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# 5

# Arbitral jurisdiction

## 1 Introduction

5.1 The features and requirements of arbitration agreements were examined in Chapter 4. This chapter addresses procedural and other issues that can arise when a party wishes to contest an arbitral tribunal's jurisdiction. It also considers the link between an arbitral tribunal's authority to rule on its own jurisdiction and the control of that authority by domestic courts.

5.2 An arbitral tribunal's jurisdiction is far from automatic. It derives from the disputing parties' free will, i.e. their agreement to arbitrate. The consensual nature of arbitral jurisdiction must be contrasted with the jurisdiction of domestic courts, which is established by the domestic law of the forum and any applicable treaties dealing with international judicial competence.

5.3 The consensual basis of arbitration means that a respondent party can attempt to contest or deny arbitral jurisdiction. The objecting party might never have agreed to arbitrate or, even if it previously agreed, may now prefer to litigate the dispute in a domestic court. In the latter case the objecting party may seek to escape its obligation to arbitrate by denying its previous agreement. Alternatively, that party might raise jurisdictional objections in an attempt to delay and frustrate the resolution of the dispute.

5.4 After introducing and summarising the procedure of jurisdictional objections (Section 2), we examine preliminary issues concerning arbitral jurisdiction (Section 3), before dealing with the competence-competence rule and prima facie jurisdictional decisions by courts (Section 4), prima facie jurisdictional decisions by arbitral institutions (Section 5), and finally the effects of a court, institution or arbitral tribunal's jurisdictional decision (Section 6).

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Jurisdiction is handled very differently in arbitrations under the ICSID Convention. This is discussed separately in Chapter 10. The present chapter focuses on jurisdiction in international commercial arbitration. 5.5

## 2 Overview and summary of jurisdictional objections

Jurisdictional objections are generally raised at the outset of an arbitration. If an arbitration progresses to completion, a party may also deny arbitral jurisdiction at the end, during a procedure to challenge the award or to resist enforcement of the award. However, a party's failure to raise jurisdictional objections promptly may give rise to a finding that the party is deemed to have waived those objections. 5.6

Overall, a party (typically the respondent) wanting to contest jurisdiction has the following options available to it:[1] 5.7

(i) First, the respondent may challenge jurisdiction by making its objections directly with the arbitral tribunal. Arbitral tribunals are empowered to decide on their own jurisdiction by virtue of a principle found in virtually all arbitration laws and rules known as the 'competence-competence' rule.[2]
   - An essential feature of the competence-competence rule is that an arbitral tribunal's decision that it possesses jurisdiction is not final – it can be reviewed by a domestic court during proceedings to set aside the decision. Save for exceptional circumstances (and erroneous decisions by some domestic courts), the only domestic court with jurisdiction to set aside an arbitral tribunal's jurisdictional decision is a court at the seat of arbitration.[3]
   - However, while a court at the seat of arbitration can always hear an action to set aside an arbitral tribunal's decision that the arbitral tribunal possesses jurisdiction, this is not true when an arbitral tribunal decides that it lacks jurisdiction. As explained further below, only some legal systems expressly empower their courts to review an arbitral tribunal's negative jurisdictional decision.

(ii) Second, the respondent party may refuse to participate in the arbitration, wait for the arbitral tribunal's final award and then (i) seek to have that award set aside (i.e. challenge it) at the seat of arbitration on the basis that the arbitral tribunal did not have jurisdiction to make the award or (ii) wait

**1** Most of the issues summarised in this list are dealt with in more detail below in this chapter. For an analysis of the different kinds of uncooperative respondent tactics, see M Hwang, 'Why is There Still Resistance to Arbitration in Asia?', Lunchtime address to The International Arbitration Club, Singapore, Autumn 2007. An earlier version of the paper was published in G Aksen, K-H Bockstiegel, MJ Mustill, PM Patocchi and AM Whitesell (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ICC Publishing, 2005. See also M Philippe and P Blondeau, 'Comment se manifestent certaines tactiques dilatoires dans l'arbitrage', (1999) 15(7) *Dalloz Affaires* 169, at p. 1097.
**2** This rule is discussed in Section 4.
**3** Regarding setting aside proceedings see Chapter 9, Section 3.2.

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for the claimant to commence proceedings to enforce the award and then resist enforcement for the same reason.

- Either of these strategies raises significant risks for the respondent. The failure to participate in the arbitration will mean that the respondent's views, arguments and position were not heard by the arbitral tribunal. This means that if its jurisdictional plea before the domestic court fails (whether in the seat of arbitration or before the court where the opposing side is trying to enforce the award), it will be faced with and bound by an award made in circumstances where its position was never argued before the arbitral tribunal. Additionally, in some circumstances the respondent's failure to participate will be considered as a waiver of its right to object to the arbitral tribunal's jurisdiction.
- If the respondent participates in the arbitration without raising an objection to the arbitral tribunal's jurisdiction but subsequently contests that jurisdiction before a court, the respondent will almost always be considered by the court to have waived its right to object to arbitral jurisdiction. (The facts on which a waiver is based may also or alternatively be used to support the invocation of other legal doctrines, such as issue estoppel or abandonment[4]).

(iii) Third, the respondent may seek from the arbitration's outset a ruling directly from a domestic court at the seat of arbitration that the arbitral tribunal lacks jurisdiction. Whether or not a court at the seat of arbitration is competent to decide an issue of arbitral jurisdiction before the arbitral tribunal has ruled on its own jurisdiction depends on the local law and practice of the courts. It depends, in particular, on that jurisdiction's interpretation and application of the competence-competence rule.

- A respondent sometimes seeks a similar ruling from a court outside the seat of arbitration – for example a court in its home jurisdiction. As a general rule, a decision from a court outside the seat of arbitration should not affect the arbitral tribunal's jurisdiction because the court concerned would not be competent under the law of the seat of arbitration to make such a decision.

(iv) Fourth, another alternative is for the respondent to commence court litigation proceedings against the claimant on the substance of the dispute. If it does so, the other side could accept – expressly or implicitly – the domestic court's competence, thereby waiving its right to invoke the arbitration agreement in connection with that dispute. For example, if the opposing party proceeds to argue its defence before the domestic court without objecting to that court's jurisdiction on the basis of the parties' arbitration agreement it will usually be considered to have waived the arbitration

**4** The concept of waiver is applied differently by domestic courts depending on the jurisdiction concerned. A discussion of the differences between waiver and other doctrines such as issue estoppel or abandonment is beyond the scope of this book, and we use the catch-all term 'waiver' to cover all of those legal concepts even at the risk of over-simplification in some contexts.

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agreement for that dispute. If, however, the opposing party contests the court's jurisdiction on the basis of the arbitration agreement then that court will, depending on its law, either rule on the arbitral tribunal's jurisdiction or order the parties to arbitrate their dispute (thus staying or dismissing its own proceedings), including their dispute as to the issue of the arbitral tribunal's jurisdiction.

Most of the issues set out in the above summary are developed in much more detail in the following sections. 5.8

# 3 Preliminary issues relating to arbitral jurisdiction

## 3.1 Partial and absolute jurisdictional objections

An objection to an arbitral tribunal's jurisdiction can be absolute (i.e. contesting arbitral jurisdiction *per se*, or over a particular party *per se*) or partial (i.e. only with respect to certain of the claims or issues submitted to arbitration). 5.9

Absolute jurisdictional objections are the most common. They are usually raised on the ground that one of the alleged parties to the arbitration is not a proper party to the arbitration agreement. They may also be raised on grounds, for example, that the respondent did not have capacity to enter into the arbitration agreement, that the arbitration agreement is illegal, void or incapable of being performed, or that the claimant has waived its right to invoke the arbitration agreement.[5] 5.10

Partial jurisdictional objections arise primarily as a consequence of the concept that an arbitral tribunal has jurisdiction to decide only those matters which the parties have agreed that it can decide. Sometimes an arbitration agreement expressly limits arbitral jurisdiction to certain carefully defined issues. Those issues could be listed in the arbitration agreement, or listed in a document created at the outset of the arbitration such as the terms of reference.[6] 5.11

Even if no specific list of issues exists, a partial jurisdictional objection could arise from the plain language of the arbitration agreement. A typical arbitration clause contained in a contract may provide for the resolution of *all disputes relating to this contract* (or words to that effect). The respondent could argue that the parties did not agree to arbitrate non-contractual claims, for example pre-contractual or post-contractual tort claims. That would be a partial jurisdictional objection. In the face of a more broadly drafted clause, for example providing for the resolution of *all disputes arising out of or in connection with this contract*, such an argument would be very difficult to sustain. 5.12

**5** Various examples of absolute jurisdictional objections are provided in the discussion of Article 6.2 of the ICC Rules below in Section 5.
**6** In relation to Terms of Reference see Chapter 7, Section 6.5.

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5.13 A partial jurisdictional objection based on the scope of an arbitration clause was raised before the Singapore High Court in the 2004 case *Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan*.[7] The parties disputed whether the ICC arbitral tribunal had jurisdiction to decide on a claim for costs which had been incurred during a prior, related ICC arbitration which had been withdrawn. It was argued that the costs claim from the previous arbitration did not fall within the scope of the arbitration agreement providing for arbitration of disputes 'arising out of or in connection with' the contract. The Singapore High Court disagreed. It found that the parties must have intended that the costs of a prior arbitration arising out of the same contract could be settled by a subsequent arbitral tribunal.

5.14 Partial jurisdictional objections can arise in many other ways. A party could argue for example that one of its opponent's claims arises from a different contract. The other contract might contain a different dispute resolution clause, such as an inconsistent arbitration clause or a clause designating a domestic court as competent.[8]

5.15 Partial jurisdictional objections can also arise by virtue of the law governing the arbitration agreement or the law governing the arbitration proceedings. Either of those laws may place limits on the kind of claims that are capable of resolution by arbitration, some subject matters being considered inarbitrable.[9] Accordingly, a partial jurisdictional objection could allege that certain issues are inarbitrable under the relevant law.

5.16 Finally, a distinction needs to be drawn between an arbitral tribunal's *jurisdiction* and the scope of its *powers*. It is sometimes argued that an arbitral tribunal does not possess the power, legally speaking, to make certain orders. For example, there has historically been debate about the extent of arbitrators' powers to order certain preliminary injunctive relief, and in particular interim injunctions that affect a party's ability to deal with immovable property. Such issues concern an arbitral tribunal's powers rather than its jurisdiction over the claims or parties involved and should be clearly distinguished.

## 3.2 Jurisdictional objections raised by a party

5.17 The most common scenario in which a jurisdictional issue will arise is where the respondent objects to the arbitral tribunal's jurisdiction at the beginning of the arbitration. Arbitration laws and rules usually require a party to raise any jurisdictional objections early, generally prior to that party's first submission on the substance of the dispute.[10] Failure to do so can mean irrevocable waiver of that party's right to raise jurisdictional objections. A comparison of the

**7** *Sabah Shipyard (Pakistan) Ltd v The Government of the Islamic Republic of Pakistan* [2004] 3 SLR 184; [2004] SGHC 109; [2004] 1 CLC 149.
**8** See the examples provided in the discussion of Article 6.2 of the ICC Rules below in Section 5.
**9** On arbitrability see Chapter 4, Section 8.
**10** But see the discussion of the position in China below.

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relevant provisions of the Model Law and the 1976 UNCITRAL Arbitration Rules follows.

Article 16(2) of the Model Law provides: 5.18

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

Article 21(3) of the 1976 UNCITRAL Arbitration Rules is slightly different:[11] 5.19

> A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

Both Articles provide that if a respondent wants to raise jurisdictional objections, it must do so not later than when filing its statement of defence. The Model Law expressly provides, in addition, that mere participation in the constitution of an arbitral tribunal will not preclude the respondent from later objecting to jurisdiction. In contrast to the Model Law, the UNCITRAL Arbitration Rules deal expressly with objections regarding arbitral jurisdiction over counterclaims. However, delay in raising such an objection would be caught by the general wording of Article 16(2) of the Model Law. Thus an objection to the arbitral tribunal's exercise of authority must be brought as soon as the matter is raised in the arbitration. That 'catch all' covers jurisdiction over new claims, including counterclaims. Finally, only the Model Law expressly empowers the arbitral tribunal to admit a later plea if it considers the delay justified. 5.20

Numerous jurisdictions including Hong Kong, Singapore, Malaysia, India, Korea, Australia and New Zealand have adopted Article 16(2) of the Model Law without any substantive modification.[12] Japan has chosen a slightly different approach. Article 23(2) of the 2003 Japanese Arbitration Law states: 5.21

> A plea that the arbitral tribunal does not have jurisdiction shall be raised promptly in the case where the grounds for the assertion arise during the course of arbitral proceedings, or in other cases before the time at which the first written statement on the substance of the dispute is submitted to the arbitral tribunal (including the time at which initial assertions on the substance of the dispute are presented orally at an oral

**11** For example, in institutional rules see ACICA Rules Article 24.3, CIETAC Rules Article 6, SIAC Rules Article 25.2, HKIAC Rules Article 20.3, and ICSID Rules, Rule 41(1). Article 23(2) of the 2010 UNCITRAL Arbitration Rules is slightly different, referring also to set-offs. Moreover, that Article includes the additional text in Article 16(2) of the Model Law starting from the second sentence of Article 16(2). Therefore, there is no longer much difference between the UNCITRAL Rules and the Model Law except that the latter does not refer to counterclaims.

**12** The corresponding section numbers in the Acts may differ but the provision is the same. China is very different, (see the discussion of Article 29 of the Chinese Arbitration Law below at Section 4.2). See also Article 13(2) of the 2006 Chinese Supreme People's Court Interpretations which confirms that a party which has failed to raise an objection to jurisdiction before the first hearing in the arbitration is precluded from requesting the Supreme People's Court to rule on jurisdiction.

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hearing). However, the arbitral tribunal may admit a later plea if it considers the delay justified.

5.22 This provision is clearly inspired by the Model Law but its language is stricter. The jurisdictional objections must be raised *before* any written or oral submission on the merits is filed.

5.23 If a party participates in the arbitration but fails to raise a jurisdictional objection within the time limit specified by the applicable law, its silence may amount to entering into an arbitration agreement. Article 7(2) of the Model Law refers to an arbitration agreement being in writing 'if it is contained in . . . an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another'. An example of where the respondent's failure to object to jurisdiction worked against it is found in *Bauer (M) Sdn Bhd v Daewoo Corp*.[13] Although the Malaysian Court of Appeal agreed with the trial judge that the parties had not incorporated an arbitration agreement into their contract, it found that the acts of the respondent in participating in the arbitration estopped it from subsequently denying the arbitrator's jurisdiction. Thus its failure to raise its jurisdictional objection in good time extinguished its right to do so at a later stage.

## 3.3 Arbitral tribunal's ex officio examination of jurisdiction

5.24 Jurisdictional objections can only be raised by an entity named as a party to arbitration proceedings. However, regardless of whether jurisdictional issues are raised by one or more parties, it is prudent for all arbitral tribunals to consider on their own initiative whether they have jurisdiction, both absolute and with respect to each claim on which they have been asked to rule.[14] An arbitral tribunal should always comment on jurisdiction in its award(s), even if it is only to cite the arbitration agreement and confirm that neither party objected to jurisdiction.

5.25 An express decision on jurisdiction must also be made if one or more parties to the arbitration proceedings does not participate at all.[15] Unlike domestic court proceedings, 'default judgments' cannot be issued simply because a party fails to appear in an arbitration. If a party does not participate, the arbitration continues without the defaulting party or parties.[16] In these circumstances, the arbitral tribunal should examine and take an express decision on its own jurisdiction. Before doing so, it should ask the participating party or parties to file submissions on jurisdiction and expressly provide an opportunity for the non-participating parties to do so as well. Each non-participating party should be kept informed of and invited to participate in all steps in the arbitration.

**13** [1999] 4 MLJ 545. See also for China, Reply of Supreme People's Court to the Request of Enforcement of Arbitral Award made in England by Swiss Bangji Co., Ltd (Civil 4, Miscellaneous), No. 47 (2006).
**14** See, e.g. ICSID Rules Rule 41(2).
**15** In 2009, there was at least one non-participating party in 6% of ICC arbitration cases at the time the ICC Court was requested to take decisions in connection with constituting the arbitral tribunal and other preliminary matters.
**16** See Chapter 7, Section 6.10 on non-participating parties.

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5.26 It is essential for an arbitral tribunal to examine and rule on jurisdiction where the respondent is not participating because the respondent may subsequently raise its objections in court proceedings challenging the award or resisting its enforcement. As noted above, however, failing to participate in an arbitration in the hope that the award can later be challenged is a high-risk strategy. If the respondent loses on the jurisdictional arguments before the courts, it will find itself bound by the substance of an arbitral award resulting from a procedure in which it did not defend its position.

5.27 In addition to an arbitral tribunal's duty to ensure that it has jurisdiction over all of the claims submitted to it, an arbitral tribunal must of its own initiative ensure that it does not decide issues incapable of settlement by arbitration under the law governing the arbitration agreement or the law of the seat of arbitration.[17] Arbitrators must also ensure that parties do not use arbitration to avoid certain mandatory provisions of a domestic law.[18]

## 3.4 Appropriate time to decide jurisdiction

5.28 When an arbitral tribunal is faced with a challenge to its jurisdiction, it has two broad options as to when it will decide that challenge. The first is that it can bifurcate the proceedings, thus hearing arguments on jurisdiction separately and then rendering a decision on jurisdiction before proceeding to examine the merits.[19] The second is that it can decide to join the issue of jurisdiction to the merits and decide both in one single award.

5.29 An arbitral tribunal's power to split an arbitration into separate phases arises from its general powers to manage the proceedings.[20] In addition, the Model Law and most arbitration laws expressly reiterate this power in relation to jurisdictional decisions. Article 16(3) of the Model Law provides that 'the arbitral tribunal may rule on a [jurisdictional objection] either as a preliminary question or in an award on the merits'.[21] Article 186 of the Swiss Private International Law Act 1987, which appears to have been inspired by Article 21(4) of the 1976 UNCITRAL Arbitration Rules, is different in that it provides a presumption in favour of deciding jurisdiction as a preliminary matter: 'The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.' The ACICA Rules,

**17** Deciding a dispute that is not capable of settlement by arbitration under the law of the seat of arbitration is not always fatal to the award. See Chapter 4, Section 8 on arbitrability.
**18** See discussion in Chapter 3, Section 4 regarding mandatory rules.
**19** A decision on jurisdiction is sometimes taken in the form of a procedural order and sometimes in the form of an award. However, it is now more common to find such decisions in the form of an award. Awards on jurisdiction are preferable because they permit scrutiny if the competent arbitral institution's rules provide for scrutiny, immediate enforceability and challenge (in some but not all jurisdictions). As discussed further below in Section 6.2, a negative jurisdictional decision cannot technically be an award.
**20** An arbitral tribunal can bifurcate, trifurcate or add even more phases to an arbitration. See further Chapter 7, Section 6.9 in this regard. See also Chapter 7, Section 6.1 describing the typical procedural steps in an arbitration.
**21** Hong Kong, Singapore, Malaysia, Korea, the Philippines, New Zealand and Australia have not modified the Model Law in this regard. Section 23(4) of the Japanese Arbitration Law is slightly different, but equivalent. Section 16(5) of the Indian Arbitration and Conciliation Act is slightly different again, but it is not clear whether it applies differently. In China this does not apply because there is no competence-competence rule empowering the arbitral tribunal to decide jurisdiction (see Section 4.2 below).

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unlike most rules in this region,[22] follow the 1976 UNCITRAL Arbitration Rules and Swiss approach. Article 24.4 of the ACICA Rules is almost identical to Article 21(4) of the UNCITRAL Arbitration Rules: 'In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the Arbitral Tribunal may proceed with the arbitration and rule on such a plea in its final award.'[23] In investment arbitrations, the usual practice is for the arbitral tribunal to make an award on jurisdiction before it proceeds to determine the merits. Rule 41(3) of the ICSID Rules states that when a jurisdictional objection is raised, the proceeding on the merits may be suspended.[24]

5.30 The advantage of deciding jurisdiction separately from the merits is that it saves a long and costly proceeding on the merits when it is uncertain whether or not the arbitral tribunal possesses jurisdiction. Time and costs could have been wasted if the arbitral tribunal later rules that it does not have jurisdiction.

5.31 On the other hand, the advantages of combining jurisdiction and the merits are twofold. First, bifurcating the proceedings will almost always add time and, as a consequence, costs to the overall procedure if the arbitral tribunal finds that it has jurisdiction. Second, if the jurisdictional objections are in any way intertwined with the substantive issues in dispute there may be a degree of overlap. A classic example is where a respondent argues that it is not a proper party to either the contract or the arbitration agreement.[25] The issues may be similar for both decisions. Separating jurisdiction from the merits when they are closely related is not only potentially inefficient, because issues may have to be re-argued, but can create a risk that the arbitral tribunal inadvertently decides something in the jurisdiction phase that will constrain or influence its subsequent decision on the merits. Similarly, the arbitral tribunal would put itself in a difficult position if it decided in favour of jurisdiction and then, subsequently when examining the merits, discovered facts that would have led it to a different conclusion on jurisdiction. Some jurisdictional issues are best decided only after the arbitral tribunal is cognisant of all the relevant facts.

5.32 The factors for an arbitral tribunal to consider when deciding whether to rule on jurisdiction separately from the merits are, therefore: (i) the complexity of the jurisdictional issues (high complexity sometimes leans in favour of bifurcation); (ii) the degree of potential overlap between the jurisdictional and substantive issues (significant potential overlap being a strong factor against bifurcation); and (iii) considerations of economy and efficiency. Without prejudging the issues, international arbitrators may also consider their first

**22** The institutional arbitration rules in this region repeat the Model Law approach except for the ACICA Rules (Article 24.4), BANI Rules (Article 18.4) and KCAB International Rules (Article 19.4), which all follow the Swiss approach.

**23** The 2010 UNCITRAL Arbitration Rules use a different construction in Article 23(3), and there is no longer a presumption in favour of ruling on jurisdiction as a preliminary matter.

**24** See also Article 36(1) of the ASEAN Comprehensive Investment Agreement, signed 26 February 2009 ('Where issues relating to jurisdiction or admissibility are raised as preliminary objections, the tribunal shall decide the matter before proceeding to the merits.')

**25** An arbitration clause in a contract is separate and distinct from the substantive contract containing it. This means that a party may have entered into one but not the other. This point is discussed in more detail in Chapter 4, Section 3.

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impressions of the likelihood of success of the jurisdictional objections. If the objections appear to be frivolous, which is not uncommon in attempted dilatory tactics, this may lean against bifurcation which would serve only to delay progression to the merits of the case. The reverse also applies: if the jurisdictional objections seem prima facie well founded, it may make sense to deal with them first before time and money is wasted on a proceeding on the merits.

5.33 It has been said by a well-known arbitrator that 'the best course for an arbitral tribunal to take is . . . where possible, it should hear arguments on the issue of jurisdiction as a preliminary matter and render an interim award on the point. This enables the parties to know where they stand at a relatively early stage'.[26] However, for the reasons set out above, we consider that there are often very good reasons not to hear jurisdiction separately. In many cases, bifurcation will only cause delay and additional costs and may pose risks where the issues are intertwined with the merits.

## 3.5 Waiver of the right to invoke an arbitration agreement

5.34 A party that has waived an arbitration agreement loses its right to rely on the arbitration agreement.[27] Waiver may either be express (e.g. the party expressly states that it waives the arbitration agreement) or implied by a party's conduct. In practice, disputes about express waiver are rare. Implied waiver on the other hand is sometimes alleged by a party contesting arbitral jurisdiction or resisting the stay of a court action.[28] Ultimately, the requirements for establishing that waiver has occurred will depend on the law governing the arbitration agreement. The rest of this section discusses mainly the general principles relevant to implied waiver.

5.35 Poudret and Besson explain:[29]

> The arbitration agreement is terminated in the case of mutual waiver, which can be explicit or tacit and is not subject to any requirements of form. Such waiver shall be deemed made where the claimant proceeds before a court and the respondent pleads on the merits without invoking the arbitration clause to contest the jurisdiction of the court.

5.36 As Poudret and Besson note, the most common form of implied waiver occurs during domestic court proceedings. It will occur where the following conditions are met:

(i) one of the parties to the arbitration agreement commences court litigation against another party or parties to the arbitration agreement;

**26** S Jarvin, 'Objections to Jurisdiction' in W Newman and D Hill, *The Leading Arbitrator's Guide to International Arbitration*, 2nd edn, JurisNet, 2008, p. 102.
**27** As noted in the introduction to this chapter, we use 'waiver' as an umbrella term that should be understood to encompass different legal terminology for different circumstances (such as issue estoppel or abandonment).
**28** See Chapter 4, Section 7 on the enforcement of arbitration agreements.
**29** J-F Poudret and S Besson, *Comparative Law of International Arbitration*, 2nd edn, Sweet & Maxwell, 2007, para 379, p. 322. See also E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, 1999, p. 441.

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(ii) the claim brought in the litigation falls within the scope of, and is capable of settlement under, the arbitration agreement; and
(iii) the defendant party in the litigation responds on the merits but does not challenge the court's jurisdiction on the basis of the parties' arbitration agreement.

5.37 If the above conditions are met, and subject to the exception for provisional relief mentioned below, the arbitration agreement will ordinarily be waived with respect to the claim brought and as between the parties to the litigation proceedings. The waiver should not affect non-parties to the litigation. Nor should it affect claims other than those raised by the plaintiff in the litigation.[30]

5.38 These conditions for waiver are set out to varying degrees in arbitration laws and arbitral case law. An example is Article 28 of the Chinese Arbitration Law:[31]

> If the parties have concluded an arbitration agreement and one party institutes an action in a People's Court without declaring the existence of the agreement and . . . the other party does not, prior to the first hearing, raise an objection to the People's Court's acceptance of the case, he shall be deemed to have waived the arbitration agreement and the People's Court shall continue to try the case.

5.39 In *ICC Arbitration No. 4367* of 1984, involving related domestic court proceedings in India, the arbitral tribunal emphasised that for implied waiver to occur the parties to the arbitration agreement must be the same as the parties to the court proceedings:[32]

> The claimant contends that the [Indian] suits . . . are separate and independent remedies brought against another party to preserve the security of a guarantee agreement. This we accept. The defendant to the suits is the [Indian] Bank, which is not a party to the 1964 Contract or to the arbitration clause therein, and the claims are brought in respect of a guarantee agreement between the claimant and the Bank dated . . . 1965, which is the basis of the dispute to which the Indian Courts have [been seized]. The fact that the respondent unilaterally has made application to be added as defendant to the suits in no way affects our view that the suits before the Indian Courts are independent remedies separate from those before this Tribunal which do not affect our jurisdiction.

5.40 Implied waiver cannot be based on mere assumption – it occurs where the parties' conduct amounts to the expression of a clear intention to relinquish their

**30** If, however, the claims not raised in the litigation are closely related to the raised claims, the opposing party might contest arbitral jurisdiction on grounds such as issue estoppel, claim preclusion, merger of claims, bad faith, or similar. For a detailed discussion of Australian case law on the waiver of arbitration agreements see M Pryles, 'The Kaplan Lecture 2009: When is an arbitration agreement waived?', (2010) 27(2) *Journal of International Arbitration* 105, particularly at p. 117 et seq.

**31** For an explanation of this provision in the light of a recent Chinese Supreme Court interpretation, see Wan Exiang and Yu Xifu, 'Latest Evolution in the Judicial Intendance Mechanism over Arbitration in China', (2008) 3(2) *Front Law China* 181, at p. 189. See also JS Mo, 'Legality of the Presumed Waiver in Arbitration Proceedings under Chinese Law', (2001) 29 *International Business Lawyer* 21.

**32** Published in 1986 XI *Yearbook of Commercial Arbitration*, p. 134. See also the partial award in ICC case no. 9787 of 1988, where the arbitral tribunal held that there could be no waiver since the related court proceedings were filed between the parties' counsel and not the parties themselves, published in 2002 XXVII *Yearbook Commercial Arbitration*, p. 181.

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contractual rights to arbitrate. The arbitral tribunal in *ICC Case No. 6840* of 1991 considered that implied waiver requires an unequivocal act:[33]

> it is a principle that the waiver of a right should not be presumed and that it must clearly result from the actions of the interested party. In this case, contrary to what A declares, B did not clearly manifest its intention to waive the arbitration clause.

5.41 Singaporean case law confirms that for an act to be considered as waiver or revocation of an arbitration agreement the party must have demonstrated a clear and unambiguous intention to waive that agreement.[34]

5.42 Outside of this region, the French Cour de Cassation has clearly held that a party will be deemed to have implicitly waived its right to arbitrate only if it has performed unequivocal acts establishing a clear intention to abandon such rights:[35]

> the abandonment of the right to take advantage of an arbitration clause may result only from clear and manifest acts expressing without any doubt the intention to abandon such right . . .

5.43 There is an exception to the principle that failing to raise an arbitration agreement can imply a waiver of the right to do so. Commencing an action or entering an unconditional appearance in a state court in relation to proceedings for temporary injunctive relief or provisional or conservative measures cannot amount to a waiver of the arbitration agreement, even if the parties are identical and the subject matter is within the scope of the arbitration agreement. Most arbitration laws and some rules expressly provide that seeking such relief, before or after the arbitral tribunal is constituted, is not inconsistent with an arbitration agreement.[36] The provisional relief exception was explained by the Philippines Supreme Court in *Transfield Philippines Inc v Luzon Hydro Corporation and Australia and New Zealand Banking Group Ltd and Security Bank Corporation*:[37]

> As a fundamental point, the pendency of arbitral proceedings does not foreclose resort to the courts for provisional reliefs (sic). The Rules of the ICC, which governs the parties' arbitral dispute, allows the application of a party to a judicial authority for

**33** Authors' translation from original French. ICC arbitration award no. 6840, 1991, *Collection of ICC Arbitral Awards*, vol. III., p. 470. In addition, the Swiss Federal Tribunal acknowledged this principle in the famous *Fomento* decision in 2001, *Fomento de Construcciones y Contratas SA* v *Colon Container Terminal SA*, ATF 127 III 279.

**34** *ABC Co v Owners of the Ship or Vessel 'Q'*, decision of SAR Tan in Admiralty in Rem no. 251 of 1995, High Court of Singapore, 9 May 1996, cited in H Alvarez, N Kaplan and D Rivkin, *Model Law Decisions*, Kluwer Law International, 2003, p. 136.

**35** Authors' translations from original French. Cour de Cassation, 18 February 1999, *Igla c/Société Soulier et autres*, (1999) 2 *Revue de l'Arbitrage*, p. 299 et seq.

**36** See, e.g. Article 9 of the Model Law ('It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.'). Article 9 of India's Arbitration and Conciliation Act goes further than the Model Law by extending the period during which interim measures can be granted through to the time an award is enforced. See DF Donovan, 'The Allocation of Authority Between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal', (2004) 12 *ICCA Congress Series* 203.

**37** GR no. 146717, 19 May 2006, Supreme Court of the Philippines.

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> interim or conservatory measures.[38] Likewise, Section 14 of Republic Act (R.A.) No. 876 (The Arbitration Law) recognizes the rights of any party to petition the court to take measures to safeguard and/or conserve any matter which is the subject of the dispute in arbitration. In addition, R.A. 9285, otherwise known as the 'Alternative Dispute Resolution Act of 2004,' allows the filing of provisional or interim measures with the regular courts whenever the arbitral tribunal has no power to act or to act effectively.

5.44 As a general proposition a defendant to a court proceeding who wants the dispute to be determined by arbitration must raise the arbitration agreement (or object to the court's jurisdiction) 'not later than when submitting his first statement on the substance of the dispute'[39] or it will be too late. In Hong Kong, this phrase from the Model Law has been interpreted fairly liberally by courts, in favour of arbitration.[40] The Philippines legislation is slightly different, requiring the objection to be raised 'not later than the pre-trial conference'.[41] The pre-trial conference would usually be later than a party's first statement on the substance of the dispute.

5.45 A party participating in any court proceeding where an arbitration agreement may cover the same dispute should be very cautious about implicitly waiving the arbitration agreement. Whether as plaintiff or defendant, it is prudent expressly to mention in each submission to the court that by making that submission the party does not intend to waive its right to invoke the arbitration agreement.

## 4 Arbitral tribunal's determination of jurisdiction: Competence-competence rule

5.46 There are various facets to the competence-competence rule.[42] At its simplest, it empowers an arbitral tribunal to decide on any and all objections as to its own jurisdiction. A more thorough consideration of the competence-competence rule reveals close links to the courts, and in particular the circumstances under which a court will allow an arbitral tribunal to rule on its jurisdiction prior to a court

**38** Article 23(2) of the 1998 ICC Rules provides: 'Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim. or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement.'

**39** Model Law, Article 8(1).

**40** See, e.g. *Louis Dreyfus Trading Ltd v Bonarich International (Group) Ltd* [1997] 3 HKC 597 (Hong Kong Supreme Court) noting that the statement on the merits must be a formal and deliberate act.

**41** Section 24 of the Philippines Alternative Dispute Resolution Act 2004 provides: 'A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if at least one party so requests not later than the pre-trial conference, or upon the request of both parties thereafter, refer the parties to arbitration unless it finds that the arbitration agreement is void, inoperative or incapable of being performed'. See also in similar terms Rule 4.2 of the Philippines Supreme Court Special Rules of Court for Alternative Dispute Resolution Proceedings, effective 30 October 2009.

**42** Competence-competence is often identified by its German name 'Kompetenz-Kompetenz'. The French sometimes call it 'compétence de la compétence'. In international arbitration, all of the different names and ways of spelling the concept are synonymous. What must be kept in mind though is that the approach of domestic courts to determining the meaning and scope of competence-competence can vary immensely, such that it can be quite different from jurisdiction to jurisdiction.

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examining that jurisdiction. It is therefore a rule that affects the temporal priority as between the arbitral tribunal and the courts in decisions relating to the arbitral tribunal's jurisdiction. There is great variation in the approaches by different courts in this respect. Section 4.1 introduces the competence-competence rule and Section 4.2 examines it from the perspective of Asia-Pacific courts.

## 4.1 Introduction to the competence-competence rule

5.47 The competence-competence rule means that an arbitral tribunal may be authorised to determine its own jurisdiction. This may at first seem illogical given that the arbitral tribunal's decision could be in the negative. How could an arbitral tribunal decide that it does not have jurisdiction if a consequence of that decision is that the arbitral tribunal did not have jurisdiction to make it in the first place? Given the consensual basis for arbitral jurisdiction, one might consider that without an agreement to arbitrate, an arbitral tribunal could not – as a matter of common sense – decide anything, and any decision it does make would be void of any effect. Pursuing that line of reasoning, one may argue that only a competent court could rule on the jurisdiction of arbitral tribunals.

5.48 Arbitral tribunals can, however, decide on their own jurisdiction, and even rule that they do not have jurisdiction. As explained by Fouchard, Gaillard and Goldman, 'the competence-competence principle also allows arbitrators to determine that an arbitration agreement is invalid and to make an award declaring that they lack jurisdiction without contradicting themselves'.[43]

5.49 In order to overcome the apparent contradiction of an arbitral tribunal deciding that it does not have jurisdiction, the competence-competence rule must exist above and beyond the agreement to arbitrate. Arbitration experts therefore tend to agree that the source of an arbitral tribunal's power to determine its own jurisdiction is *not* the agreement to arbitrate but rather the law governing the arbitration proceedings.[44] In other words, an arbitral tribunal has the authority to decide on its own jurisdiction ultimately because an applicable domestic arbitration law authorises it to do so. This was confirmed by a decision of the Supreme Court of British Columbia, Canada. While outside the Asia-Pacific, the decision is of interest because British Columbia's international arbitration law is based on the Model Law. The court in *H&H Marine Engine Services Ltd v Volvo Penta of the Americas Inc*[45] refused to recognise the competence-competence rule as applying automatically, but found that it only applies where the law governing the arbitration proceedings or the arbitral rules enact the principle.

**43** Gaillard and Savage, op. cit. fn 29, para 658.
**44** P Mayer, 'L'Autonomie de l'Arbitre International dans l'Appréciation de Sa Propre Competence', *Recueil des Cours La Haye V*, Kluwer Law International, 1989, p. 344; Gaillard and Savage, op. cit. fn 29, at para 658 note that the jurisprudential basis of the rule is 'the arbitration laws of the country where the arbitration is held and, more generally, in the laws of all countries liable to recognize an award made by arbitrators concerning their own jurisdiction'. Antonias Dimolitsa explains that 'the competence-competence principle has always been seen as a concession on the part of national legal systems, so that arbitrators might rule on their own jurisdiction, subject to possible review by courts'. A Dimolitsa, 'Separability and Kompetenz-Kompetenz', (1998) 9 *ICCA Congress Series* 217, at p. 228.
**45** 2009 BCSC 1389.

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5.50 The competence-competence rule is almost universally recognised in arbitration laws, but in distinctly varying degrees and in different ways.[46] Even in laws where it is not expressly recognised, the competence-competence rule is sometimes implied into those laws and applied as a general principle of international arbitration law and/or practice.[47] However, as shown by the British Columbian case referred to in the previous paragraph, it should not be assumed that the competence-competence rule applies as a matter of course. Some courts will only apply it where the *lex arbitri* (or perhaps arbitration rules) enact it specifically.

5.51 The competence-competence rule is set out in Article 16(1) of the Model Law:[48]

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

5.52 The first sentence of this Article enacts the competence-competence rule, while the following sentences concern the related concept of separability of an arbitration clause; that is the concept that for the purposes of an arbitral tribunal ruling on jurisdiction an arbitration clause in a contract is considered as a separate agreement from the contract containing it.[49]

5.53 In addition to its recognition by virtually all legal systems,[50] the competence-competence rule is reiterated in most arbitration institutional rules. Typical regional examples include Rule 25 of the 2007 SIAC Rules ('The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement') and Rule 33 of the JCAA Rules ('The arbitral tribunal may decide challenges made regarding the existence or validity of an arbitration agreement or its own jurisdiction').[51]

5.54 It is important to understand that while these institutional rules repeat the competence-competence principle, they are generally not considered to be the ultimate source of its authority, because they apply only by virtue of the parties'

**46** For a very thorough general overview of the competence-competence rule and a comparative analysis of several representative European and North American approaches to it, see WW Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction', (2006) 13 *ICCA Congress Series* 55.
**47** See, e.g. the discussion referring to the Partial Award of 1996 in ICC case 7878 (unpublished) in H Grigera Noan, 'Choice of Law Problems in International Commercial Arbitration', (2001) vol. 289 *Recueil des cours*, p. 53.
**48** This applies unmodified or in a substantively similar way regarding the competence-competence aspect in the following arbitration laws: New Zealand, Malaysia (Section 18(2), which provides a breakdown of the rule's elements), Singapore, Hong Kong, Australia, India and Korea. China is very different and is discussed below.
**49** On the issue of separability see Chapter 4, Section 3.
**50** The only notable exception in this region, China, is discussed below at Section 4.2.
**51** CIETAC Rule 6(1) is very different (see discussion at Section 4.2).

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agreement. If an arbitral tribunal lacks jurisdiction over a party, then any chosen arbitration rules do not apply with respect to that party either, and the authority supposedly sourced in such rules disappears. As noted above, theoretically, the ultimate authority for the principle of competence-competence must therefore be found in the arbitration law of the seat of arbitration, either by express legislative recognition, judicial acceptance or by virtue of its status as a general principle of international arbitration law. Nonetheless, the British Columbian case of *H&H Marine Engine Services Ltd v Volvo Penta of the Americas Inc*[52] curiously suggests that the source of competence-competence authority can alternatively be arbitral rules.

5.55 While arbitration rules (as opposed to laws) are not ordinarily considered to be the ultimate source of competence-competence powers, there are certain advantages in selecting arbitration rules which reiterate the principle. Redfern and Hunter[53] note that selecting such rules confirms the parties' desire for the competence-competence rule to be applied as set out in the chosen rules. They also explain that in some jurisdictions arbitrators only decide their own jurisdiction to the extent that the parties authorise them to do so. That authorisation may be in the form of the putatively applicable arbitration rules. Finally, reiteration of the principle in arbitration rules specifically chosen by the parties can be used as an additional argument as to why a domestic court seized of a matter covered by an arbitration agreement should take only a prima facie examination of that agreement before referring the parties to arbitration.[54]

5.56 The competence-competence rule is sometimes said to have a negative and a positive effect.[55] The positive effect is that parties gain a right to have their jurisdictional dispute determined by an arbitral tribunal, at least in the first instance. The negative effect is that the parties lose their right to have the jurisdictional dispute determined by a court. An essential component of the competence-competence rule is sometimes overlooked. That component is that an arbitral tribunal's decision that it has jurisdiction is not final. As discussed in Section 6.2 below, such decisions are capable of review by or appeal to courts in the seat of arbitration.[56]

5.57 The competence-competence rule can therefore be considered as a rule of temporal priority, empowering the arbitral tribunal to rule on its jurisdiction in the first instance. As noted above, the extent to which a court will give priority to the arbitral tribunal varies immensely depending on the jurisdiction of the court concerned and on other circumstances. This is the subject of the next section.

**52** 2009 BCSC 1389.
**53** A Redfern, M Hunter, N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet and Maxwell, 2004, para 5.44.
**54** This is discussed further in the following section.
**55** The terminology known as the 'negative effect' of competence-competence was used in E Gaillard, 'Convention d'arbitrage' (1994) *Juris-Classeur Droit International*, FAAC.586/5, Paris p. 49 and E Gaillard, 'Les manoeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international', (1990) *Revue de l'arbitrage* 759, at p. 771.
**56** Model Law Article 16(3) expressly recognises this in connection with positive jurisdictional rulings. A discussion of the situation in relation to negative jurisdictional rulings can be found below at Section 6.2.

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## 4.2 Competence-competence rule and extent of domestic court intervention

5.58 Domestic courts can be called on to decide, or at least consider, arbitral jurisdiction in several circumstances before an arbitral tribunal has ruled on jurisdiction. The most common is when a party has commenced an action on the merits of the dispute in a domestic court and the opposing side contests the court's jurisdiction on the basis of the arbitration agreement.[57] In these circumstances, the domestic court should refer the parties to arbitration provided that there is a binding arbitration agreement.[58] In so doing, to what extent does that domestic court consider the existence, scope and validity of the arbitration agreement? And to what extent does its decision bind the arbitral tribunal or override the arbitral tribunal's authority to rule on its own jurisdiction under the competence-competence rule?

5.59 There is variation among courts as to the extent to which priority is given to the arbitral tribunal to decide on jurisdiction. Certain courts will scarcely look at an arbitration agreement if an arbitral tribunal has already been constituted.[59] They will wait until a party seeks to challenge the arbitral tribunal's jurisdictional decision and then may exercise their control over jurisdiction. At the other extreme, some courts will in certain circumstances accept to rule definitively on arbitral jurisdiction before an arbitral tribunal does, thus usurping the arbitral tribunal's competence-competence powers.[60] Somewhere in the middle lie the vast majority of courts (including most Asia-Pacific courts) which are a hybrid and will examine only the prima facie existence of an arbitration agreement before staying their own proceedings and referring the parties to arbitration for the resolution of their dispute, including their dispute about whether the arbitral tribunal has jurisdiction.[61] In order to satisfy such a prima facie test, the party seeking to rely on the arbitration agreement generally has to show that there is an arguable case in favour of arbitral jurisdiction. The courts may refuse such an application if it is clear that a challenge to the arbitrator's jurisdiction should succeed.

**57** Another instance is when a court is requested to provide support to start arbitration proceedings (for example to appoint an arbitrator where a party has defaulted in doing so) and there is doubt as to arbitral jurisdiction (see the discussion of *SPB v Patel Engineering* below in Section 4.2). Another still is when the parties have expressly agreed that a court should decide the jurisdictional dispute as a preliminary matter before commencement of the arbitration such as under the domestic Australian Commercial Arbitration Acts (briefly discussed below in Section 4.2). See also Sections 32 and 72 of the English Arbitration Act 1996 and Article 11 of the Sri Lankan Arbitration Act, which allows an application to the High Court of Sri Lanka to determine arbitral jurisdiction even during an arbitration.

**58** See Chapter 4, Section 7 regarding the enforcement of arbitration agreements.

**59** No example has been found in the Asia-Pacific, but see Article 1458 of the French New Code of Civil Procedure.

**60** For example, Section 11 of the Sri Lankan Arbitration Act allows an application to the High Court of Sri Lanka to determine arbitral jurisdiction at any time, even during an arbitration. This is also the approach under US Federal law, see *Sandvik AB v Advent Int. Corp*. 220 F 3d 99, 3d Circuit, 2000.

**61** Various different approaches to this temporal question of when a court can and will examine arbitral jurisdiction under the competence-competence rule are discussed in Park, op. cit. fn 46, p. 55, particularly at p. 62 et seq.

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5.60 As explained in Chapter 4,[62] Article 8 of the Model Law mirrors Article II of the New York Convention in relation to stays of domestic court proceedings when there is an arbitration agreement. Both provisions aim to ensure that when there is an arbitration agreement and a party objects to the domestic court's jurisdiction, the court immediately refers the parties to arbitration. Article 8(1) of the Model Law states:[63]

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

5.61 The operative language (identical in the New York Convention)[64] is that a court must refer the parties to arbitration 'unless it finds that the said agreement is null and void, inoperative or incapable of being performed'. The language here could be understood to suggest that the court would need to make a 'finding' on arbitral jurisdiction before referring the parties to arbitration. If a court were to do so, however, this would undermine the competence-competence rule by usurping the arbitral tribunal's authority to rule on its own jurisdiction.[65]

5.62 The extent of a court's authority to rule on jurisdiction before an arbitral tribunal has had the opportunity to do so is a subject of judicial and academic debate.[66] Most commentators consider that the court should go no further than checking prima facie that there is an arbitration agreement, leaving the jurisdictional issues to be decided by the arbitral tribunal.[67] Another alternative though

**62** See Chapter 4, Section 7.

**63** Some Asia-Pacific jurisdictions have additional or differing provisions. New Zealand and Malaysia have added the phrase 'or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. See Chapter 4, Section 7.1. Section 10(1) of the Malaysian Arbitration Act also has a potentially shorter time limit for raising the arbitration agreement (i.e. '. . . before taking any other steps in the proceedings'). Section 7 of the Australian International Arbitration Act 1974 employs different but equivalent language. It also incorporates the Model Law in addition to its Section 7, such that Australia has two provisions (plus Article II(3) of the New York Convention, making the total three) serving the same purpose, albeit sometimes in different scenarios. Singapore (see Section 6 of Singapore's International Arbitration Act) is similar. Japan's Arbitration Law (Article 14) is also slightly different from the Model Law. As described below (Section 4.2), India and Sri Lanka have modified Article 8 of the Model Law to remove 'unless it finds . . . ' and following language.

**64** The only substantive difference in Article II(3) of the New York Convention is that there is no requirement that the party contesting the court's jurisdiction has to do so when making its first submission on the substance of the dispute.

**65** For the sake of completeness, it should be noted that if a domestic court finds that the arbitration agreement 'is null and void, inoperative or incapable of being performed', then it will not refer the matter to arbitration. In these circumstances the court proceedings will usually continue and the competence-competence rule does not apply, unless the arbitration in question is seated outside the jurisdiction of the state court. If it is a foreign court, the arbitration may well continue despite parallel proceedings in a foreign domestic court.

**66** For general discussions see Poudret and Besson, op. cit. fn 29, p. 440, para 489 et seq; JD Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 349, para 14–60; Gaillard and Savage, op. cit. fn 29, pp. 401 and 406; Park, op. cit. fn 46, pp. 55–153.

**67** A well-known supporter of the prima facie approach is Emmanuel Gaillard. See the recent publication, E Gaillard and Y Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in E Gaillard and D Di Pietro (eds), *Enforcement of Arbitral Agreements and International Arbitral Awards*, *The New York Convention in Practice*, Cameron May, 2008, p. 259 ('domestic courts should not, in parallel and with the same degree of scrutiny, rule on the same issue [of jurisdiction], at least at the outset of the arbitral process. In other words, the court should limit, at that stage, the review to prima facie determination that the agreement is not 'null and void, inoperative or incapable of being performed.') See also earlier works, e.g. Gaillard, 1990, op. cit. fn 55; E Gaillard, 'L'effet négatif de la compétence-compétence'

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would be for a court to make a definitive ruling on jurisdiction so that the matter is out of the way. If so, the only appropriate court to do so would be one at the seat of arbitration. It would not make sense if any court in the world could rule on the validity of an arbitration agreement in respect of arbitration proceedings seated abroad.[68]

5.63 Frédéric Bachand[69] argues strongly in favour of the prima facie approach. After observing that there is conflicting case law,[70] Bachand goes on to consider the drafting history of the Model Law. His analysis leads him to conclude that:[71]

> the Model Law's travaux préparatoires, basic structure and underlying principles reveals that the drafters considered the prevention of dilatory jurisdictional objections to be a more important objective and, consequently, that Article 8(1) ought to be interpreted as requiring courts seized of referral applications to apply a prima facie standard while reviewing the tribunal's jurisdiction.

5.64 Bachand's reasoning is compelling but it is to be contrasted with numerous authors who consider that examining the drafting history of the Model Law would lead to the opposite conclusion.[72]

5.65 The issue has come before various domestic courts around the world, including in the Asia-Pacific. As noted above, most Asia-Pacific jurisdictions give the arbitral tribunal the first opportunity to decide jurisdiction, thus limiting the court's power to a prima facie examination of arbitral jurisdiction. These decisions accordingly lend support to Bachand's interpretation of Article 8(1) of the Model Law.

5.66 Unequivocal support for the prima facie approach can be seen in Hong Kong decisions made subsequent to those cited by Bachand in the above referenced article. In *PCCW Global Ltd v Interactive Communications Service Ltd*, it was noted that:[73]

in J Haldy, J-M Rapp and P Ferrari (eds), *Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret*, Stampfli, 1999, p. 387; E Gaillard, 'The Negative Effect of Competence-Competence', (2002) 17(1) *Mealey's International Arbitration Report* 27.

**68** It should be noted however that a foreign court might need to rule on whether an arbitration agreement is 'null and void, inoperative or incapable of being performed' in the context of an application under Article II(3) of the New York Convention or Article 8(2) of the Model Law (or its equivalent) to stay a foreign domestic court proceeding (see Chapter 4, Section 7).

**69** F Bachand, 'Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?', (2006) 22(3) *Arbitration International* 463.

**70** Bachand, ibid. cites numerous cases both for and against the prima facie approach. Bachand draws his examples from Canada, Australia, New Zealand and Hong Kong. However support for the prima facie view can also be found in India. See the discussion of *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd* (2005) 7 SCC 234 below. Numerous other decisions are cited in Alvarez, Kaplan and Rivkin, op. cit. fn 34, p. 55 et seq.

**71** Bachand, op. cit. fn 69, p. 476.

**72** These include, notably, leading commentators on the Model Law such as HM Holtzmann and JE Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer, 1989. See also comments in Dimolitsa, op. cit. fn 44, p. 217, at p. 234; Mayer, op. cit. fn 44, at p. 344; Park, op. cit. fn 46, pp. 69 and 87.

**73** [2007] 1 HKC 327 at para 12. See also *The Incorporated Owners of Sincere House v Sincere Company Ltd* [2005] HKLT 18; [2007] 2 HKC 424 citing with approval *Daily Win Engineering Ltd v The Incorporated Owners of Greenwood Terrace*, HCCT 133/2000 [2001] HKC 1252 that 'The court should do no more than forming a prima facie view on the existence of an arbitration agreement between the parties'.

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> the proper test to apply . . . is whether there is a prima facie or plainly arguable case that the parties were bound to arbitrate . . . . It is only when it is clear that there was no agreement to arbitrate . . . that the stay should be refused.

5.67 This was endorsed in *Kin Yat Industrial Co Ltd v MGA Entertainment (HK) Ltd*[74] and again in *Ocean Park Corporation v Proud Sky Co Ltd*,[75] which described Hong Kong law as now settled in this respect:

> 42. In terms of the benchmark for the existence of an arbitration agreement, Burrell J[[76]] held that it had to be demonstrated that there was a good prima facie, or a plainly arguable case, that an arbitration agreement existed and bound the parties, and that the onus of so doing lay upon the defendant applicant for the stay, and that in determining whether such a case had been made out, the court should look first at the evidence in support of the defendant's contention, the relevant test being satisfied if the court was of the view that cumulatively the evidence was cogent and arguable and not dubious or fanciful. The learned judge also held that it was for the arbitrator, and not the court itself on a stay application, to make a detailed final determination as to the existence or otherwise of an arbitration agreement, a matter upon which the arbitrator would have the benefit of oral testimony from both sides.
> 43. [This] decision . . . was approved and followed in the Court of Appeal in *PCCW Limited v. Interactive Communications Service Ltd*, CACV 18 of 2006 (unrep.) . . .
> 44. The law on this point in this jurisdiction thus appears settled. The question for the court in this application thus boils down to whether, on the evidence read as a whole, and bearing in mind the burden upon the applicant for the desired stay, it can be said to be 'plainly arguable' that an arbitration agreement existed on the basis of the documentation before the court?

5.68 The position has been given less attention in Singapore but nevertheless appears relatively certain. For example, in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd*,[77] the Singapore High Court ruled on an appeal from a lower court's decision to stay its proceedings because there was an arbitration agreement. In the course of its judgment the High Court clearly took the view that its examination of jurisdiction was prima facie only:[78]

> it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings. Where it is arguable that the dispute falls within the terms of the

**74** [2007] HKCU 435: 'The proper test is well-established: is there a prima facie or plainly arguable case that the parties were bound by an arbitration clause? The onus is on the defendant to demonstrate that there is.' The court supports this with numerous prior authorities.
**75** [2007] HKCU 1974.
**76** In *Pacific Crown Engineering Ltd v Hyundai Engineering and Construction Co Ltd* [2003] 3 HKC 659.
**77** [2005] 4 SLR 646.
**78** *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646, at p. 652.

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> arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

5.69 In Sri Lanka, the provision relating to stays of court proceedings does not even mention the exception of the arbitration agreement being null and void, inoperative or incapable of being performed, thus strongly recognising the competence-competence principle.[79] Despite this omission, however, the provision might well be interpreted in a way that the courts could refuse the stay if they find that the arbitration agreement is manifestly void.

5.70 A similar provision to that in Sri Lanka is found in Section 8 of the Indian Conciliation and Arbitration Act. Curiously though, Section 8 has been interpreted as providing even more scope for court interference than the standard Model Law provision. Some conflicting court decisions have left a rather murky state of affairs in India concerning the scope of a court's examination of an arbitration agreement when a party is seeking a stay of court proceedings.

5.71 In order to understand these cases we need briefly to recall a peculiarity of Indian arbitration law. India has adopted the Model Law but with various modifications. Section 8 of the Indian Conciliation and Arbitration Act 1996 modifies Article 8 of the Model Law as follows:

> A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

5.72 Thus, like in Sri Lanka, the additional text found in Article 8 of the Model Law ('unless it finds that the said agreement is null and void, inoperative or incapable of being performed') is omitted.

5.73 Section 8 deals only with the enforcement of arbitration agreements where the seat of arbitration is in India.[80] This contrasts with the Model Law in which Article 8 also applies where the seat of arbitration is outside the country concerned.[81] In India, a different provision – Section 45 of the same Act – deals with the enforcement of arbitration agreements where the place of arbitration is outside India. Section 45 includes the additional language: 'unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

5.74 In *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd*,[82] the Supreme Court of India considered its power under Section 45 of the Indian Act to rule on the validity of

**79** Article 5 of the 1995 Sri Lankan Arbitration Act provides: 'Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter.'
**80** Section 2(2) of the Indian Arbitration Act 1996 provides that Part I of the Act (which includes Section 8) applies only where the seat of arbitration is within India.
**81** Article 1(2) of the Model Law provides that 'The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State'. In the 2006 version of the Model Law, this is extended to Articles 17H, 17I, and 17J.
**82** (2005) 7 SCC 234.

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an arbitration agreement. Section 45 rather than Section 8 was relevant because the seat of arbitration was outside India. The arbitration clause provided for ICC arbitration seated in Tokyo with Japanese substantive law governing the contract. Justice Srikrishna framed the question for determination by the Supreme Court as follows:[83]

> The core issue in this case is: Whether the finding of the court made under Section 45 of the [Act] that the arbitration agreement, falling within the definition of Section 44 of the Act, is or is not 'null and void, inoperative or incapable of being performed' should be a final expression of the view of the court or should it be a prima facie view formed without a full-fledged trial?

5.75 The Supreme Court justices in the course of their reasoning referred to Swiss, French, UK, USA, Hong Kong, Canadian and other jurisprudence. They considered what was the most appropriate time for Indian courts to control arbitral jurisdiction (i.e. at the time of hearing a stay application before the arbitration begins or at the time of hearing an objection to enforcement of the award). Ultimately a 2:1 majority held that a challenge to an arbitration agreement under Section 45 on the ground that it is null and void, inoperative or incapable of being performed is to be determined on a prima facie basis only. The majority explained that the proper time for a court to examine jurisdiction fully was at the stage of an action in connection with the enforcement of an award:[84]

> Even after the court takes a prima facie view that the arbitration agreement is not vitiated on account of factors enumerated in Section 45, and the arbitrator upon a full trial holds that there is no vitiating factor in the arbitration agreement and makes an award, such an award can be challenged under Section 48(1)(a) . . . . The award will be set aside under Section 48(1)(a) if the party against whom it is invoked satisfies the court inter alia that the agreement was not valid . . . . The two basic requirements, namely, expedition at the pre-reference stage, and a fair opportunity to contest the award after full trial, would be fully satisfied by interpreting Section 45 as enabling the court to act on a prima facie view.

5.76 Dissenting Justice Sabharwal felt that the language of Section 45 as compared to Section 8 and the interests of efficiency leaned in favour of a full-scale examination of jurisdiction by the courts.

5.77 The initial application for a stay in *Shin-Etsu Chemical* had erroneously been brought under Section 8 rather than Section 45. The references to Section 8 led the Supreme Court to make *obiter dictum* comments about its meaning. These comments confirm what one would understand from the plain language of Section 8:[85]

> Unlike Section 45, the judicial authority under Section 8 has not been conferred the power to refuse reference to arbitration on the ground of invalidity of the agreement.

**83** (2005) 7 SCC 234, at pp. 263–264.
**84** (2005) 7 SCC 234, at p. 238.
**85** Dissenting Justice Sabharwal's decision at (2005) 7 SCC 234, at p. 244 and p. 251. It should be noted that the majority judges expressly agreed with Justice Sabharwal regarding interpretation of Section 8. They differed regarding Section 45.

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> It is evident that the object [of Section 8] is to avoid delay and accelerate reference to arbitration leaving the parties to raise objection, if any, to the validity of the arbitration agreement before the arbitral forum and/or post award under Section 34 of the Act.
> ...
> As already noticed, unlike Section 45 the objection as to the validity of the arbitration agreement cannot be raised as a defence to an application filed under Section 8.

5.78 Different judges of the Indian Supreme Court gave a contradictory interpretation of Section 8 in *SBP v Patel Engineering*,[86] a decision handed down just a few months after *Shin-Etsu Chemical*. This time, the seat of arbitration was in India rather than abroad. The question before the Supreme Court was whether the court's appointment of a default arbitrator (because the parties' agreed mechanism for appointing the arbitrator had failed) under Section 11(6) of the Indian Arbitration and Conciliation Act was an exercise of administrative or judicial power. The Supreme Court overruled an earlier five-judge decision and held by majority that it is a judicial function. The majority judges, referring to previous authority, surprisingly interpreted Section 8 of the Act as requiring a fully fledged, final determination of arbitral jurisdiction:[87]

> 8. . . . while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, . . . . Section 11(7) makes his decision on the matters entrusted to him, final.
> ...
> 15. We may at this stage notice the complementary nature of Sections 8 and 11. Where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration. The expression used in this Section is 'shall' and this Court in P. Anand Gajapathi Raju v. P.V. G. Raju and in Hindustan Petroleum Corporation Ltd. v. Pink City Midway Petroleum . . . has held that the judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established. Thus, the judicial authority is entitled to, has to and is bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. (Emphasis added)

5.79 The majority made very clear that the court's determination of arbitral jurisdiction under Section 8 or 11 was final, and not reviewable by an arbitral tribunal. The majority explained that once the court has determined arbitral jurisdiction under Section 8 or 11, Section 16 of the Act (which reflects Article 16 of the Model Law and empowers an arbitral tribunal to rule on its own jurisdiction) would not apply to that arbitration.[88]

**86** *SBP & Co v Patel Engineering Ltd* 2005 8 SCC 618; 2005 (9) SCALE 1.
**87** Paragraphs 8 and 15 of Justice Balasubramanyan's judgment in *SBP & Co v Patel Engineering Ltd* 2005 8 SCC 618; 2005 (9) SCALE 1.
**88** Paragraph 19 of Justice Balasubramanyan's judgment notes that 'where the jurisdictional issues are decided under [Section 8 and/or Section 11] . . . Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made.

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5.80 *Patel Engineering* accordingly achieves a result opposite to what the plain language of Section 8 suggests. If *Patel Engineering* is followed,[89] courts in India will undertake a full and final review of the validity of an arbitration agreement before referring parties to arbitration under Section 8. This will eviscerate the effect of the competence-competence rule enshrined in Section 16(3) of the Act. Where, however, the seat of arbitration is outside India, the courts should follow *Shin-Etsu Chemical*, which adopts the much more sensible approach of taking only a prima facie decision on arbitral jurisdiction before referring the parties to arbitration. In such cases, the arbitral tribunal will be left to rule on its own jurisdiction.[90]

5.81 In certain jurisdictions, the law takes a different approach. The parties may agree to derogate from the competence-competence rule and empower the courts with exclusive jurisdiction to decide on arbitral jurisdiction.[91] An example is the uniform Commercial Arbitration Acts (for domestic arbitration) in Australia, which provide parties with the possibility to seek a ruling on a point of law from the competent State Supreme Court.[92] Parties can and do use this provision to seek a ruling on arbitral jurisdiction from the courts, rather than having the arbitral tribunal decide.

5.82 It is very unusual for an arbitration law not to recognise the competence-competence rule at all, but one example is China.[93] The Chinese Arbitration

The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it . . . . The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act, are incapable of being reopened before the arbitral tribunal'.

**89** *Patel* is more authoritative than *Shin-Etsu*. As pointed out in an article discussing the cases, '*Patel Engineering* was decided by a seven judge bench of the Supreme Court while *Shin-etsu* was decided by a three judge bench. Under the rules of precedent in India, *Patel Engineering* carries greater weight than *Shin-etsu* and, insofar as there is a conflict between the decisions, it may well be argued that *Patel Engineering* prevails'. See A Ray and D Sabharwal, 'Competence-Competence: An Indian Trilogy', (2007) *Mealey's International Arbitration Report* 26, at p. 30.

**90** A subsequent Supreme Court of India case, *Agri Gold Exims Ltd v Sri Lakshmi Knits and Wovens*, Civil Appeal No. 326 of 2007, 23 January 2007 (2007 (1) *Arb LR* 235), touched on various issues of jurisdiction but did not address the scope of court review of an arbitration agreement because the existence and validity of the arbitration agreement was not contested in that matter. However, it did comment that there was no 'discretion' not to grant a stay under Section 8 of the Indian Arbitration and Conciliation Act. While not addressing the competence-competence issue directly, see also *Bhatia International v Bulk Trading S.A.* (2002) 4 SCC 105, *Venture Global Engineering v Satyam Computer Services* (2008) 4 SCC 190; [2008] INSC 40, which both find that Part I of the Indian Arbitration and Conciliation Act 1996 can apply even to foreign arbitrations if not excluded. The more recent decision of *Max India Ltd v General Binding Corporation*, Delhi High Court, 6 May 2009 is encouraging, however. While not a Supreme Court decision, it takes a more arbitration-friendly approach to the jurisdiction of Indian courts over the conduct of arbitrations seated outside India.

**91** It is rare for this possibility to be expressly permitted by arbitration laws whether in the Asia-Pacific or elsewhere, and especially in civil law jurisdictions. Poudret and Besson contend that it is prohibited in Switzerland for parties to agree that a court will decide on jurisdiction because the competence-competence rule is mandatory. (Poudret and Besson, op. cit. fn 29, p. 389, para 462).

**92** Section 39 of the Victorian Commercial Arbitration Act provides: 'with the consent of all the other parties – the [Victorian] Supreme Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.' The Commercial Arbitration Acts are principally applicable to domestic arbitrations, but are also applicable where parties to an international arbitration seated in Australia have excluded the Model Law. See also Schedule 2 of Section 5 of the New Zealand Arbitration Act 1996, and Section 72 of the English Arbitration Act 1996.

**93** All other Asia-Pacific jurisdictions that are the focus of this book enact the competence-competence rule in some form (see above footnote 91). However, the rule is not recognised in the Pacific Islands (Fiji, Papua New Guinea and the Solomon Islands) or Vanuatu (which has no law on arbitration at all). See S Greenberg, S Fitzgerald and B Gehle, 'International Commercial Arbitration Practice in Australia, New Zealand and

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Law does not empower the arbitral tribunal to determine its own jurisdiction. It reserves that power to the administering arbitral institution (usually translated as 'arbitration commission' for Chinese institutions) or to the local court (i.e. the People's Court). Article 20 provides:[94]

> If a party challenges the validity of the arbitration agreement, he may request the arbitration commission to make a decision or the People's Court to give a ruling. If one party requests the arbitration commission to make a decision and the other party requests the People's Court for a ruling, the People's Court shall rule.
>
> A party's challenge of the validity of an arbitration agreement shall be raised prior to the arbitration tribunal's first hearing.

5.83 The scope of an arbitration commission's involvement in China is somewhat unique. Effectively, the arbitration commission's ruling on jurisdiction replaces that of an arbitral tribunal in other jurisdictions.[95]

5.84 Jingzhou Tao explains that there can sometimes be overlapping involvement of domestic courts and the arbitration commission in determining jurisdiction.[96] The arbitration commission ordinarily takes the lead role unless a party has commenced a court action prior to the arbitration proceedings. A court may revise the arbitration commission's decision upon an application to set aside the award or enforce the award. If so, the court should inform the arbitration commission of its decision so that the latter, if it has already taken a decision on jurisdiction, can suspend or even terminate the arbitration.[97]

5.85 Tao also explains that whenever there is a dispute between parties about which arbitration commission has been chosen, the competent Intermediate People's Court decides.[98] An example in point was where the arbitration agreement provided for disputes to be submitted to the 'Beijing arbitration organisation'.[99] The clause was pathological because there are two arbitration commissions in Beijing, CIETAC and the BAC (Beijing Arbitration Commission), neither of which was correctly named in the arbitration agreement. When the claimant filed for arbitration with the BAC, the respondent reacted by seeking a declaration about the validity of the arbitration agreement from the Beijing Intermediate People's Court. The court, applying a 1996 ruling from the Supreme People's Court, held that the clause was valid and that the claimant was at liberty to choose one

the Pacific Islands', in HA Grigera Naón & PE Mason (eds), *International Commercial Arbitration Practice: 21st Century Perspectives*, Lexis Nexis, 2010, Chapter 15.

**94** It should be noted that while Article 5 of the Chinese Arbitration Law appears, on its face, similar to Article 8 of the Model Law and Article II of the New York Convention, it is of limited effect given that the competence-competence rule is not recognised in China. See Jingzhou Tao, *Arbitration Law and Practice in China*, 2nd edn, Kluwer, 2008, p. 86, para 241 ('In practice, Article 5 bestows on the Court the authority to decide on the validity of the arbitration agreement instead of giving such power to the arbitration institution or arbitral tribunal in accordance with the doctrine of competence-competence.')

**95** See generally Jingzhou Tao, ibid., pp. 63–73 and 85–89.

**96** Ibid., pp. 70–71.

**97** Ibid., pp. 70–71.

**98** Ibid., p. 64 et seq.

**99** *ZhongChen International Engineering Contracting Co Ltd v Beijing Construction Engineering Group Co Ltd*, Beijing Second Intermediate People's Court, (Economic & Arbitration) No. 657, (2001) – (decision dated 18 April 2001).

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of the arbitration commissions in Beijing. The court also confirmed that it, i.e. the court, was the appropriate forum to determine jurisdiction given the lack of clarity about which arbitration commission was designated.

Under the 2005 CIETAC Rules, where the parties have agreed on CIETAC as the arbitration commission, the position is different. Article 6(1) of those Rules provides that 'CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. The CIETAC may, if necessary, delegate such power to the arbitral tribunal'. Thus, in contrast to Article 20 of the Chinese Arbitration Law, CIETAC can now delegate its power to make jurisdictional rulings to the arbitral tribunal. This is a step towards recognition of competence-competence in China. 5.86

As the above analysis demonstrates, the trend in the Asia-Pacific Model Law jurisdictions is, overall, now strongly in favour of a prima facie limitation on the scope of court examination of jurisdiction. This approach is also favoured by most continental European jurisdictions[100] and has rapidly growing support in the US.[101] 5.87

It has been suggested that:[102] 5.88

> in the civil law system, when courts are satisfied that the arbitration agreement exists and is valid, their decision to refer the matter to arbitration is final, whereas in the common law system the decision is more often than not a mere stay in court proceedings, the courts not being deprived of their jurisdiction.

The description of that distinction is not entirely correct, at least in so far as the practical effect on the arbitral tribunal's decision on jurisdiction. When a common law court stays its own proceeding, that stay is in principle permanent (unless and until the arbitral tribunal decides there is no valid arbitration agreement, or the parties agree to waive the arbitration agreement). Both common and civil law courts can – depending on their law and rules of court – place certain conditions on an order to stay (or end) their own proceedings. The nature of such conditions 5.89

**100** The seminal Swiss case is probably *Foundation M v Bank X*, Swiss Federal Tribunal, 29 April 1996, ATF 122 III 139, 1996, (ASA New Bull 527). The Federal Tribunal confirmed that where the seat of arbitration is in Switzerland the Swiss courts must decline jurisdiction unless a brief examination of the arbitration clause reveals that it is null and void, inoperative or incapable of being performed. The French courts have gone further, also covering the situation where the seat is not in France. See, e.g. *American Bureau of Shipping v Copropriété Maritime Jules Verne*, CASS CACIV 1ère 26 Juin 2001, *Revue de l'arbitrage* 529. The Cour de Cassation confirmed that the only question for the French judge before referring the jurisdictional dispute to arbitration is whether the arbitration clause is 'manifestly null or inapplicable.' These and other cases are discussed in Gaillard and Banifatemi, op. cit. fn 67, p. 264. See also P Fouchard, 'La coopération du Président du Tribunal de Grande Instance à l'arbitrage', (1985) *Revue de l'arbitrage* 5, at p. 27, noting that 'manifestly void' in Article 1458 of the French New Code of Civil Procedure is interpreted strictly; as confirmed in case law commented upon by Jose Rosell in the IBA Arbitration Committee D Newsletter of October 2002. Under French law, the courts are not permitted to examine an arbitration agreement at all once an arbitral tribunal has been constituted and is dealing with the matter. See Article 1458 of the New Code of Civil Procedure.

**101** For example, there is strong support for the competence-competence rule in *Buckeye Check Cashing Inc v Cardegna*, 546 US (2006), 21 February 2006. The US Supreme Court confirmed that arbitrators should first decide on their jurisdiction even in the face of an allegation that the underlying contract was void for illegality. The court also confirmed the notion of separability, see the discussion in A Samuel, 'Separability and the US Supreme Court Decision in *Buckeye v Cardegna*', (2006) 22(3) *Arbitration International* 477. Under US Federal law, the courts can, however, order a full examination of the arbitration clause at any time during the arbitration process: *Sandvik AB v Advent Int Corp* 220 F 3d 99 (3d Circuit, 2000).

**102** Dimolitsa, op. cit. fn 44, p. 217, at p. 234.

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depends on that law or rules, rather than whether the motion is described as a stay or termination of the proceeding.

## 4.3 Conclusions on competence-competence

5.90 The importance of the competence-competence rule is obvious. Without it, only the courts could decide disputes about arbitral jurisdiction. This would mean that any time a party raises a jurisdictional objection an arbitral tribunal would either have to wait for the courts to decide the matter before proceeding, or proceed without knowing whether it has jurisdiction. The first option could cause delays and inefficiency while the second might be strongly objected to by the party contesting jurisdiction, thus reducing that party's confidence in the process.

5.91 The previous section referred to certain arbitration laws under which the parties may derogate from the competence-competence rule and empower the courts with exclusive jurisdiction to decide on arbitral jurisdiction. The perceived advantage of this approach is said to be efficiency since the courts have the ultimate say on jurisdiction in any event. An efficient court deciding jurisdiction once and for all at the outset would avoid the cost and delay of an arbitration proceeding to the merits if the courts later find that the arbitral tribunal did not have jurisdiction. This approach is also attractive from the perspective of an underlying principle of arbitration: party autonomy.[103] It could be said that if the parties want the courts to decide jurisdiction in certain circumstances then it is arguable that they should be permitted to do so.

5.92 Conversely, perhaps the strongest argument in favour of competence-competence is the need to avoid dilatory tactics, because jurisdiction is often contested by a respondent wanting to cause delay and disruption in the arbitral proceedings. Competence-competence also relieves sometimes over-burdened and disinterested courts from having to deal with arbitration matters which might otherwise disappear because the parties settle or the respondent is eventually satisfied with the outcome of the arbitral process and decides not to contest jurisdiction.

5.93 In addition, the expertise of experienced international arbitrators generally means that they are far better placed than domestic courts to examine most questions of jurisdiction arising in international arbitrations. First, international arbitrators will apply – within the limitations and framework of the law governing the arbitration agreement – concepts of international arbitral practice which are widely accepted by the international legal and business communities. International arbitrators should take an approach that international commerce has come to expect from international arbitration whereas even experienced domestic courts can approach international arbitral jurisdiction from a rather parochial standpoint. Second, in applying this international approach, wise international

**103** See Chapter 7, Section 2 regarding the issue of party autonomy.

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arbitrators may give great weight to the character of the underlying transaction and the broad commercial context leading to the conclusion of the arbitration agreement. This may involve hearing the parties on the factual and commercial aspects of the conclusion of that agreement to establish what was really intended, both in terms of which parties (scope *rationae personae*) were supposed to be bound by the agreement and which disputes (scope *rationae materiae*) were intended to be submitted to arbitration.

5.94 Limiting the scope of the competence-competence rule would deny the parties the benefit of having a neutral, experienced, international arbitral tribunal decide what can be a key issue, i.e. jurisdiction. It is nonsense to suspect that international arbitrators have a tendency to find in favour of jurisdiction against all odds. While arbitrators' decisions on jurisdiction often find in favour arbitration, this is because many jurisdictional objections are brought for tactical or dilatory purposes and because experienced arbitrators are likely to make efforts to elicit the parties' real intentions over and above technical or formalistic jurisdictional arguments.

5.95 Furthermore, the competence-competence rule means that a court which is later required to review an arbitral tribunal's decision on jurisdiction will benefit from having the arbitral tribunal rule on jurisdiction in the first instance. Bachand quite rightly points out that:[104]

> courts will have the opportunity to take into consideration the earlier reasoning and decision of the arbitrators, which will render their task easier, while decreasing the chances that their decision will ignore general principles of international commercial arbitration.

5.96 Issues such as which disputes the parties submitted to arbitration and which parties were intended to be bound by the arbitration agreement must, therefore, ideally be left to the greatest extent possible in the arbitral tribunal's hands. Subsequent court review of jurisdiction (i.e. at the time of a setting aside or enforcement action) should ideally be limited to issues of international public policy and objective arbitrability.[105] This maximises the policy in favour of the competence-competence rule; that is, it is better to run a risk of a later contradictory court finding on jurisdiction than let a party utilise a spurious jurisdictional objection to cause delays and inconvenience.

**104** Bachand op. cit. fn 69 p. 463, n 13. Bachand cites Mayer op. cit. fn 44 at p. 350: ('L'examen successif est une garantie de bonne administration de la justice; le juge pourra s'inspirer de la motivation adoptée par l'arbitre; ou y trouver au contraire une faille révélatrice'.) Bachand's translation is: 'The successive examination ensures the sound administration of justice; the judge will have the opportunity to take into consideration reasons provided by the arbitrator; or, on the contrary, to find a revealing flaw.' See also Park, op. cit. fn 46, p. 144.

**105** The differences between subjective and objective arbitrability are explained in Chapter 4, Section 8. Sigvard Jarvin notes that opponents of the full competence-competence rule tend to consider that state courts should at least decide the jurisdictional issue first if it concerns objective arbitrability or public policy, since these are matters that the court must ultimately control anyway. Jarvin refers to allegations of bribery, corruption and violation of good morals as best suited to court determination. Jarvin, op. cit. fn 26, pp. 92–93, 96 and 99–100; see also the 1st edn (2004) of the same book, where he elaborates further. However, we consider that these issues can and should be dealt with by an arbitral tribunal first.

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5.97 In sum, we strongly support the competence-competence rule and believe that a court's initial role should be nothing more than a prima facie examination of jurisdiction. If the court considers that there is an arguable case for jurisdiction, it should refer the parties to arbitration.

## 5 Arbitral institution's examination of jurisdiction

5.98 The rules of some arbitral institutions expressly permit the institution to examine the prima facie existence of an arbitration agreement before the arbitral tribunal does so. If there is clearly no arbitration agreement, the case is dismissed. Conversely, if the institution finds prima facie that jurisdiction exits, then the arbitral tribunal may decide jurisdiction after hearing full argument on the issue.

5.99 The best known example is Article 6(2) of the ICC Rules.[106] This provides:

> If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the [ICC Court] may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the [ICC Court] is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such a case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

5.100 As can be seen from its language, the ICC Court does not analyse *sua sponte* whether an arbitration agreement under the ICC Rules exists. Article 6(2) is triggered only when the respondent does not file an answer to the request for arbitration and/or objects to the arbitration clause. In such cases, the ICC Court's analysis is limited to a mere prima facie review of the existence of an arbitration agreement under the ICC Rules. If there is a prima facie basis to start the arbitration the decision on jurisdiction is left to the arbitral tribunal. The main advantage of a provision like Article 6(2) of the ICC Rules is that it saves significant time and cost where there appears to be no way that an arbitral tribunal could accept jurisdiction over the case.

**106** In this region, the only example somewhat comparable to Article 6(2) of the ICC Rules is Article 7(2) of the BANI Rules ('The Board of BANI shall review the petition to determine whether or not the arbitration agreement or arbitration clause in the contract is adequate to provide a basis of authority for BANI to examine the dispute.'). Article 18 of the BANI Rules reserves to the arbitral tribunal the power to decide any jurisdictional issues. Article 6(1) of the CIETAC Rules provides that CIETAC has the power to determine the existence and validity of an arbitration agreement and its jurisdiction over a case. That power can be delegated to the arbitral tribunal if necessary. However CIETAC's determination of jurisdiction is not prima facie like the other examples provided because its decision is final (subject only to review by a domestic court), and is not subject to a full decision by the arbitral tribunal (see above Section 4.2). Rule 6(4) of the BAC Rules is equivalent to Article 6(1) of the CIETAC Rules. Article 36(3) of the ICSID Rules provides that the Secretary General of ICSID shall refuse to register a request for arbitration where the dispute described therein is 'manifestly outside the jurisdiction of the Centre'. The 2010 SIAC rules include a procedure for prima facie examination of jurisdiction by SIAC. The rule is very similar to Article 6.2 of the ICC Rules.

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5.101 The ICSID Secretary-General also plays a role in determining jurisdiction pursuant to Article 36(3) of the ICSID Convention. Under that provision, the Secretary-General 'shall register the request [for arbitration] unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre'.

5.102 We have already explained above (Section 4.2) that it is common for Chinese arbitral institutions to rule on the jurisdiction of arbitral tribunals. This is very different from the prima facie examination of the existence of an arbitration agreement by the ICC Court under Article 6(2) of the ICC Rules. The Chinese institutions actually replace the arbitral tribunal's role in determining jurisdiction, and are empowered to do so by the *lex arbitri*.[107] In contrast, if the ICC Court decides that there is a prima facie agreement to arbitrate, this does not relieve the arbitral tribunal from its duty to decide jurisdiction. Quite to the contrary, the arbitral tribunal must fully examine and rule on jurisdiction in accordance with the competence-competence principle.

5.103 Some of the ICC Court's most complex decisions under Article 6(2) arise in the context of multi-party and multi-contract arbitrations.[108] Examples of each are provided below. These examples also illustrate the types of jurisdictional issues that can arise in international arbitration generally.

## 5.1 Examples in multi-party arbitrations[109]

5.104 The ICC Court is often confronted with situations where a claimant has identified in the request for arbitration several respondents, one or all of which have not signed the arbitration agreement. The claimant may seek to include these non-signing entities on the basis of legal theories such as representation, corporate succession, group of companies, agency, assignment, estoppel or alter ego.[110] Normally, the ICC Court is prima facie satisfied that a non-signatory respondent can be included in the arbitration if there is evidence that it has been closely involved with the contract containing the arbitral clause, e.g. if it participated in the negotiations, performance and/or termination of the contract. Two examples may assist to clarify these types of situations.

**107** Article 20 of Chinese Arbitration Act.

**108** Multi-party arbitrations are becoming increasingly common. In each year from 2001–2009 around 30% of arbitrations submitted to the ICC involved more than two parties. In 2009, 233 ICC arbitrations (or 28.5% of all ICC arbitrations for that year) involved more than two parties. Out of these 233 cases, 206 (88.4%) involved between three and five parties, 21 (9%) involved between six and ten parties, and six (2.6%) involved more than ten parties. One case filed in 2009 had 19 different parties.

**109** The examples of 'multi-party' and 'multi-contract' arbitrations below come from L Malintoppi and S Greenberg, 'The Practice of the ICC International Court of Arbitration Concerning Multi-Party Contracts and Scrutiny of Awards', paper provided at the ICC Young Arbitrators Forum, Barcelona, 26–29 June 2008. Case numbers and other details (such as reasons) of these examples cannot be provided for reasons of confidentiality. Issues relating to multi-party arbitration are dealt with in Chapter 4, Section 6.

**110** See Chapter 4, Section 4.1 for a full discussion of non-signatory parties and arbitration agreements. For a more recent and thorough explanation of all of the ICC Court's practices, giving numerous examples, in respect of multiparty and multicontract arbitrations, see S Greenberg, J Feris and C Albanesi, 'Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience', in B Hanotiau & EA Schwartz (eds) *Multiparty Arbitration*, Dossier VII, ICC Institute of World Business Law, ICC Publication No. 701, September 2010.

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5.105 In the first example, two claimants introduced a request for arbitration against four respondents, only two of which had signed the contract containing the relevant arbitration agreement. The claimants argued that since all four potential respondents were part of the same group of companies, they should all be parties to the proceedings, even though some of them had not signed the contract. On the basis of the information submitted, the ICC Court decided that the arbitration proceedings could be initiated against all four respondents because the claimants had satisfied the prima facie test by showing that all respondents had participated in the negotiations and performance of the agreement.

5.106 By contrast, in the second example, a request for arbitration was introduced by the claimant against one respondent on the basis of a sales agency contract. The claimant later sought to raise claims against two other companies, arguing that they formed part of the same group of companies. Unlike in the previous example, the claimant contended that the burden was on the respondents to show that they did not share the same duties and responsibilities as the first respondent. The ICC Court decided that the matter could not proceed against the two additional respondents.

5.107 The ICC Court can also be called upon to take an Article 6(2) decision with respect to one or more claimant parties. Article 6(2) is triggered in this scenario when, for example, the respondent admits that it is subject to an arbitration agreement with one of the claimants, but denies that an arbitration agreement exists between it and another claimant.

5.108 An example was a case in which two claimants commenced arbitration against a single respondent. Only the first claimant had signed the contract containing the arbitration agreement and the second claimant was its corporate parent. The ICC Court found that there was a prima facie arbitration agreement between the respondent and the first claimant, but not between the respondent and the second claimant as there was no evidence that it could be a party to the arbitration agreement. Another example involved a case commenced by four claimants against six respondents. Several respondents argued that there was no prima facie arbitration agreement between them and the third and fourth claimants. The ICC Court agreed. The matter went forward with the first two claimants only, the second two being dismissed.

5.109 Of course the ICC Court often finds that a case will proceed with all of the claimants. In one recent example in a construction case, the first claimant was the contractor and a party to the contract with the respondent owner. The second claimant, a party related to the first, had not signed the contract containing the arbitration clause but had provided in a separate document a guarantee to secure the first claimant's performance. The respondent contended that there was no arbitration agreement between it and the second claimant. The ICC Court took into account inter alia that the document containing the guarantee did not have its own dispute resolution clause and decided that the matter would proceed with both claimants. It would be for the arbitral tribunal to determine whether it had jurisdiction over the second claimant.

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### 5.2 Examples in multi-contract arbitrations

5.110 Another important type of jurisdictional objection concerns multi-contract arbitrations, i.e. where a request for arbitration is filed based on more than one distinct agreement. The ICC Court has generally allowed such arbitrations to proceed under Article 6(2) of its Rules only when the following conditions have been met: (i) all contracts are signed by the same parties; (ii) all contracts are related to the same economic transaction and (iii) the dispute resolution clauses in the contracts are compatible (e.g. reference to the ICC, choice of the same seat of arbitration, referral to the same domestic court of jurisdiction, and the same method for constituting the arbitral tribunal).[111]

5.111 The ICC Court was confronted with a case where two different contracts contained clauses providing for different dispute resolution methods: arbitration under the ICC Rules in one and jurisdiction of the courts of Paris in the other. The ICC Court decided that a single arbitration could not proceed on the basis of these two contracts.

5.112 In another case, the only notable differences in the arbitration clauses contained in the two relevant contracts were the place of arbitration (Paris and Geneva) and the language of the arbitration (English and French). Those factors were viewed by the ICC Court as preventing a single arbitration from proceeding on the basis of the different contracts.[112]

## 6 Effects of jurisdictional decisions

### 6.1 Effect of a court or arbitral institution's prima facie examination of jurisdiction

5.113 If a competent domestic court at the seat of arbitration decides that there is no arbitration agreement (i.e. in most jurisdictions, that the arbitration agreement is 'null and void, inoperative or incapable of being performed'[113]) before the arbitral tribunal has ruled on jurisdiction, then the competence-competence rule does not come into effect. The substantive dispute will most likely go to court and there is nothing left for the arbitral tribunal to decide. However, a ruling by a court that is not competent, which will ordinarily be the case of a foreign court outside the seat of arbitration, that there is no arbitration agreement does not bind an arbitral tribunal sitting abroad. It is not uncommon that arbitration proceedings continue despite a foreign court's ruling that there is no arbitration agreement, and even despite a foreign court's injunction to prevent the arbitration from proceeding.

**111** AM Whitesell and E Silva-Romero, 'Multiparty and Multicontract Arbitration: Recent ICC Experience', *ICC International Court of Arbitration Bulletin*, Special Supplement, 2003, p. 7, at p. 15. Many more recent examples of multicontract cases are provided in Greenberg, Feris and Albanesi, op. cit. fn 110.
**112** Whitesell and Silva-Romero, ibid.
**113** This is the language of Article 8(1) of the Model Law and Article II(3) of the New York Convention, explained above at Section 4.2.

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5.114 If an arbitral institution, such as the ICC Court, decides that there is no prima facie arbitration agreement, the last sentence of Article 6(2) of its Rules provides that any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement. It has very occasionally happened that the ICC Court decided that there was no prima facie jurisdiction over a party and a court at the seat of arbitration has ruled otherwise, meaning that the excluded party may be readmitted into the arbitration or into a new arbitration.

5.115 Where a competent court or arbitral institution makes a prima facie ruling that there is an arbitration agreement, the jurisdictional dispute is then transferred to the arbitral tribunal. The previous prima facie decision of the court or arbitral institution has no bearing on the arbitral tribunal's subsequent decision on its jurisdiction. The arbitral tribunal should start over, de novo, and should not be influenced at all by the earlier prima facie ruling.

5.116 That said, without affecting the ultimate outcome, these prima facie determinations are probably sufficient to ensure that an arbitral tribunal will not simply dismiss the case as it might do in circumstances where no such prior ruling had been taken and there was clearly no basis for asserting arbitral jurisdiction.[114] Prima facie determination by a court or institution may also reassure the arbitral tribunal of its competence-competence powers, so that it will be sure to conduct a full examination of jurisdiction before deciding against it. In those senses, therefore, a prima facie ruling could be considered as having some effect on the subsequent arbitration proceedings.

5.117 If the prima facie decision is from a court as opposed to an arbitral institution, the extent that such a court decision is relevant may in turn depend on the extent of that court's initial examination of the jurisdictional issue.[115] If the court has examined nothing more than the prima facie existence of an arbitration agreement, as is the norm, then that decision should make no difference at all to the arbitral tribunal's decision on jurisdiction. If, on the other hand, the court is located at the seat of arbitration and it has probed a little deeper, as some courts do, then there is arguably slightly less work left for the arbitral tribunal on those particular points.

## 6.2 Recourse against an arbitral tribunal's jurisdictional decision

5.118 As emphasised above, a feature of the competence-competence rule is that an arbitral tribunal's decision on its jurisdiction is *not* final. It is subject to subsequent court review. As will be seen below, implementing this principle is different according to whether the arbitral tribunal finds that it does or does not have jurisdiction.

**114** Jarvin, op. cit. fn 26, pp. 102–104.
**115** See discussion at Section 4.2 above.

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It should be noted that in investor-state arbitration conducted under the ICSID Convention there is no scope whatsoever for court review of jurisdictional decisions.[116] 5.119

### 6.2.1 Positive jurisdictional decisions

The Model Law provides two possibilities for court review of an arbitral tribunal's decision that it has jurisdiction. First, it provides a mechanism to seek immediate review under Article 16(3):[117] 5.120

> 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 specified in article 6 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.

Several observations can be made about this Article. First, nothing is said about recourse from negative jurisdictional decisions, an omission which is discussed further below. Second, Article 16(3) creates a different form of recourse for positive jurisdictional decisions than the recourse available against awards in accordance with Article 34 of the Model Law (discussed below). It has been suggested that this may be because preliminary rulings on jurisdiction are not considered to be awards, whether for the purposes of the Model Law or for certain legal systems generally.[118] A second reason for different treatment is that a positive decision on jurisdiction is subject to de novo review by the courts, rather than the limited grounds available to review awards under Article 34 of the Model Law.[119] Another observation from Article 16(3) is that the arbitration proceedings will continue during the domestic court's review of the arbitral tribunal's decision that it has jurisdiction. This ensures that the arbitration is not delayed while a potentially lengthy court proceeding takes place. 5.121

The other Model Law provision indirectly providing for recourse from a positive jurisdictional decision is Article 34, dealing with setting aside proceedings.[120] This states in the relevant part: 5.122

> 1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
> 2) An arbitral award may be set aside by the court specified in article 6 only if:

**116** Jurisdictional decisions by ICSID tribunals may be challenged under Article 52 of the ICSID Convention. Article 52(1)(b) provides that if the ICSID tribunal 'manifestly exceeded its powers', this is a ground for annulment. No provision in Article 52 explicitly refers to the Model Law Article 34 grounds of party incapacity or arbitration agreement invalidity. See Chapter 10, Section 8.

**117** This applies unmodified or virtually unmodified in most Asia-Pacific jurisdictions. In Singapore, leave of the High Court is needed (Section 10 of the International Arbitration Act). New Zealand and India are different in that they permit recourse from negative jurisdictional decisions (see the discussion below in this section). The very different situation in China was discussed above in Section 4.2.

**118** See L Boo, 'Ruling on Arbitral Jurisdiction – Is that an Award?', (2007) 3(2) *Asian International Arbitration Journal* 125, at p. 132 and p. 140.

**119** See further Section 6.3 below.

**120** On setting aside proceedings, see Chapter 9, Section 3.

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> (a) the party making the application furnishes proof that:
>  (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
> . . .
>  (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration . . .

5.123 Article 34(2)(a)(i) deals with invalid arbitration agreements while Article 34(2)(a)(iii) deals with issues as to the scope of the submission to arbitration. As noted above there is doubt about whether decisions on jurisdiction are in fact awards.[121] As they are not generally considered to be awards, Article 34 of the Model Law should not be available to set aside a decision dealing exclusively with jurisdiction, but could be used to set aside an award on the merits on the ground that the arbitral tribunal lacked jurisdiction. Similarly, enforcement of an award on the merits could be resisted on the equivalent basis of lack of jurisdiction under Article V of the New York Convention.[122]

5.124 Section 16 of the Indian Arbitration and Conciliation Act differs from Article 16(3) of the Model Law in that it does not provide for immediate court review of an arbitral tribunal's decision on jurisdiction.[123] Subsections 5 and 6 of Section 16 state:

> (5) The arbitral tribunal shall decide on a [jurisdictional objection] and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an award.
> (6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

5.125 The effect of these subsections is that there is no possibility for immediate recourse against an arbitral tribunal's positive jurisdictional decision in India. The aggrieved party has no right to challenge a positive jurisdictional decision until an arbitral award is rendered on the merits. Only thereafter is it entitled to challenge that award under Section 34 of the Indian Arbitration and Conciliation Act (which mirrors Article 34 of the Model Law). This interpretation was confirmed by the Supreme Court of India in 2005. The Supreme Court noted that where an arbitral tribunal takes a positive jurisdictional decision, the aggrieved party: 'has to wait until the award is made to challenge that decision in an appeal against the arbitral award itself in accordance with Section 34 of the Act.'[124]

5.126 Despite these provisions, in practice international arbitrators sitting in India do sometimes render positive decisions on jurisdiction in the form of partial

**121** Boo, op. cit. fn 118, p. 132 and p. 140.
**122** See further Chapter 9, Section 6 in that respect.
**123** A proposal was made during the UNCITRAL Model Law Working Group for an approach similar to that adopted by India to be adopted for the Model Law generally. See Holtzmann and Neuhaus, op. cit. fn 72, p. 174 et. seq.
**124** *SPB v Patel Engineering* (2005) (8) SCC 618, at para 6 or 2005 (9) SCALE 1 (Supreme Court of India).

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awards. Applying Section 16 of the Indian Arbitration and Conciliation Act correctly, recourse from such decisions should not be available until the time a final award is rendered. If an Indian court did purport to hear an action to set aside such a partial award on jurisdiction, this should not prevent the arbitral tribunal from proceeding with the arbitration by virtue of Section 16(5).

5.127 Article 16(3) of the Model Law sets a 30-day deadline to apply for court review of a positive jurisdictional decision. Missing the statutory deadline means that a party loses its right to immediate court review of the arbitral tribunal's jurisdictional ruling.

5.128 Regardless of the expiry of any such deadline, jurisdiction may effectively be challenged by using one of the two other mechanisms mentioned above, that is by seeking to set aside or by resisting enforcement of a subsequent award on the merits. However, by missing the deadline, a party might well be considered to have lost its right to challenge jurisdiction even in such later proceedings on the basis that it ought to have challenged the award on jurisdiction as provided for in Article 16(3) of the Model Law or its equivalent. Furthermore, as noted several times above, contesting jurisdiction for the first time during an action to set aside or enforce an award is a very risky strategy. First, if the objecting party participated in the arbitration without raising its jurisdictional objections or reservations, its conduct may have given rise to the establishment of an arbitration agreement under Article 7(2) of the Model Law.[125] Second, even if the objecting party did not participate in the arbitration, courts in developed arbitral jurisdictions are likely to give great weight to any decision of the arbitral tribunal in favour of its jurisdiction. The court might well consider that by failing to participate in the arbitration and challenge the jurisdictional decision under Article 16(3), the challenging party's belated challenge should be treated with suspicion.

### 6.2.2 Negative jurisdictional decisions

5.129 As noted above, Article 16(3) of the Model Law does not specify whether there is any recourse against a negative jurisdictional decision. Similarly, if jurisdictional decisions are not awards then review would not be available under Article 34 of the Model Law. For reasons that are not entirely clear, neither the Model Law nor most arbitration laws provide for recourse against an arbitral tribunal's decision that it *lacks* jurisdiction.[126]

5.130 There are two exceptions in this region.[127] First, the New Zealand Arbitration Act specifically amends the Model Law in this respect. Article 16(3) of Schedule 1 to that Act provides that 'if the arbitral tribunal rules on [a jurisdictional

**125** See above Section 3.2 and the discussion of this point in Chapter 4, Section 2.1.
**126** The Singapore Court of Appeal has expressly confirmed that reading Articles 16(3), 34 and Article 5 of the Model Law together precludes recourse to the courts from a negative jurisdictional ruling. See *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 (Singapore Court of Appeal), paras 61–74.
**127** See generally P Sanders, *Quo Vadis Arbitration*, Kluwer Law International, 1999, pp. 180–187. Chinese law may recognise recourse from negative jurisdictional decisions; see Jingzhao Tao, op. cit. fn 94, p. 70, paras 193 et seq. Examples outside this region are also rare, but one is the English Arbitration Act 1996 (see Sections 30(2) and 67(1)).

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objection] as a preliminary question, any party may request, within 30 days after having received notice of that ruling, the High Court to decide the matter'. There is accordingly no limitation that the decision on jurisdiction be positive in order for it to be reviewable by the High Court of New Zealand. The second example is India. Section 37 of the Indian Arbitration and Conciliation Act dealing with 'Appealable Orders' includes as appealable an arbitral tribunal's order that it does not have jurisdiction.[128] This means that in India immediate recourse is available from a negative jurisdictional ruling but not from a positive one.

5.131 The omission of express recourse against negative jurisdictional decisions in most arbitration laws is curious. There are several possible reasons for this which are developed below.

5.132 It should first be recalled that while there is debate about whether a positive jurisdictional decision of an arbitral tribunal constitutes an award for the purposes of the Model Law and/or New York Convention, negative jurisdictional decisions certainly do not constitute awards.[129] A negative jurisdictional decision cannot be an award because the arbitral tribunal had no jurisdiction to make it in the first place. Pieter Sanders accordingly points out that to consider a negative jurisdictional decision as an award is 'legally dubious and unworkable'.[130]

5.133 In *PT Asuransi Jasa Idonesia (Persero) v Dexia Bank SA*,[131] a specific issue before the Singapore Court of Appeal was whether or not an arbitral tribunal's negative jurisdictional decision 'constitutes an award for the purposes of [the Singapore International Arbitration Act] such that it may be set aside by the Court if the circumstances of the case justify'.[132] The court held that:[133]

> the definition of an 'award' in s 2 of the Act is clear. It does not include a negative determination on jurisdiction as it is not a decision on the substance of the dispute. On the contrary, it is a decision not to determine the substance of the dispute, and therefore cannot be an award for the purposes of Art 34 of the Model Law.

5.134 Because negative jurisdictional decisions are not awards, they cannot in principle be treated as reviewable under provisions of arbitration laws which deal with recourse against or enforcement of awards, such as Article 34 of the Model Law.

5.135 While negative jurisdictional decisions are not awards, recourse against them could be expressly provided for in the law. Yet the Model Law is silent. During the drafting of the Model Law, it was suggested that a sentence be added to clarify the jurisdiction of a court to review negative jurisdictional decisions. One proposed

**128** See Section 37(2)(a) of that Act. The Supreme Court of India has confirmed that this allows recourse from negative jurisdictional decisions: 'an acceptance of the objection to jurisdiction or authority, could be challenged then and there, under Section 37 of the Act.' See *SPB v Patel Engineering* (2005) (8) SCC 618, at para 6 or 2005 (9) SCALE I (Supreme Court of India).

**129** They may nonetheless be treated as awards under the rules of certain arbitral institutions, one example being the ICC International Court of Arbitration, which treats them as awards for the purpose of its award scrutiny process.

**130** Sanders, op. cit. fn 127, pp. 186–187.

**131** [2007] 1 SLR 597 (Singapore Court of Appeal).

**132** Ibid., at para 61.

**133** Ibid., at para 66. See also para 71: 'Accordingly, in both form and substance, the Second Award is a pure negative ruling on jurisdiction and is therefore not an award for the purposes of the Act.'

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addition to Article 16(3) was: 'A ruling by the arbitral tribunal that it has no jurisdiction may be contested by any party within 30 days before the Court.'[134] This language was not included in the final draft. The UNCITRAL Working Group commented that it would depend 'on the general law on arbitration or civil procedure of a model law country whether court control of a negative ruling could be sought other than by way of a request in any substantive proceedings as referred to in Art. 8(1)'.[135] However, as noted above, the general law on arbitration rarely deals with recourse from negative jurisdictional rulings, thus leaving a legal vacuum.

5.136 One reason given during the UNCITRAL Working Group debates on this issue was that it would be 'inappropriate' for a court to compel an arbitral tribunal to continue with an arbitration after it had found that it lacked jurisdiction.[136] This does not seem to be a sufficient reason to deny an aggrieved party recourse from a negative jurisdictional ruling. First, it would be open for an arbitrator to resign if he or she felt uncomfortable deciding the case after having ruled against jurisdiction. Second, there is no reason why the same arbitral tribunal would necessarily have to hear the case. The court could simply set aside the arbitral tribunal's decision and leave it to the parties to start a new arbitration.

5.137 In our view, the key underlying reason for different treatment relates to the fundamental difference between the effects of a positive as opposed to negative jurisdictional decision.[137] A positive jurisdictional ruling means a finding that the party objecting to jurisdiction has waived or opted out of its right to go to court. Considering that access to justice is a basic human right, it follows that positive jurisdictional rulings must be reviewable because ultimately the competent state court effectively decides whether that party has truly opted out of its right to a day in court. When an arbitral tribunal decides that it does not have jurisdiction, however, the right to bring the claim to a domestic court is rejuvenated. There is only a denial of a right to access arbitral justice which has traditionally not been considered a fundamental human right. Furthermore, the right to arbitral justice is purely contractual, whereas state court justice is a product of and directly protected by the state itself.

5.138 Another often overlooked reason why state courts are reluctant to review an arbitral tribunal's negative jurisdictional decision relates to the grounds for establishing domestic court jurisdiction in international matters. If an arbitral tribunal rejects arbitral jurisdiction, there may be no reason for a court in the putative seat of arbitration to assert jurisdiction over the matter. As has been noted elsewhere in this book,[138] parties often choose the seat of their arbitration

**134** UN Doc A/CN.9/WG.II/WP.40, Article XIII(3). See also Holtzmann and Neuhaus, op. cit. fn 72, p. 496.
**135** A Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer Law International, 1990, p. 88.
**136** Report of UNCITRAL's 18th Session (June 1985), UN Doc A/40/17, No. 163. See the discussion in Boo, op. cit. fn 118, p. 129.
**137** This reason was also discussed during the UNCITRAL Working Group and is touched on in several cases cited in Boo, op. cit. fn 118, p. 125.
**138** See Chapter 2, Section 6.2.

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because of its neutrality. The seat may have absolutely no connection to the dispute, the contract or the parties. Where an arbitral tribunal has rejected jurisdiction, the putatively agreed seat of arbitration is usually rejected as well. As a consequence, the local court's international jurisdiction rules may not provide it with any ground on which to assert jurisdiction to review a negative jurisdictional ruling short of specific legislative recognition.

5.139 In practice, the absence in most jurisdictions of a means of recourse from negative jurisdictional decisions is very unfortunate and frustrating. An incorrect arbitral tribunal decision that there is no jurisdiction could deny the aggrieved party access to all of the advantages of arbitration that it seeks. That party would have two options for having its substantive dispute resolved, neither of which is satisfactory. First, it could start an action in some domestic court with all of the disadvantages that it sought to avoid by choosing arbitration in the first place; e.g. potentially inflexible and unfamiliar procedure, non-specialist judges, non-neutrality and judgment enforcement difficulties. Alternatively, the aggrieved party could attempt to constitute a new arbitral tribunal.[139] This would raise a question as to whether there is a jurisprudential basis to argue that the initial decision would prevent another arbitral tribunal from reconsidering the jurisdictional issue.[140] Theoretically, it is possible that a party could continue to constitute arbitral tribunals until one decided that it had jurisdiction since negative jurisdictional decisions have no recognised legal authority. In practice, however, an arbitral tribunal would be reluctant to overrule a prior arbitral tribunal's decision on the same jurisdictional question, even if the *res judicata* doctrine were technically inapplicable due to the lack of legal effect of the first decision.

5.140 These practical issues outlined in the preceding paragraphs have prompted strong calls for arbitration laws to address and provide for recourse from negative jurisdictional decisions.[141]

## 6.3 Scope of court review of arbitral tribunal's jurisdictional decisions

5.141 Because one of the consequences of entering into an arbitration agreement is losing one's right to go to court, the ultimate authority to determine that there is a valid agreement to arbitrate must lie with the competent courts. Therefore, when a court at the seat of arbitration reviews an arbitral tribunal's decision on

**139** See S Greenberg and M Secomb, 'Terms of Reference and Negative Jurisdictional Decisions: A lesson from Australia', (2002) 18(2) *Arbitration International* 125, at p. 133.

**140** It has been suggested that if a matter has been decided in one arbitration, the arbitration agreement between the parties (if there is one) is 'null and void, inoperative or incapable of being performed' with respect to that matter under Article II of the New York Convention. See AJ van den Berg, *The New York Convention of 1958: Towards a Uniform Interpretation*, Kluwer Law, 1981, p. 158.

**141** See, e.g. P Fohlin, 'A Case for a Right of Appeal from Negative Jurisdictional Rulings in International Arbitrations Governed by the UNCITRAL Model Law', (2008) October *Asian Dispute Review* 113, at p. 114. The author points out that the 2008 Hong Kong draft Arbitration Bill amends Article 16(2) of the Model Law so that there is clearly no recourse from a negative jurisdictional decision. He convincingly explains that this is unsatisfactory, and even more so in international as opposed to domestic arbitration cases.

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jurisdiction, the scope of that review is normally de novo. This is implied in the wording of Article 16(3) of the Model Law which empowers the court simply 'to decide the matter' of jurisdiction when a party contests the arbitral tribunal's positive jurisdictional decision. The possibility for a de novo re-hearing results from the fact that domestic courts have the final say on jurisdiction and may need to hear new arguments and evidence in order to make their determination.

5.142 This was well explained by the Singapore High Court in *Insigma Technology Co Ltd v Alsthom Technology Ltd*, referring to relevant academic writing:[142]

> In the text *Jurisdiction and Arbitration Agreements and their Enforcement* by David Joseph QC (2005, Sweet and Maxwell, London) ('*Jurisdiction and Arbitration Agreements*'), it is stated (at para 13.28) that the power of the court in deciding whether the tribunal had jurisdiction is not limited to reviewing the tribunal's decision for error, but involves a re-hearing, including if necessary the calling of witnesses already heard by the tribunal. This statement was based on the authority of a number of first instance English decisions that considered the meaning and effect of s67 of the English Arbitration Act 1996. Whilst I am not aware of any authority on the point in connection with the Model Law, it is my view that, under this legislation too, the court's jurisdiction to decide on the jurisdiction of an arbitral tribunal is an original jurisdiction and not an appellate one. This is clear from the wording of Article 16(3) of the Model Law. It simply provides for the court 'to decide the matter' of jurisdiction after the tribunal has made a ruling that it has jurisdiction. This is not language implying that the court's powers to act are of an appellate nature. Although the word 'appeal' does appear within the Article, the context in which it is found is the specification that there should be no appeal against the decision of the court on jurisdiction.
>
> There are also good reasons why the court should have the power to hear the matter afresh rather than to take the position of an appellate body. These are enumerated in the same paragraph of *Jurisdiction and Arbitration Agreements* and are as follows. First, if the court was limited to a process of review, it might be reviewing the decision of a tribunal that itself had no jurisdiction to make such a finding. Second, the procedure to determine jurisdiction is available to a party that took no part in the arbitral proceedings; if the court was confined to a review of the tribunal's decision this would greatly undermine the ability of the challenging party to make its case. Third, if there is to be a challenge on an issue of fact, the court should not be in a worse position to make an assessment than the tribunal, and should therefore be able to examine witnesses in the usual way. Accordingly, therefore, a party is entitled to raise an objection to jurisdiction before the judge that it had not raised and argued before the arbitrator. However, 'a failure to raise a specific point before the arbitrator is likely to be relevant as to weight.' (Jurisdiction and Arbitration Agreements at [para 13.5].)

5.143 Recent authority from the English court of appeal confirms that, in England, de novo review of an arbitral tribunal's jurisdictional decision is alternatively available when resisting the enforcement of an award.[143] The seat of arbitration

**142** [2008] SGHC 134, paras 21–22. The interesting circumstances of this case are discussed in Chapter 4, Section 9.6. The position in England is much the same. See *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, English Court of Appeal, 20 July 2009, [2009] EWCA Civ 755, para 21.

**143** *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, English Court of Appeal, 20 July 2009.

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was Paris and the respondent, the Ministry of Religious Affairs of the Government of Pakistan, had challenged the arbitral tribunal's jurisdiction in the course of the arbitration. The arbitral tribunal found in a partial award that it possessed jurisdiction. The Ministry then ceased participating in the arbitration and the arbitral tribunal proceeded to issue a final award ordering damages of US$19 million against the Ministry. Rather than challenging either of the awards in Paris, the Ministry waited until Dallah, the claimant in the arbitration, sought to enforce the award against it in England and resisted enforcement of the award. The Court of Appeal confirmed the lower court's decisions (i) that jurisdiction could be re-examined de novo by the enforcing court and (ii) that the arbitral tribunal had erred in its finding that it had jurisdiction over the Ministry.

5.144 While rarely, if ever, done, in some jurisdictions parties may effectively be able to exclude the ability of courts to review certain jurisdictional issues. After the jurisdictional dispute arises, the parties could enter into a new arbitration agreement, either expressly or implicitly through conduct or a document such as terms of reference,[144] which empowers the arbitral tribunal to decide *finally* a disputed issue of jurisdiction relating to their initial arbitration agreement. By entering into a second arbitration agreement, the scope of which includes the jurisdictional dispute arising from the first, the aspect of the competence-competence rule that allows court review of jurisdictional decisions would apply only to the second arbitration agreement. Only the new arbitration agreement could be challenged and not the first. This would in effect 'raise the stakes'.[145] The party challenging jurisdiction, if successful, would have a more final resolution of the issue. The party that wins on the jurisdictional issue arising from the first arbitration agreement would have a more final resolution of the issue because only the new arbitration agreement could be challenged in the courts.

## 6.4 Subsidiary orders with negative jurisdictional decisions

5.145 If an arbitral tribunal decides that it does not have jurisdiction over a party, and/or rejects *absolute* jurisdiction,[146] then it ceases from that moment to have any authority with respect to that party. It logically follows that an arbitral tribunal in these circumstances has no power to make a subsidiary order, such as an order for costs.[147]

**144** For example, terms of reference could in some circumstances inadvertently include an agreement that the arbitral tribunal finally decide a jurisdictional issue arising from the initial arbitration agreement, see Greenberg and Secomb, op. cit. fn 139, p. 135.
**145** See the example of this given in Park, op. cit. fn 46, pp. 64–65 and his discussion at pp. 72–79 et seq giving examples of US cases which have confirmed this approach. Not all jurisdictions will allow this though as it might be seen as an attempt to oust the jurisdiction of the courts completely. See, e.g. *Czarnikow v Roth Schmidt* [1922] 2 KB 478 concerning the traditional prohibition on ousting court jurisdiction).
**146** See Section 3.1 above.
**147** Other possible subsidiary orders include orders of confidentiality, payment of fees to the arbitrator and interim measures of protection (or more likely, unwinding interim measures of protection).

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5.146 This situation is well-illustrated by the case of *CDC v Montague* in Queensland, Australia.[148] CDC commenced arbitration against Montague and three other parties. The arbitrator ultimately found that he did not have jurisdiction to hear the disputes between CDC and Montague because Montague was not a party to any arbitration agreement with CDC. He made an award of costs against CDC in favour of Montague in order to compensate Montague for being dragged into an arbitration to which Montague was not a proper party. The seat of arbitration was in Auckland, New Zealand, but Montague sought to enforce the costs award in Queensland, Australia under the New York Convention.

5.147 CDC resisted enforcement of the award for costs, arguing as follows:[149]

> once the Arbitrator determined that he had no jurisdiction to entertain proceedings instituted by the Appellant [CDC] because he was not a party to a written agreement containing an arbitration clause, from that time he lacked power to make any order with respect to the cost of the arbitration proceedings which he initiated in the International Court of Arbitration.

5.148 As Simon Greenberg and Matthew Secomb explain,[150] at first blush this may seem to be a rather ambitious but technically correct argument. While it may seem somewhat unfair to refuse enforcement where the costs incurred by Montague were incurred as a result of CDC's wrongful allegation of a valid arbitration agreement, arbitration is based upon the consent of the parties. If both parties did not agree to the arbitration agreement, how could they be bound by that arbitration agreement and hence bound by a costs award made on the basis of jurisdiction deriving from it?

5.149 The District Court of Queensland allowed enforcement of the award and CDC appealed. The Queensland Court of Appeal confirmed that the costs award was enforceable, relying on the fact that CDC had signed the ICC terms of reference[151] which included costs as an issue for the arbitrator to decide. As Justice Ambrose stated:[152]

> In my view, the short answer to this rather unmeritorious contention is that the Terms of Reference signed by Counsel for the Appellant and by Counsel for the Respondent and the other defendants and indeed the Arbitrator himself on 13 September 1996 in clear and explicit terms require the Arbitrator to determine 'what decision should be taken with regard to the cost of arbitration'.
>
> In my view, the Terms of Reference, signed by or on behalf of all parties to it, come directly within sub-article 1 of Article 2 of the Convention as 'an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship'.

**148** *Commonwealth Development Corp (UK) v Montague* [2000] QCA 252 (Supreme Court of Queensland Court of Appeal), Appeal Justice Thomas, Justices Ambrose and Fryberg, 27 June 2000. The case is discussed in Greenberg and Secomb, op. cit. fn 139, p. 125. The following discussion draws from that article.
**149** *Commonwealth Development Corp (UK) v Montague* [2000] QCA 252 (Supreme Court of Queensland Court of Appeal), p. 5.
**150** Greenberg and Secomb, op. cit. fn 139, p. 127.
**151** See Chapter 7, Section 6.5, on terms of reference.
**152** *Commonwealth Development Corp (UK) v Montague* [2000] QCA 252 (Supreme Court of Queensland Court of Appeal), p. 5.

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5.150 The Court of Appeal decision accordingly lends strong support for the value of terms of reference, which were initially conceived of by the ICC and are now also required by other arbitration institutions.[153] However, the decision leaves one wondering what would have happened had there been no terms of reference in this matter. Montague could possibly have been left having incurred unrecoverable costs, short of the hazardous option of commencing a court proceeding, somewhere, for damages.

5.151 Provisions in some arbitration laws may implicitly suggest that costs can be awarded with negative jurisdictional rulings,[154] but express language to this effect is not found in Asia-Pacific jurisdictions nor many, if any, in the world.[155] It is hoped that courts enforcing awards in these circumstances will take a pragmatic approach and enforce the subsidiary order, as the Queensland courts did in *CDC v Montague*.

5.152 Finally, as mentioned in the preceding section, recourse against negative jurisdictional decisions should be addressed expressly in arbitration laws. The same is true for the enforceability of subsidiary orders made with negative jurisdictional decisions.

**153** SIAC adopted a similar document called the 'Memorandum of Issues' in its 2007 Rules. However, this has been abandoned in its 2010 Rules.

**154** Consider, for example, Articles 23(4)(2) and 49(3) and (4) of the Japanese Arbitration Act. These provisions read together arguably allow costs orders together with a ruling to terminate arbitral proceedings when there is no jurisdiction. See also Section 6(1)(b) of the New Zealand Arbitration Act and the very similar provision at Section 44(1)(c) of the Malaysian Arbitration Act.

**155** Section 37 of the Swedish Arbitration Act provides some protection for respondents who win on jurisdiction by ensuring that they do not have to pay the arbitral tribunal's costs save exceptional circumstances. However, the Act does not deal with party legal costs etc. in the case of a negative jurisdictional ruling.