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Anticipatory Deference: What Will Courts Decide and not Decide Before Enforcing an Agreement to Arbitrate?

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Chapter 4: Anticipatory Deference: What Will Courts Decide and Not Decide Before Enforcing an Agreement to Arbitrate?

George A. Bermann

§4.01 INTRODUCTION

The question of deference in international arbitration usually arises when the issue before a decision-maker, be it a tribunal or a court, is one that has already been addressed and ruled upon by another decision-maker over an arbitration’s life-cycle. The salience of this question stems from the fact that international arbitration is a highly iterative and staged process over the course of which different actors are successively confronted with the same issue. This is particularly the case in regard to jurisdictional issues because the authority of a tribunal to entertain a dispute is potentially an issue at all stages.

But deference may be shown not only to past rulings but also to rulings yet to come. Although there has been no prior ruling on an issue, a decision-maker may ask itself whether it should approach the issue deferentially, i.e., in the sense of leaving it to be primarily decided at a later time and elsewhere. This may not be how we usually view the notion of deference, but it is in fact a species of deference. It is one we may call deference by anticipation, or simply ‘anticipatory deference’.

In arbitration, the issues on which anticipatory deference is shown are typically ‘threshold’, i.e., issues that determine whether a proceeding will or will not go forward. These are commonly placed in one of two categories: issues of jurisdiction and issues of admissibility. According to the general understanding, jurisdictional issues pertain to the authority of an arbitral tribunal to entertain and decide a claim, while admissibility issues focus instead on the claim’s amenability to adjudication. (1) Jurisdictional issues include, for example, whether an arbitration agreement was formed, whether it is valid, whether it covers the dispute and whether it is applicable to a non-signatory. Admissibility issues, by contrast, include, for example, whether a claim is res judicata, whether the right to arbitrate has been waived, whether a statute of limitations has elapsed, and whether a condition precedent has been satisfied.

The decision-maker before which a threshold issue first arises may be a court or a tribunal. If a jurisdictional or admissibility issue is first raised before an arbitral tribunal, anticipatory deference ought not, in principle, come into play. These are precisely the matters that fall within the sphere of a tribunal’s Kompetenz-Kompetenz. Although an arbitral tribunal may not have the ‘last word’, as these matters may arise again in post-award review, we ordinarily expect a tribunal, in initially addressing them, to exercise nothing less than full independence of judgment. There is no room for anticipatory deference (except in the most unusual case in which another tribunal has already made a jurisdictional or admissibility ruling over the same claim).

§4.02 ANTICIPATORY DEERENCE SCENARIOS

However, threshold issues in arbitration can just as easily arise initially before a court as before an arbitral tribunal, and here questions of anticipatory deference can come to the fore. Imagine, as is very often the case, that a party institutes litigation in a national court over a dispute that the named defendant considers exclusively subject to arbitration on the basis of a putative arbitration agreement between the parties. The defendant will almost certainly invoke the arbitration agreement as grounds for dismissal of the case. If the plaintiff intends, for whatever reason, on remaining in court, it will, if at all possible, call the enforceability of the arbitration agreement into question. The arbitration agreement’s enforceability is now squarely before the court. If the court deems the arbitration agreement entitled to enforcement, it will relinquish jurisdiction over the dispute, whether by stay of proceedings or dismissal. (2) Depending on the jurisdiction, it may also issue an order compelling arbitration and possibly even, upon request, issue an anti-suit injunction. (3) On the other hand, if the court finds the arbitration agreement unworthy of enforcement on one ground or another, it will presumably maintain jurisdiction (assuming it had jurisdiction in the first place) and proceed with adjudicating the case.

Other circumstances can be imagined in which a court is the first actor asked to determine the enforceability of an arbitration agreement. Thus, a party, rather than initiating arbitration, may bring a self-standing action in court to compel arbitration. Or a party may, either prior to arbitration or immediately upon initiation of arbitration, turn to court for a declaration of non-enforceability of the arbitration agreement. (4)
Neither of these is particularly common, though when they do occur, the court will once again be the first to determine jurisdiction or admissibility and thus have the opportunity to show, or not show, anticipatory deference to the tribunal.

On the other hand, anticipatory deference is not engaged if, by the time a jurisdictional or admissibility question is raised in court, it has already been addressed and determined by a tribunal. This may easily happen since some arbitration laws specifically provide that a tribunal’s finding of jurisdiction may, within a short period of time, be challenged in court. The 1985 UNCITRAL Model Law on International Commercial Arbitration (‘UNCITRAL Model Law’) specifically so provides:

If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court … to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. (6)

This is not, however, an anticipatory deference scenario since, by definition, the jurisdictional or admissibility issues will already have been addressed and ruled upon by a tribunal.

It is also possible that, by the time a court is asked to refer a dispute to arbitration, a court of another jurisdiction has already been asked to take that same step, and has agreed or declined to do so. The court must then decide whether, and if so to what extent, to defer to the prior determination. This represents a variant on the usual deference scenario, i.e., one in which an adjudicatory body is called upon to revisit an issue on which another adjudicatory body in the same dispute has already made a determination. This is not an anticipatory deference scenario.

Focusing now on the situation in which a court is indeed the first body to address the enforceability of an arbitration agreement in a given dispute, we may safely assume that the court will be willing to entertain at least some challenges to jurisdiction or admissibility if asked to do so. Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (‘New York Convention’), which governs the enforcement of arbitration agreements as opposed to arbitral awards, specifically directs a court, when faced with a dispute subject to arbitration, to refer the parties to arbitration, ‘unless it finds that the said agreement is null and void, inoperative or incapable of being performed’. (7) The Convention drafters plainly contemplated a role of some kind for courts in determining whether an arbitration agreement will or will not be enforced.

Faced with one or more jurisdictional or admissibility objections, the court has options. It may determine that, under the prevailing law and practice in that forum, the objection is one on which judicial enforcement of an arbitration agreement depends. In that case, the court will be prepared to address it if asked to do so. However, it may also determine that the objection is one that is left primarily to the arbitrators, in which case the court will instead refer the parties to arbitration, unless of course there is some other basis on which enforcement may be denied. The court will have shown anticipatory deference to the tribunal.

Assuming a court is willing to address a given objection to jurisdiction or admissibility, it must decide upon the standard by which to make its determination. On the one hand, it can exercise full and independent judgment over the matter, just as a tribunal would if the matter first came before it. If it sustains the objection, it will deny enforcement of the arbitration agreement and retain jurisdiction. If it overrules the objection, it will refer the parties to arbitration (again unless there is some other reason to deny enforcement.) In neither case will it have shown anticipatory deference to the tribunal. Indeed, it will expect any tribunal before which the objection is raised to respect its decision should the same objection again arise.

However, the court need not make a full and independent judgment over the jurisdictional or admissibility objection. It may approach the matter on what may be called a prima facie basis only, meaning that, as long as it considers the tribunal’s finding of jurisdiction or admissibility to be plausible, it will defer, to the tribunal to make a definitive decision. As will be seen, in many jurisdictions, the court will sustain the objection and deny enforcement only if it finds the objection to be manifestly established. Thus, the tribunal will show anticipatory deference to the tribunal that remains to be constituted. Of course, deference itself is a matter of degree. It may be easier in some jurisdictions than others to establish a prima facie case of jurisdiction or admissibility, or harder in some jurisdictions than others to show that an agreement is manifestly unenforceable. Only if prima facie jurisdiction or admissibility cannot be found, or manifest unenforceability can be found, will a court decline to enforce the agreement to arbitrate.

For this reason, the present chapter addresses not only the question whether a particular objection will be entertained but also the degree of deference, if any, to be shown by national courts to the tribunal. This chapter is concerned with what may be called, respectively, the scope and standard of judicial review of an agreement to arbitrate. In other words, the court asks two questions. First, on what grounds may a court, to which an
arbitration agreement is brought in the first instance for enforcement, withhold enforcement and accordingly retain jurisdiction over the dispute? Second, how substantial is the showing that must be made in order for such a ground to be established?

§4.03 THE SCOPE AND TIMING OF THE CHALLENGE

Implicit in the preceding discussion is a requirement that the challenge mounted against an arbitration agreement targets that agreement only and not the contract as a whole in which it is found. (6) The principle of separability is ubiquitous in the world of international arbitration. For a court that is asked to enforce an arbitration agreement to enquire on that occasion into the validity of a contract as a whole would impermissibly interfere with the core function of an arbitral tribunal, whose authority in contract cases extends not only to claims of breach of contract but also to claims that a contract is for one reason or another invalid and unenforceable. (9)

In some jurisdictions, however, the principle of separability has no application to questions regarding existence of the arbitration agreement, as distinct from validity. In other words, courts may, if asked, determine not only whether an arbitration agreement as such was ever formed but also whether the main contract was ever formed. They act on the belief that if a contract was never formed, then an arbitration clause within the contract necessarily cannot have been formed either. According to the US Supreme Court, ‘courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties’ arbitration agreement nor its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, the court must resolve the disagreement’. (10) UK courts take the same position. As put by one court, ‘[t]here will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate’. (11)

For simplicity’s sake, all references in this chapter to jurisdictional and admissibility objections should be understood as limited to challenges directed uniquely to a contract’s arbitration provision and not to the contract as a whole.

Buried in this discussion is an important choice-of-law angle that must at least be acknowledged. A court before which an arbitration agreement is sought to be enforced must not only determine what challenges to jurisdiction or admissibility it will and will not consider, but also for those that it will consider, the law by which those challenges are to be determined, i.e., the law applicable to the challenge. Importantly, the court will not necessarily apply forum law to that issue. Article II of the New York Convention, requiring courts to enforce an agreement to arbitrate, does not tell us by reference to what law a court should determine whether an agreement is ‘null and void, inoperative or incapable of performance’. We do know, however, from Article V of the Convention that a court that is asked to enforce an arbitral award may not necessarily apply forum law in determining whether a ground for the refusal of enforcement is established. Thus, on the important question of whether an award should be denied enforcement due to the invalidity of its underlying arbitration agreement, Article V(1)(a) requires courts to apply not forum law, but rather the law to which the parties subjected that agreement, failing which the law of the seat.

Nor do national arbitration laws generally tell us the law by which to determine whether a ground for refusing enforcement of an arbitration agreement is established. Even the UNCITRAL Model Law which, in many respects, is still regarded as state of the art, is silent on the law applicable to challenges to the arbitration agreement. An interesting exception among national laws is Swiss law, according to which: ‘[a]s regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or to Swiss law’. (12)

Choice of law matters because jurisdictions may understand defences to the enforcement of arbitration agreements differently. The defence of invalidity is a good example. We may assume that virtually everywhere an arbitration agreement will be deemed invalid if it suffers from any standard contractual defect, such as fraud, duress or incapacity (or, a fortiori, was never formed), but rules on those defences may vary from jurisdiction to jurisdiction. The notion of invalidity may also, depending on the jurisdiction, be more encompassing, covering, for example, the question whether a non-signatory may invoke or be bound by an arbitration agreement. Similarly, an agreement purporting to cover claims that are non-arbitrable will also be denied enforcement, but jurisdictions differ as to the claims they consider legally incapable of being arbitrated. Although according to the prevailing view a court faced with an arbitration agreement which contemplates , does not necessarily apply forum law to that issue. (13) courts may do otherwise, such as apply the arbitrability norms of the jurisdiction under whose law the claim arises, i.e., the lex causae. The content of public policy again differs from jurisdiction to jurisdiction. Moreover, a court should also decline to enforce an arbitration agreement that violates a mandatory provision of the lex arbitri, but we cannot be confident of that. (14)

While this chapter is of course concerned with the jurisdictional and admissibility challenges that national courts are willing to entertain before enforcing an agreement to arbitrate, and with its standard of judgment in entertaining them, it does not delve into
This further question of the relevant law to be applied in performing that enquiry. This choice-of-law angle of the matter at hand is for another day.

§4.04 DEGREES OF ANTICIPATORY DEFERENCE

It is the rare jurisdiction in which courts are prepared in virtually all circumstances to enforce agreements to arbitrate, refraining from any threshold enquiries at all. However, Colombia appears to be one such jurisdiction, in that courts are confined to assessing whether there is evidence of an agreement in writing. (15) Although the 2012 Colombian Arbitration Act is inspired by the UNCITRAL Model Law, the drafters deliberately did not include the expression ‘unless it finds that the agreement is null and void, inoperative or incapable of being performed’ in the provision that mandates courts to refer parties to arbitration. (16) Thus, courts do not even conduct a prima facie review of the validity, scope and operativeness of the arbitration agreement.

The jurisdictions that, almost without exception, permit courts to exercise some degree of scrutiny of an arbitration agreement before enforcing it differ in the extent to which they are willing to do so, and may be situated along a broad spectrum in this regard. However, if we leave nuances aside, they may all be placed in one of three general categories, depending on the breadth and depth of enquiry that are allowed.

At one end of the spectrum lie jurisdictions whose courts subject enforcement of arbitration agreements to minimal enquiry and that may, in this respect, be characterized as ‘liberal’. Other jurisdictions, which we may call ‘moderate’, allow courts measurably greater, but still limited, scope in determining the worthiness of arbitration agreements for enforcement. On the other end, courts in a small number of jurisdictions go even further in their willingness to entertain jurisdictional or admissibility challenges. Their attitudes may be described as ‘conservative’ in their readiness to enforce agreements to arbitrate.

[A] A Liberal Approach

Courts in this first category may be viewed as liberal in two respects. First, they subject the enforcement of an arbitration agreement to few, if any, conditions. Second, even in regard to the few conditions that they do impose, they designately apply a standard that arbitration agreements are readily able to meet. In both respects, the courts subject agreements to arbitrate to minimal scrutiny before giving effect to them. They are decidedly undemanding.

The well-known prototype for these jurisdictions is France. Under French law, a court that is asked to enforce an agreement to arbitrate will do so ‘unless an arbitral tribunal has not yet been seized of the dispute and ... the arbitration agreement is manifestly void or manifestly not applicable’. (17) Nor may it decline jurisdiction on its own motion.

Showing that an arbitration agreement is manifestly void or manifestly inapplicable under French law is no easy matter. Unless a party resisting arbitration is prepared to demonstrate that an arbitration agreement is clearly and convincingly invalid, and cannot reasonably be viewed otherwise, it cannot hope to prevent its being enforced. Moreover, despite the statutory language expressly requiring the arbitration agreement to be ‘manifestly not applicable’, French courts, it appears, do not seriously examine whether the dispute before it falls outside the agreement’s scope of application. (18) The usual explanation is that, if the only question before a court is an arbitration agreement’s scope of application, then the agreement is conceded both to exist and be valid, which justifies allowing a tribunal to freely determine its scope. Tribunals, it is widely thought, are ‘better placed to assess the reach of the agreement to arbitrate’. (19)

Due to the narrowness of the enquiry that courts may make at this stage, French authors thus describe Kompetenz-Kompetenz as having both a ‘positive’ and ‘negative’ dimension. It is positive, as it is virtually everywhere, because it confers on arbitral tribunals authority to determine their own jurisdiction (and, a fortiori, the admissibility of a dispute) if challenged by the respondent. However, it is also negative because it largely deprives courts of that authority, due to the fact that courts may not question the enforceability of an arbitration agreement at all once a tribunal has been constituted, (20) and even before then, can do no more than determine that an agreement is manifestly invalid or inapplicable. (21) In other words, positive Kompetenz-Kompetenz is absolute, while negative Kompetenz-Kompetenz is subject to qualification, albeit slight. Because judicial enquiry is limited to issues of validity and applicability, it does not in any event extend to issues of admissibility because such issues have nothing to do with either the validity or applicability of the arbitration agreement, but only the readiness of the claim to be arbitrated.

The fact that courts in this category have scant opportunity to consider objections to an arbitration agreement at the outset does not mean that they also have scant opportunity to do so after an award is rendered and therefore, at that stage too, owe no deference to the tribunal’s determination of jurisdictional or admissibility issues. On the contrary, in actions to annul an award, French courts examine those issues, if so requested, on a fully de novo basis. Generally speaking, then, tribunals have the ‘first word’ on jurisdictional
issues, but by no means necessarily the 'last'.

In sum, French courts will not decline to enforce an agreement to arbitrate unless a tribunal has not yet been formed and the agreement's invalidity or inapplicability is plain to see. This represents a decidedly 'light touch', thereby enhancing the latitude of a tribunal in exercising its Kompetenz-Kompetenz to determine an arbitration agreement's validity and applicability. Jurisdictions falling within this category accordingly consider themselves, for this reason and others, to be highly 'pro-arbitration' – an impression heightened by the widely held, but not empirically established, assumption that, all else being equal, a tribunal is less likely than a court to find an arbitration agreement invalid or inapplicable.

France is by no means alone in its liberal approach. Under Portuguese arbitration law, a court before which a claim subject to an arbitration agreement is brought shall, if the defendant so requests no later than upon submitting its first substantive submission, dismiss the case, except where it can be shown that the agreement is manifestly null and void or has manifestly become inoperative or incapable of being performed. The enquiry is not, as appears to be the case in France, limited to validity and applicability, but extends to the viability of the agreement more generally. According to the Portuguese Superior Court of Justice, courts may decline to refer parties to arbitration only 'if it is manifest and non-controversial that the arbitration clause/agreement is invalid, unenforceable or if the dispute blatantly falls outside its scope'. (23) In other words, 'if there are any doubts as to the validity or scope of the arbitration clause, then the parties should be referred to the Arbitral Tribunal'. (24)

Commentators in Portugal, like those in other jurisdictions, commonly characterize the determination to be made as a prima facie one. If this term means 'on its face', then it is scarcely distinguishable from 'manifest' as a standard of review. In short, Portuguese courts embrace not only positive Kompetenz-Kompetenz, but also negative Kompetenz-Kompetenz, largely as understood in France. (25)

A liberal approach to anticipatory deference is widely followed in Latin America. Peruvian courts, for example, refer parties to arbitration unless the arbitration agreement is shown to be manifestly null and void. Commentators on Peruvian law commonly characterize judicial review of an arbitration agreement at this stage, as in Portugal, as prima facie. (26) Moreover, like many Latin American jurisdictions, Peruvian courts may conduct this highly restricted review of agreements to arbitrate only in the period prior to the constitution of the arbitral tribunal. If, by the time the issue arises in court, arbitral proceedings have already commenced, the court will refer parties to arbitration in all cases, save when doing so would violate international public policy. (27)

The Argentine Civil Code is clearly to the same effect: the arbitration agreement binds the parties to comply with its terms and excludes the jurisdiction of the courts over disputes submitted to arbitration, unless the arbitral tribunal is not yet hearing the dispute, and the agreement appears to be manifestly null and void or unenforceable. (28)

Argentine courts are, once again, described as confining themselves to a prima facie assessment of the arbitration agreement's existence, validity and scope. (29) Under this approach, a court will retain a case in the presence of an arbitration agreement only if its jurisdictional defect is so evident as to become apparent upon a summary examination. Nevertheless, according to some commentators, notwithstanding the requirement that the arbitration agreement's defect be manifest, the review conducted by courts at this stage is in practice rather strict. (30)

In Brazil, the courts, professing negative Kompetenz-Kompetenz, are similarly willing to enquire only into the existence, validity, scope and operativeness of an arbitration agreement, doing so strictly on a prima facie basis and declining to enforce the agreement only if a defect in one of these respects is manifest. (32) Here too, an arbitration will be considered invalid to the extent it authorizes arbitration of a non-arbitrable claim. Reportedly, by way of exception, there are decisions involving non-signatories and arbitrations against the Brazilian Federal Government, where Brazilian courts have taken a closer look at challenges to arbitration agreements. (33)

The 2004 Chilean Arbitration Act, based on the UNCITRAL Model Law, requires a court to refer parties to arbitration 'unless it finds that the agreement is null and void, inoperative or incapable of being performed', (34) thus perfectly echoing Article II of the New York Convention. Also, like the Model Law and the Convention, it does not specify the standard of review to be applied by a court in making that determination. Although the Santiago Court of Appeals held in 2011 that the validity of an arbitration agreement, if challenged, will be subject to a fully independent judicial determination at the stage of its enforcement, later decisions demonstrate a significantly greater liberality. According to the newer view, consolidated in a 2021 ruling by the Civil Court of the 9th Circuit of Santiago de Chile, an arbitration need only be found prima facie valid and applicable in order to be enforced. (35)

In the important Asian jurisdictions of Hong Kong and Singapore, a liberal approach likewise appears to prevail. In Hong Kong, issues that touch upon the existence of an arbitration agreement, or its validity or scope, will be examined by the court though only...
on a prima facie basis. (36) As long as there is a ‘plainly arguable case’ that an arbitration agreement exists and is valid, arbitration will be compelled. (37) Unsurprisingly, as in France, admissibility issues such as fulfilment of conditions precedent to arbitration are left to the arbitral tribunal on the view that they will ‘usually be well-placed to consider and determine what needs to be done having regard to commercial realities and practicalities, including whether it would be futile to compel the parties to go through the motions’. (38)

The situation in Singapore is very much the same. Courts there are willing to examine issues such as the existence, validity and scope of an arbitration agreement, though only on by a prima facie standard. (39) However, there is some inconsistency in the willingness of courts to determine the operativeness of an arbitration agreement and its capacity to be performed. (40) Still, admissibility issues, such as satisfaction of conditions precedent, are left to the arbitral tribunal, though a Singaporean court evidently will examine the matter if raised in an appeal from an arbitral tribunal’s ruling. (41)

A word about waiver of the right to arbitrate is in order. A party seeking to avoid arbitration on the ground that its opponent waived its right to arbitrate is challenging neither the existence, nor validity, nor scope of the agreement. On the contrary, the argument presumes that, but for the asserted waiver, the agreement would be enforceable. Put simply, the challenge is one not of jurisdiction but of admissibility. In principle, therefore, an allegation that the party invoking an arbitration agreement had waived its right to arbitrate should be left for the arbitrators to decide. However, that will not always be the case. This is because, far more often than not, allegations of waiver arise when the defendant, in an action in court, fails to invoke an arbitration agreement as a jurisdictional defence on a timely basis. It will have participated, at least to some extent, in the judicial proceedings. Since, in this scenario, the conduct underlying the alleged waiver will have taken place in the judicial proceedings themselves, the court conducting those proceedings may be better positioned than a tribunal to determine whether the defendant’s conduct should or should not be treated as a waiver. (42) There is at least one reported case from Brazil, in which the court ruled on waiver itself, rather than reserve it for the eventual tribunal to decide as a matter of admissibility. (43)

A peculiarity of Swiss law (44) is that, while in keeping with this liberal model, i.e., a jurisdictional defect must be ‘manifest’ in order to justify non-enforcement of an arbitration agreement, that rule applies only if the arbitration is seated in Switzerland. (45) Such review has been called ‘summary’. (46) However, the situation is different where the seat of arbitration is outside of Switzerland. Challenges relating to the existence, validity and scope of an arbitration agreement are conducted without anticipatory deference, i.e., on the basis of a fully independent review of the agreement. (47)

In sum, courts adopting a liberal stance favour the enforcement of arbitration agreements in several ways. First, they confine judicial review of the agreement chiefly to issues of its existence, validity and, to some extent, scope and operability. Second, on issues that they will entertain, the standard of review is a notably narrow one. A court may decline to enforce an arbitration agreement only if the jurisdictional defect is essentially manifest one. In both respects, these courts display extreme anticipatory deference. They may also, as in France, confine even this very limited judicial role to the period prior to the tribunal’s constitution, disallowing it thereafter.

[B] A Moderate Approach

Courts in other jurisdictions draw the lines in a discernibly different way. While they too address standard jurisdictional objections, such as the formation or validity of the agreement and, at least to some degree, its scope, the standard of review they exercise is not a particularly restrictive one. They do not purport to limit themselves to situations in which the defect is manifest.

The United States (US) is a good example. Though the Federal Arbitration Act (FAA), which applies equally to domestic and international arbitration, was enacted in 1925 for the express purpose of putting an end to ‘widespread judicial hostility to arbitration agreements’, (48) the statute gives little indication either of the challenges courts may entertain before enforcing an arbitration agreement or of the standard of proof to apply in doing so. All that the FAA tells us is that agreements to arbitrate ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract’. (49) Thus, at the least, agreements to arbitrate are to be enforced or denied enforcement on the same terms as any other contract.

As in many systems, it is the courts in the US, not the legislature, that have established the scope and standard of judicial enquiry into an arbitration agreement at the threshold of arbitration. Over time, and very much under the leadership of the US Supreme Court, the judiciary has come to draw a general distinction between so-called gateway issues (those that courts will address at the outset if asked to do so) and ‘non-gateway’ issues (those that courts will leave entirely to arbitral determination at the outset, unless the parties expressly agree otherwise). (50) The Supreme Court has the habit of using the
term 'arbitrability' to signify any and all gateway issues, a practice which leads to considerable confusion since that term is used throughout most of the world in a much narrower sense, denoting categories of claims that are deemed legally incapable of being adjudicated through arbitration. (51)

Gateway issues, as commonly understood, are those that are deemed to implicate a party’s consent to arbitrate. Thus, they encompass such matters as the existence (or formation) of an agreement to arbitrate, the validity of that agreement, and the agreement’s coverage or scope of application. Understandably, the courts have generally assimilated the binding effect of an arbitration agreement on a non-signatory to the existence of the agreement, thus treating it too as a gateway issue. This is understandable, for when a court disallows a non-signatory to invoke an arbitration agreement or declines to enforce an arbitration agreement against a non-signatory, it is effectively declaring the agreement ‘inexistent’ for that party.

Non-gateway issues, on the other hand, are those that determine whether a claim that the parties did in fact agree to arbitrate should, for one reason or another, not go forward. They do not call into question the jurisdiction of a tribunal but rather the capacity of a claim to be heard. Issues such as whether a claim is time-barred or whether a precondition to arbitration has been satisfied (and, if not, whether its non-fulfilment is excusable) do not implicate the consent of the parties to arbitrate. On the contrary, they assume the existence of an agreement that was validly formed and encompasses the dispute, and question only whether, for one reason or another, the claim should not be heard. The Supreme Court has broadly likened non-gateway issues to issues of procedure. (52)

By this criterion, whether a party waived its right to arbitrate constitutes a non-gateway issue since it too presumes there exists a valid and otherwise enforceable agreement to arbitrate. However, as explained earlier, (53) an argument that a party waived its right to arbitrate is one that a court might nevertheless entertain if waiver took the form of the claimant’s participation in the proceeding before that court. Similarly, a claim of res judicata, or claim preclusion, has a non-gateway character, for it too presupposes a valid and otherwise enforceable agreement to arbitrate. A court may nevertheless choose to decide the matter itself on the ground that the New York Convention places an obligation on national courts not only to enforce arbitral awards but also to recognize them, provided the award cannot justifiably be denied recognition or enforcement under Article V. If recognition of an award means anything, it must mean that the award has conclusively determined the merits of the claim adjudicated and warrants res judicata effect. Subject to these two special cases, US courts will not address non-gateway challenges to enforcement of an arbitration agreement even if asked to do so. Indeed, in all likelihood, these challenges will also be entertained at most deferentially rather than on a de novo basis when raised in a post-award action to annul or enforce the resulting award.

In sum, non-gateway issues are largely analogous to issues of admissibility and, under US law, are reserved for arbitral determination. Indeed, in all likelihood, these challenges will not be entertained, or will be entertained only on a highly deferential basis, if and when raised on a post-award basis, either to achieve annulment of an award or defeat its recognition or enforcement.

More delicate is the question of the standard of judgment by which courts determine whether a gateway objection to arbitration, such as the invalidity of the arbitration agreement, is established. As seen, jurisdictions falling within the liberal category permit a court to refuse enforcement of an arbitration agreement only if it considers the jurisdictional defect alleged to be ‘manifest’, or prima facie disqualifying. Jurisdictions are placed within the moderate category because there is no reason to suppose that the standard by which they review agreements to arbitrate is particularly narrow. From all appearances, these courts do not exhibit anticipatory deference in this regard but rather examine fully and independently, if asked, the existence, validity, and scope, as well as perhaps the operativeness, of the arbitration clause. Matters are actually not quite so simple when it comes to matters of scope, as courts in the US and elsewhere commonly act on the view that, when in doubt, they should err on the side of treating a dispute as covered by an agreement to arbitrate or, put differently, that arbitration agreements are to be liberally construed. But, with the possible exception of scope, parties should expect courts within this category to entertain gateway challenges to an arbitration agreement without a strong bias in favour of arbitration. The US Supreme Court considers its willingness to engage in full review of an arbitration agreement on gateway matters, despite appearances, to be entirely consistent with its ‘pro-arbitration’ stance. (54) It views consent to arbitrate a dispute as so central to an arbitration’s legitimacy that nothing less than full review in connection with gateway challenges is adequate.

Discussion of the treatment of gateway issues in the US would not, however, be complete if attention were not drawn to the fact that US law allows parties to ‘delegate’ to an arbitral tribunal primary authority over gateway challenges, thus depriving courts at the outset of their presumptive authority over those issues. However, because parties are not to be lightly assumed to have made a delegation of authority over gateway issues, courts
will not find that they have done so in the absence of ‘clear and unmistakable’ evidence to that effect. (55) What constitutes sufficiently clear and unmistakable evidence for these purposes is at present a matter of considerable contestation. (56)

From all appearances, joining the US in the moderate category are a number of other common law jurisdictions. Among these may be counted Australia, whose arbitration law directs courts, faced with an arbitration agreement, to ordinarily ‘stay the proceedings … and refer the parties to arbitration in respect of [the] matter’, (57) but not ‘if the court finds that the arbitration agreement is null and void, or incapable of being performed’, (58) to borrow the New York Convention Article II formula. There is no indication, either in the statute or in the case law, to suggest that the standard of review practised by the courts is anything but full and independent. (59) On the contrary, when determining whether a dispute falls within the scope of an arbitration agreement, the courts in Australia apply the higher standard of balance of probabilities (as opposed to prima facie), and ‘will not presume that a dispute falls within the scope of an arbitration clause unless the court can be persuaded otherwise’. (60) The Supreme Court of Western Australia has asserted jurisdiction to grant declaratory relief on the existence of an arbitration agreement and adopted a ‘full merits’ approach in its determination. (61) Unsurprisingly, Australian courts, much like US courts, will not undertake to consider issues of admissibility even if asked to do so.

The courts of the United Kingdom (UK) in particular tend to follow the US law distinction between gateway and non-gateway issues, without using those terms as such. The matters that UK courts will examine independently are those they consider to be ‘jurisdictional’, (62) which include at a minimum the arbitration agreement’s existence, validity, and application to non-signatories, all of which would be characterized as gateway in US law. (63)

Outside the common law world, mention may be made of Spain whose Supreme Court in a 2017 ruling squarely rejected what we have termed anticipatory deference in its determination of jurisdictional issues. According to the Supreme Court of Spain, ‘the judicial organ dealing with the plea against its jurisdiction due to a submission to arbitration, must assess in full the validity, efficacy and applicability of the arbitration agreement’. The Supreme Court of Spain further stated that ‘there are no reasons to sustain the strong thesis of the Kompetenz-Kompetenz principle in our legal system and to limit the scope of the court’s competence when it resolves the plea against the arbitral jurisdiction’. (64)

[C] A Conservative Approach

Some jurisdictions appear to subject the enforcement of arbitration agreements to a still broader enquiry. What makes their review more extensive is their willingness to examine independently at the threshold, not only gateway issues but also, to one degree or another, non-gateway issues. Such may be the case, for example, of Sweden. (65) Swedish courts are prepared to examine in full the existence and validity (66) (including the binding effect on non-signatories (67)), scope, (68) and operativeness (69) of an arbitration agreement prior to enforcing it. (70) However, they are also evidently not averse to examining at least some non-gateway issues, including not only whether a party invoking an arbitration agreement waived its right to invoke an arbitration agreement (71) but also whether it failed to make the requested deposit of funds or appoint an arbitrator in due time. (72) It is apparently not yet determined whether failure to comply with a condition precedent to arbitration is a ground on which a court may deny enforcement of an arbitration agreement. (73) Interestingly, the fact that Swedish courts are willing to entertain a broader range of challenges to the enforcement of an arbitration agreement than the courts of many other jurisdictions has not deprived Sweden of its reputation as a highly arbitration-friendly jurisdiction. (74)

Several other jurisdictions present a similar picture. Italian courts likewise are willing to entertain challenges based not only on standard jurisdictional objections, such as the existence, (75) validity and scope (76) of an arbitration agreement as well as its applicability to non-signatories (77) but also on admissibility objections, such as waiver (78) and lapse of the statutes of limitations. (79) Similarly, Kenyan courts have entertained objections such as waiver of the right to arbitrate and failure to satisfy conditions precedent. (60)

These jurisdictions evidently believe that the presumptive right of access to a court is sufficiently fundamental to warrant early judicial intervention, not only when the jurisdiction of an eventual tribunal but also when the admissibility of the claim is open to question.

§4.05 Conclusion

It is not surprising that jurisdictions differ considerably both in the threshold issues that their courts will consider at the outset of arbitration, if asked to do so, and in the standard of judgment applied to them. At one extreme lies Colombia, whose courts avoid addressing threshold questions, whether of a jurisdictional or admissibility character.
Beyond that exceptional situation, jurisdictions can, without great difficulty, be placed in one of three categories across the spectrum.

In a very large number of jurisdictions, typified by France but also by countries in Latin America and Asia, courts will entertain jurisdictional, to the exclusion of admissibility challenges, but only by a highly deferential standard. Arbitration agreements will be enforced by courts in these liberal jurisdictions unless they are proven to be manifestly invalid or inapplicable. Practice shows that prima facie examination of jurisdictional issues seldom results in refusals to enforce an agreement to arbitrate. A somewhat lesser number of jurisdictions – in many cases common law – practice what may be called a moderate level of review. While courts in those countries likewise limit themselves to enquiries of a jurisdictional rather than admissibility nature, they appear to conduct those enquiries without anticipatory deference, except possibly in regard to the scope of the arbitration agreement, a matter on which they may in practice exercise less than fully independent judgment. There remains a last category of jurisdictions that apparently examine not only gateway issues, again apparently on an independent basis, but also some or all non-gateway issues, further entitling parties to argue that their dispute should be heard in court and in court alone.

What the jurisdictions falling in all three categories have in common is their effort to strike a balance between, on the one hand, promoting arbitration as a means of dispute resolution and, on the other hand, ensuring that disputes are not unwarrantedly diverted from courts to arbitral tribunals. Evidently, that balance can be struck in a number of different ways, and these differences show no signs of abating. The taxonomy set out in this discussion may not only have descriptive value but also serve as a point of reference for jurisdictions, either seeking to establish an approach to judicial determination of threshold issues in international arbitration, or reexamining an approach that has already been established.

References

1) The author expresses appreciation for the valuable research assistance of Mateo Verdias, Gino Rivas, Camila Macedo Simao and Lynn Chong.


2) Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, Comparative International Commercial Arbitration (Kluwer 2003) 340 (‘The principle that a valid arbitration agreement requires courts to refer parties to arbitration is firmly established’).


4) In some jurisdictions, such as Sweden, the arbitration law specifically provides for such an action. Swedish Arbitration Act, section 2 (‘If the arbitrators have rendered a decision finding that they have jurisdiction to adjudicate the dispute, any party that disagrees with the decision may request the Court of Appeal to review the decision. Such a request shall be brought within thirty days from when the party was notified of the decision. The arbitrators may continue the arbitration pending the court’s determination’). On the other hand, for a party to seek a declaration of non-arbitrability from a court before the tribunal has ruled on its jurisdiction, it may be viewed, as it is in Switzerland, as inconsistent with the principle of Kompetenz-Kompetenz. See Bernhard Berger, ‘Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 186 [Jurisdiction]’ in Manuel Arroyo (ed.), Arbitration in Switzerland: The Practitioner’s Guide (2nd ed., Kluwer Law International 2018) 192-211.

5) In other jurisdictions, it may not be possible to seek a declaratory judgment of non-enforceability once arbitration has been commenced. See, e.g., Portuguese Voluntary Arbitration Law (VAL), Law No. 63/2011, of 14 December 2011, Article 5(1) (‘The issues of invalidity, inoperativeness or unenforceability of an arbitration agreement cannot be discussed autonomously in an action brought before a State court to that effect or in an interim measure procedure brought before the same court, aiming at preventing the constitution or the operation of an arbitral tribunal’).

6) UNCITRAL Model Law, Article 16(3). For example, the Kenyan Arbitration Act states that ‘where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter’, adding, however, that the court’s ruling ‘shall be final and shall not be subject to appeal’. See Kenyan Arbitration Act 1995, section 17(6) and (7).

8) Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (‘We hold, therefore, that in passing upon a s 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate’). Case No. 274/1/16.178PTM.L1, S1, Portuguese Superior Court of Justice, Decision of 14 May 2019 (‘In the case at hand, the nullity of the swap agreement [of which the arbitration clause in the framework agreement forms part of] is controverted and, thus, it is not possible to conclude prima facie that the swap agreement and consequently the arbitration clause are null’). Brazilian Superior Court of Justice, Special Appeal (RESp) No. 1699855-RS, Decision of 6 June 2021 (‘The intended declaration of nullity or non-existence of a contractual clause or of the written contract itself [in which the arbitration clause is included] is a matter to be decided by the arbitral tribunal’).

9) Respect for separability, in this sense of the term is not, however, universal. Shortly after the country’s new arbitration law based on the UNCITRAL Model Law came into effect in 2017 (Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law – Issuing the Law of Arbitration in Civil and Commercial Matters), the Qatari Court of Cassation held that Qatari courts may address and decide the validity of the main contract prior to any arbitral determination either of arbitral jurisdiction or of the underlying contract’s validity. See Civil Appeal No. 65-2017.


11) Harbour v. Kansa [1993] 1 Lloyd’s Rep 455, para. 53. Forgery is one of these instances (Albon (t/a NA Carriage Co) v. Naza Motor Trading SDN BHD and Anor [2007] EWHC 665 (Ch)).

12) Swiss Private International Act, Article 178.

13) At the stage of recognition and enforcement of an award, the New York Convention prescribes in Article V(2)(a) that arbitralability is to be determined by the law of the jurisdiction where recognition or enforcement is sought.

14) In Marchetto v. DeKolb Genetics Corp., 711 F. Supp. 936 (N.D. Ill 1989), a US court enforced an arbitration agreement designating Italy as the seat, even though the agreement appeared to violate Italian arbitration law. This was because three of the four defendants were not parties to the agreement and the agreement was therefore unenforceable in Italy and the eventual award risked annulment. See also Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Achiile Lauro, 555 F. Supp. 481 (D. V.I. 1982).


16) Colombian Arbitration Act No. 1563/2012 (12 July 2012), Article 70: ‘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, no later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.’


18) See, for instance, Paris Court of Appeal, 4 December 2002, Société American Bureau of Shipping (ABS) v. Copropriété Maritime Jules Verne et al, 2001/17293 (where the Court of Cassation of France ruled that whenever there is an arbitration agreement, a local court is prevented from conduct an extensive review of the arbitration agreement). See also, Paris Court of Appeals, Judgment No. 19/08056 of 12 June 2019.


20) Code of Civil Procedure, Book IV, title II, Article 1448: ‘When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. […]’


22) Portuguese VAL, Article 5(1) (‘The State court before which an action is brought in a matter which is the object of an arbitration agreement shall, if the respondent so requests not later than when submitting its first statement on the substance of the dispute, dismiss the case, unless it finds that the arbitration agreement is clearly null and void, is or became inoperative or is incapable of being performed’).
23) According to the Portuguese Superior Court of Justice, a court should decline to refer parties to arbitration only 'if it is manifest and non-controversial that the arbitration clause/agreement is invalid, unenforceable or if the dispute manifestly falls outside its scope. This means that if there are any doubts as to the validity or scope of the arbitration clause, then the parties should be referred to the Arbitral Tribunal'. See Nuno Ferreira & Raquel Galvão Silva, 'Chapter 5: Jurisdiction Issues and State Courts' in André Pereira da Fonseca et al. (eds), *International Arbitration in Portugal* (Kluwer Law International 2020) 68-70. Portuguese Courts have systematically interpreted that an invalidity is manifest when it can be determined without further evidence. See generally Dário Manuel Lenz de Moura Vicente, 'National Report for Portugal 2018-2021' in Lise Bosman (ed.), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020) 1-52.


25) This analysis examined all decisions from the Portuguese Superior Court of Justice, as well as the decisions rendered by the Tribunais da Relação, regarding the validity and effect of the arbitration agreement identified as relevant by the Law School of the University of Lisbon (Faculdade de Direito da Universidade de Lisboa) ([https://www.fd.ul.pt/faculdade/arbitragem-e-resolucao-de-litigios/#1530879584728-8a99c2e2-51b9](https://www.fd.ul.pt/faculdade/arbitragem-e-resolucao-de-litigios/#1530879584728-8a99c2e2-51b9)).


27) Peruvian Arbitration Act (Legislative Decree No. 1071), Article 16(a): 'In international arbitration, if the arbitration has not commenced, the judicial authority shall dismiss the objection only if it determines that the arbitration agreement is manifestly null and void pursuant to the legal rules chosen by the parties to govern the arbitration agreement or the legal rules applicable to the merits of the dispute ... . If the arbitration had commenced, the judicial authority shall dismiss the objection only if it determines that the subject matter manifestly violates international public policy.'

28) Civil and Commercial Code of Argentina, Article 1565. Further, according to Article 1656 of the Code, 'in case of doubt, the greater effectiveness of the arbitration contract is to be considered'. See Francisco A. Macias & Gonzalo Santamaria, 'Quick Answers on Drafting Agreements – Argentina', Quick Answers on Drafting Agreements, Kluwer Law International. Experienced arbitrators report that, in the presence of an arbitration agreement, '[a] judge could only declare himself competent “if the nullity or unenforceability of the arbitration clause is clear” (I would say grossly flawed or unenforceable, citing the case of Francisco Cibor v. Wall-Mart Argentina S.R.L., 2016).’ Roque J. Caivano & Natalia M. Ceballos Ríos, *El principio Kompetenz-Kompetenz, revisitado a la luz de la Ley de arbitraje comercial internacional argentina (2020) 77 Thèmes* 22.


30) Guido Santiago Tawil & Federico Campolieti, 'National Report for Argentina (2019 Through 2021)’ in Lise Bosman (ed.), *ICCA International Handbook on Commercial Arbitration* (ICCA & Kluwer Law International 2020, Supplement No. 114, October 2019) 1-54: ‘Prior to referring the parties to arbitration, the court will perform a full scrutiny of the arbitration agreement and verify whether respondent’s objection was filed in a timely fashion. For instance, if on account of public policy reasons (i.e., the matter is not subject to compromise or settlement in accordance with Art. 737 of the National Code of Civil and Commercial Procedure “CP”, see Annex I) the dispute cannot be submitted to arbitration, or if respondent has raised its objection after having submitted its answer to claimant’s complaint (the latest moment in which a challenge to the court’s competence may be filed), the court will assert its own jurisdiction in the case and disregard the arbitration agreement. Failure to raise an objection against the court’s jurisdiction in a timely fashion is generally regarded as a party’s consent to such jurisdiction.’ On the uncertainty surrounding the standard of review in Argentine courts, see Francisco A. Macias & Gonzalo Santamaria, ‘Quick Answers on Drafting Agreements – Argentina’, Quick Answers on Drafting Agreements, Kluwer Law International.

31) Questions regarding the enforcement of arbitration agreements in Brazil are submitted predominantly to Brazilian state courts (27 State Courts – Tribunais de Justiça) (Article 125 of the Brazilian Federal Constitution). However, in some cases, especially involving the public administration, enforcement of arbitration agreements is to be decided by federal courts (5 Federal Regional Courts – Tribunais Regionais Federais) (Article 109 of the Brazilian Federal Constitution). As a rule, the Superior Court of Justice is the competent court to hear appeals regarding enforcement of the arbitration agreement at the third instance (pursuant to Articles 104 and 105 of the Brazilian Federal Constitution, the Superior Court of Justice is the competent court responsible for the uniform interpretation of federal law throughout Brazil and for the definitive solution of civil and criminal cases that do not involve constitutional matters or specialized justice).
Superior Court of Justice, Special Appeal (REsp) No. 1.699.855-RS, Reporting Justice Marco Aurélio Belizze, Third Chamber, Decision of 1 June 2021 (‘it is up to the arbitral tribunal to rule on its own jurisdiction, before any other judging body, deciding, for such purpose, on issues related to the existence, validity and effectiveness of the arbitration agreement ... the jurisprudence of the Superior Court of Justice, admits exceptionally and in thesis, that state courts, when requested to do so, recognize the non-existence, invalidity or ineffectiveness of the arbitration agreement whenever the defect that taints the arbitration agreement was manifest (thus, consisting in a truly pathological arbitration clause’). See also: Superior Court of Justice, Special Appeal (REsp) No. 1.656.643-RJ, Reporting Justice Nancy Andrighi, Third Chamber, Decision of 9 April 2019; Superior Court of Justice, Special Appeal (REsp) No. 1.550.260-RS, Reporting Justice Ricardo Villas Bôas Cueva, Third Chamber, Decision of 12 December 2017; Superior Court of Justice, Special Appeal (REsp) No. 1.327.619-MG, Reporting Justice Maria Isabel Gallotti, Fourth Chamber, Decision of 20 August 2013.

State Court of Appeals of Sao Paulo, Case No. 000.01.060969-5, Decision of 8 April 2002; Superior Court of Justice, Conflict of Jurisdiction (CC) No. 151.130, Reporting Justice Nancy Andrighi, Special Court, Decision of 27 November 2019.


See, e.g., Morgado v. Ita Corpbanca, Judgment No. C-1107-2019 (9th Cir. Civil Court of Santiago, 15 October 2021). There, a civil court in Santiago, Chile, expressly affirmed the very reduced role of courts in the enforcement of arbitration agreements.

See Cathay Pacific Airways Ltd. v. Hong Kong Air Cargo Terminals Ltd. [2002] HKCU 246.


Restatement (Third) U.S. Law of International Commercial Arbitration, §2.20 PFD (2019) ('Courts are in the best position to assess in context a waiver defense founded on conduct occurring as part of the same litigation between the parties; courts should accordingly decide claims of waiver arising out of such proceedings, provided they relate to the same dispute. The advantage courts enjoy when facts arise within the context of litigation is ordinarily not present when the conduct alleged to establish waiver takes place in other contexts. The waiver question in those circumstances is entrusted to the arbitrators').

Superior Court of Justice, Special Appeal (REsp) No. 1.894.715-MS, Reporting Justice Paulo de Tarso Sanseverino, Third Chamber, Decision of 17 November 2020.

Swiss Private International Act, Article 7 ('If parties have concluded an arbitration agreement with respect to an arbitrable dispute, a Swiss court before which an action is brought shall decline its jurisdiction, unless: (a) the respondent has submitted to the procedure without reservation; (b) the court finds that the arbitration agreement is invalid, inoperable or incapable of being performed; or (c) the arbitral tribunal cannot be constituted for reasons for which the respondent in the arbitration is manifestly responsible'). See also Swiss Code of Civil Procedure, Article 61; Swiss Private International Law (PILS), Article 186.

However, doubts have been expressed as to whether the standard of review actually applied by Swiss courts is as deferential as is assumed. Mariella Orelli writes that it is 'unclear whether the required summary examination amounts to more than a mere formal examination of the existence of an arbitration agreement between the parties. In a case where its discretion was limited to a control of arbitrariness, the Federal Supreme Court upheld a state court's decision which refused to appoint an arbitrator based on the reasoning that it was convinced that the dispute at hand did not fall within the scope of the arbitration agreement. While it reiterated the scholarly opinion that the judge called upon for an appointment shall not rule on the validity or exact scope of an arbitration agreement, it gave preference to the respondent's interest of not being irregularly drawn into international arbitration proceedings. Critics claim that Federal Supreme Court’s reasoning leads to a state courts' duty to examine the existence of a connection between the arbitration agreement and the claims raised in the proceedings'. See Mariella Orelli, 'Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 179 [Arbitral Tribunal: Constitution of the Arbitral Tribunal] in Manuel Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide (2nd ed. ed. Kluwer Law International 2018) 99-113. See generally, Christoph Müller & Olivier Riske, 'Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 178 [Arbitration Agreement]' in Manuel Arroyo (ed.), Arbitration in Switzerland: The Practitioner's Guide (2nd ed., Kluwer Law International 2018) 96.


49) FAA, §2.


53) See Restatement (Third) U.S. Law of International Commercial Arbitration (n. 42) and accompanying text.


57) Australian International Arbitration Act 1974, section 7(2).

58) Id., section 7(5).

59) Australian courts will consider issues such as scope of an arbitration agreement (which will be construed broadly). See Cheshire Contractors Pty Ltd v. Civil Mining & Construction Pty Ltd [2021] QSC 75.


63) UK Arbitration Act 1996, section 9(4), provides that '[o]n an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperable, or incapable of being performed’. However, the UK courts are not entirely consistent in this regard. In the case of Birse Construction v. St. David [1999] BLR 194, the court referred the question of the arbitration agreement’s very existence to the arbitral tribunal.


66) Of the cases examined, four cases dealt with the existence of the arbitration agreement (e.g., whether agreement to arbitrate was signed or whether agreement could be inferred from established practice between the parties) and its validity (e.g., whether arbitration clauses found in standard term contracts are enforceable). See Tureberg-Sollentuna Lastbilscentral v. Byggnadsfirman Rudolf Asplund Aktiebolag, Case No. Ö 108/78, Supreme Court, Decision of 12 February 1980; PM v. KLS Ugglorps AB, Case No. Ö 775/14, Göta Court of Appeal, Decision of 8 September 2014; Värmeledningsaktiebolaget Radiator v. Skanska AB, Case No. Ö 2840-87, Svea Court of Appeal, Decision of 15 November 1988; and Alingsas Kommun v. Luftenhk Mellan & Selling (cited in Lars Heuman, Arbitration Law of Sweden: Practice and Procedure (JurisNet 2003) 34). In one case, the court was asked to determine whether competition law claims are arbitrable, and the court found that they were. See Danska stoten genom BornholmsTrafikken Havnen DK v. Ystad Hamn Logistik Aktiebolag, Case No. T 2808-05, Supreme Court, Decision of 19 February 2008.

67) The question arose in one of the cases examined, and the court held the non-signatory to be bound. See MS ‘Emja’ Braack Schiffahrts KG, v. Wärtsilä Diesel Aktiebolag, Case No. Ö 3176/95, Supreme Court, Decision of 15 October 1997.


69) In one case, the arbitration clause provided that the arbitral proceeding should be administered by the Stockholm Chamber of Commerce, but in accordance with ICC rules. Although the court found that the arbitration agreement was inconsistent, it nevertheless held it valid and enforceable. See also Swedish Arbitration Act, section 5; Case No. T2454-14, SVEA Court of Appeals, Decision of 23 January 2015.


71) Case No. T 2277-04, Supreme Court, Decision of 24 March 2015. The当事人 must invoke an arbitration agreement on the first occasion that a party pleads his case on the merits in the court. The invocation of an arbitration agreement raised on a later occasion shall have no effect unless the party had a legal excuse and invoked such as soon as the excuse ceased to exist.


Out of 16 Swedish decisions analysed, arbitration agreements were enforced, upon full review, in 13 of them.


Rocco Giuseppe e Figli s.n.c. v. Agenzia Marittima Constantino Tomasos Ltd., agent for Armadora San Francisco S.A. (Panama) and for its vessel Lagos Erie, Corte di Cassazione, Italy, 20 December 1982, Yearbook Commercial Arbitration 1985 (Vol. X) 466-467 (The arbitration agreement established a time limit to appoint an arbitrator, the court assessed if that requirement resulted in the arbitration clause being not valid or ineffective).