



## Practice Guideline 6: Guidelines for arbitrators dealing with jurisdictional problems

### 1. Introduction

1.1 These guidelines cover how to deal with jurisdictional problems in an international arbitration context.

1.2 The huge variety of issues that can arise in this area in international arbitrations makes it impossible to provide definitive guidance to arbitrators dealing with jurisdictional problems in all situations. What the arbitrator needs is an awareness of the key issues that come up regularly and the relevant principles so that the tribunal can react intelligently when challenges to its authority are raised.

1.3 The law in the countries governed by these guidelines embodies four relevant principles which should be borne in mind by arbitrators when considering matters relevant to their own jurisdiction.

1.3.1 The first principle is that, unless the parties otherwise agree, an arbitral tribunal has the power to rule on its own substantive jurisdiction and that, if it does so, that ruling will be binding on the parties, subject to any available arbitral or judicial process of appeal or review.

1.3.2 The second principle is that the arbitral tribunal is not the final arbiter of a question of jurisdiction. Consequently, on any application to the Court, the question of jurisdiction may be approached anew and both the findings of fact (except in Switzerland: *National Power Corporation v. Westinghouse International Projects Company* ATF 119 II 380) and holdings of law of the arbitral tribunal concerning jurisdiction may generally be challenged. Moreover, there is no absolute rule that the arbitral tribunal must always be the first to rule on its own jurisdiction or that there can be no court intervention or ruling until it has done so.

1.3.2.1 Article 16(3) of the UNCITRAL Model Law creates an exception to the first part of this rule which is repeated in the section 34 of the Hong Kong Ordinance, by providing that decisions declining jurisdiction cannot be challenged in the Courts. The German ZPO essentially follows the Model Law and a decision of its Supreme Court appears to have closed the door on any review in this area although the case is not free from ambiguity: BGH, 6 June 2002, Schieds VZ 2003 p. 9, [2003] Rev. Arb. 507. This refusal to review decisions declining jurisdiction is expressly not followed by section 2 of the Swedish Lag om Skiljemän (Arbitration Act) and other statutory provisions of Austrian, Belgian, Dutch, English, French, Swiss and US law. See on this subject, J-B Racine, "La sentence d'incompétence", [2010] Rev. Arb. 729.

1.3.3 The third principle is that, if entered into after a dispute as to jurisdiction has arisen, an arbitration agreement may confer on an arbitrator an unchallengeable right to rule on his jurisdiction to decide the original dispute. (This is because the parties may by an ad hoc agreement confer on an arbitrator the power to determine a question of jurisdiction in a manner that is definitive and excludes appeal or review by the Court to the extent that the Courts concerned regard decisions on the merits as unreviewable: *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.*, 559 U.S. , 130 S. Ct. 1758 (2010)).

1.3.4 The fourth principle is that any objection to the tribunal's jurisdiction and any challenge to a ruling on jurisdiction must be raised promptly and within a specified time or the right to object may be lost.

## **2. Initial enquiries to be made by the arbitrator**

2.1 On being appointed, an arbitrator should normally satisfy himself that the parties have made a relevant arbitration agreement and that the dispute falls within its terms. He should ask to be supplied with a copy of the agreement or details of agreement, as the case may be, under which the dispute is said to have arisen and should check that it contains a valid arbitration clause which appears to cover the dispute and that he is qualified under the clause.

2.2 Similarly when the details of the claim are brought to his attention, he should check whether they fall or appear to fall within the terms of the agreement. If it is clear that there

is no relevant agreement to arbitrate and that the parties are unwilling to conclude one, it will serve no purpose to proceed further.

2.3 The position can be more doubtful when one party produces some reasonable prima facie evidence that the arbitrator has jurisdiction to decide the dispute but that evidence is not necessarily clear. If the other party does not take part in the arbitration or does not challenge the arbitrator's jurisdiction, the right course would normally be for the arbitrator to proceed to the merits of the dispute. Where there is a reasonable prima facie case for saying that jurisdiction exists, the arbitrator should not take it upon himself to mount a challenge to that case such as the opposing party might make but has not opted to make. The one well-known exception to this rule concerns the possible unenforceability of an arbitration clause under Council Directive 93/13/EEC on unfair terms in consumer contracts: *Mostaza Claro v. Centro Móvil Milenium SL* (C-168/05) [2006] ECR I-10421, [2006] EUECJ C-168/05, [2007] 1 CMLR 22 October 26, 2006 & *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, (C-40/08) [2009] EUECJ C-40/08, 6 October 2009.

2.4 These four considerations should guide the arbitrator's initial engagement with the matter. It is appropriate to next consider the issues that typically arise in respect of jurisdiction.

### **3. The issues that typically arise**

3.1 It may be helpful to list some of the most common types of dispute that may be regarded as jurisdictional:

- (a) identity of the parties;
- (b) identity of the contract or contracts governed by the agreement to arbitrate;
- (c) validity of the agreement to arbitrate;
- (d) the effect of a problem with the main contract on the validity of the arbitration clause (separability);
- (e) failure of a condition precedent to the right to arbitrate contained perhaps in an agreement to mediate in advance;

(f) whether a particular subject-matter can be arbitrated;

(g) time-limits for commencing proceedings;

(h) whether an arbitrator may apply a law other than the one expressly chosen by the parties or breach a duty contained in arbitration or other legislation;

(i) whether particular relief or remedies can be awarded.

3.2 There are issues that may contain elements of jurisdiction mixed in with other points. For example, problems relating to the constitution of a tribunal are definitely matters of jurisdiction. An improperly constituted panel does not have jurisdiction to render an award. However, issues of bias more properly belong to another subject.

3.3 Otherwise, the range of possible jurisdictional disputes is enormous. It covers all the typical formation and construction issues that arise in ordinary contract and company law, both domestic and international. In addition, one might have to consider features of one or more set of municipal laws specifically related to arbitration or the resolution of disputes generally.

3.4 Jurisdictional issues considered by the arbitral tribunal usually break down uneasily into three categories:

(a) whether there is a valid agreement to arbitrate at all;

(b) whether the scope of the agreement to arbitrate covers the dispute; and

(c) whether the arbitrator has certain powers.

3.5 Validity of the agreement to arbitrate and problems with the main contract (separability) (issues (c) and (d)) typically fall within the first category. They involve a decision on whether there is a valid agreement to arbitrate. Questions relating to whether the arbitrator may disregard the parties' choice of law and whether he can award particular relief or remedies (issues (h) and (i)) come within the third category. They deal with the ambit of the arbitral tribunal's powers. The other points, such as subject matter arbitrability, fit within the second category. They relate to whether the arbitration agreement allows the arbitrator to deal with the particular dispute and the parties to it.

## 4. The Process

### 4.1 Attitude

4.1.1 The first question that an arbitral tribunal faced with a challenge to its jurisdiction must consider is the process by which it is going to deal with the problem. The internationalization of the process and the greater risk of cultural clashes make it vital for the tribunal to deal calmly with the facts and issues. It must not, and must not appear to take personally the challenge to its authority. The tribunal must avoid anything which may give the impression to the losing party on the jurisdictional issue that it has any bias against that party.

4.2 The arbitral tribunal has the right to rule on its own substantive jurisdiction

4.2.1 If the tribunal does so, that ruling will be binding on the parties, subject to any available arbitral process of appeal or review and subject to appeal or review by the Court.

4.2.2 The parties are at liberty to exclude the power of the tribunal to make a ruling as to its substantive jurisdiction. They may do so either expressly or by implication.

4.2.3 "Substantive jurisdiction" embraces disputes as to:

(i) whether there is a valid arbitration agreement;

(ii) whether the tribunal is properly constituted;

(iii) what matters have been submitted to arbitration in accordance with the arbitration agreement.

It is reasonably clear that (iii) does not, unless the arbitration agreement clearly states otherwise, normally embrace the question whether or not the claim is time-barred. This is the view expressed by the US Supreme Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

4.2.4 The laws of all the important arbitration centres permit the arbitral tribunal to consider a challenge to its own jurisdiction. The tribunal does not have to wait for a party to bring court proceedings. In UNCITRAL Model law countries and under the ICC rules, there is no obligation to wait for the court to make up its mind. So, the tribunal faced with a challenge to it needs to consider straight away what to do with the problem.

4.2.5 However, the arbitral tribunal is not the final arbiter of a question of jurisdiction. Given this, on any appeal to the Court the question of jurisdiction may be approached anew and typically both the findings of fact (except in Switzerland) and holdings of law of the arbitral tribunal may be challenged. Moreover, there is no hard and fast rule that the arbitral tribunal must always be the first to rule on its own jurisdiction or that there can be no court intervention or ruling until it has done so.

### **4.3 Waiver**

4.3.1 In the legal systems considered here and under most institutional rules, the parties must raise their jurisdictional objection within a reasonable time. For general objections, under Article 16(2) of the UNCITRAL Model Law, this must be no later than the submission of the statement of defence. Otherwise, it will have waived the right to object to the step in question or to the case being dealt with at all. As Article 16(2) says:

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

4.3.2 Section 31(1) of the English 1996 Act provides that a challenge to the jurisdiction arising at the outset of the arbitral proceedings must be made before the party making that challenge takes the first step in the proceedings to contest the merits of any matter in relation to which he contests the tribunal's jurisdiction. Section 31(2) provides that an objection during the course of the proceedings that the tribunal is exceeding its jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised. These provisions are mandatory save that, as with Article 16(2) of the Model Law, an arbitral tribunal may admit a later objection "if it considers the delay justified" (Section 31(3)). Similarly Section 73(1) provides that by continuing to take part in an arbitration without objecting a party may lose his right to object to the tribunal's jurisdiction unless "he did not know and could not with reasonable diligence have discovered the grounds for the objection".

4.3.3 In practice, there is considerable divergence in the way in which different courts and tribunals interpret behaviour in this area. The individual facts of a case can easily sway a judge or arbitrator either way. The general test should be whether the party now seeking to raise the objection has behaved in a way inconsistent with the position that it now wishes to take in relation to the point in question. A greater concern, though, is whether waiver requires some finding of prejudice to the other party or parties.

4.3.4 Similar provisions appear in various arbitration rules. Article 23(2) of the UNCITRAL Rules is almost identical to Article 16(2) of the Model Law. Other examples include Article 23.2 of the LCIA Rules which says:

“A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim. ...In any case, the Arbitral Tribunal may nevertheless admit an untimely plea if it considers the delay justified in the particular circumstances.”

4.3.5 The last sentence, clearly based on section 31(3) of the 1996 Act and Article 16(2), gives the tribunal a little more latitude than some national laws might allow. The first part of the rule is based on Article 16(2) of the Model Law and the almost identically worded Article 23(2) of the UNCITRAL Rules.

4.3.6 Article 39 of the ICC Rules (2012 Version) contains a general waiver provision which may be interpreted as being much stricter than the UNCITRAL approach. It reads:

“A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.”

4.3.7 Article 15(3) of the ICDR Rules of the American Arbitration Association is much simpler but on broadly similar lines, stating:

“A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection.”

4.3.8 One can argue as to whether there needs to be any reliance on the behaviour by either the tribunal or the other party. The UNCITRAL approach does not require it. In practice, it will not be difficult to find reliance where one party’s behaviour is inconsistent with its position on the jurisdictional challenge.

4.3.9 Overall, these provisions can give rise to complex issues as to whether an objection has been made in time. If the point gives rise to arguable issues it is best dealt with in an award as to jurisdiction or an award on the merits, as the case may be. If the objection is obviously out of time, then an arbitrator, after giving both parties an opportunity to make submissions, may in a suitable case give a summary and informal decision but which should be recorded in writing with brief reasons explaining why the right to object has been lost. The arbitrator should subsequently record that he has done so in any later award on the merits.

#### **4.4 Dealing with jurisdictional issues not raised by the parties**

4.4.1 Where an arbitrator identifies a jurisdictional issue that the parties have not noticed, the question arises as to whether he should take any active steps to draw this to their attention. In many cases, failure to raise a point promptly will result in its waiver. Bearing in mind the fact that the parties have not objected to the arbitrator dealing with the case or at least not on the ground in question, the arbitrator should normally not raise issues on his own. This is particularly the case when the tribunal may not know where the parties will have to enforce the award.

4.4.2 However, in some rare public policy situations, it can be argued that the arbitrator has a duty not to deal with the case for fear of offending local norms or risking the subsequent recognition or enforcement of the award. In most such situations and only if the arbitrator is confident of the argument’s correctness, the point should be raised with the parties so that they can make submissions on the point. This may be the case where the tribunal risks allowing an arbitration to be used to cover up corruption or other criminal matters or actually become part of the means by which the parties aim to transfer funds as part of money laundering, terrorist financing, exchange control fraud or other criminal

activity. The legal consensus has been for some time that such problems do not invalidate the arbitration agreement. Nevertheless, with the modern emphasis on the need to avoid money laundering, terrorist financing and corruption, an arbitrator may think it more appropriate to decline jurisdiction.

4.4.3 An area where the law is much clearer concerns possible unenforceability of an arbitration clause under Council Directive 93/13/EEC on unfair terms in consumer contracts: *Mostaza Claro v. Centro Móvil Milenium SL* (C-168/05) [2006] ECR I-10421, [2006] EUECJ C-168/05, [2007] 1 CMLR 22 October 26, 2006 & *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, (C-40/08) [2009] EUECJ C-40/08, 6 October 2009. In the *Asturcom* case, the European Court of Justice held that a national court when dealing with an application to enforce an arbitration award against a consumer had a duty to take the point relating to the Directive even where the consumer had not raised it. It must follow that an arbitration tribunal has a similar duty when confronted with an agreement that appears to be unenforceable under the Directive.

#### **4.5 Agreements about jurisdictional issues**

4.5.1 Increasingly in international cases, the tribunal has to issue a ruling on jurisdiction. With different legal cultures involved, it may be vital for the tribunal to obtain the parties' agreement as to the precise scope of the challenge. The use of Terms of Reference, mandatory in ICC cases, or a document like it, may be particularly useful here. If signed, even under protest by the objecting party, it may reduce the scope for challenges not listed in the Terms of Reference. For example, an argument about the overall formal validity of the agreement may be excluded if the challenging party only indicates in the Terms of Reference concerned a general concern about whether one or all of the parties agreed to arbitrate.

4.5.2 It is always open to the tribunal to invite the parties to agree to it resolving the jurisdictional issue. This is a practical solution notably where the ruling on whether there is a contract containing the arbitration clause in question may determine both the jurisdictional point and the outcome of the case. The US Supreme Court, though, demonstrated in *Stott-Nielsen* that where a country's notion of excess of jurisdiction extends to a review of "obviously wrong" decisions, the agreement submitting the jurisdiction issue to arbitration will not prevent the courts from reversing the arbitrator's ruling on the point.

4.5.3 Without the parties' agreement to submit the relevant dispute to the arbitrator, there does not appear to be any scope for forcing the parties to be bound by the tribunal

concerned. This applies even if the parties appear to have agreed to arbitration under a set of rules which empower the tribunal to rule on its own jurisdiction: *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46. It is always open to the party objecting to the arbitrator dealing with the case to argue before a court that he did not validly consent to arbitrate at all or under the relevant rules.

4.5.4 In an English arbitration, the tribunal or the other parties may consent to a party bringing an application to court to resolve a jurisdictional issue under section 32 of the 1996 Act. Where a challenge is made in good faith and seems to have a reasonable prospect of success, there is something to be said for consenting. If the parties agree to the court deciding the matter, the arbitrator has no choice in the matter. This consensual approach seems to be unique to England. It is discussed in more detail below.

#### **4.6 Ruling on jurisdiction: the process**

4.6.1 More commonly, the tribunal has to issue a ruling on jurisdiction before the court can intervene directly. The alternative approach, found in Sweden and the USA, is that either of the parties may request the court to make a ruling at any time and regardless of whether the arbitrator agrees to this. Under the English 1996 Act, a party who declines to participate in the arbitration may apply for a declaration or injunction using a similar procedure found in section 72(1). Either way, the tribunal might consider it better for it to express an opinion on the point regardless, to allow the court the benefit of its view of the case.

4.6.2 The key question is whether to deal with jurisdiction separately from substance. Article 16(3) of the UNCITRAL Model Law reflects modern legislative practice by giving the arbitrator a choice as to whether to rule on his own jurisdiction in a preliminary ruling or the final award on the merits. Examples of this include Section 31(4) of the English 1996 Act and Article 186 of the Swiss LDIP. Even in countries such as France (in international cases), Belgium and Holland where there is no provision for challenging anything other than an award on the merits, the practice is to issue an award on jurisdiction if the arbitrator considers this appropriate and allow the Court to consider setting it aside as if it was an award on the substance.

4.6.3 There is much to be said for the view, expressed in Article 186(3) of the Swiss LDIP, that normally the arbitrator should deal with jurisdictional matters separately. It is helpful if such problems can be cleared up at an early stage of the process with any court challenges

being concluded before extensive consideration of the merits. If the tribunal is likely to declare that it has no jurisdiction over all or part of the case, it is imperative that it rules swiftly on jurisdiction. It needs to end the arbitrators' consideration of parts of the claim that fall outside their authority. Delays may also cause an unsuccessful claimant to be time-barred elsewhere. There are, though, exceptions to this, notably:

(i) Jurisdiction and substance revolve around the same facts or issue

(ii) The challenge is made in bad faith

(iii) Delays in the local legal system could result in the case being delayed for many years pending the resolution of any court challenge to the ruling.

4.6.4 As seen above, jurisdiction and substance sometimes concern the same point, notably where the case revolves around whether the parties ever concluded the contract or validly assigned it. Normally, in such a case, issuing a final award on jurisdiction and substance together makes sense.

4.6.5 The same applies where the jurisdictional challenge appears to be a delaying tactic with no prospect of success or there is a risk of delays within the local court system damaging the proceedings.

4.6.6 When considering matters of jurisdiction, the tribunal must be careful to observe the rules of natural justice and give both parties a reasonable opportunity to present their case. An informal approach has led to challenges to the tribunal's general ability to handle the case as well as to its actual decision.

#### **4.7 Circumstances where a party objecting to jurisdiction can go directly to court to obtain a ruling on this.**

4.7.1 This refers to a possibility noted earlier. In the USA and Sweden, the parties can bring a jurisdictional matter to Court at any time. In Sweden, the remedy is a declaration. In the USA, a party seeking to confirm jurisdiction may seek a motion to compel arbitration. One objecting to it in the USA can apply for an injunction to stop the arbitration.

4.7.2 Under the English 1996 Act, the Court will directly consider the issue:

(i) if the application is made with the written agreement of all parties to the arbitral proceedings or, (ii) where the application is made by one party and

(A) it is made with the permission of the arbitral tribunal and

(B) the Court is satisfied that the determination is likely to produce substantial savings in costs, that the application was made without delay and that there is good reason why the matter should be decided by the Court. (Options (i) and (ii) are dealt with in section 32.)

(iii) where a party not participating in the arbitration seeks a declaration or injunction (under section 72(1)).

#### **4.8 Enabling the parties to go straight to the Court under the English 1996 Act**

4.8.1 The philosophy of the 1996 Act is that, usually (though not invariably), all questions relating to jurisdiction should be decided in the first instance by the arbitral tribunal and that its decision should be binding on the parties subject only to challenge under Section 67. The remedy of going straight to the Court under Section 32 is an exceptional one but it can lead to savings both in time and costs (particularly where a substantial body of evidence is to be investigated) provided that the Court is willing to decide the issue under the section.

4.8.2 The points to be borne in mind by arbitrators in considering requests for consent to go to court under section 32 and dealing with jurisdictional challenges include the following:

4.8.2.1 While normally it may be the duty of an arbitrator to rule on his own substantive jurisdiction, it may be better for the arbitrator not to express an opinion and simply consent to the matter being heard by the court on the application of one of the parties. Where the case will go to the Court on jurisdiction in any event under Section 32, this can result in a substantial saving in costs in that there will be one jurisdictional hearing instead of two. This is particularly the case where a substantial body of evidence is to be investigated because the Court, on a challenge to an award on jurisdiction, is not bound by the arbitrator's findings and may decide to hear the whole matter, including all the evidence, again, and may further decide to investigate arguments not advanced before the arbitrator.

4.8.2.2 In such a situation, an experienced arbitrator may sometimes be able to persuade the parties to agree to go straight to the Court.

4.8.2.3 Where only one party wishes to go straight to the Court, the arbitrator should carefully weigh whether an early determination of the jurisdictional point by the Court is

likely to produce substantial savings in costs, whether the application was made without delay and whether there is good reason why the matter should be decided by the Court.

4.8.2.4 Before giving permission for one party to go straight to the Court, the arbitrator should give the other party an opportunity to make submissions as to why that permission should not be given.

4.8.2.5 If the arbitrator gives permission, it is usually desirable that he should state his reasons so that the Court can take them into account in deciding how to determine the matter.

4.8.2.6 If an application is made to the Court the arbitrator may continue the arbitral proceedings and make an award while the application is pending or he may stay the arbitration until the Court gives its decision. Where a party is not participating in the arbitration and the jurisdictional objection appears to be weak, the arbitrator should be reluctant to halt proceedings pending the court's decision for fear that the tribunal could be assisting a delaying operation. If the parties agree to either course, the arbitrator must proceed accordingly (Sections 31(5) and 32(4)). The normal course would be to await the Court's decision before proceeding to determine the merits of the dispute.

#### **4.9 The form of a ruling on jurisdiction**

4.9.1 An issue that can arise relates to the form in which the arbitrator's decision should be delivered. Any ruling against jurisdiction may terminate the case and should in such a situation clearly be in the form of a final award. It should also cover the tribunal's fees.

4.9.2 A problem arises with rulings that reject jurisdictional challenges. Anything called an "award" in ICC cases must be subject to the approval process of that organization under Article 33 of that organization's rules (2012 version). This can create delays. There is, therefore, much to be said for avoiding making the decision on jurisdiction in that form. Unfortunately, it is not just a question of labelling the ruling "order" or such like. If the arbitrator's ruling purports to decide definitively an issue in the case, it is an award under certain legal systems (notably French and Swiss). One solution is to make a ruling giving reasons but reserving the tribunal's right to reach a different decision at a later date in the proceedings. The final option is just to incur the delays of institutional approval while campaigning for the relevant requirements to be relaxed.

#### **4.10 Dealing with the objection in a ruling on the merits**

4.10.1 A tribunal may consider that, in terms of time and cost, the procedure most suitable to the circumstances of a particular case is to deal with the objection to his jurisdiction in a ruling on the merits.

4.10.2 Should it decide to proceed in this way, the tribunal should give each party an opportunity to put its case both on the jurisdictional objection and on the substance of the dispute.

4.10.3 If the tribunal rejects the objection, it will give reasons for so doing in its ruling and then proceed to make a ruling on the merits.

4.10.4 If it upholds the objection with regard to certain matters referred to arbitration but not to others, the tribunal will proceed to make a ruling on the remainder.

4.10.5 If the tribunal upholds an objection as to all matters referred to arbitration, it may seem pointless and illogical to proceed to deal with the merits of the dispute at all.

4.10.6 However, the parties might wish the award to deal with both aspects so that, if the Court subsequently upholds the tribunal's jurisdiction, the successful party can then enforce the ruling on the merits without having to start anew.

#### **4.11 Stopping the arbitration to await a court's ruling**

4.11.1 When a court is considering a challenge to his jurisdiction, should the arbitrator stop the procedure? Normally, again, the answer depends on the likely success and good faith of the challenge as well as any applicable law of the seat. If the challenge seems reasonable, waiting at least initially for a reasonably prompt ruling can make sense. If not, the arbitrator should usually continue to prevent an abusive application to court from delaying the resolution of the matter.

4.11.2 Faced with a challenge to his authority, the arbitrator must be aware of the seat of arbitration and its rules governing the process to adopt. So, for example, if sitting in the USA, he may find himself or the parties prevented from proceeding by an injunction brought in aid of an application to court for a final order stopping the arbitration. Failure to observe this may affect the arbitrator's ability to complete the case or others in the future and depending on the jurisdiction concerned, could prevent the enforcement of the award.

4.11.3 However, the arbitrator may be faced with an injunction obtained outside the seat of arbitration. This may, and usually does, involve the home country of the party objecting to jurisdiction. In that case, the arbitrator should normally continue with the case. Otherwise, the ability of one party to obstruct an arbitration merely depends on the compliance of its local courts. Anyway, if the parties did agree to arbitrate, they consented to a process in the place of arbitration not elsewhere. If the courts in the seat are happy for the case to continue - or indeed unhappy for this to happen - it accords with the parties' agreement and commonsense to follow their lead.

4.11.4 Article 186(1 bis) LDIP (in force from 1st March 2007) allows arbitrators sitting in Switzerland to rule on their own jurisdiction and proceed with the arbitration even if litigation is pending elsewhere unless there are "serious reasons" to suspend the proceedings. This effectively removes the possibility that the courts will criticize an arbitrator in that country for continuing with a case while proceedings are pending before a court elsewhere.

## **5. Jurisdictional Issues**

5.1 There is increasing convergence between municipal arbitration laws in their treatment of jurisdictional issues. As a result, many of them can be dealt with in practice by only cursory references to municipal law. This is notably the case where the question relates to the proper construction of the arbitral agreement.

### **5.2 Parties**

5.2.1 Increasingly, the international arbitrator's main jurisdictional task is to decide whether the actual or prospective participants in the case are parties with claims under the arbitration agreement. The differences between the approaches to this point of various countries' legal systems may be more apparent than real. The French courts have made a number of decisions indicating a willingness to include within an arbitration more companies within a corporate group than are listed in the contract, particularly where those other entities play a significant role in performing the agreement. This is accentuated where the involvement of non-signatories was anticipated at the point of sale.

5.2.2 Ostensibly, this appears to be different to the domestic legal positions in countries like England and Switzerland with their apparently stricter approaches to the corporate veil. However, as the French cases indicate, it is a matter of judging the parties' intentions as to who they thought they were contracting with. This may involve consideration of who is involved in the performance of the contract. A number of US, Swiss and English court decisions have shown that concepts of agency, unilateral contracts or simple construction based on the parties' intentions can produce similar results to those found in France. However, such approaches must be used instead of the French group of companies' theory outside France or there is a serious risk of an award being set aside.

5.2.3 Indeed, an arbitrator sitting in France might do well to explain any conclusion in favour of jurisdiction in terms of the specificity of French law and perhaps explain how this might produce the same result in other countries where enforcement may be sought in the future. (See for an example of this *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 to be contrasted with the subsequent Cour d'appel de Paris decision on the same case reaching the opposite view on French law.) It should be appreciated, though, that conflicting decisions by different countries applying the same law are not as surprising as they might seem since they involve not just a view of a difficult area of law but a relatively subjective interpretation of the facts involved.

### **5.3 Incorporation of arbitration clauses by general reference**

5.3.1 The issues here may be two-fold. First, there is the contractual question of whether the parties' behaviour demonstrated an intention to incorporate the second agreement. That often breaks down to two sub-questions: whether the words of incorporation are drafted widely enough and whether the arbitration clause fits the dispute in question. Secondly, there can be difficulties with the formal validity of the arbitral clause under local laws and notably Article II (2) of the New York Convention. This requires the agreement to arbitrate to be contained either in a signed document or an exchange of letters or telegrams. In recent times, as will be seen, the courts and statutes of major arbitration countries have liberalised their rules in this area and the Convention represents the minimum acceptable standard. Option 1 of Article 7(6) of the UNCITRAL Model Law reflects the modern consensus in this area for those countries which still have formal validity requirements. It says:

“The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”

Nevertheless, arbitrators need to be careful in this area. The English courts have traditionally been more inclined than most countries to permit the incorporation of arbitration clauses by general reference to a standard form agreement. Even then, there is a great deal of conflicting English caselaw on the incorporation of arbitration clauses in charterparties into bills of lading when less than clear terms have been used in this area.

5.3.3 The greater emphasis is on the point about the parties’ intentions. Not infrequently, one finds a master agreement to which other contracts refer with greater or lesser degrees of clarity and incorporation. This has given rise to the difficult line of English cases referred to above. Sometimes, arbitrators have to sort out conflicting dispute resolution clauses in the different agreements.

#### **5.4 Formal validity**

5.4.1 Since the 1980s, there has been a general convergence of legal systems on formal validity.

5.4.2 One should note, though, that in original UNCITRAL Model Law countries and states such as Belgium and Switzerland, one has to be able to find written evidence of an agreement to arbitrate. An e-mail or facsimile confirming an arbitration agreement concluded orally will not, on its own, constitute a formally valid agreement under these legal systems even though the underlying contract remains in force. The Anglo-American (and Dutch) approach of accepting oral or other types of evidence to indicate an intention to be bound by an arbitration clause in writing is not acceptable in those countries. When UNCITRAL amended the Model Law in 2006, it adopted the Anglo- American position as Option 1 of Article 7(3) of the Model Law, which now reads:

“An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.”

Section 19 of the Hong Kong Ordinance 2010 adopts Option 1.

5.4.3 Sweden has no formal validity requirements. Nor does France for international cases: Article 1507 CPC. Option 2 of Article 7 of the UNCITRAL Model Law now adopts this position. However, very few countries have taken this approach. England and the USA are in the odd position of allowing purely oral agreements to arbitrate but if there is no writing to which they agreed, these fall outside their arbitration statutes. In practice, since an oral agreement to a written arbitration agreement suffices, formal validity is not a significant issue under these countries' legal systems.

5.4.4 Whatever the situation, having a properly signed agreement to arbitrate either in the original contract or a subsequent Terms of Reference or submission can facilitate enforcement of the award. The New York Convention still permits countries to decline enforcement in the absence of both parties' signature or an exchange of letters or telegrams. The fact that few countries insist on such formalities should not blind the arbitrator to the desirability of a signed document (typically obtained by asking the parties to sign a Terms of Reference). This reduces the scope for later disputes.

## **5.5 Separability**

5.5.1 The international arbitrator needs to know that all major arbitration centres apply the principle of separability. This creates a presumption that the agreement to arbitrate will survive any problems with the validity of the main contract. If the problem affects the arbitral clause equally, this may invalidate the arbitration clause. It is insufficient, though, to say the contract is illegal or its formation was affected by fraud. Unless it is argued that the arbitral clause suffers from those defects, the challenge must be rejected.

5.5.2 Arbitrators should be aware that in France and Switzerland, the Supreme Courts have held that separability does not extend to the situation where it is alleged that the parties did not conclude the underlying agreement, while the Swedish equivalent reached the opposite result where the parties had reached agreement on the arbitral clause. The House of Lords in *Premium Nafta Products Ltd v. Fili Shipping Company Ltd* [2007] UKHL 40 expressed agreement with the Swedish approach. Usually, a contract formation problem (but not the failure of a condition precedent) will affect the arbitration clause equally. This is more open to discussion, though, where, during negotiations, the parties agreed the arbitration clause but there is a dispute as to whether they reached agreement on the necessary substantive provisions.

### **5.5.3 Separability within an arbitration agreement**

5.5.3.1 The US Supreme Court in *Rent-A-Center v. Jackson* concluded that even if it was alleged that the arbitration clause as a whole was void for unconscionability, a provision of a separate arbitration agreement referring the question to arbitration was valid. This was so long as the unconscionability was not alleged to affect the submission of the question to arbitration.

5.5.3.2 The English Court of Appeal took the opposite view in *Jivraj v. Hashwani* [2010] EWCA Civ 712, concluding controversially that the invalidity of the clause's requirement for a member of the Ismaili community to be the arbitrator invalidated the entire agreement to arbitrate. While it reversed the Court of Appeal's decision in this case on two other points, the UK Supreme Court declined to deal with this issue: [2011] UKSC 40.

5.5.3.3 The traditional position and that found in other countries probably lies somewhere between the two. Courts are usually keen to save agreements to arbitrate where one has been clearly entered into freely. For example, the German Bundesgerichtshof "saved" an arbitration clause which provided for arbitration under a non-existent set of rules administered by an equally non-existent institution. The overriding view of the clause was that the parties intended to arbitrate and that the courts would honour that by reconstructing the clause either to refer to another institution or in that case none at all: III ZB 70/10 14 July 2011. This is in line with the approach of the US Court of Appeals in *Bauhinia Corporation v. China National Machinery & Equipment Import & Export Corp*, 819 F. 2d 247 (9th Cir. 1987) and the House of Lords in *Premium Nafta Products Ltd v. Fili Shipping Company Ltd* [2007] UKHL 40.

## **5.6 Conditions precedent – mediation**

5.6.1 It is becoming increasingly common for arbitration clause to require the parties to engage in a mediation process before agreeing to arbitrate. Recent French Supreme Court and English High Court decisions and an older judgement from the US has favoured the enforcement of these clauses. Australian authority favours enforcement where the mediation process is sufficiently certain, contrast *Hooper Bailie Associated Ltd v. Natcon Group Pty Limited* (1992) 28 NSWLR 195 at 206 where it was said "What is enforced is not co-operation but participation in a process from which co-operation and consent might come," with the decision in *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* (1995) 36 NSWLR 709 at 716 where enforcement was refused. Section 32 of the Hong

Kong Arbitration Ordinance requires the courts to take the same view as the Court in *Hooper Bailie*. So does the decision of the Dubai Supreme Court in *A v. B* [2010] Rev. Arb. 354. Section 32 goes further entitling the Hong Kong International Arbitration Centre to appoint a mediator if the parties fail to make the necessary appointment. This whole approach can be used to prevent the arbitral tribunal from having jurisdiction over a party who fails to cooperate with the mediation process.

## **5.7 Subject-matter arbitrability**

5.7.1 Subject-matter arbitrability can cause serious problems although major arbitration centres have made a point of removing barriers to arbitration of this type over the last 50 years. Arbitration statutes use a variety of different approaches sometimes in combination, such as prohibiting arbitration where a dispute cannot be settled (Belgian and Dutch approach), where a court has exclusive jurisdiction (Belgium, France and Holland), a dispute cannot be valued in money terms (Switzerland) and in the case of England, an absence of any particular approach at all.

5.7.2 As an example of the exclusivity approach of European law, it is now clear that an arbitrator can resolve a dispute over whether a contract infringes the anti-competition provisions of what is now Article 101 TFEU. The Swiss Tribunal fédéral even requires arbitrators to rule on this in cases involving the European Union's scope of activities. They cannot, though, give an exemption to the nullity of the contract entered into in violation of Article 101.

5.7.3 It is sometimes argued that patent validity disputes are a matter for the exclusive jurisdiction of a court. This argument should almost invariably be rejected on the basis that this refers to rulings capable of binding people not party to the arbitration. US legislation in 1983 expressly clarified the arbitrator's right to rule on patent validity. However, it does contain an odd provision allowing the arbitrator to reverse an earlier award if the patent concerned is subsequently found to be invalid. Arbitrators in countries such as Belgium, France and Holland should not declare a patent invalid, merely unenforceable as against a particular party, to avoid restrictions in this area. A much safer approach is to study the local law in countries where patent validity may be in issue before proceeding, particularly if minded to conclude that the patent is invalid. See on this complex subject E Fortunet, "Arbitrability of Intellectual Property Disputes in France", 26 *Arbitration International* 281 (2010).

5.7.4 Bankruptcy is a subject always to be handled with care and reference to local lawyers. In practice, there is no general rule that stops an arbitration in the event of a bankruptcy. There are, however, a series of complex municipal laws which can prevent arbitrations continuing, require awards to be limited to a declaration of indebtedness and may lead to the annulment of an award on public policy grounds: *Société MJA c/ Société International Company for Commercial Exchanges Income*, French Cour de cassation, 6 May 2009 [2010] Rev. Arb. 299, on the last two points. Local lawyers must be consulted if a wasted arbitration is to be avoided. See J Sutcliffe & J Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for thought in Testing Times, 76 Arbitration 277 (2010).

5.7.5 In England, the Insolvency Act allows an administrator, administrative receiver or liquidator in a voluntary liquidation to conduct arbitration proceedings and refer cases to arbitration. A liquidator in a compulsory liquidation only has these powers with the court's consent. The position of the insolvent respondent is a little different from that of a claimant. Once a company is in administration, no proceedings can be begun or proceeded with except with the permission of either the administrator or the Court. Leave of the court is required to commence or continue with proceedings against a company in voluntary liquidation; the consent of the Court is needed for a case brought against a company being compulsorily liquidated.

5.7.6 In the USA, the mandatory stay of proceedings affects arbitration against insolvent parties. However, a party can apply for relief from it "for cause". Under French law, there is an initial stay until the creditor files a declaration of claim. After that, the arbitrator may proceed with the arbitration and declare the parties' rights but must not order an insolvent party to pay any sum of money. The problems in this area become even more complex where an arbitrator may find itself wondering what to do with a party that is insolvent under a different municipal legal system to the seat.

## **5.8 Time-limits for commencing proceedings**

5.8.1 It is an unusual feature of English and Hong Kong law (section 58 of the Arbitration Ordinance) that the court and, in the case of Hong Kong, the arbitrator, has or have a limited power to extend time for commencing arbitration. Other major arbitration centres and the UNCITRAL Model Law do not contain any such provision. This may increase the importance of deciding whether a limitation rule affects the tribunal's jurisdiction or is merely a ground for dismissing the claim. The US Supreme Court in *Howsam* followed the majority view in

England and other major arbitration countries by presuming that a limitation rule was not jurisdictional. Clearly, though, an arbitration clause can be worded to make the time-limits clearly go to jurisdiction or be mandatory.

## **5.9 Disregarding the law applicable to the substance**

5.9.1 Where the parties have expressly chosen the law to govern the merits of the dispute in question, the arbitrator is normally bound to try to apply that law. (The only exception is where public policy requires otherwise.) If he fails to do this accurately, that is not typically regarded as a matter of jurisdiction. However, the House of Lords in the *Lesotho Highlands* case went further in deciding that a failure to observe the Arbitration Act 1996 when reaching a conclusion on the merits did not constitute an excess of jurisdiction. Its reasoning suggested that so long as the remedy awarded was not excluded by the arbitration agreement, the arbitrator could not exceed his jurisdiction by reaching a particular result on the merits. Lord Steyn in a part of his judgment with which the majority agreed said:

“It will be observed that the list of irregularities under section 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the “correct decision” could afford a ground for challenge under section 68. On the other hand, section 68 has a meaningful role to play. An example of an excess of power under section 68(2)(b) may be where, in conflict with an agreement in writing of the parties under section 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest. There is a close affinity between section 68(2)(b) and section 68(2)(e). The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator.”

5.9.2 In other parts of Europe, a deliberate failure to apply the law chosen could be regarded as a breach of public policy, notably in Switzerland where the courts have repeatedly referred to *pacta sunt servanda* as having the force of *ordre public*. In France (Art

1502(3), Holland (Art. 1065(1)(c), an arbitral tribunal may be held not to have conformed to the task entrusted to it and face the setting aside or refusal to enforce its award. The Belgian Courts may just take a different approach to Article 1704(2)(d) of their Code Judiciaire to their English counterparts. The US Supreme Court appeared to do so in *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.*, 559 U.S. 130, S. Ct. 1758 (2010). The court there concluded that a decision to hold a class action arbitration was in excess of jurisdiction even though the parties had expressly agreed in a separate submission to have the question of whether the contract provided for it to be determined by the arbitrator. Breaching the Federal Arbitration Act in making that ruling was deemed to be an excess of jurisdiction. It may be a matter of semantics whether one describes these matters as jurisdictional or a matter of excess of powers or public policy. Except for the English *Lesotho Highlands* and the US *Stolt-Nielsen* case, practical examples are extremely rare.

5.9.3 In any event, a court reviewing an award, as part of setting aside or enforcement proceedings, may always rule that for public policy reasons, the arbitrator was right not to apply the law agreed upon by the parties.

## **5.10 Remedies - Punitive Damages**

5.10.1 One can argue that this has less to do with jurisdiction than the limits of the arbitrator's powers. Such restrictions are themselves "jurisdictional" in one sense.

5.10.2 While the USA's Federal Arbitration Act is silent on the issue, the Revised Uniform Arbitration Act §21(a) provides

"an arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim."

5.10.3 Some states have enacted statutes which prohibit arbitral tribunals from awarding punitive damages, which suggests that such topics are not arbitrable in those states. There is a question of whether such laws are substantive (in which case they follow the parties' choice of law) or procedural (in which they apply only if the arbitral tribunal is seated in that state). However, in a case governed by the Federal Arbitration Act where a federal statute mandates an award of punitive damages, a refusal to make such an award based on state law will almost certainly result in the setting aside of the award on the basis that the state

law prohibition is pre-empted by a combination of the two statutes. This would seem to follow from the *Mitsubishi*, *Mastrubono* and *Pacificare Health Systems* cases.

Consequently, an arbitrator sitting in the US probably has to consider awarding punitive damages even if the arbitral agreement indicates otherwise where antitrust and RICO claims are raised in relation to activities which have a substantial effect on the USA. Otherwise, his award would probably be set aside, as a matter of public policy. A tribunal sitting outside America may find his award unenforceable in the US if it fails to give proper consideration to these types of claims.

5.10.4 An arbitrator in continental Europe, where such awards are generally frowned upon, might find that he has no jurisdiction to make such an award even where the parties have agreed to apply a US state or federal law to the case. The arbitrator is in a difficult position here in view of the lack of any definitive caselaw on the subject. Even the Swiss Tribunal fédéral has ruled that the tribunal has to resolve a competition law issue raised by one of the parties regardless of whether it arose under the law governing the contract. If in doubt, a tribunal might do best to make the award according to the applicable law chosen by the parties, make it clear which parts of the award relate to any punitive damages element and risk partial annulment or limited enforcement of the award.

## **6. Concluding Remarks**

6.1 There is no fundamental difference between the jurisdictional problems that arise in international cases from those that come up in domestic arbitrations. The arbitrator must focus on whether there is a valid agreement to arbitrate at all, whether it covers the dispute and parties in question and whether he has the power to act in the way in which he would like to. In resolving these issues, he must, as always, pay careful attention to the arbitration agreement and the surrounding circumstances.

6.2 The difficulty stems from the possible application of legal systems with which the arbitrator may not be familiar. He needs to be aware of the possible differences between the laws of different countries in the areas most likely to concern him. There will, though, be occasions where the very international nature of the disputes produces intractable difficulties. This comes about where different legal systems with an interest in the case produce conflicting outcomes. At the same time, the growing consensus in international arbitration statutes and increasing amounts of information available about the differences

should make the handling of jurisdictional problems less challenging than it has been in the past.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to [nmcnamee@ciarb.org](mailto:nmcnamee@ciarb.org). Thank you in advance.

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