on *res judicata*.) But it is nevertheless something the court may have to do, if only because a party raises the issue. This prospect should not in principle arise in those jurisdictions that adhere to the dichotomy between jurisdictional and admissibility issues. The challenges just mentioned are in principle of an admissibility nature, and thus left to the arbitrators to decide. To that extent, courts have no occasion to identify a choice of law rule.

In systems that reserve the initial determination of arbitral jurisdiction to the arbitrators, subject to immediate interlocutory judicial review, the choice of law situation is somewhat different. If the function of the court under this approach is defined as merely reviewing the tribunal's jurisdictional determinations, a good case may be made for the reviewing court's applying to the ground in question the same law that the tribunal itself applied, even if the reviewing court, acting entirely on its own, would have applied a different one.

B. *Delegability*

We have assumed in this discussion a system that allows courts to entertain some but not all objections to arbitral jurisdiction. As noted earlier, however, the question arises whether and to what extent the parties enjoy party autonomy, i.e. freedom through agreement to divest courts of the authority to entertain such objections even if asked to do so.

The answer may not be a simple one or one that is common to all objections. It seems not at all unreasonable to allow parties to vest in the arbitral tribunal discretion – even unfettered discretion – over the question whether a given claim falls within the scope of the agreement to arbitrate. Though this question implicates consent to arbitrate, resolving it entails contract construction, an exercise ordinarily left to the arbitrators. On the other hand, it seems improbable, if not improper, for the parties to have contractual authority to prevent courts, if asked to do so at the outset, from deciding whether a dispute is arbitrable or not or whether enforcement of the arbitration agreement would be contrary to public policy.

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[19] New York Convention, *supra* note 2, Article V(1)(b) (the right to notice and to be heard).

[20] New York Convention, *supra* note 2, Article V(1)(d) (regularity of the panel composition and the procedure).

In systems that reserve the initial determination of arbitral jurisdiction to the arbitrators, subject to immediate interlocutory judicial review, the issue of delegability will of course not arise. Authority will already have been vested in, and exercised by, the arbitral tribunal in the first instance.

C. *Waiver and Judicial Determination Sua Sponte*

Closely related to delegability are the questions whether a party may waive a particular ground or whether a court may raise a particular ground on its own motion, i.e. even if the party resisting arbitration did not raise it. There are some grounds that would seem quite amenable to waiver. These would include the ground just mentioned, namely that the dispute does not fall within the scope of the arbitration agreement. But it may also include other grounds, such as the invalidity of the agreement, failure to satisfy conditions precedent or, in many jurisdictions, the statute of limitations. If Art. V(2)(*a*) and (*b*) – non-arbitrability and violation of public policy – are by analogy any indication, these grounds, however, may not be validly waived. By the same token, they may and perhaps should be raised by the court *sua sponte*.

In systems that reserve the initial determination of arbitral jurisdiction to the arbitrators, subject to immediate interlocutory judicial review, the court will presumably entertain a challenge to whatever jurisdictional determination the tribunal may have made, waiver included. On the other hand, a court may presumably still raise *sua sponte* the grounds of non–arbitrability and violation of public policy due to the nature of those challenges. But the party challenging a tribunal's jurisdictional ruling bears the burden of instituting the judicial proceeding.

D. *Effect on the Tribunal's Exercise of Kompetenz-Kompetenz*

The fact that a court was asked to resolve a challenge to the arbitration agreement and ultimately rejected the challenge does not, of course, mean that the respondent will not renew its challenge before the tribunal itself, invoking the tribunal's *Kompetenz-Kompetenz*. As a practical matter, of course, a tribunal is unlikely to uphold a challenge to the arbitration agreement when that same challenge was raised before, and rejected by, the court that referred the parties to arbitration in the first place. The possibility cannot, however, be categorically excluded.

There is nevertheless one important qualification to be made. It is possible for courts, in referring the parties to arbitration, to explicitly state that their determination of arbitral jurisdiction is a *prima facie* determination only. Nothing prevents a court from resolving a threshold challenge to an arbitration agreement on a *prima facie* basis only. A court may do so, for example, when it considers that the challenge raised before it is one in which the jurisdiction of the tribunal is so intertwined with the factual findings that the arbitral tribunal will eventually

make that the court should not even purport to resolve it definitively.[21] This may well happen, of course, when a non-signatory objects to being brought into an arbitral proceeding as respondent. Again, as a practical matter, in these circumstances, the tribunal may – for the very same reasons that moved the court – be reluctant to decide the matter as a threshold question within its *Kompetenz-Kompetenz*. It may prefer deferring a determination until such time as evidence on the merits is heard.

It should be added that in systems that reserve the initial determination of arbitral jurisdiction to the arbitrators, subject to immediate interlocutory judicial review, the question of the effect of the court's determination on the tribunal's exercise of *Kompetenz-Kompetenz* will simply not arise because the tribunal will already have exercised its *Kompetenz-Kompetenz* by the time the court intervenes.

E. *Effect of Prior Determinations on the Presence or Absence of a Ground*

One piece of good news for advocates of a meaningful role for national courts in entertaining threshold challenges to an arbitration agreement is the relative unimportance of the question of the impact that prior judicial determinations should have on a court in deciding whether a ground for denying enforcement of an agreement to arbitrate has been established. This is a problem that can plague national courts at later stages in the arbitral life-cycle. This is because grounds upon which an award may be annulled under the arbitration law of the place of arbitration, or may be denied recognition or enforcement in a foreign jurisdiction, are ones that may already have been raised and addressed – most commonly at the very stage that is the subject of the present inquiry, namely at the stage of referring the parties to arbitration. For example, a court that is asked to enforce an arbitration agreement may have already been called upon to decide whether the underlying dispute falls within the scope of the agreement, and it may have answered that question in the affirmative. Or it may have been called upon to determine the validity of the very agreement itself. By the time these questions arise at the annulment or at the enforcement stage, rulings on these questions may thus already have been made by the court that initially referred the parties to arbitration. For them, the question naturally arises whether these prior judicial determinations deserve any weight in the decision to be made by the annulment or enforcement court.

By contrast, at the time a court makes its threshold determination, it is unlikely that there has been any prior judicial determination on the grounds that might justify denying the agreement's enforcement. Importantly, courts entertaining threshold challenges to an arbitration agreement are also not burdened by prior determinations on the grounds that may have been made by the arbitral tribunal itself. By definition, they make their determinations prior to the arbitral proceedings. (Distinctive is the system that reserves the initial determination of

[21] The UNCITRAL Model Law provides in Art. 16(3) that the tribunal may rule on a jurisdictional objection "either as a preliminary question or in an award on the merits".

arbitral jurisdiction to the arbitrators, subject to immediate interlocutory judicial review. Here, the very function of the court is to review, by the established standard, the jurisdictional determinations made by the tribunal.)

F. *Timing of the Judicial Intervention*

A last consideration for those legal systems that allow early judicial challenges to agreements to arbitrate is a question of timing. It would seem implicit in the mere reference to "threshold" issues concerning the agreement to arbitrate that, even in systems that give courts an early opportunity to entertain challenges to enforcement of the agreement, the opportunity arises only at the threshold, widely understood to mean only up until the time that an arbitral tribunal has been finally constituted.[22] The question nevertheless may be asked whether a national court (and, for simplicity's sake, let us contemplate a court of the arbitral situs) may intervene to determine the enforceability of an arbitration agreement even after the tribunal has been constituted (i.e., *during* the arbitration). It is interesting to note that, although some systems that permit judicial review of the agreement to arbitrate establish a formal end point in time when such an intervention may be made,[23] not all such systems do.[24]

As a policy matter, a court should not entertain challenges to an arbitration agreement once the arbitral proceedings are underway, even if they would have entertained them before the tribunal had been constituted. Arbitral tribunals should not be expected to perform their task under constant threat that a party may have recourse to a national court for a declaration that an arbitration agreement is for one reason or another unenforceable and that the parties should never have been referred to arbitration in the first place. It is also not unreasonable to expect parties that want an early judicial determination of the enforceability of an arbitration agreement, and are entitled in principle to have one, to seek it promptly, i.e. truly at the threshold. The period of time between initiation of arbitration and final constitution of a tribunal is ordinarily long enough to enable a party to have judicial recourse before resources have been committed to the arbitration.

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[22] See, *e.g.*, ZIVILPROZESSORDNUNG [ZPO] (CODE OF CIVIL PROCEDURE), § 1032(2) (Ger.) (expressly providing that *"[p]rior to the constitution of the arbitral tribunal*, an application may be made to the court to determine whether or not arbitration is admissible") (emphasis added). *See also* CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1448(1) (Fr.) (even were an arbitration agreement manifestly invalid, that claim will not be entertained by a French court once the arbitral process has commenced)..

[23] *See id.*

[24] *E.g.*, The Swedish Supreme Court has ruled that the arbitral tribunal's *Kompetenz-Kompetenz* "does not … prevent a court, at the request of a party *during the arbitral proceedings*, from ruling on the jurisdictional issue". Hogsta Domstolen [HD] [Supreme Court] 2010-11-12 O 2301-09 (Swed.), ¶ 5 (emphasis added).

There is no particular decision as to timing to be made in systems that reserve the initial determination of arbitral jurisdiction to the arbitrators, subject to immediate interlocutory judicial review. The timing of the court's interlocutory review of the arbitral determination will be prescribed by the system itself.

V. CONCLUSION

The role that national courts play at the threshold of arbitration is anything but standard across jurisdictions. Jurisdictions have a wide range of choice. To the extent that they make a deliberate choice, they have at their disposal numerous considerations to take into account, the most important of which are arbitration's efficacy (in terms of facilitating arbitration's achievement of its core objectives) and its legitimacy (in terms of ensuring the adequacy of party consent on which arbitration depends). There is more than one way in which each of these twin objectives may be promoted and, no less important, more than one way to strike the balance between them.

Positions at the polar ends of the spectrum of judicial involvement are not especially attractive. A system that permits plenary judicial inquiries into all aspects of the enforceability of arbitration agreements prior to arbitration risks inviting costs, delays and judicial involvement in a very big way, contrary to arbitration's basic premises. On the other hand, a system that treats access to a court for these purposes as wholly off-limits, irrespective of the seriousness of the challenge, risks exacting too great a price in terms of arbitral legitimacy. Efficacy may be achievable through less drastic means.

Of the four intermediate solutions that may be imagined, there are three, it seems to me, that commend themselves to policymakers, whether legislative or judicial.

A first such alternative is to permit judicial inquiry over a broad range of challenges, but at the same time place on the party making the challenge a substantial burden of proof. The task then is to identify the showing that the party resisting arbitration must make in order to succeed. This task is not insuperable. A usual means is to posit that arbitration agreements are to be enforced if there is any prima facie basis for enforcing them.

A second attractive solution is to give arbitral tribunals exclusive authority to make an initial determination of the enforceability of the arbitration agreement, but to subject the tribunal's determination in that regard to immediate interlocutory judicial review. Here, too, the system must define the courts' standard of review of the arbitral determination. And here too, the task is not insuperable.

A third, albeit more complex, solution is to draw a distinction among challenges to the enforceability of arbitration agreements between those that a court will entertain prior to arbitration if asked to do so and those that it will decline to entertain even if asked to do so. The viability of this alternative depends on the ability of a legal system to draw that line on a clear and principled basis.

The distinction between jurisdictional and admissibility issues is a highly useful point of departure in this endeavor.

It should be noted in conclusion that these intermediate solutions are not mutually exclusive. The best possible solution may lie in a combination, such as one that adopts a system of interlocutory judicial review of a tribunal's initial jurisdictional determination (as in the second solution above), while also confining the court's involvement to issues of jurisdiction rather than admissibility (as in the third solution above). That said, there is no compelling reason why a legal system should prefer any one of these intermediate solutions over the others. Whatever solution or combination of intermediate solutions among these is adopted will strike a more appropriate balance between competing values than the solutions at either end of the spectrum are capable of achieving.