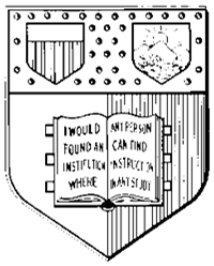

Arbitrability Decisions Before, During, and after Arbitration

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I. Introduction

The cornerstone of arbitration is the arbitration agreement between the parties. If there is no such agreement, the parties should not be sent to arbitration. If there is such an agreement, one party should not be allowed to obstruct the agreement by litigating in a national court the very issues the parties agreed to arbitrate. But at the outset of a dispute one party may contest the existence, validity, or scope of a putative arbitration agreement. Put another way, that party may claim that there is no arbitration agreement in existence that commits the parties to resolve their underlying merits dispute in arbitration. Either there is no arbitration agreement in existence at all, or—what amounts to the same thing—one of the disputing parties is not a party to the putative agreement. Or a party may claim that an arbitration agreement entered into by both parties is nevertheless for some reason invalid and hence not enforceable. Or a party may claim that an existing and valid arbitration agreement binding the two contesting parties does not extend in its scope to cover a particular merits-based issue in dispute. These are the questions of the existence, validity or scope of the arbitration agreement that are characteristically raised in disputes over whether a particular merits-based dispute between the parties is "arbitrable"—that is, whether the merits-based dispute should be resolved by arbitration instead of by a court.

In using the term "arbitrability" in this way, I am following the lead of the U.S. Supreme Court. Some commentators object to the U.S. Supreme Court's terminology, because in many countries the term "arbitrability" is used in a narrower sense to refer to a particular kind of invalidity of an existing arbitration agreement.[1] In these countries the question of "arbitrability" refers to the issue of whether the underlying merits-based issue falls into the category of questions "not capable of settlement by arbitration" (to use the terminology of the New York Convention)—in particular because such nonarbitrable issues are so infused with public policy concerns that the country whose law applies allows resolution of such issues only in one of its national courts. But, as stated, I will use the concept of

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[1] See J. Paulsson, THE IDEA OF ARBITRATION 72-77 (2013); G. Bermann, 37 Yale J. Int'l L. 1, at 10-13 (2012); E. Gaillard & J. Savage, eds., FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION at 312 (para. 532) (1999).

"arbitrability" in the broader sense discussed in the opening paragraph to cover any dispute over whether the parties have validly bound themselves to arbitrate the merits-based issue in dispute.

The arbitrability issue, understood in this way, can arise at each of the characteristic three stages of the arbitration/litigation process. It can arise at what I have called Stage One,[2] before a national court where one party seeks to litigate the merits of the dispute and the other party petitions to have the dispute sent to arbitration. The arbitrability issue can also arise at Stage Two, when the parties are before the arbitrable tribunal itself. In this scenario the objecting party asks the tribunal to declare itself without jurisdiction to decide the dispute because the essential requirement of a binding and valid arbitration agreement is lacking. Finally, the arbitrability issue can arise at Stage Three, when the party who wins an award asks a national court to enforce it, or the party who loses asks a national court to set it aside or refuse to recognize and enforce it.

Discussing the arbitrability issue at each of the three characteristic stages of the arbitration/litigation process is helpful, because the issue is treated differently at each stage. It should be clear of course that there may not be a Stage One, because the parties may proceed directly to Stage Two (before the arbitral tribunal) without invoking a national court's jurisdiction to litigate the enforceability of the arbitration agreement. Stage One and Stage Two can also go forward in parallel proceedings at the same time. The existence of an arbitrability dispute in a national court at Stage One does not prevent an arbitral tribunal from being seized with the case and proceeding with it simultaneously. It should also be clear that there need not be a Stage Three if the losing party agrees to pay the award. Because of the differences in context and approach that arise at each of the three stages just discussed, it helps to analyze how the arbitrability question is treated and how that treatment differs at each of the three stages, which is how the discussion below is organized.

Substantive Arbitrability (Jurisdiction) and Procedural Arbitrability (Admissibility)

But before we begin that discussion, it is important to distinguish between two types of issues that the U.S. Supreme Court calls, on one hand, "substantive arbitrability" and, on the other hand, "procedural arbitrability". Many civil law jurisdictions, in contrast, refer to these issues as "jurisdiction" of the tribunal (substantive arbitrability) and "admissibility" of the claim (procedural arbitrability). "Substantive arbitrability" in the U.S. Supreme Court's usage refers to whether the arbitral tribunal has good jurisdiction to decide the merits of the dispute. The issue concerns which forum is the proper one to decide the dispute—an arbitral tribunal or a court. Thus, substantive arbitrability (whether the arbitral tribunal has good jurisdiction) turns on the existence, validity and scope of the arbitration agreement. "Procedural arbitrability" in the U.S. Supreme Court's usage, refers to whether the particular claim advanced by the claimant is timely and has been properly handled by the claimant so that it is appropriate for an existing and valid arbitral tribunal to hear this particular claim. Many civil-law jurisdictions refer to this issue as one of the "admissibility" of the claim. Hence the "procedural

[2] See J. Barceló, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective," 36 Vanderbilt J. Transnati'l L. 1115, 1118-1119 (2003).

arbitrability" or "admissibility" issue deals with such questions as whether the claim has been brought too late (after the statute of limitations has run), or too early (because a certain required precondition such as mandatory mediation has not yet occurred), or whether the claimant has waived its right to arbitrate by having sought resolution of its claim in another forum, for example. Thus "procedural arbitrability" or "admissibility" focuses on the claim itself as opposed to which forum, court or tribunal, is the appropriate decision-maker.[3]

Characterizing an arbitrability dispute as falling within one or the other of these two categories can have a dramatic effect on the outcome of the dispute, as I will discuss below. And whereas the distinction is often straightforward and easy to make, there can be situations in which making it poses a serious challenge.[4]

II. Arbitrability at Stage One

A classic dilemma in arbitration typically arises at Stage One and concerns, on one hand, not wanting to send parties to arbitration unless they have validly agreed to arbitrate a dispute, and, on the other hand, not wanting to allow a party to obstruct a valid arbitration agreement through dilatory litigation tactics before a national court. To deal with this dilemma courts and legislatures have developed two legal principles that apply very commonly in legal systems throughout the world at Stage One: (i) separability and (ii) the negative effect of Kompetenz-Kompetenz.

A. Separability

Under the concept of separabilidty (or "severability" or "autonomy of the arbitration agreement"), if parties enter a transaction that includes an arbitration clause, they are held to have entered two separate and in many respects independent agreements: (i) the commercial transaction

[3] For an insightful discussion on the distinction between "jurisdiction" and "admissibility, see J. Paulsson, THE IDEA OF ARBITRATION, 82-90 (2013) (Section 3.2 Jurisdiction Distinguished from Admissibility).

[4] Consider an example drawn from the recent U.S. Supreme Court decision in BG Group v. Argentina, 572 U.S. __ (2014). The case involved a claim under the U.K.-Argentina Bilateral Investment Treaty (BIT) by a British investor, BG Group, against Argentina for unfair treatment of an investment. The BIT authorized arbitration but provided that the claimant investor must first file the claim in a local Argentinian court and pursue it there for a specified amount of time. The investor did not do so, but the arbitral tribunal found the local court litigation requirement inapplicable because of certain actions Argentina took that the tribunal characterized as obstructing the path to litigation. The question on enforcement of the award was whether the local court litigation requirement was a pre-condition to the formation of the arbitration agreement itself (a question of substantive arbitrability), or a pre-condition on the viability of the claim (a question of procedural arbitrability (admissibility)). In a 7-2 decision the Court characterized the issue as one of procedural arbitrability. Suppose the local court litigation requirement had been included in a clause under the heading of "Conditions of Consent". Would the local court litigation requirement then have been a pre-condition applying to the formation of the agreement to arbitrate (substantive arbitrability) or still a procedural pre-condition applying to the viability of the claim (procedural arbitrability)? Justice Sotomajor's concurring opinion in *BG Group* indicates that on these facts she would probably have changed her characterization, but the majority might not have. One can imagine a variety of factual patterns in which the choice would be difficult to make.

itself (sale, distribution agreement, license, transport agreement, construction contract, and so on) and (ii) an arbitration agreement. Thus, a challenge to the validity of the basic commercial agreement will not constitute a derivative challenge to the validity of the arbitration agreement. If a party resisting arbitration claims before a national court at Stage One that the basic commercial agreement (let us say a sale) is invalid because the other party fraudulently induced the complaining party into agreeing to the sale, that claim does not on its own terms pose a challenge to the separate arbitration agreement conceived of as independent from the sale contract. Thus, the question of whether the sale contract is invalid because of fraudulent inducement is one that should be sent to the arbitral tribunal for decision. The arbitration agreement does not collapse by derivation from the invalidity of the larger agreement. It maintains a separate existence and therefore requires that an arbitral tribunal should decide whether the commercial agreement (the sale) was in fact invalid.

We should note an important qualification that applies to the separability principle. If the party resisting arbitration claims that the commercial transaction (the sale) never came into existence, because, for example, the person putatively acting as agent for the respondent had no actual or apparent authority to bind the respondent, then that claim applies equally to the separate arbitration agreement. Thus, if the argument is sound, it undercuts at the same time and directly (not derivatively) the existence of the arbitration agreement. Therefore the separability doctrine does not apply as a basis for sending such an argument to the arbitration tribunal for decision.[5]

B. Negative Effect of Kompetenz-Kompetenz

The second principle, the negative effect of Kompetenz-Kompetenz, applies even to claims directly challenging the existence, validity or scope of the arbitration agreement. The principle operates to cause a national court seized of a dispute, concerning which there may or may not be a binding arbitration agreement, to stay its hand and send the matter to an arbitral tribunal for an initial decision on the arbitrability of the dispute. The tribunal's arbitrability decision can of course be subject to further judicial review at Stage Three. The applicable standard of review at that stage then becomes a particularly important issue, as we discuss below.

The term "negative effect" (of Kompetenz-Kompetenz) refers to the way the principle operates to restrain courts from exercising their otherwise legitimate jurisdiction to decide arbitrability at Stage One in deference to a first decision on the issue by the arbitral tribunal. The appropriateness of an arbitral tribunal's exercising competence to decide its own competence is effectively the "positive side" of the Kompetenz-Kompetenz principle—a principle recognized the world over.

[5] Generally, a challenge to the *existence* of the main contract also at the same time undercuts the *existence* of the arbitration agreement included in that contract, even if the arbitration clause is conceptualized as a separate agreement. But this "double function" (or "double relevance") of an existence challenge does not necessarily always apply. See G. Born, Vol. III INTERNATIONAL COMMERCIAL ARBITRATION 3457-3458 (2014).

The force and effect of the "negative effect" doctrine operates differently in different national legal systems around the world. If we examine the way the doctrine operates in two leading arbitration jurisdictions—the U.S. and France, in particular—we will have an illustration of two major patterns that one sees replicated in other jurisdictions.

The U.S. Approach to the Negative Effect of Kompetenz=Kompetenz

The U.S. Supreme Court has been the principal architect of the negative effect doctrine that applies in the U.S., and it has developed that doctrine by asking what the parties would likely have intended when negotiating their arbitration agreement. This approach has led the Court to introduce important presumptions. Because the Court assumes that parties very rarely even think about who, court or arbitrator, should decide substantive arbitrability questions (the arbitration agreement's existence, validity, or scope), the Court sets up a presumption that the parties do not normally intend such questions to be decided by the arbitrator. Thus, at Stage One a court should decide substantive arbitrability (jurisdiction) issues.[6] This presumption can be rebutted, however, if the parties include in their agreement "clear and unmistakeable evidence" that they intend substantive arbitrability issues to be decided by the arbitrators.[7]

The Court reverses the pattern just sketched, however, if the abitrability question falls into the "procedural arbitrability" (admissibility) category. For procedural arbitrability issues the Court presumes that the parties intend the arbitral tribunal to be the principal decision-maker, so that at Stage One a court should not decide such issues, but should send them instead to the arbitrators for initial decision. Once again the presumption can be rebutted if the parties make clear in their agreement that they want a court to decide any emerging procedural arbitrability issues.

What are "procedural arbitrability" issues? They are the questions mentioned above that some jurisdictions label as questions of the "admissibility" of the claim. Hence they include such issues as the timing of the claim, notice requirements, waiver, estoppel, prior mediation requirements, and similar preconditions to bringing a claim.

In the U.S., then, at Stage One substantive arbitrability issues are presumptively for the court to decide and procedural arbitrability issues are presumptively for the arbitral tribunal to decide. These presumptions at Stage One have an important effect in the U.S. on the standard of review applied by a U.S. court at Stage Three when an award is before the court for confirmation or for recognition and enforcement. At Stage Three concerning substantive arbitrability issues (whether the arbitral tribunal has good jurisdiction), a U.S. court should decide the jurisdictional issues de novo, with no deference to the arbitral tribunal—unless of course the normal presumption has been rebutted by the parties' explicit agreement to delegate this function to the tribunal. In the latter case, an enforcing court should give

[6] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).
[7] Id. at 944-945.

deference to the prior decision by the arbitral tribunal. By parallel logic if the issue is one of "procedural arbitrability" (admissibility of the claim) where the arbitrator is presumed to be the principal decision-maker, then the normal outcome is for an enforcing court at Stage Three to give deference to the arbitrator's prior decision. Again, this result can be reversed by explicit party agreement.

When deference is called for, how much deference should be given? In its recent *BG Group v. Argentina* decision,[8] the U.S. Supreme Court clarified that issue. In *BG Group* the arbitration agreement (contained in the U.K.-Argentina Bilateral Investment Treaty) required the claimant (investor) first to litigate in a local Argentinian court for a certain period of time before initiating arbitration. BG Group did not litigate locally, but instead went directly to arbitration with a claim that Argentina had breached the investment treaty by treating BG Group's investment unfairly. The arbitral tribunal rejected Argentina's challenge to its competence by applying the Vienna Treaty on Treaties to interpret the prior litigation requirement in the bilateral investment treaty as being inapplicable under the circumstances. The U.S. Supreme Court characterized the local litigation requirement as a "procedural arbitrability" question, concerning which an enforcing U.S. court was required to give deference to the tribunal's decision. In applying the deferential standard, the Court asked only whether the arbitral tribunal's resolution of the procedural arbitrabiltiy issue had been based on the tribunal's interpretation of the arbitration agreement—as opposed to an application "of [the tribunal's] own brand of justice". The Court said that it did not necessarily agree with the tribunal's interpretation, but that it was convinced that the tribunal had engaged in an interpretive exercise and had not simply pronounced what it considered to be a just result. Thus, it had acted within its delegated authority, and an enforcing court was required to enforce the resulting award. The deference called for is thus quite sweeping.

This sweeping deference would presumably also be called for in the case of substantive arbitrability issues whenever the parties include a provision that rebuts the normal presumption privileging the court and that privileges the arbitral tribunal instead as the principal decision-maker. Some recent lower court decisions in the U.S. have found the normal presumption rebutted whenever the parties choose institutional arbitration rules that include a provision reaffirming the positive Kompetenz-Kompetenz principle.[9] Those cases have so far arisen at Stage One and have resulted in the court's referring the parties to arbitration for an initial decision on substantive arbitrability. The reasoning seems unsound, however, especially because of the sweeping deference that would thereafter be called for at Stage Three. Since institutional rules often contain a provision reaffirming the positive Kompetenz-Kompetenz principle, this means that arbitral tribunals proceeding under such rules will have almost unfettered discretion to decide their own jurisdiction without serious review by a court at Stage Three. Because arbitrators have a financial incentive to find good jurisdiction in close cases, deferring so completely to the tribunal's decision on jurisdictional issues seems highly questionable. This is especially so when the triggering event is the mere inclusion in institutional rules of a provision reaffirming the positive Kompetenz-Kompetenz principle, which really says nothing at all about the

[8] BG Group PLC v. Republic of Argentina, 572 U.S. ___ (2014).

[9] See, e.g., Republic of Ecuador v. Chevron Corp, 638 F.3d 384, 394 (2d Cir. 2011).

parties' intent concerning who will be the principal decision-maker on substantive arbitrability questions.[10] As we will see, the French approach to these issues avoids this potential pitfall.

The French Approach to the Negative Effect of Kompetenz-Kompetenz

The French approach to the negative effect doctrine derives not from court interpretation of expected party intent articulated in an arbitration agreement, but rather from the express provisions of the French Code of Civil Procedure. Thus, in good civil-law tradition the applicable rule is given by legislative will and is found in Article 1448 of the 2011 version of the French Code of Civil Procedure:

> "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." [emphasis added] [11]
> * * *

By virtue of this provision, at Stage One a French court must send the parties to arbitration if the arbitration agreement has prima facie existence and validity and the dispute falls prima facie within its scope. Thus, in the vast majority of cases where litigation occurs at Stage One, a French court will not decide the arbitrability question, but will instead send it to the arbitral tribunal for an initial decision. But the tribunal's decision on arbitrability at Stage Two is not final. And in fact it is entitled to no deference at all at Stage Three. At the enforcement stage a French court will decide on arbitrability de novo, on the theory that a court must be the final arbiter of whether the parties have agreed to forego their right to a judicial decision on the merits in favor of arbitration.[12]

One might wonder why French law would require French courts to abstain from deciding arbitrability at Stage One, only to be the final decision-maker at Stage Three. Why delay if a court will decide the question in the end anyway? French commentators have explained the logic as follows. This approach gives full scope to the "positive" Kompetenz-Kompetenz principle and deters a party from trying to obstruct arbitration by raising arbitrability questions for extended litigation at Stage One.

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[10] The U.S. Supreme Court itself has contributed indirectly to this flawed analysis through its reasoning in *BG Group v. Argentina*, supra, note 7. In that case having found that the issue of pre-arbitration local court litigation was a procedural arbitrability question on which the arbitral tribunal would normally be privileged, the Court asked whether the parties' agreement contained any indication that they intended to shift that privilege to a court at Stage One. The Court cited as evidence to the contrary that the parties had chosen the UNCITRAL Arbitration Rules that authorized the arbitrators to decide their jurisdiction, the normal positive Kompetenz-Kompetenz principle. 572 U.S. ___ at ____. But surely the inclusion of rules containing a positive Kompetenz-Kompetenz principle says nothing at all about the parties' intent concerning who should be the principal decision maker on substantive or procedural arbitrability questions.

[11] Although Article 1448 appears in the section of the French Code of Civil Procedure applicable to domestic arbitration, Article 1506 of the Code expressly makes Article 1448 applicable to international arbitration as well.

[12] See Gaillard, supra note 1, at 924-29 (para. 1605). See also Barceló, supra note 2, at 1125 and sources cited therein.

Instead, most cases go directly to the arbitrators, who, when the arbitrability issue involves strong arguments both ways, may issue a preliminary award on jurisdiction. That award may then be reviewed de novo by a French court in a set-aside proceeding (if the seat is in France) with little delay.[13] If the tribunal believes the party objecting to jurisdiction is merely engaged in dilatory or obstructionist tactics, the tribunal may decide to continue with the arbitration proceedings, even while a set aside proceeding is underway at the arbitral seat. Thus the obstructionist tactics will not delay the arbitration.

A number of civil law jurisdictions have followed the French lead on the negative effect of Kompetenz-Kompetenz. For example, a recent amendment to the Mexican Commercial Code adopts this same approach.[14] And some jurisdictions follow this negative effect approach at Stage One even where the code or statutory provisions do not expressly require it. This is the case, for example, in Swiss practice.[15]

We have thus far discussed the French law approach to what the U.S. Supreme Court calls "substantive arbitrability". What about procedural arbitrability? In French practice issues that the U.S. Supreme Court calls "procedural arbitrability"—timeliness of the claim, or notice, or prior mediation requirements—would generally be referred to as issues of "admissibility" of the claim. They would not affect the jurisdiction of the arbitral tribunal but instead would relate only to whether the claim itself was timely and properly presented for decision on the merits. At Stage One, such a claim would be sent to the arbitral tribunal for decision, and at Stage Three a court would not review the tribunal's admissibility decisions. Thus, at Stages One and Three the outcomes would be similar in the U.S. and France and in other jurisdictions that characterize "procedural arbitrability" questions as issues of admissibility of the claim. [16]

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[13] If the seat is elsewhere, French theory assumes a court at the seat will be available to review the jurisdiction issue de novo, since French theory assumes that a court should always be the principal decision-maker concerning whether its jurisdiction has been ousted.

[14] See Article 1465 of the 2011 revision of the Mexican Commercial Code:

> "[When a party petitions a court to stay judicial proceedings and refer the parties to arbitration,] the remission to arbitration will be denied only
>
> a) If there is a judgment or an award holding that the arbitration agreement is null; or
>
> b) If, after careful scrutiny, the judge concludes that it is manifest that the arbitration agreement is null, inoperative, or incapable of being performed."
>
> [authors' translation]

[15] See Gaillard, supra note 1, at 409 (para. 675).

[16] See Solomon Ebere and Blerina Xheraj, "Who Decides Arbitrability Where a Precondition to Arbitration Has Not Been Satisfied? A Comment on the U.S. Supreme Court's Decision to Hear the Appeal in BG Group v. Argentina", 31 J. Int'l Arb 101, 106 (2014). For the result in France, Ebere and Xheraj cite *Poiré v. Tripier*, Cour de Cassation, Chambre mixte, February 14, 2003, Revue de l'Arbitrage 2/2003, 403 (pre-arbitration requirement is an admissibility issue) and *Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft*, Cour d'Appel de Paris, March 4, 2004, Revue de l'Arbitrage 2005, 143 (arbitral tribunal decision on admissibility issue not subject to independent court review). For Germany to the same effect, they cite Bundesgerichtsof (BGE), decision published in (1999) Neue Juristische Wochenschrift, Heft 9, 647; Bundesgerichtshof (BGE), decision published in (1984) Neue Juristische Wochenschrift, Heft 12, 669.

III. Stage Two—Arbitrability Before the Arbitrators

As we have noted, arbitration proceedings may go forward at Stage Two even if, and while, a challenge to arbitrability has been raised before a court at Stage One. In this situation arbitrators will have to decide whether they have good jurisdiction (issues of the existence, validity, and scope of the arbitration agreement) and whether the claim is admissible. They will do so whether deciding under institutional rules that do or do not expressly give them that power, or whether deciding ad hoc under an arbitration statute at the seat that either does or does not expressly grant that power. The concept of Kompetenz-Kompetenz is universally recognized. As we have noted, that does not mean that the arbitrator's decision is final. It means essentially that an arbitrator is entitled to decide on arbitrability and to proceed according to that decision, without having to suspend proceedings until the parties obtain a judicial decision on arbitrability. The judicial decision will come at Stage Three.

The arbitrability issue before arbitrators at Stage Two raises several important issues. Suppose, for example, a national court has already reached a decision at Stage One that the arbitration agreement is invalid. Will the arbitrators be bound by that decision? Technically the answer is no, but if the court decision occurs at the arbitral seat, then experienced arbitrators will generally want to heed it. Why? Because if they do not, then any award they render that is inconsistent with that prior arbitrability decision by a court at the seat will presumably be set-aside, and thus, because of New York Convention V(1)(e)[17] will generally be refused recognition and enforcement in other New York Convention countries. A decision on arbitrability by a national court not at the seat will not command the same respect from the arbitral tribunal. The award will not be enforceable in that jurisdiction, but it could still be enforceable in other jurisdictions. So if the arbitrators disagree with the conclusion of the non-seat jurisdiction on arbitrability, they may go forward with their own analysis and conclusions.

Another characteristic issue that arises at Stage Two concerns what law the arbitrators should apply in deciding the existence, validity and scope of an arbitration agreement? This question cannot be answered definitively, but certain tendencies are common in practice. A dominant tendency among arbitrators is to privilege party autonomy. So if the parties have thought about the question and expressly included a clause choosing a particular national legal system to decide the interpretation and validity of the arbitration agreement, arbitrators will be compelled to apply that law. Some commentators may see this as illogical or as "bootstrapping". If the arbitration agreement is invalid, how can one make use of a choice of law provision contained in an invalid arbitration agreement? Clearly, privileging party autonomy in this situation effectively treats the parties' choice of law agreement in the arbitration clause as separate from the arbitration agreement itself. Thus that choice

[17] Article V(1)(e) of the New York Convention gives as a ground for refusing recognition and enforcement of an award, that the award was set aside "by a competent authority of the country in which * * * that award was made", that is, at the seat. There is no guarantee that an award set-aside at the seat will be refused recognition or enforcement in other New York Convention countries, but this is generally the result. As is well known, awards set-aside where made will still be enforced in France if they are enforceable under the French national law standards for enforcing foreign awards, standards that are more favorable to enforcement than those of the New York Convention.

of law agreement can be valid and effective, even if when applying the chosen law the arbitrators conclude that the arbitration agreement itself is not valid. And even though the New York Convention is not technically addressed to the arbitral tribunal, arbitrators will surely feel supported in this approach by the provision in New York Convention Article V(1)(a) that refers an enforcing court to the law "to which the parties have subjected [the arbitration agreement]" in deciding the agreement's validity.

Another tendency is for arbitrators to favor validating over invalidating law—a validity preferring approach. Thus, if there are contending arguments for the applicability of two different legal systems, one that invalidates the arbitration agreement and one that validates it, arbitrators will favor the validating law. This approach would not seem well-grounded if the issue is the existence itself of the arbitration agreement. It is hard to see any basis for presuming or preferring existence of an arbitration agreement over nonexistence. But if the parties have clearly entered an agreement to arbitrate and one party challenges its validity, arbitrators will assume that parties entering an agreement intended a valid agreement.

When parties have not explicitly chosen a law to govern the validity of the arbitration agreement, there are usually two contending approaches to the applicable law, each having some basis in party autonomy. The first is to presume that the law governing the basic transaction (e.g. an international sale) within which an arbitration clause is embedded also applies to the arbitration agreement, which is in one sense just one of the clauses of that basic transaction. If the parties have specifically chosen the applicable law for the basic transaction and that law is presumed to apply as well to the arbitration clause, then at least indirectly party autonomy has decided the law applicable to the arbitration agreement. Even when there is no such clause, the transaction's links to national jurisdictions, links that often determine the applicable law, also emerge out of the parties' negotiation and performance practices and in that sense are also determined by party autonomy.

A second approach is to apply the law of the seat. Suppose for example a private party agrees to perform services for a governmental entity in Egypt, and the law applicable to this agreement is Egyptian law. The parties nevertheless place the arbitration seat in Geneva, Switzerland. Suppose under Egyptian law the agreement might be considered an administrative contract so that disputes concerning the agreement could not validly be submitted to arbitration. Thus, under Egyptian law the arbitration agreement could arguably be invalid. In a well-known arbitral award involving similar facts the arbitrator chose to apply not Egyptian law, but the law of the seat, Swiss law, to determine the validity of the arbitration agreement.[18] Under Article 177(2) of the Swiss Private International Law Act a governmental entity is not allowed to rely on its own law to challenge the validity of an arbitration agreement that it has entered into. Hence, the arbitrator applied this point of the Swiss arbitration law and found the arbitration agreement valid. [19]

[18] See Consultant (France) v. Egyptian Local Authority, 17 Yearbk. Comm. Arb'n 153 (1992) (ICC Arbitral Award, Geneva, Switzerland).
[19] Id.

IV. Stage Three: Arbitrability at Award Enforcement

A. Setting Aside

If a final arbitral award is brought to a national court at the seat for confirmation or to be set aside, then the national arbitration law at the seat will govern the proceedings, not the New York Convention. If there are questions concerning the arbitrability of the dispute, they will surely be raised here, even though the arbitral tribunal will presumably have already upheld its own jurisdiction as a basis for rendering the award.

If the arbitral tribunal renders a preliminary award declaring that the tribunal has good jurisdiction to hear the claim, the respondent may again seek to have the preliminary award set aside at the seat. In French practice this way of proceeding—the tribunal's issuance of a preliminary award on jurisdiction followed by a court challenge to the award—has advantages when combined with the strong French doctrine of the negative effect of Kompetenz-Kompetenz. As we have discussed above, under that doctrine most arbitrability issues are not decided by a court at Stage One, but are sent by the court to the arbitral tribunal for an initial decision. If the tribunal upholds its jurisdiction in a preliminary award, the opposing party can get a relatively timely judicial decision on arbitrability before the proceeding advances very far. In the set-side proceeding (Stage Three) the French court will decide arbitrability de novo, with no deference to the arbitral tribunal's prior decision. At the same time, the arbitral tribunal, in its discretion, would be free to continue with the arbitral proceedings, even when a set-aside action is underway, in order to thwart any attempt by the opposing party to obstruct arbitration by raising dubious arbitrability issues. If on the other hand the tribunal considers arbitrability to be a close question, it might choose to delay the proceedings to await the court's final decision. The tribunal would presumably abide by a negative court decision, because otherwise the final award would be set aside at the seat and would then be unenforceable in most New York Convention countries on the basis of Article V(1)(e) of the Convention.[20]

Should the tribunal conclude that the dispute is not arbitrable, that award too could be challenged by the claimant in a set aside action in at least some jurisdictions. France and Switzerland are examples.[21] But countries that have patterned their arbitration law closely on the Model Law do not provide for a court challenge to a tribunal's decision declining jurisdiction.[22]

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[20] As noted above in footnote 17, Article V(1)(e) authorizes a New York Convention country to refuse to recognize or enforce an award that has been set aside at the seat.

[21] Article 1520(1) of the 2011 version of the French Code of Civil Procedure provides for set aside of an award made in France where: "the arbitral tribunal wrongly upheld or declined jurisdiction; * * *". Article 190(2)(b) of the Swiss Private International Law Act provides for set aside of an award made in Switzerland: "When the arbitral tribunal wrongly accepted or declined jurisdiction; * * *."

[22] Article 16(3) of the UNCITRAL Model Law provides: "If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request * * * the court specified in Article 6 to decide the matter * * *" The Model Law contains no provision authorizing court review of a tribunal decision declining jurisdiction.

In the U.S. recall that at Stage Three an enforcing court would decide substantive arbitrability issues (existence, validity, and scope of the arbitration agreement) de novo, unless the parties expressed their intent through "clear and unmistakable evidence" that they wanted the arbitral tribunal to decide arbitrability—a rare occurrence. On procedural arbitrability (admissibility), however, the presumption is reversed. On such an issue (timeliness of the claim, notice, waiver, estoppel, and so on) an enforcing court should give deference to the tribunal's decision, unless the parties rebut the ordinary presumption that they intend the arbitrator to be the primary decision maker with clear and unmistakable evidence that they prefer a court decision instead.

In several civil law jurisdictions, "procedural arbitrability" questions will be analyzed as claim admissibility issues. We have discussed the French practice in this respect above in the Stage One section.[23] Germany also follows this approach.[24] In these jurisdictions at Stage One courts will send admissibility issues to the arbitral tribunal for decision and will not review the tribunal's decision on such issues at all at the Stage Three enforcement level.[25]

It is worth noting that a party challenging arbitrability at Stage Three must also have raised that challenge before the arbitrators at Stage Two. Otherwise that party will be estopped from raising the claim at Stage Three. Civil law jurisdictions often reach this result on the ground of breach of good faith. One exception to this result would be a case in which the seat considers the arbitration agreement to be invalid because the dispute deals with non-arbitrable subject matter under the seat's law. Because this is a matter of mandatory law—essentially public policy—the parties' actions cannot waive or prevent a court from enforcing the national law sua sponte.

B. Recognition and Enforcement

Non-Arbitrable Subject Matter

At Stage Three enforcement under the New York Convention in countries other than the seat country, the same issue of non-arbitrable subject matter is regulated specifically in Article V(2)(a) of the Convention. If the arbitration agreement deals with a subject matter not capable of settlement by arbitration—as determined by the law of the enforcing country—then the award will not be enforced in that country. For other kinds of arbitrability challenges, the analysis is not quite so straightforward.

[23] See Ebere and Xheraj, supra, note 16.
[24] Id.
[25] Id.

Formal Validity

Formal validity of the arbitration agreement at Stage Three is generally understood to be regulated by Article II of the New York Convention. Under that article the arbitration agreement must be either signed by all the parties or contained in an exchange of writing coming from all parties. A party seeking to enforce an award under the New York Convention is instructed in Article IV of the Convention to present the award and "the agreement referred to in Article II". Thus a first step in obtaining recognition and enforcement of the award is to present the arbitration agreement, which should conform to the writing requirements of Article II. If the arbitration agreement is not in writing according to the standards of Article II, then the party seeking recognition and enforcement is not able to meet the requirements of Article IV and hence will not succeed.

However, if the country of enforcement has enacted a national arbitration statute that provides for enforcement of a *foreign* award under more lenient writing standards than those of Article II, then the "most favorable right" provision of Article VII of the Convention comes into play, and the enforcing country is required to enforce the award under those more lenient national writing standards. Any country enacting the 2006 revision of the Model Law containing a more lenient writing requirement—or under Option 2 of that revision, no writing requirement at all—will be in this position. As more and more countries adopt more lenient writing requirements for arbitration agreements and expressly provide for recognition and enforcement of foreign awards where the arbitration agreement meets the more lenient national formality standard, the stricter writing standards of Article II of the Convention will be less frequently applicable to block enforcement of a foreign award.

Substantive Validity

A challenge to the substantive validity of the arbitration agreement on grounds other than non-arbitrable subject matter (governed by Article V(2)(a)) is regulated under Article V(1)(a) of the Convention. Thus, an award may be refused enforcement if the arbitration agreement "is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country where the award was made."[26] The chapeau of Article V(1) places the burden of proof concerning all V(1) grounds to refuse recognition and enforcement on the party resisting enforcement ("[r]ecognition and enforcement of the award may be refused, * * * only if [the party requesting refusal] furnishes * * * proof that: [subparagraph a, b, c, d, or e applies]")[27].

The force of party autonomy is evident in this provision, since validity is to be determined by the law to which the parties have subjected their agreement. The law of the seat on substantive validity only comes into play if the parties have not included in their agreement any indication of the law to which they intended to subject their agreement. Hence under V(1)(a) the law of the seat is subordinated to the law chosen by the parties. On the other hand, if the arbitration agreement is invalid

[26] New York Convention Article V(1)(a).
[27] New York Convention Article V(1) chapeau.

under the law of the seat, the losing party might be able to get the award set aside by a national court at the seat, and then the award would be unenforceable in most jurisdictions by virtue of Article V(1)(e), which provides, as we have seen, that an award may be refused enforcement if it has been set aside where made. This outcome depends of course on whether a court at the seat would apply the law of the seat to invalidate the arbitration agreement, instead of the law chosen by the parties, which law would presumably treat the agreement as valid.

Nonexistence of the Agreement

Many countries treat the issue of an arbitration agreement's "existence"—as between the contending parties—under the same V(1)(a) standards that apply to the agreement's "validity". [28] Thus, the party resisting enforcement bears the burden of proof. Some countries, however, follow a different approach. Courts in Germany and Spain, for example, consider "existence" issues under the provisions of Article IV requiring the enforcing party to present the award and the arbitration agreement as an initial step in getting the award enforced.[29] These courts thus conclude that under Article IV the enforcing party must bear the burden of proving that the arbitration agreement has come into existence as between the claimant(s) and respondent(s) as parties. The issue of substantive validity of the agreement is then governed by the provisions of New York Convention Article V(1)(a).

Scope

At the enforcement stage, issues of scope will generally be analyzed under Article V(1)(c) of the Convention ("the award * * * contains decisions on matters beyond the scope of the submission to arbitration * * *."). Again the party resisting enforcement bears the burden of proof. In both France and the U.S. the scope issue should normally be decided de novo by the enforcing court. In the U.S., however, an enforcing court should resolve any doubts in favor of including a disputed issue within the scope of arbitrable issues. Only if the parties have been clear and unmistakable in wanting to exclude a particular issue from the arbitrators' jurisdiction, should an enforcing court conclude that a disputed issue is beyond the scope of submission.[30] This is the correct approach because sending different issues

[28] The U.S. and the UK are examples. For the U.S., see Restatement (Third) U.S. Law of International Commercial Arbitration sec. 4-12, Comment a (Tentative Draft No. 2, 2012) ("* * * Article V()1)(a) of the New York Convention * * * permit[s] a court to deny recognition or enforcement of an award if no arbitration agreement exists, * * *"). For the U.K., see the U.K. Supreme Court's decision in Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan, [2010] UKSC 46.

[29] See S. Kröll, Chapter 17: "The Arbitration Agreement in Enforcement Proceedings of Foreign Awards," in S. Kröll, L. Mistelis, P. Viscasillas, V. Rogers, eds., INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE, AND EVOLUTION (2011). Professor Kröll cites cases in Germany (e.g., Oberlandesgericht Celle, 4 September 2003, YEARBOOK COMM. ARB'N XXX (2005) 528) and Spain (e.g. Tribunal Supremo, 16 September 1996, Actival International SA v. Conservas El Pilas SA in YEARBOOK COMM. ARB'N XXVII 528 (2002). He also cites cases in Argentina and Norway that follow the same interpretation.

[30] See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 at 945 (1995) (considering the question "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement" the

arising from a single controversy to different dispute resolution systems is highly inefficient and would not normally be what the parties had intended.

Procedural Arbitrability (Admissibility)

As we have discussed above, If a disputed issue concerns procedural arbitrability or admissibility of the claim, an enforcing court will normally not review the arbitrators' decision. This is certainly so in France and Germany, for example.[31] This is also the normal result in the U.S. In U.S. practice, however, the parties have the power to provide for de novo court review of procedural arbitrability issues if they expressly provide in the arbitration agreement that any particular such issues are to be decided by a court.

V. Conclusion

As we noted at the outset of this discussion, the arbitration agreement is the cornerstone of international commercial arbitration. Disputes over the agreement's existence, validity, and scope—the essential elements for a controversy to be arbitrable—arise at each of the three fundamental stages of the arbitration/litigation process. Moreover, the arbitrability issue is typically subject to different rules and different analytical approaches at each of these three stages. There is also some variability of approach in different national jurisdictions. In all jurisdictions, however, an international commercial arbitration will not yield an enforceable award unless the arbitration agreement exists as between the parties, is valid, and the disputed issues fall within the scope of the agreement.

Court cites and quotes Mitsubishi Motors, 473 U.S.614 at 626, which in turn quotes Moses H. Cone, 460 U.S. 1 at 24-25, as follows: " '[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration' ")).

[31] See, supra, fn 16.