

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Jurisdictional Challenges

Chartered Institute of Arbitrators

Chartered Institute of Arbitrators
12 Bloomsbury Square
London, United Kingdom
WC1A 2LP
T: +44 (0)20 7421 7444
E: info@ciarb.org
www.ciarb.org
Registered Charity: 803725

The Chartered Institute of Arbitrators is a learned society that works in the public interest to promote and facilitate the use of Alternative Dispute Resolution (ADR) mechanisms. Founded in 1915 and with a Royal Charter granted in 1979, it is a UK-based membership charity that has gained international presence in more than 100 countries and has more than 14,000 professionally qualified members around the world. While the Chartered Institute of Arbitrators has used its best efforts in preparing this publication, it makes no representations or warranties with respect to the accuracy or completeness of its content and specifically disclaims any implied warranties of merchantability or fitness for a particular purpose.

All rights are reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission in writing of the Chartered Institute of Arbitrators. Enquiries concerning the reproduction outside the scope of these rules should be sent to the Chartered Institute of Arbitrators' Department of Research & Academic Affairs.

TABLE OF CONTENTS

Members of the drafting committee	
Introduction	1
Preamble	1
<i>Articles and commentaries</i>	
Article 1 — General principles	4
Commentary on Article 1	5
Article 2 — Grounds for jurisdictional challenges which typically arise	10
Commentary on Article 2	11
Article 3 — Admissibility of the claim	15
Commentary on Article 3	15
Article 4 — Timing and form of the decision on jurisdiction	17
Commentary on Article 4	17
Conclusion	19
Endnotes	20

MEMBERS OF THE DRAFTING COMMITTEE

Practice and Standards Committee

Tim Hardy, Chair

Andrew Burr

Bennar Balkaya

Charles Brown, ex officio

Ciaran Fahy

Jo Delaney

Karen Akinci

Lawrence W. Newman

Michael Cover

Mohamed S. Abdel Wahab

Murray Armes

Nicholas Gould

Richard Tan

Shawn Conway

Wolf Von Kumberg, ex officio

Jurisdictional Challenges

Jurisdictional Challenges

Introduction

This Guideline sets out the current best practice in international commercial arbitration for handling jurisdictional challenges. It provides guidance on:

- i. how to deal with challenges to jurisdiction (Article 1);
- ii. the most common types of challenges which arise, including jurisdiction-related and admissibility-related challenges (Articles 2 and 3);
- iii. factors that arbitrators should take into account in determining how and when to deal with jurisdictional challenges (Article 4, paragraph 1); and
- iv. the form in which a ruling on jurisdiction should be made (Article 4, paragraph 2).

Preamble

1. The authority of arbitrators to determine the merits of a dispute, otherwise known as the arbitrators' jurisdiction, arises out of a valid and enforceable arbitration agreement,¹ which is broad enough in scope to encompass the parties and their dispute(s). Once arbitrators have been appointed to decide a given dispute, in normal circumstances, their jurisdiction will last until they render a final award that resolves the dispute. However, if one or more of the parties challenge(s) the arbitrators' jurisdiction, their decision-making power² may become an issue.

2. It is impossible to provide definitive guidance on every single situation concerning jurisdictional challenges. This Guideline, therefore, seeks to raise awareness of the key issues that regularly arise and the relevant principles to apply when determining the most frequent challenges, which fall within the following broad categories:
 - i. existence of the arbitration agreement;
 - ii. validity of the arbitration agreement;
 - iii. scope of the arbitration agreement; and
 - iv. enforceability of the arbitration agreement.
3. The fact that a party has challenged the arbitrators' jurisdiction does not prevent the arbitrators from deciding the merits of that challenge and determining whether they do, or do not, have jurisdiction. This is based upon the universally accepted principle in modern international arbitration according to which arbitrators have the inherent power to determine whether they have jurisdiction. In other words, arbitrators are competent to determine their own competence.³
4. The majority of national laws and arbitration rules provide that a party who wishes to challenge the arbitrators' jurisdiction should raise the challenge at the outset of the arbitration, or as soon as they are aware of the grounds for the challenge. Although most challenges arise at the beginning of the arbitration, challenges may arise at any time throughout the arbitration, even after an award has been rendered.⁴ Since challenges are sometimes used for purely tactical reasons, it is good practice for arbitrators to confirm with the parties that they do not have objections to

Jurisdictional Challenges

the arbitrators' jurisdiction to decide the matter.

5. A challenge to jurisdiction may be either comprehensive or partial.⁵ A comprehensive challenge to jurisdiction relates to the arbitrators' authority to decide all aspects of the dispute between all the parties. A partial challenge to jurisdiction is one directed at the arbitrators' authority to decide a particular claim, counterclaim, or issue, or the arbitrators' authority over a particular party, for example, on the grounds that it falls outside of the scope of the arbitration agreement.
6. When considering challenges, arbitrators should take care to distinguish between challenges to the arbitrators' jurisdiction and challenges to the admissibility of claims. For example, a challenge on the basis that a claim, or part of claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time, i.e. whether the arbitrators can hear the claim because it may be defective and/or procedurally inadmissible.⁶ It is not a challenge to the arbitrators' jurisdiction to decide the claim itself.
7. On the one hand, 'jurisdiction' defines and determines the power and authority of arbitrators to hear and decide a case.⁷ On the other hand, the 'admissibility' relates to the claim and whether it is ripe and capable of being examined judicially, as well as a party's legal right to bring its claim before the arbitrators. Before deciding on an admissibility challenge the arbitrators should first be satisfied that they have jurisdiction to determine the admissibility issue.⁸
8. If the reason for any inadmissibility can be overcome, the arbitrators

should consider whether it is appropriate to stay the proceedings for the missing admissibility requirements to be satisfied. For example, if a mandatory requirement for mediation before the commencement of arbitration has not been complied with, the arbitrators may consider it appropriate to stay the arbitration pending compliance.

9. The most important aspect of this distinction is that if the arbitrators fail to classify the challenge correctly, i.e. as a challenge to jurisdiction or admissibility, this may result in grounds for either party to challenge the decision. In addition, whilst inadmissibility may be waived by a party, lack of jurisdiction can only be overcome by a fresh agreement between the parties.⁹

Article 1 — General principles

- 1. Unless otherwise agreed by the parties, arbitrators should consider and rule on their own jurisdiction when a party raises a jurisdictional challenge. However, they may not be the final arbiters of the matter, because, in certain circumstances, their decision on jurisdiction may be reviewed by a competent national court.**
- 2. The arbitration agreement is severable from the contract in which it is contained. Any challenge relating to the validity of the underlying contract will generally not affect the validity of the arbitration agreement.**
- 3. Upon being appointed, arbitrators should satisfy themselves, without making any detailed enquiry, that the parties have entered**

Jurisdictional Challenges

into a valid arbitration agreement, that they have been properly appointed and that the dispute falls within the scope of the arbitration agreement.

- 4. Arbitrators may reject a jurisdictional challenge if it has not been raised promptly or within any specified time limits.**
- 5. If the arbitrators have a concern that the subject-matter of the dispute is not arbitrable and neither party has raised the issue, then the arbitrators may invite the parties to make submissions on the issue before considering and ruling whether they have jurisdiction.**
- 6. If the arbitrators are concerned that the arbitration is being used as part of a criminal activity, such as money laundering, they should investigate those concerns and rule on whether they have jurisdiction.**
- 7. If one of the parties decides not to participate in the arbitration, even though no challenge has been raised, the arbitrators should consider and rule on whether they have jurisdiction to determine the matter in relation to the defaulting party.**

Commentary on Article 1

Paragraph 1

Arbitrators' jurisdiction to rule on their own jurisdiction

- a) It is generally accepted that arbitrators have the power to decide upon their own jurisdiction. However, they may not be the sole or final arbiters of the question of jurisdiction.¹⁰

- b) If the court of the place of arbitration rules that there is a valid arbitration agreement, arbitrators may be able to re-examine their jurisdiction, at any stage, regardless of the court judgment. Conversely, if the court of the place of arbitration rules that there is no valid arbitration agreement, arbitrators should carefully consider whether such a judgment may have a pre-emptive effect against the validity of a future award.¹¹
- c) If a party commences parallel court proceedings to challenge the arbitrators' ruling on their own jurisdiction, the arbitrators need to decide whether to stay the arbitration pending the court decision or issue an anti-suit injunction.¹² Considerations to be taken into account include the likely success of the challenge and whether they consider that it was made in good faith or just as a device to disrupt and/or delay the arbitration. If the arbitrators consider that the challenge is reasonable, it may be appropriate to wait for the court's ruling. Conversely, if they consider that the application to court has been made unreasonably to delay the resolution of the dispute, they should continue with the arbitration proceedings.
- d) If parallel court proceedings are initiated outside the place of arbitration and the relevant court rules that the arbitrators have no jurisdiction, arbitrators are not bound by such a ruling and they should therefore proceed with the arbitration proceedings.¹³
- e) If parallel arbitral proceedings are initiated and two arbitral tribunals are seized regarding the same dispute, the tribunal first seized with the

Jurisdictional Challenges

matter should decide on its jurisdiction while the second tribunal stays the proceedings pending the decision of the first tribunal.¹⁴ Depending on the circumstances, the proceedings may be consolidated provided that this is permitted under the applicable *lex arbitri*, arbitration rules and/or the parties agree to the consolidation.¹⁵

Paragraph 2

Independence of the arbitration agreement from the main contract

A contract will often contain clauses recording an agreement to arbitrate any dispute arising out of or in connection with that contract. That agreement to arbitrate is widely accepted to represent a separate and independent contract from the main contract itself. This is known as the principle of ‘severability’ or ‘separability’. Consequently, even though the arbitrators may consider that the main contract is invalid and/or unenforceable, they may decide that the arbitration agreement is valid and enforceable, insofar as it was not affected by the defects and/or vitiating factors which impacted the main contract.¹⁶

Paragraph 3

Initial enquiries to be made by arbitrators

- a) One aspect of the validity of arbitration may be whether arbitrators have been properly appointed.¹⁷ Before accepting an appointment, each of the arbitrators should declare that they possess any qualifications required by the agreement to arbitrate, including any arbitration rules and/or the

applicable law.¹⁸ If an arbitrator does not have any required qualifications, the arbitrator should immediately notify the parties of this in writing and ask them whether they wish to proceed with the appointment. The appointment of an arbitrator without any required qualifications in breach of the arbitration agreement could lead to the arbitrator's removal and/or the setting aside and/or non-enforcement of the award. In order to reduce the risk of future challenges, it is good practice for arbitrators to record, at an early stage, that no party has raised a challenge to their jurisdiction and that they consider themselves properly appointed.

- b) Upon being appointed, arbitrators should satisfy themselves that the parties have made a valid arbitration agreement and that the dispute falls within its scope. To assist with this, they should ask to be supplied with a copy of the agreement or details of the agreement, as the case may be, under which the dispute is said to have arisen. If the arbitrators' preliminary view is that there is no valid agreement to arbitrate, it will serve no purpose to proceed further with the arbitration, unless the parties are willing to enter into a fresh agreement to arbitrate, together with a confirmation of the prior appointment of the arbitrators. In this case, it is good practice to consult with the parties and ask for their comments concerning the arbitrators' jurisdiction.

Jurisdictional Challenges

Paragraph 4

Timing of challenges raised by a party

Jurisdictional challenges are usually raised by one of the parties. National laws and arbitration rules may require a party raising a challenge to do so within a specified time limit. Accordingly, if a party challenges the arbitrators' jurisdiction, the arbitrators should consider whether the challenge was made within any time limit specified. If there is no time limit, or where a party becomes aware of a given matter after the time limit, arbitrators should consider whether a challenge is made in a timely manner after the facts giving rise to the challenge become known. Challenges are sometimes used to attempt to delay and/or to frustrate the arbitration. Arbitrators should, therefore, decide whether the party making the challenge is deemed to have waived its right to challenge because the challenge is made late and there is no good reason for the delay, or whether the party's position is inconsistent with an earlier stance.

Paragraphs 5 to 7

Arbitrators' examination of jurisdiction in the absence of a challenge

- a) Where arbitrators identify a jurisdictional issue which the parties have not raised, the question arises as to whether they should take any active steps to draw the parties' attention so that they can make submissions on this point. Arbitrators should normally not raise issues on their own. However, in some situations, they should examine their jurisdiction on

their own motion, regardless of the fact that no party has raised any challenge.¹⁹

- b) Examples include cases where arbitration is used as a means to cover up corruption, money laundering, exchange control fraud or other criminal activity. In addition, as part of their best efforts to render an enforceable award, arbitrators should ensure that the subject-matter is capable of settlement by arbitration and not contrary to any overriding mandatory laws and/or principles of public policy at the place of arbitration or a known place of enforcement or recognition.²⁰ Finally, where one party decides not to participate in the arbitration, arbitrators should consider and rule on their jurisdiction with respect to that party, regardless of whether any challenge has been raised.²¹
- c) In any of these cases, it is good practice to invite the parties to file submissions on jurisdiction, whether separately or as part of their substantive memorials, before making any decision in order to ensure fair hearing. In addition, arbitrators should be wary to avoid appearance of bias when raising issues of jurisdiction on their own motion.

Article 2 — Grounds for jurisdictional challenges which typically arise

Most jurisdictional challenges arise in relation to whether:

- i) the arbitration agreement exists;**
- ii) the parties to the dispute are the same as the parties to the arbitration agreement;**
- iii) the arbitration agreement is defective;**

Jurisdictional Challenges

- iv) the arbitration agreement was made in the required form;**
- v) the subject-matter falls within the scope of the arbitration agreement; and/or**
- vi) the arbitrators have the necessary powers.**

Commentary on Article 2

Where different legal cultures are involved in international arbitrations, it is good practice for arbitrators to obtain the parties' agreement as to the precise scope of any challenge. Arbitrators may invite the parties to agree upon the challenge or to narrow its scope at the case management conference. This can also be done by asking the parties to agree a Terms of Reference or a similar document, such as a Terms of Appointment.

i) Whether the arbitration agreement exists

- a) A party challenging jurisdiction may argue that the contract it had entered into did not contain an agreement to arbitrate. Arbitration agreements are usually contained in the main contract between the parties, but sometimes an arbitration agreement is contained in a distinct and separate document, which is incorporated by reference in the contract between the parties.²² Examples include references to general terms and conditions, previous agreements between the parties or standard form contracts.
- b) The incorporation of an arbitration agreement by reference raises two questions which arbitrators should examine (1) whether the reference is

Chartered Institute of Arbitrators

clear and sufficient to imply consent to arbitrate and (2) whether such an agreement complies with the formal requirements of the *lex arbitri* and, if it is different, the law governing the arbitration agreement. Arbitrators should look at the common intention of the parties and determine whether the terms referred to actually form part of the contract between or among them.

ii) Whether the parties to the dispute are the same as the parties to the arbitration agreement

Arbitrators may need to determine who the parties bound by the agreement are and whether a third party not designated in the original agreement is nevertheless bound by it. The general principle is that an arbitration agreement binds only the parties who have originally agreed to it and, as a consequence, third parties are not bound by an arbitration agreement. However, a third party may be bound by the arbitration agreement in certain circumstances, if, for example, it is an assignee, successor in title, guarantor or so on, depending on the factual matrix of the case and the applicable legal norms governing extension of the arbitration agreement to third parties.

iii) Whether the arbitration agreement is defective

A challenge may arise where an arbitration agreement is incomplete, ambiguous, incoherent or contradictory.²³ Typically, such an agreement might refer to an incorrectly described or a non-existent arbitral

Jurisdictional Challenges

institution or a set of arbitration rules.²⁴ When faced with such a challenge, arbitrators should interpret any defective agreement and should, depending on the applicable legal norms, try to salvage the arbitration agreement,²⁵ provided that they can determine that the parties did intend to submit their dispute to arbitration.²⁶

iv) Whether the arbitration agreement was made in the required form

Any arbitration agreement should satisfy the requirements as to form which arise from the law governing the arbitration agreement and/or the *lex arbitri*. Most national laws require that an arbitration agreement be in writing or evidenced in a written text. In addition, they may require that the arbitration agreement be signed by duly authorised representatives of both parties. Arbitrators faced with such a challenge should, therefore, check the relevant applicable law and the arbitration agreement, including any arbitration rules, in order to determine whether such requirements have been satisfied.

v) Whether the subject matter falls within the scope of the arbitration agreement

- a) It is important for the arbitrators to determine whether the dispute(s) arising between the parties fall within the substantive scope of the arbitration agreement. Subject to any specific or different approach under the pertinent applicable law(s), arbitrators should construe the arbitration agreement broadly in light of the parties' common intention.

Accordingly, if it appears that certain matters or disputes are excluded from the scope of the arbitration agreement, arbitrators should consider whether to decline jurisdiction to decide on such matters or disputes, after giving the parties the opportunity to share their views in this regard.

- b) The determination of whether the scope of the arbitration agreement encompasses the subject matter in dispute is also linked to questions of arbitrability, subjective or objective.²⁷ However, given the fact that arbitrability is treated as a separate ground for setting aside and/or refusing enforcement and/or recognition of arbitral awards, it suffices, for the purpose of the present Guideline, to state that arbitrators are indeed expected to observe any prevailing and overriding norms on arbitrability under the *lex arbitri* and/or the *lex loci executionis* when deciding on the dispute(s) arising between the parties.

vi) Whether the arbitrators have the necessary powers

Disputes frequently arise as to what powers have been given to the arbitrators. In such cases, jurisdictional challenges directed against arbitrators' exercise of a particular procedural power, such as, for example, imposing sanctions for failure to produce documents, granting interest and/or awarding interim relief.²⁸ The arbitrators' powers derive from the arbitration agreement, including any arbitration rules which may confer specific powers or impose certain limitations, and the applicable law. When faced with such a challenge, arbitrators should

Jurisdictional Challenges

carefully determine the precise scope and extent of their powers. Any lack of powers may be cured by agreement of the parties. However, such an agreement may be limited by any overriding mandatory provisions of the applicable law.

Article 3 — Admissibility of the claim

After deciding upon the jurisdictional challenges, arbitrators may also be called upon to decide on the admissibility of the claim. This may include a determination as to whether a condition precedent to referring the dispute to arbitration exists and whether such a condition has been satisfied. It also involves challenges that the claim is time-barred.

Commentary on Article 3

Condition precedent (multi-tier) arbitration clauses

- a) Sometimes the parties' agreement to arbitrate may include provisions to the effect that parties should take certain steps in advance of filing for arbitration, such as trying to settle their dispute(s) by direct negotiation, mediation or any other dispute resolution mechanism.²⁹ For example, it is becoming increasingly common for arbitration agreements to require the parties to engage in one or more forms of alternative dispute resolution (ADR) before initiating arbitration. In such a case, arbitrators should decide whether (1) such a clause imposes an obligation and (2) if so, whether such an obligation should be or has been satisfied.³⁰ They

Chartered Institute of Arbitrators

should carefully examine the wording of the clause and also look at the conduct of the parties when they engaged in the fulfilment of the imposed condition in order to determine whether adequate efforts were made to satisfy the condition.³¹

- b) Where there is a clear and precise condition that was intended to be binding on the parties and was not fulfilled, arbitrators should reject the request for arbitration as procedurally inadmissible.³² Conversely, where they determine that the condition is imprecise or is only optional, arbitrators should dismiss the challenge to the admissibility and proceed with the arbitration.³³

Time-bars

- c) Many arbitration rules do not contain any provision limiting the time for commencing arbitration. However, an arbitration agreement may be worded in such a way that it contains an express time limit. In such a case, arbitrators should examine the wording and determine whether there are any limitations that apply, because it will serve no purpose to commence the arbitration if the claim is not ripe, nor to continue if the claim has become time-barred.

Whether the arbitration agreement is enforceable

- d) It may be the case that the arbitration agreement is validly concluded, but is not enforceable in relation to certain dispute(s). This will require the arbitrators to determine the enforceability of the arbitration

Jurisdictional Challenges

agreement in relation to those disputes in order to ascertain whether the claim is admissible.

Article 4 — Timing and form of the decision on jurisdiction

- 1. Arbitrators should resolve any jurisdictional challenge in a timely and effective manner. When faced with a challenge to their jurisdiction, arbitrators may:**
 - i) decide on jurisdiction separately from the merits; or**
 - ii) deal with the jurisdictional challenge and the merits simultaneously.**
- 2. In any event, arbitrators should decide on jurisdiction in a reasoned decision or award.**

Commentary on Article 4

Paragraph 1

Arbitrators have broad discretion to determine the timing and the process by which to deal with a jurisdictional challenge. They need to consider the most efficient way to resolve jurisdictional challenges on a case-by-case basis.³⁴ In any event, they should give directions for the exchange of evidence and submissions on the jurisdictional question, as well as the timing of any hearing that may be held separately from the hearing on the merits, if one is deemed necessary. They can either decline or confirm their jurisdiction.

Chartered Institute of Arbitrators

*Factors to consider when determining whether
to separate (bifurcate) the decision on jurisdiction from the merits*

- a) When deciding whether to split the jurisdictional challenge from consideration of the merits, arbitrators should consider the likelihood of success of the jurisdictional challenge and whether it can be determined without considering the merits of the underlying claim.³⁵ Where jurisdictional challenges are well-founded and/or can be separated from the merits, arbitrators should normally separate the jurisdictional challenge from the merits and decide on the challenge first. Arbitrators should also take into account the views of the parties and any possible delay to the arbitral proceedings and increase of costs which may result.
- b) Conversely, if the challenge is closely related to the substantive issues of the dispute, or where the arbitrators consider it to be a mere tactical device to delay the proceedings, arbitrators should continue with the proceedings and incorporate their decision on jurisdiction into the final award on the merits.

Paragraph 2

- a) It is good practice for arbitrators to issue their decision as to jurisdiction in the form of an award so that such a decision (or orders as to costs contained in such a decision) can be recognised and enforced under the New York Convention.³⁶ Arbitrators should, therefore, ensure that their award on jurisdiction complies with all the relevant requirements with which awards need to comply.³⁷ The form of the decision may, however, vary depending on the applicable law and the outcome.³⁸

Jurisdictional Challenges

- b) If arbitrators reject the challenge and confirm that they indeed have jurisdiction, they should do so in a procedural order and then proceed to hear and make an award on the merits. If arbitrators consider that they do have jurisdiction with regard to certain matters referred to arbitration, but not to others, arbitrators should proceed to hear and rule upon those which do fall within their jurisdiction.
- c) If, however, they consider that they do not have jurisdiction as to all matters referred to arbitration, they should issue a final award declining to decide the case for lack of jurisdiction.³⁹ They should also consider making an award as to costs.⁴⁰ An award deciding that the arbitrators have no jurisdiction should deal only with the jurisdictional question and should not address any aspect of the merits of the dispute between the parties.⁴¹

Conclusion

Jurisdiction is fundamental to the validity of arbitration proceedings and to the enforceability of arbitral awards. This Guideline focuses on the most commonly raised issues relating to any challenge to the arbitrators' jurisdiction so that they can be dealt with in an efficient and effective manner.

NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

Last revised 29 November 2016

Endnotes

1. In this Guideline, ‘arbitration agreement’ should be understood as referring to an arbitration clause by which parties agree in their contract to submit future disputes to arbitration, a submission agreement by which parties can mutually submit an existing dispute to arbitration, an agreement through exchanged written communications and/or an agreement incorporated by reference into the parties’ contract.
2. See generally Julio César Betancourt, ‘Understanding the “Authority” of International Tribunals: A Reply to Professor Jan Paulsson’ (2013) 4(2) *Journal of International Dispute Settlement*, pp. 227-244.
3. The principle is also referred to as ‘Kompetenz-Kompetenz’ as it appears in German or ‘compétence-compétence’ as it appears in French. See Jakob Ragnwaldh, ‘Compétence-compétence – The Power of an Arbitral Tribunal to Decide the Existence and Extent of its Own Jurisdiction’ in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age?*, ICCA Congress Series No. 17 (Kluwer Law International 2013), p. 224 and Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999), pp. 395-397. Note, however, that in the USA, the courts refer to this question as ‘arbitrability’. For a discussion of the different terminology, see Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law* (Schulthess 1989), pp. 179-183; William W. Park, ‘The Arbitrator’s Jurisdiction to Determine Jurisdiction’ in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series 13 (Kluwer Law International 2007), p. 75; and

Jurisdictional Challenges

- Sigvard Jarvin and Alexander G. Leventhal, 'Objections to Jurisdiction' in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration* (3rd ed, Juris 2014), p. 515.
4. Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008), p. 205.
 5. Park, n 3, p. 104; and Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (5th ed, Oxford University Press 2009), pp. 342-344.
 6. Laurent Gouiffès and Melissa Ordonez, 'Jurisdiction and Admissibility: Are We Any Closer to a Line in the Sand?' (2015) 31 (1) *Arbitration International*, pp. 109-110; Anne Véronique Schlaepfer, 'Jurisdiction and Admissibility: A Subtle Distinction, Not Always Easy to Make in International Arbitration' (2013) 2 *Cahiers de l'arbitrage/Paris Journal of International Arbitration*, pp. 333-334. See generally Veijo Heiskanen, 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2013) *ICSID Review*, pp. 1-16; Michael Waibel, 'Investment Arbitration: Jurisdiction and Admissibility', (2014) 5(4) *Legal Studies Research Paper Series*, pp. 1-80; Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen and others (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (ICC 2005), pp. 601-617.
 7. *Betancourt*, n 2, pp. 233-235.
 8. ICC Case No. 6474 of 1992 in Sandra Synkova, *Courts' Inquiry into Arbitral Jurisdiction at the Pre-Award Stage: A Comparative Analysis of the English, German and Swiss Legal Order* (Springer 2013), p. 38 (where the arbitral tribunal held that "It is correct to state that a decision as to the admissibility of the claim, [...]

- presupposes that the Tribunal has first found that it had jurisdiction.”)
9. Waibel, n 6, pp. 67-68 and p. 73.
 10. It is important to note that the determination of jurisdiction by national courts depends on the *lex arbitri* or the *lex loci executionis*. Some arbitration laws expressly provide that parties may apply to court for a decision whether the arbitrators have or lack jurisdiction. See generally Nadja Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (Kluwer Law International 2014), pp. 25-70. See also Ragnwaldh, n 3, p. 229; Doug Jones, ‘Competence-Competence’ (2009) 75(1) *Arbitration*, p. 62 and Adam Samuel, ‘Jurisdiction, Interim Relief and Awards under the LCIA Rules’ in Andrew Berkeley and Jacqueline Mimms (eds), *International Commercial Arbitration, Practical Perspectives Series* (Centre of Construction Law & Management 2001), p. 40.
 11. Simon Greenberg and others, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011), pp. 204 and 233.
 12. C-536/13 Lietuvos Aukščiausiasis Teismas (Lithuania).
 13. See International Law Association (ILA), Final Report on *Lis Pendens* and Arbitration, (2006), p. 26. It is important to note that in investment arbitration, arbitrators are not bound by the ruling of national courts in this regard.
 14. Bernhard Berger, ‘Commentary on Chapter 12 PILS, Article 186: Jurisdiction’ in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (Kluwer Law International 2013), p. 149. ILA, n 13, pp. 22-23. See generally Filip De Ly and Audley Sheppard, ‘ILA Report on *Lis Pendens* and Arbitration’ (2009) 25(1) *Arbitration International*, pp. 3-34.
 15. The most common situations where consolidation has been

Jurisdictional Challenges

- considered are (1) two arbitral proceedings between the same parties under the same contract and arbitration agreement, (2) two arbitration proceedings between the same parties under different arbitration contracts and arbitration agreements, and (3) two arbitration proceedings between different parties and based on different contracts and arbitration agreements, see Bernardo Cremades and Ignacio Madalena, 'Parallel Proceedings in International Arbitration' (2008) 24(4) *Arbitration International*, pp. 507-540.
16. It is important to note that the separability principle should be understood to preserve the validity of the arbitration agreement in cases where the main contract 'ceased to exist' and not 'never existed', Blackaby, n 5, p. 350.
 17. Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007), p. 383.
 18. Park, n 3, p. 98.
 19. Seung Wha Chang, 'Inherent Power of the Arbitral Tribunal to Investigate Its Own Jurisdiction' (2012) 29(2) *Journal of International Arbitration*, p. 174 citing the UNCITRAL Report of the Working Group on Arbitration and Conciliation (Vienna, 11-15 September); Reto M. Jenny, 'Objections to the Jurisdiction of the Arbitral Tribunal' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013), p. 480 ("Exceptionally, even without timely objection (cf. Art. 21(3) of the 2012 Swiss Rules), an arbitral tribunal seated in Switzerland has the power to examine its jurisdiction *ex officio* where the arbitrability of the dispute appears questionable, in view of a possible violation of international public policy."); Poudret and Besson, n 17, pp. 398-399. See also Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law

- International 2003), pp. 219-220.
20. ICC Case No. 1110 where a sole arbitrator raised the question of his jurisdiction *ex officio* and declined his jurisdiction because the case involved “gross violations of good morals and international public policy[...]” in Jean-Jacques Arnaldez, Yves Derains and Dominique Hascher, *Collection of ICC Arbitral Awards/Recueil des sentences arbitrales de la CCI, 1996-2000* (Kluwer Law International 2003), pp. 1-5.
 21. Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (ICC Publication No. 729E, 2012), p. 87 and Berger, n 14, p. 151 (“in cases where the respondent remains passive and fails to participate in the arbitration. In such a case, the arbitral tribunal shall examine on its own initiative whether or not it has jurisdiction over the dispute, i.e., whether there is an arbitration agreement that is binding upon the party in default.”)
 22. See e.g., Final Award, CAM Case No. 7211, 24 September 2013 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXIX (Kluwer Law International 2014), pp. 275-276 (“the written form requirement does not mandatorily mean that the contractual intention must be expressed in one document signed by both parties. It is therefore undisputedly allowed, and relevant here, that the intention to refer to arbitration may also be expressed by means of a reference to a separate document in which the arbitration clause is contained [...].”)
 23. According to Eisemann (who coined the term “pathological clauses”) there are four essential elements of an arbitration clause: (1) to produce mandatory consequences for the parties, (2) to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award, (3) to give powers to the arbitrators to resolve the disputes likely to arise between the parties, and (4) to

Jurisdictional Challenges

- permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible of judicial enforcement, Frédéric Eisemann, ‘La clause d’arbitrage pathologique’ in *Commercial Arbitration Essays in Memoriam Eugenio Minoli* (Torino: Unione Tipografico-editrice Torinese 1974). See also, Jean-Louis Delvolvé, Jean Rouché and Gerald H. Pointon, *French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration* (2nd ed, Kluwer Law International 2009), pp. 65-67 and Blackaby, n 5, pp. 146-149.
24. See examples in Delvolvé, n 23, p. 67 and Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014), pp. 779-780.
 25. See e.g., Final award on jurisdiction in case no. 14581 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXVII (Kluwer Law International 2012) pp. 81-82 (“[...] the wording ‘International Arbitration Court in Switzerland’ is ambiguous. It is however widely recognized that pathological arbitration clauses may be healed, pursuant to the principle of efficacy. According to this principle, the arbitration agreement has to be interpreted in a way that upholds its validity and legal effect.”)
 26. Philippe Bärtsch and Angelina M. Petti, ‘The Arbitration Agreement’ in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (2nd ed, Kluwer Law International 2013), p. 31.
 27. Subjective arbitrability (or arbitrability *ratione personae*) concerns the capacity of a party to enter into an arbitration agreement, whereas objective arbitrability (or arbitrability *ratione materiae*) deals with those matters that are not capable of settlement by arbitration. See Lew, n 19, pp. 187-188.

28. William W. Park, 'Arbitral Jurisdiction in the United States: Who Decides What?' (2008) *International Arbitration Law Review*, p. 36.
29. See generally Jason A. Crook, 'What is Alternative Dispute Resolution (ADR)?' in Julio César Betancourt (ed), (CI Arb, 2010).
30. See e.g., ICC Case No. 11490 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXVII (Kluwer Law International 2012), p. 35.
31. Dyala Jiménez Figueres, 'Multi-Tiered Dispute Resolution Clauses in ICC Arbitration' (2003) 14(1) *ICC Bulletin*, p. 71.
32. See e.g., ICC Case No. 6276 (1990) in Figueres, n 31, p. 76.
33. See e.g., ICC Case No. 4229 (1985) and ICC Case No. 10256 (2000) in Figueres, n 31, p. 87.
34. Peter Aeberli, 'Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map' (2005) 21(3) *Arbitration International*, p. 265 and Marie Öhrström, 'Jurisdiction of the Arbitral Tribunal' in Ulf Franke and others (eds), *International Arbitration in Sweden: A Practitioner's Guide* (Kluwer Law International 2013), p. 83.
35. John Y. Gotanda, 'An Efficient Method for Determining Jurisdiction in International Arbitrations' (2001) 40(11) *Columbia Journal of Transnational Law*, p. 26 (citing Partial Award of 17 March, 1983, ICC Case No. 4402 where the tribunal decided to bifurcate the issue of jurisdiction from the merits based on the following factors: (1) whether the issue to be decided in the partial award was clearly separable from the other issues, (2) whether the issue was sufficiently proved, (3) whether the partial award would help decide the remaining issue and (4) whether there is "urgency in deciding this special question.") and Greenberg, n 11, p. 210.
36. Blackaby, n 5, p. 353.
37. See CI Arb Guideline on Drafting Arbitral Awards Part I—General.

Jurisdictional Challenges

38. There are jurisdictions in which only a decision rejecting jurisdiction should be made in the form of an award. See, for example, Indonesia and the Philippines where courts have refused to enforce more than a single award in a case and therefore a decision confirming jurisdiction should not be made as an award. Moreover, in Singapore a ruling on jurisdiction is not considered to be an award for the purposes of the Singapore International Arbitration Act 2012. See also Greenberg, n 11, pp. 235-240; and Lawrence Boo, 'Ruling on Arbitral Jurisdiction: Is that an Award?' (2007) 3(2) *Asian International Arbitration Journal*, pp. 125-141.
39. But see Pieter Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice, A Comparative Study* (Kluwer Law International 1999), pp. 186-187; and Simon Greenberg, 'Direct Review of Arbitral Jurisdiction under the UNCITRAL Model Law on International Commercial Arbitration: An Assessment of Article 16(3)' in Frédéric Bachand and Fabien Gélinas (eds), *UNCITRAL Model Law after Twenty-Five Years: Global Perspectives on International Commercial Arbitration* (Juris 2013), pp. 69-78 explaining why a negative ruling on jurisdiction is not an award.
40. Peter Huber and Ivo Bach, 'Competence of Arbitral Tribunal to Rule on its Jurisdiction' in Karl-Heinz Böckstiegel, Stefan Kröll and Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* (2nd ed, Kluwer Law International 2015), p. 223; Yves Derains and Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* (Kluwer Law International 2005), pp. 108-109; Lew, n 19, p. 335 and Gotanda, n 35, p. 20. See CIArb Guideline on Drafting Arbitral Awards Part III—Costs.
41. Aeberli, n 34, p. 265.