

## CHALLENGING ARBITRAL JURISDICTION: THE ROLE OF INSTITUTIONAL RULES

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### I. – INTRODUCTION

Among the many accomplishments of Laurie Craig, one stands out for scholars and practitioners alike: his efforts in bringing to life the first comprehensive book on the rules of a major international arbitration institution. Legend has it that Laurie conceived the project in 1980 while flying home to Paris after counseling a client in Dubai, following which he put together a team of co-authors, which in 1984 produced the first edition of International Chamber of Commerce Arbitration, followed late by second and third editions. In this context, Laurie's *Festschrift* must certainly include at least one contribution on the recently amended ICC Rules.

Laurie's interest in institutional rules always connected with the broader contours of arbitration law. Although most fields of law provide guidance on how courts decide cases, arbitration law tells judges when *not* to decide disputes, in deference to private decision-makers selected by the litigants. Catalysts for the development of arbitration law include people changing their minds, with one side regretting its decision to arbitrate, or divergences about what the arbitration clause covers or whether the arbitral tribunal conducted itself in a way that comports with basic procedural integrity. In such instances, courts may be asked to assist in construing or in implementing the arbitration agreement or resulting award.

Arbitration law normally includes two limbs. The first aims to hold parties to their bargains to arbitrate. The second seeks to monitor the basic integrity of the arbitral process, so that the case will be heard by a tribunal that listens before deciding, and which stays within its mission. This last element, the arbitrators'

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duty to remain within the contours of confines of their authority, has been the subject of well-known national judicial decisions applying the hard law of statutes and treaties.<sup>1</sup>

Less-often debated, institutional rules on jurisdiction play a vital role in complementing national and international legal norms. As we shall see below, in the context of the 2012 ICC Arbitration Rules, the operation of these institutional rules implicates the proverbial “devil in the details” of both administrative decisions and rulings of the arbitral tribunal itself.

## II. – GUIDE FOR THE PERPLEXED

### A. – Preliminary Determinations

An arbitral tribunal often must address objections to the existence, validity or scope of an arbitration agreement. Perhaps a contract signed by a government official lacked parliamentary approval, as allegedly required by relevant law. Or a corporate officer might purport to bind a company without authority pursuant to relevant by-laws. Questions might arise about the existence of an agency between affiliated entities, one of which arguably signed an agreement on behalf of the other.

Such complex challenges will best be left to the arbitrators themselves. The arbitral tribunal can give careful consideration to the alleged jurisdictional defects, weighing the contentions and arguments presented by the parties’ counsel, subject of course to whatever review might be appropriate in otherwise competent courts.

On occasion, however, arbitrations have been filed without even minimal indicia of consent to the arbitral process. No document seems to exist saying the respondent actually agreed to arbitrate with the claimant.

In such instances, efficiency will be served by early consideration of a respondent’s argument that the case should not proceed. To this end, the ICC Rules permit the ICC Court to consider obvious jurisdictional defects, with arbitration going forward only to the extent the ICC Court is *prima facie* satisfied that an arbitration agreement may exist.

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1. See *e.g.*, decision of the United States Supreme Court in *BG Group v. Argentina*, reviewing an award arising from gas distribution in Buenos Aires. *BG Group PLC v. Argentina*, 134 S. Ct. 1198 (2014). Argentine emergency measures had “pesified” tariffs by converting dollar-denominated rates into pesos at a third the original value. An UNCITRAL arbitral tribunal sitting in Washington awarded a British investor \$185 million for violation of the “fair and equitable treatment” standard in the UK-Argentine investment treaty, which provided for arbitration to be brought eighteen months after the dispute had been submitted to host country courts. The arbitral tribunal decided the case notwithstanding failure to respect the eighteen-month rule, reasoning that the emergency decrees restricted access to the judiciary in a way that precluded a literal reading of the eighteen-month provision.

This allocation of functions between the arbitral tribunal and the ICC Court has been set forth in Article 6 of the ICC Rules, which in subsection 3 states that “pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration” unless the Secretary General refers the matter to the ICC Court. Subsection 4 then provides that in cases referred to the ICC Court, “the arbitration shall proceed if and to the extent that the [ICC Court] is *prima facie* satisfied that an arbitration agreement under the Rules may exist.”

This jurisdictional filter remains one of the distinctive features of ICC arbitration. While the arbitral tribunal remains competent to decide most jurisdictional challenges, the ICC Court provides prompt preliminary determination of objections that an arbitration agreement may not even exist.

In addition to this institutional gate-keeping function, by reason of preliminary jurisdictional determinations, the ICC Rules contain provisions covering several more specific aspects of jurisdictional analysis, particularly with respect to joinder, consolidation, and multiple contracts as well as multiple parties. As summarized below, these rules are applied against the backdrop of otherwise applicable national law and generally accepted jurisdictional principles.

### B. – Joinder of Additional Parties

Pursuant to a partnership agreement containing an ICC arbitration clause, Partner A files a claim in against Partner B. Sometime later, Partner A seeks to join Partner C. May the tribunal hear the claims against Partner C? The answer will depend on the timing of the joinder request and the attitude of other parties. Under Article 7 of the ICC Rules, no additional party may be joined after confirmation or appointment of any arbitrator, absent agreement of all parties including the person sought to be joined.

The term “joinder” may on occasion cause confusion, in that the term as used in the ICC Rules contrasts with a more general jurisdictional usage related to “non-signatories” to an arbitration agreement. Article 7 of the ICC Rules addresses the matter of timing, in the sense of adding a new party after the arbitration has begun.

By contrast, “joinder” of non-signatories relates to questions of consent, when, for instance, a claimant seeks to extend the arbitration clause to an affiliate of the contracting respondent. Such joinder would derive not from any provision of the ICC Rules, but from legal principles such as agency or estoppel, whether under national law or transnational practice.

For example, no problem would normally arise under Article 7 if claimant’s initial request for arbitration had been filed against both a subsidiary that had signed the relevant contract, and a parent that had not. However, the arbitral tribunal might be asked to determine whether an award should be made against the parent on the basis of some theory such as alter ego or corporate veil piercing. And the ICC Court might need to decide whether it was *prima facie* satisfied that

an agreement to arbitrate might bind the parent, although this would be a matter separate from any issue of timeliness pursuant to Article 7 of the Rules.

By contrast, if the request for arbitration did not name the parent, then Article 7 of the ICC Rules could preclude its subsequent inclusion in the proceedings, even if the parent had clearly signed the contract containing the relevant arbitration clause.

### C. – Claims between Multiple Parties

Partner A begins proceedings pursuant to the same arbitration clause in the above-mentioned partnership agreement. Avoiding his earlier mistake, however, at the outset he files claims against all three Partners: B, C and D. Does the ICC tribunal have jurisdiction to hear claims that Partner C then brings against Partner B in the context of the initial arbitration?

Article 8 of the ICC Rules generally allows claims by any party against any other, subject of course to the limitation on new claims filed after the Terms of Reference have become effective.<sup>2</sup> As with joinder of additional parties, if a preliminary determination is requested in a case with more than two parties, the ICC Court must be “*prima facie* satisfied” that an arbitration agreement that binds them all may exist.

### D. – Claims Involving Multiple Contracts

Buyer X brings claims against Seller Y pursuant to an ICC arbitration clause in a machinery sales agreement and an arbitration clause in an agreement for after-sales service with respect to the purchased equipment. Will the arbitral tribunal have authority to hear both sets of claims in the same proceedings? Article 9 of the ICC Rules confirms that the existence of claims under different contracts and arbitration agreements will not in itself preclude their being heard in the same arbitration.

Moreover, if the ICC Court is asked to make a preliminary determination on objections to having both claims heard together, the arbitration may proceed if the ICC Court is “*prima facie* satisfied” that (i) the multiple arbitration agreements are compatible and (ii) that all parties may have agreed to have those claims determined together in one proceeding. See Article 6(4)(ii) of the ICC Rules.

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2. See Article 23(4) of the ICC Rules. The existence of multiple parties with clearly divergent interests may also create difficulties in nominating arbitrators (perhaps requiring the ICC Court to appoint all arbitrators under Article 12(8) of the ICC Rules), which of course raises issues about formation of the tribunal rather than arbitral jurisdiction.

### E. – Consolidation of Two or More Arbitrations

Buyer X brings a claim against Seller Y for non-conforming equipment pursuant to a contract containing an ICC arbitration clause. In parallel, Seller Y brings an action against Buyer X for non-payment of the equipment price, as well as against Buyer's Parent, who agreed to guarantee payment. Later, Seller Y asks the ICC Court to consolidate the two proceedings.

Pursuant to Article 10 of the ICC Rules, consolidation may be ordered under any one of three scenarios:

- all parties agree; or
- all claims arise under the same arbitration agreement; or
- different arbitration agreements have been invoked, but the arbitrations are between the same parties, in connection with the same legal relationship, and pursuant to compatible arbitration provisions.

In some instances, the ICC Court decision, on whether or not to consolidate, will be a matter separate from any discretion to consolidate that might be given to an arbitral tribunal under the relevant arbitration agreement.

### F. – National Law

Even if the ICC Court is *prima facie* satisfied that an arbitration agreement may exist, and/or even if an arbitral tribunal concludes that it has jurisdiction, the story may not end there. One side may decide to challenge arbitral authority before a national court, either after the award has been rendered, or in an attempt to enjoin the arbitration before it begins. The disposition of such applications will be highly country-specific, in the sense that different legal systems take different approaches both with respect to timing of judicial intervention and the finality accorded to arbitral and institutional decisions about the arbitrators' authority.

As discussed more fully below, the maxim *Kompetenz-Kompetenz* (*compétence-compétence* in its French incarnation) has often been invoked to the detriment of rigorous analysis. Although the ICC Court and/or the arbitral tribunal may make their respective decisions notwithstanding a jurisdictional objection from one side or the other, the effect of those determinations before courts will ultimately depend on principles of arbitration law that diverge considerably from one place to another. Some countries, such as France, generally reserve judicial consideration of the matter until after an award has been rendered. In other places, like the United States for example, opportunities exist for courts to get involved early in the arbitral process, with the arbitration perhaps nipped in the bud.

The ICC Rules contain no provision purporting to address the interaction of courts and arbitrators on such jurisdictional determinations. Likewise, the effect of any attempt to limit by contract the intervention of otherwise competent courts must, in the final analysis, depend on the law applied by judges called to consider such clauses.

### III. – THE INSTITUTIONAL FILTER: GATEKEEPING AND “*PRIMA FACIE* SATISFACTION”

Pursuant to Article 6(3) and 6(4) of the ICC Rules, a jurisdictional defect in arbitral authority may, to a limited extent, be addressed at the institutional level even before a tribunal has been constituted.

If a party against which a claim has been made does not submit an answer or raises jurisdictional objections, the Secretary General possesses power to refer the matter to the ICC Court. If the ICC Court is “*prima facie* satisfied” that an agreement under the ICC Rules “may exist,” the arbitration shall proceed. The arbitral tribunal will render its own decision on jurisdiction in an interim or final award, without being bound by the ICC’s preliminary determination.

If the ICC Court is *not* “*prima facie* satisfied” that an arbitration agreement may exist, and thus decides that the arbitration shall not proceed, dissatisfied parties retain the right to take the matter to national judicial authorities of competent jurisdiction. Pursuant to Article 6(6) of the ICC Rules, those national judiciaries will decide whether or not, and in respect of which of parties, a binding arbitration agreement exists.

Although some might see this power of the ICC Court as an unwarranted administrative intrusion, this procedure is a useful safeguard. Indeed, over the years this power of the ICC Court has been broadened. In 1998, the ICC Rules were changed to allow the ICC Court to make a preliminary determination of whether an arbitration agreement may exist, but also whether it applies to the relevant respondents and claims.

Under the 1998 ICC Rules, jurisdictional objections were transferred to the ICC Court automatically. Some commentators considered that such automaticity resulted in dilatory tactics because the ICC Secretariat deferred any steps towards constitution of a tribunal until after the ICC Court’s preliminary determination.

The 2012 ICC Rules address the problem by establishing a two-tiered system of preliminary assessment, in that the Secretary General performs the role of a gatekeeper to see if there exists a possibility that the ICC Court might not be *prima facie* satisfied that the arbitration agreement may exist. Only then will the second tier of the institutional filter come into play, with the ICC Court making its determination.

The ICC Rules do not set forth the standard by which the Secretary General will decide whether a matter should be sent to the ICC Court. In practice, at least four situations will justify such referral: (i) when the agreement does not provide for arbitration under the ICC Rules; (ii) when the claimant files a request against one or more respondents that did not sign the arbitration agreement; (iii) when the request for arbitration is based on multiple contracts; and (iv) when a request seeks joinder of a non-signatory.

The *prima facie* test has not always been well articulated. The 1975 ICC Rules spoke of the ICC Court being “satisfied of the *prima facie* existence” of an agreement to arbitrate.<sup>3</sup>

That oft-used term “*prima facie* existence” (like a variant “*prima facie* agreement”) was a bit of a misnomer. The expression “*prima facie*” served not to qualify the existence or the agreement, but rather to describe the level of satisfaction that needed to be found at the level of the ICC Court. In other words, after an initial examination the ICC Court must be satisfied that on its face the arbitration agreement seemed to exist. More complex challenges would be left to the arbitral tribunal. This understanding was clarified in the subsequent 1998 Rules.

For example, the arbitration agreement may require the parties to go through mediation procedures prior to the initiation of arbitration. Although the ICC Court could be *prima facie* satisfied that an arbitration agreement exists between the two parties, only the arbitral tribunal would be in a position to assess whether the parties’ failure to mediate prior to filing the request for arbitration rises to the level of jurisdictional bar to the arbitral proceedings.

Jurisdictional challenges often raise doubt not about the existence of the agreement itself, but about its applicability to one or more parties, for example with respect to non-signatories or disputes not specifically mentioned in the agreement.

The current formulation of the ICC Rules, by requiring that the ICC Court be satisfied that the arbitration agreement may exist, aims to cover situations where a reasonable argument can be made about the existence of the arbitration agreement, even if further examination before the arbitral tribunal will be needed.

The ICC Rules thus provide an important safeguard against putting arbitrations into motion when no jurisdictional basis exists at all. In practice, however, the ICC Court seldom prevents arbitration from going forward. While some contract pathologies preclude finding that a binding agreement to arbitrate may exist, bona fide questions of fact and law concerning an arbitration clause will most often be decided by the arbitral tribunal itself in a debate subject to the parties’ full participation. Arguments may arise that the potential respondent has only a tenuous connection to the agreement, due to conditions precedent (such as negotiation procedures), which might arguably be jurisdictional in nature, rather than requirements related to the dispute’s ripeness to be heard. Or, controversy may surround whether an arbitration clause survives assignment or termination of the larger agreement in which the clause finds itself.<sup>4</sup>

The ICC Rules give little if any role to the ICC Court concerning subject-matter arbitrability, related to public policy bars that might preclude certain types of claims from being considered in arbitration. Such issues will normally be addressed by the arbitral tribunal.

3. Article 8(3) of the 1975 Rules, as amended in 1988.

4. For discussion of the respective roles of ICC and national courts in connection with assignment of claims by a trustee in bankruptcy, see *Apollo Computer v. Berg*, 886 F. 2d 469 (1<sup>st</sup> Cir. 1989).

### A. – *Prima Facie* Satisfaction in “Complex” Arbitrations

The 2012 Rules brought significant revisions related to proceedings with more than two parties and/or implicating more than one contract.

#### 1° More than Two Parties

Article 6(4)(i) of the ICC Rules provides that if there are more than two parties to the arbitration (“multi-party” proceedings), the arbitration shall proceed between those of the parties with respect to which the ICC Court is *prima facie* satisfied that an arbitration agreement “that binds them all” may exist. The ICC Court may decide that the arbitration will proceed with respect to certain parties only. Joinder of additional parties pursuant to Article 7 of the ICC Rules calls for the same preliminary control by the ICC Court as when pleas have been raised concerning the existence, validity and scope of the arbitration agreement.

#### 2° More than One Contract

Where claims are made under more than one agreement, the arbitration shall proceed as to those claims with respect to which the ICC Court is *prima facie* satisfied not only that the relevant agreements may be compatible, but that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration. See cross-reference to Article 9 in Article 6(4)(ii) of the ICC Rules.

For better or for worse, the ICC Rules give no guidance as to what is meant by compatibility among arbitration agreements. At the least, compatibility requires only that all agreements provide for arbitration under the ICC Rules, as contrasted to some other adjudicatory framework. Some commentators suggest that under the current practice of the ICC Court, agreements would not be compatible if they contain differences regarding method of appointment for arbitrators or seat of arbitration.<sup>5</sup>

The litigant seeking to proceed must establish that parties to different but compatible arbitration agreements consent to having their claims decided in a single arbitration. If such consent is not explicit, the ICC Court will examine objective factors to determine *prima facie* whether the parties to the different arbitration agreements may have consented to the claims being heard together.

To illustrate, consider the following illustrative scenario. Buyer acquired an equity interest in a company, pursuant to a share purchase agreement. Buyer’s parent corporation issued an unconditional guarantee to Seller, assuring payment of the purchase price. Upon Buyer’s failure to pay, Seller brought an ICC claim against Buyer to enforce the guarantee. In turn, Buyer’s Parent brought a counterclaim based on the share purchase agreement (to which it was also a

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5. W. L. CRAIG & L. JAEGER, *The 2012 ICC Rules: Important Changes and Issues for Future Resolution*, *The Paris J. of Int’l Arb.*, n° 1, 2012, at 15, 27.

signatory) alleging fraudulent inducement of the purchase agreement and the guarantee.

The Parent's counterclaims arise from a different contract (share purchase agreement) and if Seller objects, they would be subject to the provisions of Article 6(4)(ii) and Article 9. Accordingly, the Parent's claims can be decided in the same proceedings with Seller's claims if the arbitration clauses of the share purchase agreement and the guarantee are compatible and all parties agree that these claims can be determined in a single proceeding.

### B. – Raising Jurisdictional Issues before the ICC Court

Even if there is no ICC arbitration agreement at all, a response on the merits which does not contest arbitral jurisdiction will permit the arbitration to proceed without prejudice to the right to raise jurisdictional issues before the arbitral tribunal. However, if any party against which a claim has been made contests jurisdiction, or the possibility of determining all of claims together, the Secretary General will refer the matter either to the arbitral tribunal itself or to the ICC Court for *prima facie* determination. As mentioned above, the same will be true if a respondent simply fails to answer.

In determining whether an agreement for ICC arbitration may exist, the ICC Court will limit itself to a review of the contract documents and the written argument submitted by counsel. No opportunity exists for oral argument by counsel or the parties. This restriction seems fully justified given that jurisdictional issues are fully considered by the arbitral tribunal itself. Article 6(5) of the ICC Rules clearly provides that in such matters, "any decision as to jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall be taken by the arbitral tribunal itself."

Despite the fact that respondents get another bite at the jurisdictional apple before the arbitral tribunal, they generally present full arguments before the ICC Court in the hope of terminating the proceedings at that stage. Accordingly, there is often elaborate correspondence between parties and the ICC Court. Frequent arguments include the following: (i) the arbitration clause is defective, often in the sense of lacking reference to ICC arbitration; (ii) no arbitration clause exists at all; (iii) respondent neither signed nor ratified the arbitration agreement; (iv) lack of binding nature to an agreement made by an alleged agent or affiliated company; and (v) a guarantor is not bound by an arbitration clause in the contract whose performance was guaranteed.

The current formulation of the ICC Court's task, to be "*prima facie* satisfied" that an agreement may exist, makes it unlikely that the ICC Court will refuse to order arbitration to proceed even where doubts may exist on jurisdiction. Nevertheless, the ICC Court will continue to play an important preliminary role not only where it refuses to permit an arbitration to proceed, but also where the ICC Court limits the scope of arbitration by refusing to join non-signatory parties

(such as parent companies, guarantors, or states) as additional respondents in otherwise valid arbitrations.

When the ICC Court has made a preliminary determination, the ICC Secretariat notifies the parties, as well as the arbitral tribunal when appropriate. No reasons are given for the decision, which is considered administrative in character. The circumstances in which decisions have been taken may come to light only in the rare cases of challenge before national courts.<sup>6</sup>

The power of the ICC Court in this respect has been confirmed by national courts. For example, in *Cekobanka v. CCI*, the ICC Court determined that documents exchanged between the litigants did not bind the parties to ICC arbitration.<sup>7</sup> The disappointed claimant brought suit before the Tribunal de grande instance of Paris seeking to compel the ICC to constitute an arbitral tribunal to hear the affair. The French court found that there was no proof that the ICC Court committed any wrong in refusing to organize the arbitration solicited by the claimant. Because of the administrative nature of the ICC Court's mission, the French court did not itself consider whether arbitral jurisdiction existed, but only whether the ICC Court had fulfilled its role under the Rules.<sup>8</sup>

Such administrative determinations by the ICC Court would not in any event be subject to the court supervision normally accorded arbitral awards under national law. Only an award by the arbitral tribunal itself constitutes the exercise of decision-making powers which, at the arbitral seat or place of award recognition, would be subject to judicial review.

#### IV. – ARBITRATORS' AUTHORITY TO DETERMINE THEIR OWN JURISDICTION

##### A. – Overview

As mentioned earlier, the default rule in ICC arbitration remains that challenges to arbitral authority normally get decided by the arbitral tribunal itself, unless the ICC Court fails to be "*prima facie* satisfied" that an arbitration agreement may exist. The arbitrator's jurisdictional determination, however, does not necessarily end the story. Normally, a dissatisfied party may challenge the award

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6. See generally, A. DIMOLITSA, *Issues Concerning the Existence, Validity and Effectiveness of the Arbitration Agreement*, 7 ICC Bull. 14 (Dec. 1996). – Y. DERAÏNS & E. A. SCHWARTZ, *A guide to the ICC Rules on Arbitration* 61 (2<sup>nd</sup> ed. 2005), 87-99.

7. TGI Paris, 8 Oct. 1986 : *Rev. arb.* 1987, 367. – P. FOUCHARD, *Les institutions permanentes d'arbitrage devant le juge étatique* : *Rev. arb.* 1987, 225, 233.

8. Of course, if a suit were brought before a national court on the merits of the dispute, the national court would ordinarily be required to determine, as a preliminary matter, whether there was in fact a binding arbitration agreement despite the ICC Court's negative finding. See *JDI* 1987, 1039, 1044 (note Y.D.).

for lack of jurisdiction before national courts either at the arbitral seat or in the enforcement forum.

Challenge in national courts often raises application of the so-called *Kompetenz-Kompetenz* principle, which take on various forms and begs two further questions, one relating to timing and the other to finality. Indeed, few terms have been subject to the confusion that surrounds the chameleon-like catch-phrase *Kompetenz-Kompetenz* (or *compétence-compétence*, depending on whether one prefers the French or the German formulation). The over-simplification has on occasion resulted in misunderstanding of how the ICC Rules operate.

Literally translated as “jurisdiction on jurisdiction” this principle has most often been pressed into service when one side challenges an arbitrator’s power to hear a case or to decide a particular issue.<sup>9</sup>

As regards timing of judicial intervention, the difference in approaches becomes significant when one side to the dispute makes application to a court with supervisory competence over the arbitration, asking that the proceedings be stopped or that a case be heard notwithstanding an alleged arbitration clause.

Between two extremes, many legal systems provide hybrid timing solutions that vary according to the specific posture in which arbitral jurisdiction has been challenged. One standard might apply when a legal action is brought in respect of matters purportedly referred to arbitration. Another standard might pertain to a motion for declaratory judicial determination of preliminary jurisdictional questions. Distinctions might be made depending on whether the applicant has or has not taken part in the arbitration.

The second question relates to the effect of an arbitration agreement on jurisdictional questions. A legal system might take the position that all arbitral decisions on jurisdiction may be reviewed *de novo* by the appropriate court. However, such is not the only option. An alternative would be for courts to ask what jurisdictional matters the parties agreed the arbitrator would decide, and to defer accordingly.

In systems where courts defer to an arbitrator’s jurisdictional determination, judges must still examine arbitral authority. However, the analysis takes place at a different level, asking whether the parties intended an arbitrator to have the last word on a particular jurisdictional issue. The pertinent question is what the contract provides.<sup>10</sup>

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9. See generally P. MAYER, *L'autonomie de l'arbitre dans l'appréciation de sa propre compétence*, 217 Recueil des Cours (Académie de droit international de La Haye 1989) at 320. – E. GAILLARD, *L'effet négatif de la compétence-compétence*, in J. HALDY, J.-M. RAPP and P. FERRARI, eds., *Études de procédures et d'arbitrage en honneur de Jean-François Poudret*, Fac. dr. Lausanne, 1999, p. 385. – W. W. PARK, *Jurisdiction to Determine Jurisdiction*, in 13 ICCA Congress Series 5 (Permanent Court of Arbitration, The Hague, 2007).

10. The alternative of no judicial review does not necessarily conflict with the discussed timing alternatives. It might be that an American court, examining jurisdiction early in the game when a motion is made to compel arbitration, comes to the conclusion that the parties intended for the relevant issue to be given to the arbitrator for decision.

With the obvious exception of challenges based on public policy (non-arbitrable subjects), analysis would normally focus on the parties' pre-dispute intent. Courts must examine the facts of each case as they bear on the parties' pre-dispute expectations. If the litigants intended to arbitrate a particular jurisdictional question, the matter would be given to the arbitrator for ultimate disposition, not just an expression of preliminary views. However, in all events courts would first look seriously at the parties' expectations.

Although private, arbitration proceeds in the shadow of public coercion. Arbitrators have no marshals or sheriffs, and thus parties often ask judges to stay litigation, compel arbitral proceedings, seize assets or grant *res judicata* effect to an award so as to preclude competing court actions. The contours of arbitral power thus concern not only arbitrator and litigants, but also national legal systems which must establish guidelines for when and to what extent courts may intervene to review or to pre-empt the arbitrator's jurisdictional ruling.

Accordingly, from the perspective of a national legal system, challenges to an arbitrator's authority raise two distinct questions. The first relates to the point in the arbitral process when courts ought to examine arbitral authority to prevent or correct an excess of jurisdiction. The second addresses the matter of when (if ever) courts should defer to an arbitrator's jurisdictional determination as final.

The principle that arbitrators may address questions related to their own authority says nothing about who ultimately decides a particular case. Nor does the principle say whether national courts will give deference to an arbitral tribunal's jurisdictional ruling, or fix the moment at which judges might consider the matter.

### B. – Different Types of *Kompetenz-Kompetenz*

National legal systems have taken at least three different approaches to these questions, in some events adding various wrinkles to the basic paradigms on timing of court intervention and finality of arbitral determinations on jurisdiction.

#### 1° No Need to Stop the Arbitration

In its most primitive form, *Kompetenz-Kompetenz* means only that arbitral proceedings need not stop just because one side challenges the arbitrator's authority. Until a competent court directs otherwise, arbitrators may offer an opinion on the limits of their own authority, but without in any way restricting the court's consideration of the same question. The arbitrator's right to make jurisdictional rulings operates in tandem with a rule allowing courts to examine arbitral jurisdiction before an award has been rendered. Although the arbitration does not necessarily stop, neither do related judicial actions. Courts proceed pursuant to whatever motions might be available under local law. In some countries, such as the United States,<sup>11</sup> courts may

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11. See *Sandvik AB. v. Advent Int'l Corp.*, 220 F. 3d 99 (3<sup>rd</sup> Cir. 2000).

intervene from day one and even direct the arbitration proceedings stayed during determination of issues on which the arbitral jurisdiction depends. In others, courts would have full power to address arbitral jurisdiction in the context of lawsuits on the merits of the claim, as well as declaratory judgments such as motions to compel or to stay arbitration.<sup>12</sup>

In the United States, courts address arbitration questions in connection with motions to stay court proceedings or to compel arbitration. In practice, arbitration proceedings usually go forward despite arguments as to the scope or contested survival of a clause, such as by reason of bankruptcy or assignment. However, courts will provide early decisions on the validity of a dispute resolution clause alleged to be void *ab initio* because, for instance, the person signing the contract lacked authority to commit the company sought to be bound.<sup>13</sup> At one time, the position in England was roughly analogous to that in the United States,<sup>14</sup> although the 1996 English Arbitration Act added nuance, with the result in some instances depending on whether the objecting party participated in the arbitration.<sup>15</sup>

## 2° Giving Arbitrators the First Word

In other legal systems, recourse to courts must await the end of the arbitration, after an award has been rendered. This version of *Kompetenz-Kompetenz* lays down rules not only about what arbitrators may do, but what judges may *not* do. The negative effect of the principle tells courts to wait until the arbitration ends before inquiring about the validity or effect of an arbitration clause.

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12. See German ZPO Sect. 1032 (2). Furthermore, for declaratory decisions the law sometimes limits the circumstances in which such applications may be made. In Germany an application for a court declaration on the arbitration clause may be made only before the tribunal is constituted. The arbitration proceedings may still be commenced while the court action is pending (ZPO Sect. 1032(3)).
  13. See e.g., *Apollo Computer v. Berg*, 886 F.2d 469 (1<sup>st</sup> Cir. 1989) (court refused to enjoin ICC arbitration based on allegations that the arbitration agreement had not been validly assigned by trustee in bankruptcy and that any assignment was unenforceable due to non-assignment clause in contract; these issues were for ICC arbitrators.); *Tbree Valleys Municipal Water District v. E.P. Hutton*, 925 F.2d 1136 (9<sup>th</sup> Cir. 1991) (court must determine whether person signing arbitration agreement had authority to do so.). *Paine Webber v. Elahi*, 87 F.3d 589 (1<sup>st</sup> Cir. 1996). See generally, W. W. PARK, *Arbitral Jurisdiction in the United States*, 11 Int'l Arb. L. Rev. 33 (2008).
  14. See M. J. MUSTILL and S. C. BOYD, *Commercial Arbitration* (1982 ed.), p. 514-515, discussing the possibility of declaratory relief on questions of jurisdiction under the law as it stood prior to 1996.
  15. Under Section 32 of the 1996 Act, a party to ongoing arbitral proceedings may seek judicial determination of a jurisdictional question only with the agreement of all parties or of the arbitral tribunal, or if the tribunal grants permission and a court finds that addressing the question is likely to produce substantial savings in costs. Under Section 72 of the 1996 Act, a party who takes no part in the arbitral proceedings may seek declarations or injunction from the court on the ground that there was no valid arbitration agreement.

Best exemplified by French law, this approach means that if an arbitrator has already begun to hear the matter, courts must decline to hear the case.<sup>16</sup> The French Code of Civil Procedure limits opportunities for court's intervention for domestic and international arbitrations. Only if an arbitral tribunal has not yet been seized of the matter may a court address jurisdiction, and then only if the alleged arbitration clause is "manifestly void."<sup>17</sup>

This so-called "negative" *Kompetenz-Kompetenz* addresses the flip side of the equation: not the arbitrators' power to decide jurisdictional questions, but the time limitations on courts' ability to hear challenges to the competence of an arbitral tribunal.

At issue here is the timing, rather than the extent or finality, of judicial review. Going to court at the beginning of the proceedings can save expenses for a defendant improperly joined to the arbitration. On the other hand, judicial resources may be conserved by delaying review until the end of the process, by which time the parties may have settled.

The French timing mechanism has not gained widespread acceptance. Outside France, most legal systems follow a more flexible and nuanced approach with respect to court intervention. Significant departures from French practice can be seen in Sweden and Switzerland, as well as nations such as Germany, which follow the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law").

When French courts do consider arbitral jurisdiction, they have full authority to vacate an award for excess of jurisdiction. Grounds for annulment include Article 1520(1) (the arbitral tribunal incorrectly declared itself to have jurisdiction or not to have jurisdiction) and Article 1520(3) (the arbitral tribunal decided without conformity to the mission conferred upon it) of the Code de Procédure Civile.<sup>18</sup>

Even in France, however, courts sometimes intervene early in the arbitral process to ensure the proper constitution of an arbitral tribunal. The case of *Elf Neftegaz v. Matte* arose from an arbitration with a Stockholm seat under the UNCITRAL Rules, commenced by a Russian entity against a French company that had earlier

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16. E. GAILLARD, *L'effet négatif de la compétence-compétence*, in J. HALDY, J.-M. RAPP and P. FERRARI (eds.), *Études de procédures et arbitrage en honneur de Jean-François Poudret*, Fac. dr. Lausanne, 1999, p. 385.

17. French Code of Civil Procedure, Art. 1448 (pursuant to Article 1506 applicable to international arbitration) provides as follows: « Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable. » D. n° 2011-48, 13 Jan. 2011. Translated: "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable." Article 1465 of the French Code of Civil Procedure also states explicitly that an arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction.

18. Article 1520 of the Code de Procédure Civile provides as follows: « Le recours en annulation n'est ouvert que si : 1. Le tribunal arbitral s'est déclaré à tort compétent ou incompétent ou [\*\*\*] 3. Le tribunal arbitral a statué sans se conformer à la mission qui lui avait été confiée. »

been dissolved.<sup>19</sup> After a court-appointed representative had nominated an arbitrator on behalf of the liquidated French entity, the nomination was challenged by the French parent of the dissolved subsidiary. Another French court directed resignation of the arbitrator appointed contrary to the wishes of the parent. The Cour de cassation confirmed the principle that French courts had power to determine the validity of an arbitral appointment for a French entity, even after constitution of the tribunal, and even with the arbitral seat abroad. According to the Cour de cassation, the validity of a putative arbitral appointment, in turn, will determine the jurisdiction of an alleged tribunal to render a binding award.

Some states take a hybrid approach to the nature of judicial consideration of jurisdictional objections. In Switzerland, for example, courts engage in only summary examination of arbitral authority when the seat of the proceedings is inside the country.<sup>20</sup> When the arbitral seat lies outside of Switzerland, however, the *Tribunal fédéral* has called for a fuller and more comprehensive examination of the validity of the arbitration agreement,<sup>21</sup> for example if the arbitration clause is invoked in a Swiss court action on the merits of the dispute allegedly brought in disregard of the agreement to arbitrate.<sup>22</sup> The distinction between arbitration

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19. Cass. 1<sup>re</sup> civ., 28 mars 2013, arrêt n° 393. The underlying arbitration had been brought by the Russian entity, Interneft, in connection with a contract for exploitation of hydrocarbon deposits implicating a subsidiary of the French group Elf Aquitaine.
  20. Tribunal fédéral, ATF 122 III 139, 29 Apr. 1996, *Fondation M v. Banque X*, which holds at consideration 2(b): « Il est généralement admis que, si le juge étatique est saisi d'une exception d'arbitrage et que le tribunal arbitral a son siège en Suisse, le juge se limitera à un examen sommaire de l'existence *prima facie* d'une convention d'arbitrage, afin de ne pas préjuger de la décision du tribunal arbitral sur sa propre compétence. » ("It is generally accepted that if a state judge hears a defence based on arbitration, and the arbitral tribunal has its seat in Switzerland, the judge will limit himself to a summary examination of the *prima facie* existence of the arbitration agreement, in order not to prejudice the arbitral tribunal's decision on its own jurisdiction.")
  21. *Tribunal fédéral*, ATF 121 III 38, 16 Jan. 1995, *Cie de Navigation et Transports SA v. MSC Mediterranean Shipping Company SA*. The court stated at consideration 3(b), « En revanche, si le tribunal arbitral a son siège à l'étranger, le juge étatique suisse, devant lequel une exception d'arbitrage est soulevée, doit statuer sur ce moyen de défense avec plein pouvoir d'examen quant aux griefs soulevés, et en particulier celui déduit de l'article II al. 3 de la Convention de New York, sans pouvoir se limiter à un examen *prima facie*. » (By contrast [to arbitration conducted inside Switzerland] if the arbitral tribunal has its seat abroad, the state judge before whom the arbitration exception is raised must decide on this defense with full powers of examination concerning the grounds for challenge, and in particular that of Article II (3) of the New York Convention, without limiting himself to a *prima facie* examination).
  22. In applying Article II of the New York Convention (requiring reference to arbitration unless the clause is void, inoperative or incapable of being performed), courts would *not* limit themselves to a summary (*prima facie*) examination of the validity of the agreement to arbitrate. Article 186 of the Private International Law Act (LDIP/IPRG) provides that an arbitral tribunal shall decide on its own jurisdiction, with subsection 1bis permitting a jurisdictional determination notwithstanding an action on the same matter between the same parties already pending before a national court or another arbitral tribunal, unless there are serious reasons to stay the proceedings. For Swiss domestic arbitration, one would normally look to Chapter 3 of the Federal Swiss Code of Civil Procedure.

held inside and outside of the country was recently confirmed in a decision by the Swiss Tribunal fédéral instructive for its illustration of how such matters arise.<sup>23</sup> Although the policy behind the distinction remains subject to lively scholarly debate (with some critics suggesting that judicial review should never pre-judge the arbitrators' determination of their own jurisdiction<sup>24</sup>), many thoughtful observers will note the logic of the Swiss rule, in that jurisdictional mistakes by an arbitral tribunal sitting in Switzerland will be subject to judicial correction at the moment of a vacatur motion, which is not true of foreign arbitral tribunals.

In deciding whether to hear a claim brought before a Swiss court, the court itself can hardly avoid assessing, according to its own standards, the validity and extent of any alleged waiver by judicial jurisdiction by reason of the arbitration clause. Moreover, the notion of "summary" examination of jurisdiction remains a complex matter in the context of arbitral awards, given that an arbitrator either does or does not have jurisdiction. An improperly constituted tribunal does not assume legitimacy just because the lack of authority is not easily detected.<sup>25</sup>

### 3° The Arbitrator's Decision is Final

Regardless of when judges entertain motions on arbitral jurisdiction, the parties might agree, expressly or impliedly, to subject the jurisdictional question to arbitration. In some legal systems, such jurisdictional determinations by the arbitrator would be given deference by reviewing courts. In essence, the parties' agreement transforms the jurisdictional difference into a disputed question of fact or law, whose substantive merits the litigants submit to final determination by an

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23. *X A.G. v. Y / ATF, 4A\_119/2012* (I. zivilrechtliche Abteilung), 6 Aug. 2012. German original available on Tribunal fédéral website. A contract implicating an asset manager in Zürich and a German client contemplated creation of a Panama foundation which in turn was to manage a portfolio deposited with a Swiss bank. After losses, the client alleged negligent management, including asset transfer to an Austrian bank without instructions from the client. When the client sued in the Zürich Commercial Court, of Zurich, the portfolio manager objected to the jurisdiction of the court on the basis of the arbitration clause, which provided for arbitration in Zurich.

24. See J.-F. POUURET and G. COTTIER, *Remarques sur l'Application de l'Article II de la Convention de New York*, 13 ASA Bull. 383 (1995). The authors write, « Si cette solution doit certes être approuvée, la motivation qui la soutient repose toutefois sur une distinction peu convaincante et même infondée... » *Id.*, at 387. See also A. BUCHER, *L'examen de la compétence internationale par le juge suisse : Semaine judiciaire* Oct. 2007, 129, n° 5, 153. — A. BUCHER, *Le nouvel arbitrage international en Suisse*, Helbing & Lichtenhahn, 1988, p. 55, n° 130.

25. Regardless of the merits of these competing arguments, the situation may well change. A parliamentary proposal would amend Article 7(2) of the Federal Conflicts of Law Code (LDIP/IPRG) to provide uniformity of approach regardless of arbitral seat. Under the proposal, a Swiss court will suspend its own decision until the arbitral tribunal has ruled on its jurisdiction unless a limited review demonstrates that there exists no arbitration clause binding the parties. The rule would apply regardless of whether the arbitration takes place inside or outside of Switzerland. At present, suspense surrounds the fate of the initiative. Consideration of the initiative was stayed until mid-2014.

arbitrator. The parties' agreement will determine whether this type of *Kompetenz-Kompetenz* makes sense. In each instance, the question for judges will be what the parties intend to submit to arbitration.

In the United States, a clear line of judicial pronouncements holds that in some situation arbitrators may rule on their own powers without subsequent *de novo* review by courts. Such grants of power require evidence of parties' real intent expressed in concrete language either in the main contract or in separate agreement.

In practice, giving arbitrators the last word on jurisdictional questions means that some litigants may well lose their access to court. The peril derives not so much from isolated mistakes, whether by arbitrators or by courts, but from the risk that an overburdened judiciary might fall into a systematic proclivity toward granting jurisdictional authority to arbitrators, even when contracts are ambiguous on the matter. Prior to Germany's adoption of the UNCITRAL Model Law in 1998,<sup>26</sup> court decisions had recognized that an arbitral tribunal might be granted the power to rule on its own jurisdiction pursuant to a specific clause, accepted by both parties, that implicitly dispensed with subsequent judicial review.<sup>27</sup>

### C. – Jurisdictional Determinations in ICC Practice

When a plea of lack of jurisdiction is raised, ICC arbitrators have a duty to proceed with determination of their own jurisdiction. Such obligation will usually remain even in the face of parallel action in national courts to nullify the arbitral proceedings. Any other rule would encourage parties to deploy dilatory judicial procedures, often in their own national courts, and to disregard their agreement to arbitrate.

Given this duty to proceed with the arbitration irrespective of the pendency of a judicial proceeding or injunctions contesting jurisdiction, only a direct order emanating from a competent court at the seat of the arbitration itself should ordinarily affect arbitral proceedings. Nevertheless, there may be cases in which the enjoined party decides not to continue the proceedings, for example if employees and/or assets are found in the country from which the injunction emanates.

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26. Countries that follow the UNCITRAL Model Law provide another twist on the timing of judicial review, giving the arbitral tribunal an explicit right to determine its own jurisdiction in the form of a "preliminary" award, subject to challenge on a request from a party within thirty days (Article 16). Arbitrators, of course, may choose to delay decisions on jurisdictional matters until the final award. See generally W. W. PARK, *Jurisdiction to Determine Jurisdiction*, in 13 ICCA Congress Series 55 (Permanent Court of Arbitration, The Hague, 2007), p. 85.

27. BGH, 5 mai 1977, III ZR 177/74. Reported in 68 BGHZ 356, p. 358. See discussion in P. SCHLOSSER, *Das Recht Der Internationalen Privaten Schiedsgerichtsbarkeit* (1989), § 556. – See generally, R. H. KREINDLER, J. K. SCHÄFER & R. WOLFF, *Schiedsgerichtsbarkeit Kompendium Für Die Praxis* (2006), § 191-193.

As discussed above, some jurisdictions allow the courts to intervene in the arbitral proceedings at any stage (United States approach). Furthermore, jurisdictions that do not permit recourse to the courts prior to the arbitral awards still provide procedural safeguards for dissatisfied litigants (France). In those jurisdictions, after an award is rendered it is subject to an action to have it set aside by the courts of the place of arbitration if it lacks a jurisdictional foundation.

In this regard, it is important not to confuse the allocation of functions between arbitrators and the supervisory arbitral institution (ICC Court) with the allocation of responsibility between arbitrators and national courts. The ICC Court *prima facie* finding that the arbitration agreement may exist forwards any jurisdictional challenge of a deeper nature to arbitrators. This does not mean that national courts will be deprived of power to make jurisdictional determinations when asked to stay litigation, enjoin arbitration or vacate the award. However, as discussed above, there is no uniform approach among jurisdictions to timing of judicial intervention or to scope of review of arbitral decision on jurisdiction. In ICC cases, the fact that the ICC Rules agreed by the parties specifically provide that the arbitrator will decide upon his own jurisdiction may well influence a court's decision not to intervene to determine most jurisdictional issues until after an award has been rendered.<sup>28</sup>

Even if the parties do not specifically raise any jurisdictional objection, the arbitrators will often, for good order, articulate the basis of jurisdiction in the award. If jurisdiction is specifically challenged, this will of course be one of the issues which the parties require to be determined in the award. Arbitral tribunals constituted under the ICC Rules have routinely over the last quarter century utilized the powers given to them by the ICC Rules to determine jurisdictional questions.<sup>29</sup>

Arguments that arbitral jurisdiction should be refused on the grounds that the award might not be enforceable at the domicile of the respondent are given

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28. In *Apollo Computer v. Berg*, 886 F.2d 469 (1<sup>st</sup> Cir. 1989) the court stated: "By contracting to have all disputes resolved according to the Rules of the ICC... Apollo agreed to be bound by Articles 8.3 and 8.4 [Articles 6.5 and 6.9 of the 2012 Rules]. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate whose continued existence and validity is being questioned." In *Andersen Consulting v. Andersen Worldwide Société Coopérative and Arthur Andersen LLP*, 1998 WL 122590 (SDNY 1998), claimant's demand for an injunction to compel respondents to arbitrate certain disputed issues in a pending ICC arbitration was denied.

29. See ICC Case 1007/1959, cited in P. SANDERS, *L'autonomie de la clause compromissoire*, in *Hommage à Frédéric Eisemann* 39 (ICC Publication n° 321, 1978). See also ICC Case 1526/1968, extracts in *JDI* 1974, 915. The arbitrator in this case stated: "It is a rule admitted in international arbitration matters that in the absence of a contrary decision of State procedural law, the arbitrator is judge of his own jurisdiction... This rule is invalidated neither by French law, law of the headquarters of the International Chamber of Commerce, nor by Swiss law, law of the seat of arbitration, nor by the law of [the African State in question]."

no weight in ICC arbitration, and properly so.<sup>30</sup> Moreover, ICC arbitrators would normally reject the argument that potential non-enforceability of an award in one state deprives the arbitrator of jurisdiction. Execution of the award may be sought in many other states. Indeed, national legislation may be modified during the arbitration so as to make the award enforceable by the time it is rendered. The jurisdiction of an ICC tribunal depends solely on the ICC Rules, the contract between the parties, and the laws applicable thereto.

Furthermore, the ICC Court's preliminary determination that the arbitration agreement may exist has no binding effect on the jurisdictional decision of the arbitral tribunal. If an objection passes the institutional gate-keeping function, the arbitrators themselves, not the ICC, make the final jurisdictional decision.<sup>31</sup>

#### D. – Separability

Jurisdictional determinations by ICC arbitrators will inevitably interact with other legal principles related to arbitral authority that affect national judicial deference to arbitrators' determinations about their own authority. Among the more important of these principles, the "separability" doctrine (or "autonomy" of the arbitration clause) has been reinforced by the ICC Rules.

Even in the face of an argument that the principal contract is void or voidable, the arbitration clause itself may remain effective. Article 6(9) of the ICC Rules provides that "Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement." Just as significantly, that provision continues to give the arbitral tribunal jurisdiction to determine "the respective rights of the parties and to decide their claims and pleas even though the contract itself may be non-existent or null and void."<sup>32</sup>

That the arbitration clause is deemed severable is a crucial factor when an allegation is made which, if proved, would nullify the principal contract.<sup>33</sup>

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30. See also ICC Case n° 2476/1976, I ICC Awards 289. In the award concerning a license agreement, Italian defendants argued that their consent to the agreement was vitiated and that in any event the arbitration award would not be enforceable in Italy because under Article 7 of the Italian Code of Civil Procedure, an Italian defendant could not be deprived of the right to be heard by his "natural judges," *i.e.*, the Italian courts. The arbitral tribunal rejected both grounds of attack on its jurisdiction, finding that the alleged lack of consent applied only to certain stipulations of the contract but not to the arbitration clause and stating that the question of execution after the award is in no way tied to that of jurisdiction of the arbitral tribunal.

31. ICC Case n° 4504/1985/1986, II ICC Awards 279. Authors' translation.

32. This acceptance of the independence of the arbitration clause is reflected in Article 23 of the UNCITRAL rules, Article 5(3) of the European (Geneva) Convention of 1961 and Article 41 of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Embracing this principle as well, the UNCITRAL Model Law also provides (in Article 16) for the initial determination by the arbitrator of his own jurisdiction.

33. See ICC Case n° 2476/1976, I ICC Awards 289.

## V. – ICC RULES ON MULTIPARTY AND MULTI-CONTRACT PROCEEDINGS

One of the more important aspects in the 2012 revision of the ICC Rules relates to complex arbitrations, in connection with matters such as joinder of parties (Article 7), claims between multiple parties (Article 8), claims arising out of multiple contracts (Article 9), and consolidation of arbitrations (Article 10). Except for Article 10, these provisions had no equivalent in the 1998 Rules.<sup>34</sup>

### A. – Joinder of Additional Parties

Article 7 is new to the ICC Rules, and does not have an equivalent in previous versions of the ICC Rules. However, before adoption of the current version of the ICC Rules “the Court and its Secretariat developed a number of practices under the 1998 Rules allowing additional parties to be joined to an arbitration in a limited number of circumstances.”<sup>35</sup>

Article 7 of the ICC Rules establishes a clear timeframe for requests for joinder. Such requests can be made only before the confirmation of any of the arbitrators, to ensure that every party participates in appointment of arbitrators pursuant to Article 12 of the ICC Rules. In most cases, this means that the Request for Joinder must be submitted no later than the Answer to the Request for Arbitration.

The principle now enshrined in Article 12(7) of the ICC Rules provides that the additional party may jointly with the Claimant(s) or Respondent(s) nominate an arbitrator for confirmation by the ICC Court. In the absence of a joint nomination, and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the ICC Court may appoint each member of the arbitral tribunal.<sup>36</sup>

Absent agreement of all the parties to the arbitration agreement, and of the party to be added to the proceedings (thus modifying the arbitration agreement), no authority under the ICC Rules permits the intervention of a third party either

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34. With regard to the new article on complex arbitrations commentators note that “[w]hile these rules are said to flow from recent developments of practice in the Court of Arbitration, they overturn what had been generally thought as a general principle of ICC arbitration, that the initial Claimant was the master of the arbitration and could decide, by its initial Request for Arbitration, the parties with which it wished to arbitrate in the proceedings.” W. L. CRAIG and L. JAEGER, *The 2012 ICC Rules: Important Changes and Issues for Future Resolution*, The Paris J. of Int’l Arb., n° 1, 2012, p. 5, 31 citing A.-M. WHITESELL and E. SILVA-ROMERO, *Multiparty and Multicontract Arbitration: Recent ICC Experience*, ICC, International Court of Arbitration, Bulletin, 2003 Special supplement, 8-18.

35. J. FRY, S. GREENBERG, F. MAZZA, *The Secretariat’s Guide to ICC Arbitration*, § 3-291 (2012).

36. Article 12(8) of the ICC Rules has been added in response to the *Dutco* decision. *Sociétés BKMI et Siemens v. Société Dutco construction*, Cour de cassation, 7 Jan. 1992 : *Rev. arb.* 1992, 470.

at its request or at the request of one of the parties to the arbitration.<sup>37</sup> Adding a party to the arbitration is subject to the same preliminary control by the Secretary General and the ICC Court as pleas concerning the existence, validity or scope of the arbitration agreement (Article 6(3) – 6(7)).

The Secretary General and/or ICC Court will verify that the criteria set out by Articles 6(4)(i) and 6(4)(ii) respectively for multi-party and multi-contract arbitrations, are met. This requires either that (i) the additional party is bound by the same arbitration agreement as the initial parties or (ii) in a multiple contract situation, that the additional party is bound by a different but compatible arbitration agreement and that all the parties agree to a single arbitration.

As mentioned earlier, joinder pursuant to Article 7 concerns the *timing* of adding a party. By contrast, joinder of non-signatories, discussed later, relates to whether the party sought to be joined has in fact consented to arbitration, regardless of whether or not the claim was filed in a timely fashion.

Under the ICC Rules, the request for joinder may be submitted only by the existing parties to the arbitration, which must in any event bring a claim against the additional party. Third parties cannot intervene in the existing arbitration *sua sponte*.<sup>38</sup>

## B. – Claims between Multiple Parties

Article 8 of the ICC Rules is entirely new and provides that “[i]n an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Article 6(3) – 6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without authorization of the arbitral tribunal pursuant to Article 23(4).” Article 8 of the ICC Rules makes it clear that all the parties to a multi-party

37. In this respect the ICC Rules are narrower than the LCIA Rules which do not require consent of all the parties as a condition for joinder and which provide in Article 22.1 under the heading “Additional Powers of the Arbitral Tribunal”: “Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to:... (h) allow, only upon application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.”

38. Commentators explain the absence of intervention mechanism in the ICC Rules by the ICC Secretariat and ICC Court’s duty of confidentiality with respect to existing proceedings and lack their authority to inform the third parties about existence of the arbitration. – P. MAYER and E. S. ROMERO, *Le nouveau règlement d’arbitrage de la Chambre de commerce internationale (CCI) : Rev. arb.* 2011, n° 4, p. 897, 913-914. « La raison en est simple. Ni la Cour, ni son Secrétariat, tous les deux tenus de respecter un devoir exprès de confidentialité... ne pourraient même pas informer un tiers désirant intervenir volontairement dans un arbitrage CCI de l’existence de celui-ci. ».

arbitration can bring claims against each other (when all the parties were named in the original Request for Arbitration or joined subsequently).<sup>39</sup> “Although this possibility was not prohibited under the 1998 Rules, their silence was sometimes misinterpreted as restricting claims to those between opposing sides in the dispute, thereby excluding claims made in between parties on the same side.”<sup>40</sup>

The procedure for making cross-claims is set forth in Article 8(2) and 8(3) and is similar to that for filing the Request for Arbitration and the Answer. One commentator notes that taking into account the increasing number of multiparty arbitrations, “one may expect difficulties in resolving jurisdictional issues both by the ICC Court and by arbitral tribunals. One guiding principle must not be forgotten: the Rules specify that an arbitration may proceed only if there is an arbitration agreement that binds all the parties.”<sup>41</sup>

### C. – Multiple Contracts

Pursuant to Article 9 “[s]ubject to provisions of Article 6(3) – 6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.”

Commentators opine that “there are two principal conditions required for a multi-contract claim to succeed: (i) that the arbitration agreements are compatible, and that the claims can be determined together in a single arbitration... The Secretary General would be expected in a complex case involving multiple parties and contracts to refer the matter to the Court of Arbitration for a *prima facie* decision.”<sup>42</sup>

### D. – Consolidation

The ICC Court’s relatively cautious approach to de facto consolidation may reflect the limited power of de jure consolidation – the right to order consolidation of separate pending arbitrations – provided in Article 10 of the ICC Rules. Article 10 provides *inter alia*:

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39. “In an arbitration with more than two parties, Article 8(1) explicitly allows one party to the arbitration, whether a claimant, respondent or additional party, to make claim against any other existing party.” J. FRY, S. GREENBERG, F. MAZZA, *The Secretariat’s Guide to ICC Arbitration*, § 3-332 (2012). – See also W. L. CRAIG and L. JAEGER, *The 2012 ICC Rules: Important Changes and Issues for Future Resolution*, The Paris J. of Int. Arb., n° 1, 2012, p. 15, 32.

40. J. FRY, S. GREENBERG, F. MAZZA, *The Secretariat’s Guide to ICC Arbitration*, § 3-325 (2012).

41. W. L. CRAIG and L. JAEGER, *The 2012 ICC Rules: Important Changes and Issues for Future Resolution*, The Paris J. of Int’l Arb., n° 1, 2012, p. 15, 32.

42. W. L. CRAIG and L. JAEGER, *The 2012 ICC Rules: Important Changes and Issues for Future Resolution*, The Paris J. of Int’l Arb., n° 1, 2012, p. 15, 29, 30.

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

- the parties have agreed to consolidation; or
- all of the claims in the arbitrations are made under the same arbitration agreement; or
- where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

Article 4(6) of the 1998 Rules provided that unless the parties agreed to consolidation, the ICC Court could merge the proceedings only when the arbitrations to be consolidated were between the same parties. Article 10 of the current ICC Rules adds that consolidation is also appropriate when all the parties have agreed to consolidation or when all of the claims in the arbitrations are made under the same arbitration agreement.

Finally, the ICC Court may consolidate proceedings where “the claims in the arbitrations are made under more than one arbitration agreement” if three conditions are met: (i) the arbitrations are between the same parties; (ii) the disputes arise in connection with the same legal relationship; and (iii) the arbitration agreements are compatible.

The ICC Rules do not give any guidelines as to the definition of the “same legal relationship.” Some commentators suggest that this term is equivalent to the “same economic transaction.”<sup>43</sup>

It has been suggested that consolidation pursuant to Article 10(c) will proceed pursuant to different standards from those set forth by Article 6(4)(ii) to determine *prima facie* satisfaction that an agreement to arbitrate exists. In each situation, the Court of Arbitration exercises a different function. In the former case, making a *prima facie* determination of jurisdiction, the ICC Court decides only that an arbitration may go forward, determining that the parties may well have agreed that the claims arising from different contracts might be arbitrated together. The arbitral tribunal will make a fuller investigation into its own jurisdiction.

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43. L. M. PAIR and P. FRANKENSTEIN, *The New ICC Rule on Consolidation: Progress or Change?* 25 Emory Int’l. L. Rev. 1061,1075 (2011) citing Y. DERAÏNS and E. A. SCHWARTZ, *A Guide to the ICC Rules on Arbitration* 61 (2<sup>nd</sup> ed. 2005). “The same legal transaction was found to exist when two separate agreements between the same parties, signed the same day and relating to products with the same definition, were subject to a dispute. In both cases the matter turned on whether the claimant had terminated the contracts. Relief sought was identical and most of the evidence involved both contracts. In a different instance, the ICC consolidated two cases based on the same project, in which one claim was based on the original contract and the second on the amended contract.” Pierre Mayer suggests that in the new version of ICC Rules “same legal relationship” should have been substituted with “same business transaction” See P. MAYER and E. S. ROMERO, *Le nouveau règlement d’arbitrage de la Chambre de commerce internationale (CCI) : Rev. arb.* 2011, n° 4, p. 897, 909. 2011.

On the other hand, when dealing with consolidation of proceedings, the ICC Court makes a decision that changes the procedural situation initially created by the parties. The requirements for such decisions are therefore stricter.

Some commentators opine that the ICC Court's decision concerning consolidation is final and that there is no subsequent review by the arbitral tribunal.<sup>44</sup> However, this does not necessarily mean that the ICC Court has exclusive powers to consolidate arbitral proceedings. Although not specifically mentioned in the ICC Rules, powers of the arbitral tribunal to consolidate proceedings, if authorized to do so by the parties' arbitration agreement, are generally recognized by the ICC Court.

Article 10 eliminates any strict time frame for consolidation. The ICC Court may take into account any circumstances it considers to be relevant. Among these factors, it may be pertinent that arbitrators have already been confirmed in more than one arbitration, or that the same (or different) individuals have been appointed.<sup>45</sup>

In many instances, a type of *de facto* consolidation may be attempted when a party seeks to raise claims and counterclaims from related contracts before the originally constituted arbitral tribunal. Article 10 was not designed to address those situations, but rather circumstances in which one of the parties chooses to bring a separate arbitration. The claimant, for instance, may decide to split its claims, or the defendant in a first-filed arbitration may elect to act as claimant in new proceedings.

Under the 1998 Rules, the ICC Court had generally been reluctant to order consolidation of separate proceedings where one of the parties opposed consolidation. Criticism was leveled against the ICC Court's practice of refusing consolidation, permitting a claimant to split its causes of action into separate arbitral proceedings for tactical reasons.<sup>46</sup> To the extent this policy is maintained, new Article 10 loses much of its utility since the pendency of separate arbitrations between the same parties concerning disputes arising in connection with the same legal relationship or arbitrations arising from the same arbitration agreement most frequently is the result of a conscious preference of one of the parties for separate arbitrations. At present, only time will tell.

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44. W. L. CRAIG and L. JAEGER, *The 2012 ICC Rules: Important Changes and Issues for Future Resolution*, *The Paris J. of Int'l Arb.*, n° 1, 2012, p. 15, 30.

45. See P. MAYER and E. S. ROMERO, *Le nouveau règlement d'arbitrage de la Chambre de Commerce Internationale (CCI)* : *Rev. arb.* 2011, n° 4, p. 897, 908.

46. See P. LÉBOULANGER, *Multi-Contract Arbitration*, 13 *J. Int. Arb.* n° 4 (1996), 43.

## VI. – THE QUESTION OF NON-SIGNATORIES

### A. – ICC Arbitrations as Case Law

One oft-vexed objection to face ICC arbitrators concerns the so-called “non-signatory” to the arbitration agreement. As discussed earlier, joinder of non-obvious parties by the arbitral tribunal, in the exercise of its jurisdictional functions, remains a matter distinct from the question of whether Article 7 of the ICC Rules permits additional parties to be joined after the arbitration has commenced.

In this connection, ICC cases have long contributed to the establishment of transnational norms related to the extension of arbitration clauses to companies and individuals that had not actually signed the relevant agreement. As discussed below, such norms do not supplant clearly applicable national law, but rather provide guidance to arbitrators seeking to make decisions that meet the shared expectations of the international commercial community.

The joinder of non-signatories will most often be assessed by reference to principles such as agency, estoppel, fraud, or piercing the corporate veil. Although it remains uncontroversial that consent must be the foundation of arbitration, such consent may be manifested in different ways.<sup>47</sup> Under the above-mentioned doctrines, a person may be bound by, or may benefit from, an admittedly existing arbitration agreement signed by someone else.

The non-signatory issue may arise even when all potential parties have agreed to arbitration, but not with each other. For example, in a construction project the owner might agree to ICC arbitration with its main contractor, who in turn has agreed to ICC arbitration with its sub-contractor. In the course of arbitration with the owner, the main contractor may wish to have the sub-contractor included in the proceeding. The sub-contractor might object on the basis that it had never signed a contract with the owner. Although neither the ICC Court nor an arbitral tribunal has power to create an agreement to arbitrate between the owner and the sub-contractor, this does not mean that in some circumstances implied consent might not be found in a course of parties’ conduct or through an agency relationship.

### B. – Unsigned Agreements

Although many legal systems impose no requirement that arbitration agreements must take the form of signed documents,<sup>48</sup> the expression “non-signatory”

47. W. W. PARK *Non-signatories and International Contracts: An Arbitrator's Dilemma*, in *Multiple Party Actions in International Arbitration* 3 (2009); adapted from *Non-Signatories and International Arbitration*, *Leading Arbitrators' Guide to International Arbitration* 553 (L. NEWMAN and R. HILL, 2<sup>nd</sup> ed. 2008); reprinted 2 *Dispute Res. Int'l* 84 (2008).

48. Some countries enforce arbitration agreements made orally. Furthermore, national arbitration statutes often recognize consent memorialized in unsigned written provisions, as does UNCITRAL Model Law. The New York Convention covers agreements to arbitrate concluded through unsigned exchanges of letters and telegrams.

has taken a linguistic currency to capture a wide range of concerns about the existence or validity of an arbitration agreement. The term thus remains useful for what might be called “less-than-obvious” parties to an arbitration clause: individuals and entities that never signed the agreement, but still should be part of an arbitration under the circumstances of the relevant business relationship, and whose right or obligation to arbitrate may be real but not self-evident.

The fact that a “non-signatory” might be bound to arbitrate does not dispense with the need for an arbitration agreement. Rather it means only that the agreement takes its binding force through some circumstance other than the formality of signature. The legal framework for normal commercial arbitrations (whether statute, treaty or institutional rules) continues to require some assent to arbitrate, whether express, implied or incorporated by reference to other documents or transactions.

Verbal formulae vary from one legal system to another. However, most explanations of joinder relate either to (i) implied consent or (ii) disregard of corporate personality. In each case, an agreement to arbitrate must exist. Nonetheless, the effect of that agreement extends beyond the named signatories, by virtue of behavior that either suggests acceptance of the agreement by someone else or justifies going beyond the corporate form of the signatory entity. In all instances, the exercise of joining non-signatories implicates a tension between two principles: maintaining arbitration’s consensual nature, and maximizing an award’s practical effectiveness by binding related persons.

### C. – Governing Law

When the issue of non-signatories has been raised, arbitrators can face a “chicken and egg” conundrum. The side arguing that an arbitration agreement exists might urge application of the governing law designated by the contract itself, even though that law was clearly not intended to govern relationships with strangers.

Choice of law questions can present themselves to arbitration and courts in very different procedural contexts. Arbitrators need to decide whether the factual and legal context of the dispute permits joinder of an entity that never signed the contract. Courts, however, may need to decide the preliminary matter of whether they even have jurisdiction to entertain an application with respect to foreign proceedings, where one side asks that an award be vacated or proceedings enjoined.

Moreover, even when addressing similar questions about non-signatories, judges have a much easier job than arbitrators in finding applicable standards. Courts can look to the conflict of laws principles or substantive contract law of the legal systems from which they draw their judicial authority. By contrast, international arbitrators derive their decision making power from no single national jurisdiction. Arbitration implicates a renunciation of dispute resolution in

national courts, with the litigant agreement serving as the foundation for the arbitrators' authority and mission.

If "X" never accepted the contract, it would not have consented to its applicable law or the standards at the arbitral seat. The relevance of each depends on assent. Although each legal system might affect award enforcement, either would be problematic in guiding the arbitrator on whether "X" consented to arbitrate.

When a non-signatory denies having consented to arbitrate, the very existence of that arbitration agreement remains at the heart of the parties' dispute. An arbitrator whose decision rests on a single version of contested facts (the assertion that "X" agreed to arbitrate) would be open to the charge of having engaged in a circular exercise, presuming the very fact that remains open for determination and starting from the contested conclusion whose truth must be evaluated.

One way out of the arbitrators' dilemma lies in seeking notions of "agreement" divorced from any particular national legal system. Such suggestions often find voice in ICC arbitral awards. Standards articulated in published decisions, supplemented by scholarly comment, often provide intellectual coherence and practical merit for arbitrators seeking guidance on questions related to non-signatories. Such transnational norms reach for common sense notions of contract distinct from a governing law whose relevance depends on the story told by one side to the dispute. Their intelligent application can enhance the procedural predictability of international arbitration.

These standards constitute part of a larger corpus of emerging principles sometimes described as *lex mercatoria*, commanding wider application than trade practices derived from specific professions, and remaining distinct from general principles of law. While not binding in the strict sense of "precedent" as applied by a single national judiciary, transnational norms often serve an analogous function in that they represent decisional authority from one case likely to justify the award in another. Increasingly, one even sees a tendency for arbitrators to scrutinize general pronouncements in earlier awards with the aim of distinguishing what some legal traditions consider *obiter dictum* statements not essential to determination of the case.

Such norms can justify themselves as the best calculus for determining reasonable expectations of litigants from diverse legal cultures, as a way to promote fair dispute resolution in a global community where not all commercial actors accept the parochial standards of a single national law.

Article 21(1) of the ICC Rules supports application on non-national law by permitting arbitrators to apply "rules of law" (not limited to national legal systems) that they determine as "appropriate." This approach commends itself in the absence of a clear agreement by the parties. One may argue that this is precisely the situation arising when a request for joinder of a non-signatory is made to the arbitral tribunal.

When joinder is urged on the basis of implied consent, application of transnational norms reduces the circularity inherent in reliance on the law of the contract or the arbitral situs, neither of which may be relevant with respect to a

stranger to the transaction. By contrast, when joinder rests principally on lack of corporate personality, arbitrators often begin with the place of incorporation, reducing the role played by transnational norms.<sup>49</sup>

#### D. – ICC Practice

An example of how the issue may be raised is found in ICC Case 4402/1983<sup>50</sup> involving a dispute under an oil field operating agreement in which a French company had agreed to act as operator. When disputes arose under the agreement, the claimant companies sought to join in the arbitration not only the French operating company, but also its French parent company which was not a party to the agreement. In support of ICC jurisdiction, it was argued, in pleadings addressed to the ICC Court, that the parent company had previously signed a “Protocole d’Accord n° 1” pursuant to which it had entered into commitments concerning operations and had agreed on the key clauses to be contained in the Operating Agreement, including ICC arbitration. The parent company had reserved the option to decide whether it would intervene in the Operating Agreement directly or via a subsidiary. The claimants alleged that the French parent company was the real party in interest and that the Operating Agreement, and its signature by a subsidiary company, was merely the execution of a pre-existing obligation, including the obligation to arbitrate.

The French parent company pointed out that the Protocole d’Accord n° 1 was an entirely separate agreement, containing a specific forum selection clause in favor of the ordinary courts of law in Luxembourg, and that its signature of that agreement did not make it a party to the Operating Agreement.

The ICC Court found, however, *prima facie* evidence of an agreement to arbitrate binding not only the French operating company, but also the French parent company, and ordered the arbitration to proceed against both parties in accordance with Article 8(3) of the Rules [Article 6(3) of the 2012 Rules].<sup>51</sup>

To determine the jurisdictional issue, the arbitral tribunal was required to investigate in detail the factual relationships between the parties, their conduct, and the various contractual documents signed by them, as well as the provisions of applicable law. The relevant Swiss law required that an arbitration agreement must be in writing, thus inhibiting any argument that the parent company’s consent to arbitration could be implied. In the circumstances, the tribunal found that the officer of the subsidiary who signed the Operating Agreement could not

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49. This general principle comports with commercial expectations of most business managers, and presents no unfair surprises.

50. VIII Yearbook 204 (1983).

51. VIII Yearbook 204 (1983). In this case the decision was taken by the President of the ICC Court exercising the power granted to him under Article 1(3) “to take urgent decisions on behalf of the Court.” The effect was the same as a decision taken by the full Court.

be found to have been acting for and on behalf of the parent company. Nor, in view of the separate legal identity of the related companies, could it be found that the subsidiary was acting as an agent of the group. Claimant had the obligation to prove that the parent company was, in fact, a party to the Operating Agreement, and had failed to carry this burden. The arbitral tribunal rendered a partial award denying arbitral jurisdiction over the French parent company,<sup>52</sup> and rejected the argument that the conduct of the parties proved an implicit agreement to arbitrate.

The lengthy briefing of factual and legal issues, and the arbitrators' handing down of a fully reasoned partial award, illustrates the distinction between a finding on arbitral jurisdiction by an arbitral tribunal, and the preliminary determination by the ICC Court. It is obvious that where the ICC Court is presented with a plausible theory of arbitral jurisdiction over a party which has not signed the arbitration agreement, it will favor making a finding of *prima facie* jurisdiction and will leave disputed questions for the arbitral tribunal. It will be for the arbitral tribunal to determine what the parties intended and to rule on all disputed issues of law and fact.

ICC arbitral tribunals have been called upon to decide the following jurisdictional questions:

- “(i) whether representatives of a company which initiated an arbitration agreement on behalf of a company to be formed bound the existing company to arbitrate;<sup>53</sup>
- (ii) whether a state agency or entity bound the state itself to arbitral jurisdiction;<sup>54</sup>
- (iii) whether a member of a group of corporations could appear as a claimant with respect to injury caused to it as seller under the terms of a distribution agreement entered into by another member of its group and containing an arbitration clause;<sup>55</sup>
- (iv) whether a member of a group of companies having played a role in the negotiation of the contract containing an arbitration agreement, and signed by a member of its group, could be joined to the arbitration proceedings as respondent;<sup>56</sup>
- (v) whether a company intended to be the beneficiary of an agreement containing an arbitration clause, but not a signatory thereof, could itself claim the benefit of arbitration;
- (vi) whether a corporation was bound by an ICC arbitration clause entered into by an officer and employee having general powers of representation when it was alleged that certain signature formalities required under the law of incorporation had not been respected;

52. IX Yearbook 138 (1984).

53. ICC Case 5065/1986, *JDI* 1987, 1039.

54. See, e.g., ICC Case 1803/1972, V Yearbook 177 (1980); ICC Case 3493/1983, *Southern Pacific Properties v. EGOTH and the Arab Republic of Egypt*, 22 ILM 752 (1983), and subsequent court proceedings, *Rev. arb.* 1986, 75.

55. ICC Case 4131, interim award of 23 September 1982, *Dow Chemical v. Isover-Saint Gobain*: *Rev. arb.* 1984, 137 (full text), IX Yearbook 131 (1984).

56. ICC Case 4504, interim award of 1985, *JDI* 1986, 1118.

- (vii) whether a state was bound by the acts of its minister when it was alleged that certain formalities required under the law of that state were not complied with;
- (viii) whether a sub-contractor which had signed an arbitration clause with the main contractor was also bound to arbitrate in a comprehensive proceeding with the owner of the works due to incorporation by reference of the arbitration clause between the contractor and the owner;
- (ix) whether states which were members of a joint venture consortium, in the nature of a partnership, were individually bound to arbitrate pursuant to the terms of an arbitration agreement entered into by the consortium entity with a third party contractor;<sup>57</sup>
- (x) whether multiple contracts (agreement and distributorship) constituted a single contractual ensemble;<sup>58</sup>
- (xi) whether non-signatories who played a critical role at the time the contract was concluded were bound by it. The related signatory was formed only for specific purpose of qualifying for an exemption from the value added tax;<sup>59</sup> and
- (xii) whether participation of the non-signatory in the contract negotiation is sufficient evidence of consent to arbitrate.”<sup>60</sup>

The solution to such diverse issues will normally require arbitrators to address principles of agency and contract under applicable systems of law supply the basis by which a non-signatory may in some cases be obligated under, or may claim the benefit of, an arbitration clause. Yet the burden of the party requesting extension of the arbitration agreement under such principles is great, particularly where mandatory procedural requirements in force at the place of arbitration may impose additional formal conditions. Much time and money may be spent arguing these issues, a disadvantage which is compounded by the knowledge that jurisdictional issues decided by the arbitrators are subject to review by national courts, whether in review proceedings at the place of arbitration or in proceedings brought elsewhere to secure execution of the award.<sup>61</sup>

Occasionally, the circumstances which lead to jurisdictional claims on behalf of or against a non-signatory party could not have been foreseen at the time of contracting. Principles of construction and implication may be invoked to effect what must have been the true intent of the original parties to the arbitration agreement and to parties related to them. More frequently, the issue of the rights or liabilities of non-signatory parties arises because of a failure of contract drafters

57. ICC Case 3879, interim award of 5 March 1984, *Westland Helicopters, Ltd. (U.K.) v. A.O.I. et al.*, 23 ILM 1071 (1984), XI Yearbook 127 (1986). Tribunal fédéral Suisse, 19 July 1988, 1988 Swiss Bull. 220.

58. ICC Case 8910 decided in *JDI* 1998, p. 1085 (2000).

59. ICC Case 11160 decided in 2002, XVI n° 2 *ICC Bull.*, p. 99-101.

60. ICC Case n° 10758 decided in 2000, XVI n° 2 *ICC Bull.*, p. 94-98; *JDI* 2001, p. 1171.

61. See *Dallab Real Estate & Tourism Holding Co. v. Gov't of Pakistan*, [2010] UKSC 46. Although the British Supreme Court held that there was no justification to join the government of Pakistan as respondent to the proceedings, an analogous decision by the Paris *Cour d'appel* came to the opposite conclusion, dismissing a challenge to an award against the state. *Cour d'appel* [CA] de Paris, Case n° 09-28533, 17 Feb. 2011.

to take the most rudimentary precautions. In such circumstances, the chances are that the arbitral tribunal will find it impossible to make for the parties a contract which they failed to achieve by themselves.

It is difficult to generalize as to the circumstances in which non-signatories will be found to be subject to the terms of an agreement calling for ICC arbitration. The variation in approaches of different national courts is considerable, but the consequence of such variability should not be over-emphasized: a claimant is likely to seek to join a non-signatory party as respondent where justified without excessive concern about enforcement in that party's home court jurisdiction. For instance, where the issue is the liability of a state for the obligations incurred by a public corporation or authority, it is accepted that enforcement against the sovereign in its own courts will be difficult. The issue of determining liability is of great importance in and of itself, however, and has value irrespective of enforceability by the courts of the state in question. Enforcement may, moreover, be achieved elsewhere.

A number of points in connection with the exercise of arbitral jurisdiction over non-signatories are worthy of comment:

(i) Exemption from arbitral jurisdiction does not mean exemption from liability. Claimants often seek to establish arbitral jurisdiction over a wealthy parent company, or a solvent affiliate, on some theory of vicarious liability motivated by the desire to be in a position to execute an award against someone who can pay. It may well be that a national court in subsequent litigation would find a sister or parent corporation liable if the subsidiary did not execute an award. But these issues will not be for the arbitral tribunal unless it can be proved that the parent or sister corporation agreed (whether directly or by an agent) to be bound by the arbitration agreement itself, and hence to the determination of these issues by arbitrators.

(ii) In the absence of clear proof of contrary intent, it should be presumed that assignees of contract rights will enjoy the benefits and burdens of the arbitration clause<sup>62</sup> in the assigned contract. While the issue arises in a variety of factual contexts and under differing provisions of national law, leading sometimes to conflicting views, the survival of the undertaking to arbitrate after assignment has a strong policy background and is consistent with the needs of modern commerce. Numerous precedents involving ICC arbitration have maintained arbitral jurisdiction in a variety of circumstances following assignment.<sup>63</sup>

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62. The naming of the assignee of an agreement as defendant in an arbitration, even when such assignment has been accepted and acknowledged by the claimant (and other party to the contract), does not necessarily preclude the naming of the original signatory to the contract as an additional Respondent in the arbitration. J. CREMADES, *Problems that Arise from Changes Affecting one of the Signatories to the Arbitration Clause*, 7 ICC Bull. 29 (Dec. 1996). – See generally, D. GIRSBERGER and C. HAUSMANINGER, *Assignment of Rights and Agreement to Arbitrate*, 8 Arb. Int'l. 123 (1992).

63. See, e.g., ICC Case 6259/1990, interim award of 20 September 1990, *Helge Berg and Lars Arvid Skoog v. Apollo Computer, Inc.*, (unpublished) (the facts of the case are stated in *Apollo Computer, Inc. v. Berg*, 886 F. 2d 469 (1<sup>st</sup> Cir. 1989)).

(iii) Claiming a right to arbitrate as a third party beneficiary or intended beneficiary of contract rights does not give rise to an equally favorable presumption of arbitral jurisdiction. Every case will depend on the particular contract, the circumstances, and evidence of the intention of the parties.<sup>64</sup>

(iv) Arbitral jurisdiction over non-signatory parties is more easily established when they initiate arbitration by acting as claimants than when they are sought to be joined as respondents. The issue may arise in a variety of contexts but is most easily illustrated in the example of groups of companies.<sup>65</sup>

(v) The addition as respondents of non-signatory parties, parent corporations, or members of a group of companies, is justified only where there are special circumstances (including participation in the performance of the contract) from which a contractual intention to include them within the scope of the arbitration clause can be implied.<sup>66</sup> The “alter ego” approach, frequently relied on by United States courts as the basis for holding a parent liable for the obligations of its subsidiary (or in some rare cases, an individual for the obligations of a company), has sometimes been used as a basis for positive findings of arbitral jurisdiction by ICC tribunals and by court cases compelling ICC arbitration.<sup>67</sup> Similarly, a non-signatory party may become responsible for a related company’s obligations, including its obligation to arbitrate, when the non-signatory’s conduct has deceived the opposing party as to the identity and status of the company related to the non-signatory with which the contract containing an arbitration clause was signed.<sup>68</sup>

(vi) A non-signatory parent or related corporation, named as respondent in a national court case concerning the activities of its subsidiary, may sometimes be able to establish the primary jurisdiction resulting from an arbitration clause in a contract between its subsidiary and the claimant party. If successful, the parent

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64. ICC Case 3683/1982, interim award of 25 April 1985, reported in CA Paris, 19 Dec. 1986 : *Rev. arb.* 1987, 359 (setting aside the award on unrelated grounds). – Cass. civ., 8 Mar. 1988 : *Rev. arb.* 1989, 481 (annulling the Paris Cour d’appel decision). – CA Versailles, 7 Mar. 1990 : *Rev. arb.* 1991, 326.

65. ICC Case 4131, interim award of 23 September 1982, *Dow Chemical v. Isover-Saint Gobain* : *Rev. arb.* 1984, 137 (full text), IX Yearbook 131 (1984).

66. ICC Cases 7604 and 7610/1995, *JDI* 1998, 1027. ICC Case 8385/1995, *JDI* 1996, 1061. See also ICC Case 7155/1993, *JDI* 1996, 1037; ICC Case 6519/1991, III ICC Awards 420, note Y.D.; ICC Case 6752, III ICC Awards 195.

67. For cases dealing with the issue see *Wren Distributors, Inc. and Innovative Marketing Concepts, Inc. v. Phone-Mate, Inc.*, 600 F. Supp. 1576, 1579 (S.D.N.Y. 1985); *Roger Jakubowski v. Nora Beverages, Inc.* (unpublished) Supreme Court of the State of New York, 21 Nov. 1995, (the New York trial court stayed arbitration against the president of the company, which was a respondent in ICC arbitral proceedings, on the grounds that the president was not the alter ego of the company).

68. ICC case n° 5730, 24 Aug. 1988, *Orri v. Sté de Lubrifiante Elf Aquitaine* : *Rev. arb.* 1992, 125. – CA Paris, 11 Jan. 1991 : *Rev. arb.* 1992, 95, setting aside confirmed Cass. civ., 11 June 1991 : *Rev. arb.* 1992, 73.

would obtain a stay of the court proceeding to have the issues first determined in the arbitration.<sup>69</sup>

(vii) Where a state has not specifically agreed to arbitration, its approval of the agreement of a state entity with a foreign party, and the arbitration agreement contained therein, does not necessarily subject it to arbitral jurisdiction even if its approval is manifested by signature of the agreement entered into by the state entity.<sup>70</sup> Where the state has not signed the arbitration agreement at all, its consent to arbitration by conduct or behavior is not as easily implied as in the case of corporations in relation to the obligations of their subsidiaries.<sup>71</sup>

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69. See, e.g., *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A.*, 863 F. 2d 315, 319 (4<sup>th</sup> Cir. 1988); *Sonatrach v. General Tire & Rubber Co.*, 430 F. Supp. 1332 (S.D.N.Y. 1977). *Dale Metals Corp. v. Kiwa Chem. Indus. Co.*, 442 F. Supp. 78 (S.D.N.Y. 1977).

70. CA Paris, 12 July 1984, *Southern Pacific Properties Ltd. v. Arab Republic of Egypt*, 23 I.L.M. 1048 (1984) upheld, Cass. civ., 6 Jan. 1987, 26 I.L.M. 1004.

71. Although a state, like a parent company, can become subject to arbitral authority by conduct and actions of agents and servants, the principle of sovereign immunity from jurisdiction will often create independent obstacles to jurisdiction.

