Kompetenz-Kompetenz and Its Negative Effect—A Comparative View

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This chapter deals with the “Kompetenz-Kompetenz”¹ concept in international commercial arbitration and even more so with what has been called—originally by French scholars²—its “negative effect”. Kompetenz-Kompetenz, refers to an arbitral tribunal’s authority, or “competence”, to decide its own jurisdiction, although not with finality. Article II of the New York Convention, to which currently 157 countries are party,³ requires Convention countries to recognize and enforce arbitration agreements. Under Article II(3), a national court, before which a disputant brings a claim, must decline jurisdiction and refer the parties to arbitration, at the request of a disputing party, if the parties have entered a valid arbitration agreement covering the dispute. Thus, privileged arbitral jurisdiction supplanting first-instance national court jurisdiction depends upon the (i) existence, (ii) validity, and (iii) scope of an arbitration agreement formed between the parties—that is, it depends on (i) an arbitration agreement between the parties having come into existence, (ii) the existing agreement being valid, and (iii) the dispute being within the scope of the kinds of disputes the parties agreed to arbitrate.⁴

The “negative effect” concept typically refers to the circumstances under which a national court will stay its own proceedings (hence the “negative effect”) and refer the parties to arbitration so that an arbitral tribunal can make the first decision on the existence, validity and scope of the alleged arbitration agreement. A strong negative-effect doctrine allows the arbitral tribunal to exercise its “positive” Kompetenz-Kompetenz more fully. In the U.S. the negative-effect doctrine also affects how much deference, if any, a U.S. court will give to a prior tribunal jurisdictional ruling, when the tribunal’s award is brought to a U.S. court for enforcement. This feature of U.S. law is not followed, however, in most other countries.

Some commentators tend to think of the negative-effect doctrine as deriving from the meaning of the Kompetenz-Kompetenz concept itself.⁵ In other words, if the arbitral tribunal is to have any real role in deciding its own jurisdiction—the Kompetenz-Kompetenz concept—courts must refrain from deciding jurisdiction in the first instance. Other commentators prefer to treat the negative-effect concept, not as deriving directly from the conceptual content of Kompetenz-Kompetenz, but as more of

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¹ German is often used. See E. Gaillard & J. Savage, eds., *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 396 para. 651. However, so is French (*compétence-compétence*) and English (competence-competence).

² See Gaillard & Savage, *Id.* at 401, para 660; at 406, para. 671.

³ See UNCITRAL website: www.uncitral.org (last consulted August 15, 2017).

⁴ Our discussion below will sometimes turn on which one of these three elements is in dispute. Thus, distinguishing among them is important. “Existence” refers to whether the elements needed for the formation of a contract between two parties have been met. “Validity” concerns whether an agreement that has objectively come into existence is, nevertheless, not enforceable because of some flaw that allows it to be avoided, such as fraud, mistake, inadequate writing, violation of public policy, or the like. Note that most of these grounds for avoidance must be affirmatively asserted by a party opposing validity. However, “violation of public policy” can generally be asserted by a court on its own motion. “Scope” refers to whether the particular issue in dispute falls within the ambit of the kinds of issues the agreement was meant to cover.

⁵ See E. Gaillard, Note, *Cour de cassation (1^{re} Ch. civ.) 21 mai 1997*, *Revue de l’Arbitrage* (1997, Issue 4) pp 538-543.

a separate, free-standing doctrine, related of course to Kompetenz-Kompetenz, but not predetermined by it.

In this latter conceptual posture the negative-effect concept is viewed as resulting from how a given national jurisdiction resolves and balances two conflicting policy considerations related to the legitimacy and efficacy of the arbitration system.⁶ The central dilemma arises, because, on one hand, national jurisdictions want to prevent a party, who has agreed to arbitrate, from obstructing arbitration by seizing a national court with one or more issues likely to require lengthy and expensive judicial proceedings—precisely what the arbitration agreement was intended to avoid (the *efficacy of arbitration* goal). But on other hand, national jurisdictions also want to uphold a party's fundamental right to court access when that party has not given up that right through an arbitration agreement (the *fairness* issue). Sometimes this policy objective is also characterized as aimed at "*procedural efficiency*". The logic is this. If in the end a national court will decide the tribunal's jurisdiction *de novo*—as is generally the case—then it would save time and expense were a national court simply to decide the jurisdiction issue at the outset, before sending the parties to arbitration.⁷ Thus, I will refer to this policy goal as the "*fairness/procedural efficiency*" goal. The negative effect doctrine adopted by a given jurisdiction determines how that jurisdiction resolves the dilemma of balancing those two conflicting policy goals: *arbitral efficacy*, on one hand, and *fairness/procedural efficiency*, on the other hand.

Whereas the positive Kompetenz-Kompetenz principle is more or less universally accepted in all national jurisdictions,⁸ the negative-effect doctrine has generated a variety of different national approaches. The existence of such diversity, in itself, reflects the difficulty of resolving the "*efficacy versus fairness/procedural efficiency*" dilemma just mentioned. Nevertheless, since relative uniformity across national jurisdictions contributes significantly to the utility and coherence of international arbitration, the literature is replete with discussions of the negative-effect issue and what might be advanced as a preferred approach to it.⁹ This chapter aims at clarifying and contributing to that discussion.

In the sections that follow, I will discuss some of the leading national approaches to the negative-effect issue according to where on a spectrum of deference to the arbitral tribunal each approach falls—almost full first-instance deference, very little deference, or something in between. At the end of the chapter I will draw on these different national approaches to offer suggestions for a "best practices" approach to the negative-effect doctrine.

To improve clarity and ease of discussion, I will adopt a convention I have often employed for identifying the different stages of the arbitration-litigation process at which issues of arbitral jurisdiction

⁶ See Note in T. Várady, J. Barceló, S. Kröll, eds., *INTERNATIONAL COMMERCIAL ARBITRATION—A TRANSNATIONAL PERSPECTIVE* 179-180 (6th ed. 2015).

⁷ See F. Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" 22 *Arb. Int'l* 463, 465 (2006).

⁸ See E. Gaillard & J. Savage, eds., *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 397 ("[A] vast majority of countries admit the positive effect of the competence-competence principle." *Id.* at 406).

⁹ For an extraordinarily thorough and incisive discussion of the issues addressed in this chapter, see G. Born, Vol. 1, *INTERNATIONAL COMMERCIAL ARBITRATION* Chap 7, 1046-1252 (2d ed. 2014) [cited hereinafter as Born Treatise].

can arise, namely Stage 1, Stage 2, and Stage 3. Since I will frequently use this short-hand convention in the discussion below, it is important to be clear about what I mean by this three-stage terminology.

Three Stages of the Arbitration-Litigation Process

I will use “Stage 1” to refer to litigation before a national court in which one party asks the court to decide whether there is a binding arbitration agreement between the parties and, if so, to stay or dismiss the litigation and refer the parties to arbitration. Stage 1 proceedings could occur at the putative seat or in a non-seat jurisdiction, and this difference could be important, as we will see when we turn below to the Swiss approach to the negative-effect issue. Also, Stage 1 proceedings could occur at the same time in more than one national jurisdiction. Moreover, there will not always be a Stage 1. The parties to a transaction containing an ostensible arbitration agreement might simply go directly to arbitration, although one of the parties might assert before the tribunal that the tribunal does not have good jurisdiction. Normally this would be the respondent,¹⁰ but in a jurisdiction with a strong negative-effect doctrine (one deferring most jurisdiction questions arising at Stage 1 to the arbitrators), even a claimant who prefers litigation might be forced to initiate arbitration, seeking all along to persuade the tribunal to refuse jurisdiction. This curiosity is one of the reasons why some jurisdictions and commentators prefer a weak negative-effect doctrine, or none at all.

“Stage 2” refers to proceedings before the arbitral tribunal itself. At this stage, of course, following the positive Kompetenz-Kompetenz principle, the tribunal will decide for itself whether it has good jurisdiction. In most countries, however, a tribunal’s finding of good jurisdiction is not final. It will be subject to de novo judicial review in any proceeding to enforce or reject the award.

“Stage 3” refers to proceedings before a national court, either at the seat or elsewhere, to enforce or reject the tribunal’s award. That award might be a preliminary one¹¹ addressing only the tribunal’s jurisdiction (affirming or rejecting jurisdiction), or a final one on the merits, including a finding that the tribunal had good jurisdiction.

The issue whether the arbitral tribunal has (or had) good jurisdiction to decide the merits can arise at all three stages of the arbitration-litigation process. At Stage 2, as we have noted, the positive Kompetenz-Kompetenz doctrine, more or less universally applied, means that the arbitral tribunal will decide for itself—though not generally with finality—whether it has good jurisdiction. At Stage 1 the intensity of review a court will give to the jurisdiction issue will depend upon the negative-effect doctrine applicable in the courts of that country. Courts in some jurisdictions will send most jurisdictional disputes to the arbitrators for a first instance decision, reserving a final de novo court decision for a Stage 3 enforcement proceeding. Others will decide the issue for themselves with finality at Stage 1.

¹⁰ Generally, a respondent must raise any jurisdictional objections before filing a statement of defense. See UNCITRAL Model Law Article 16(2).

¹¹ Sometimes a tribunal’s preliminary decision on jurisdiction is referred to as a “ruling”, instead of an award. See Model Law Article 16(3). For the potential significance of whether such a preliminary ruling is properly considered an award, see V. Pavic, “Appropriate Compromise: Article 16(3) of the Model Law and Its Progeny” in Kröll, Mistelis, Perales & Rogers, eds., *INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION*, Liber Amicorum Eric Bergsten 387-410 (2011).

In general the issue of whether the arbitral tribunal has good jurisdiction arising at any of the stages will turn on three specific issues mentioned in the opening paragraph: (i) whether an arbitration agreement between the parties has come into *existence*; (ii) whether an existing arbitration agreement between the parties is *valid*; (iii) whether an existing and valid arbitration agreement between the parties is sufficiently broad in *scope* to cover all the substantive issues in dispute between them. Thus whether an arbitral tribunal has good jurisdiction will turn on the *existence*, *validity*, and *scope* of an arbitration agreement alleged to have been formed between the parties.

If the arbitral tribunal were not constituted according to the agreement of the parties, that could also lead to a challenge to the tribunal’s jurisdiction. Such a challenge would also involve the negative-effect policy dilemma mentioned above, although it would arise only after the tribunal had been formed. At that point the tribunal itself could generally rule for itself on any improper-tribunal-formation challenge to its jurisdiction. But burdensome litigation costs (including the cost of potential court appeals) could also be imposed on the arbitration claimant were the respondent allowed simultaneously to seize a Stage 1 court with full review authority over this issue. For ease of analysis, however, I will limit discussion of the negative-effect doctrine to issues concerning the existence, validity, and scope of the arbitration agreement itself and will not take up issues concerned with proper constitution of the tribunal.

I should note another important qualification—the distinction between the tribunal’s “jurisdiction” proper and “admissibility” of the claim.¹² Courts, tribunals and commentators use the concept of “claim admissibility”—especially in civil law countries—to refer to issues related to the timeliness of the claim and related matters concerning how the claimant handled the claim. Thus, admissibility issues concern, for example, whether the claimant had followed all of the mandated pre-arbitration procedural steps (e.g., fulfilling a required period of settlement negotiations, or honoring required notice procedures), or whether the claimant misled the respondent by taking steps inconsistent with arbitration and hence waived its right to arbitrate the given claim. These “admissibility” issues center on whether the claimant has handled the claim properly so that it is appropriately presented for decision, not whether the tribunal or the court is the proper decision-maker. Hence “admissibility” issues are not technically “jurisdiction” questions—those going to whether the tribunal or the court is the proper decision-maker. Rather they concern whether the claim is ripe for decision, or too stale for arbitration, or whether the claim has been properly handled in other respects. Articulated in this way, “admissibility” issues are not subject to the negative-effect doctrine. They are always the province of the arbitrators for decision, once the existence, validity, and scope of the arbitration agreement is established or conceded.

Nevertheless, when we turn below to a discussion of the U.S. approach to the negative-effect doctrine we will discover that the terminology used by the U.S. Supreme Court treats these “admissibility” issues as “jurisdiction” questions of a special character. The ultimate outcome tends to parallel that generally reached in civil law jurisdictions, although the conceptual terminology is different. As noted, I will delay that discussion until later.

New York Convention and the UNCITRAL Model Law on Negative Effect

¹² For a general discussion of this distinction, see J. Paulsson, *The Idea of Arbitration* 82-90 (2013).

The provisions of the New York Convention¹³ and the UNCITRAL Model Law¹⁴ are logical starting points for any discussion of the negative-effect doctrine, because they are the main vehicles for achieving uniformity of arbitration doctrine at the transnational level. If the New York Convention were to be understood broadly to call for a clear-cut negative-effect doctrine, that would put an end to variability on this issue, because the Convention binds most of the countries of the world, and all of the important commercial countries.¹⁵ Provisions of the Model Law also go a long way to promoting uniformity, because, as of this writing, 75 States in a total of 106 jurisdictions have adopted national arbitration legislation based on the 1985 Model Law.¹⁶ Thus, through voluntary legislative choice, a large number of jurisdictions have adopted very similar international arbitration law. That means that if the Model Law included a clear-cut negative-effect provision, or could be interpreted persuasively to have done so, a large number of countries would presumably fall in line with that approach. As it turns out, however, neither the texts nor the legislative histories of the Convention and the Model Law allow such a persuasive interpretation. Commentators have advanced conflicting views on this issue, either with respect to the Convention or the Model Law, as I will discuss in the following section, but the preferred view seems to be that neither enactment takes a “clear-cut” position on how to approach the negative-effect issue—thus, leaving it to national legislative and judicial discretion.

New York Convention. Turning first to the Convention, the operative language occurs in Article II(3):

“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, *unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*” (emphasis added)

Clearly the provision concerns a Stage 1 proceeding. Does “unless it finds” call for a “prima facie” finding or a finding based on a full factual and legal review? That is the question.

One of the earliest commentators on the Convention, Albert Jan van den Berg, writing in 1981,¹⁷ argued that Article II(3) should be read as calling for only a “prima facie” finding at Stage 1. He did so on the basis of what he argued was the “pro-enforcement bias” of the Convention, not on the express language of Article II(3) or its legislative history. Thus, one might find his position to be based on a somewhat weak foundation. Another early commentator, this time dealing with the meaning of the exact same language in the UNCITRAL Model Law, seemed to agree with van den Berg, although his support was rather equivocal.¹⁸

¹³ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, available at <http://www.uncitral.org>.

¹⁴ U.N. Commission on International Trade Law [UNCITRAL] Model on International Commercial Arbitration of 1985, U.N. GAOR, 40th Sess., Annex I, U.N. Doc. A/40/17 (1985), available at <http://www.uncitral.org>.

¹⁵ As noted above in the text, as of this writing 157 countries are parties to the N.Y. Convention. www.uncitral.org (status of UNCITRAL texts)—last consulted, August 15, 2017.

¹⁶ *Id.*

¹⁷ Albert Jan van den Berg, *THE NEW YORK ARBITRATION CONVENTION* 155 (1981).

¹⁸ See H.M. Holtzmann & J.E. Neuhaus, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 303 fn 5 (1989). Holtzmann & Neuhaus actually appear in their text to read the “unless it [the court] finds” language in Article 8 of the Model Law as calling for a full review of jurisdiction at Stage 1 and are frequently

A more recent leading commentator, Gary Born, rejects van den Berg's view and asserts that Article II(3) cannot be read as authorizing only a *prima facie* test of the existence, validity and scope of the alleged arbitration agreement. In his view the Convention should be read as not taking a position on the standard of review at Stage 1 and, thus, as allowing adhering countries to decide for themselves how strong a negative-effect doctrine they wish to adopt. This view seems sound, especially, as Born argues, if one takes into account the contemporaneous interpretation of the Convention found in the implementing law of many Convention countries that have adopted national rules calling for full review of arbitral jurisdiction at Stage 1, at least in some cases.¹⁹ If van den Berg's view were correct, these countries would all be violating the New York Convention.²⁰

Note at the same time that Born's view²¹—and that of other commentators as well²²—also rejects reading the Convention as requiring a full review of jurisdiction at Stage 1. Again one can cite the contemporaneous interpretation of those countries that have adopted a *prima facie* test as contradicting any such interpretation, including France, Mexico, and in some circumstances Switzerland, Canada, and Hong Kong.²³

Model Law. Turning now to the UNCITRAL Model Law, we confront a somewhat more complex situation. Although in Article 8 the Model Law adopts the same language we find in Article II(3) of the Convention, quoted above, the Model Law also specifically provides for Kompetenz-Kompetenz in Article 16(1). In Article 16(3) it provides for early, non-appealable judicial scrutiny of an arbitral tribunal's

cited for that view. See Holtzmann & Neuhaus, *Id.* at 303. However, in a footnote they qualify this view by citing and seeming to agree with van den Berg: "[I]t is probably true, as has been said, that '[h]aving regard to the 'pro-enforcement bias' of the Convention, the words should be construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only.' A.J. van den Berg, *supra*, at 155." Holtzmann & Neuhaus, *Id.* at 303 fn. 5.

¹⁹ Born Treatise, Vol. 1, at 1052-1257. Germany, Switzerland, the U.S., and England are all jurisdictions in point. See the discussion in the text below dealing with each of these jurisdictions.

²⁰ In an earlier piece I noted that the U.S. Supreme Court precedents controlling the negative-effect doctrine in the U.S.—*First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995) and *Howsam v. Dean Witter Reynolds, Inc.* 537 U.S. 79 (2002)—were domestic arbitration cases technically arising under FAA Chapter 1. I speculated that when clearly confronted with international arbitration and the need to apply New York Convention Article II(3)—incorporated as U.S. law by FAA Chapter 2—the Court might interpret the Convention as calling for a *prima facie* standard for Stage 1. See Barceló, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective," 36 *Vanderbilt J. Transnat'l L.* 1115, 1134-35. I speculated then that such a result might require more countries to adopt a "prima facie" review interpretation of Convention Article II(3) than had done so as of 2003. *Id.* at 1136. That has not happened. Moreover, in the more recent *BG Group* ruling (*BG Group v. Argentina*, 572 U.S. ____ (2014); 134 S.Ct. 1198 (2014))—clearly an international case—the Court applied the *First Options/Howsam* analysis without suggesting that the technical applicability of the Convention would have any effect on those precedents. Note, however, that *BG Group* involves a Stage 3 case and does not expressly discuss Convention Article II(3). Nevertheless, the Court's reasoning clearly implies that domestic and international arbitration cases will be treated the same at Stage 1. Thus, any move to a *prima facie* test at Stage 1 in the U.S. would seem to require a legislative enactment.

²¹ See Born Treatise, Vol. I, at 1054.

²² See F. Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" 22 *Arb. Int'l* 463, 471 (2006) (citing as well J.-F. Poudret & s. Besson, *DROIT COMPARÉ DE L'ARBITRAGE INTERNATIONAL* 409, para. 459 (2002).)

²³ For France, Switzerland, and Canada (Quebec), see the discussion in the text below. For Mexico, see Mexican Commercial Code Article 1465 (2014 revision). For Hong Kong, see *Chee Cheung Hing & Co. v. Zhong Rong Int'l Group Ltd*, Action 1454 of 2015, Court of First Instance.

preliminary ruling finding good jurisdiction. The point here is that the drafters have provided for an approach that harmonizes well with a *prima facie* test at Stage 1. That is because it provides for a “fairness/procedural efficiency” counterbalance—in the form of early judicial review of a preliminary jurisdictional ruling—to an “efficacy” influenced Stage 1 *prima facie* test.

Consider the situation of a litigant who has not genuinely agreed to arbitrate a given dispute, but nevertheless faces the arguable “unfairness” and “wasteful costs” of being sent to arbitration anyway. That seeming unfairness and inefficiency is counterbalanced by two factors: (i) the *prima facie* test itself, which will cause some requests for arbitration to be defeated outright at Stage 1, and, for cases that go on to Stage 2, (ii) the availability of early *de novo* judicial review of a preliminary arbitral finding of good jurisdiction. Thus, the litigant unfairly sent to arbitration will suffer inappropriate arbitration costs for only a limited period. At the same time, an arbitration claimant legitimately entitled to arbitration—who presumably will meet a *prima facie* test—will be able to stay litigation while arbitration goes forward. *De novo* judicial review of jurisdiction will occur, but only after the tribunal has had a chance to defend its jurisdiction in a preliminary ruling.

Despite the appeal of this argument, the legislative history of the Model Law can certainly be cited as specifically rejecting the *prima facie* approach. Commentators favoring full review at Stage 1 often rely heavily on the early legislative history showing that the drafters specifically rejected a proposal to add “manifestly” to Article 8(1).²⁴ That addition would have caused Article 8(1) to instruct a Stage 1 court to refer the parties to arbitration, unless it were to find that the alleged arbitration agreement was “*manifestly* null and void, inoperative or incapable of being performed”—a *prima facie* standard. Thus, at that point in the legislative history the drafters were not willing to adopt a *prima facie* test of good jurisdiction at Stage 1.

At least one commentator, aware of this legislative history, has nevertheless strongly urged that later parts of the history reflect the drafters’ change of heart on the *prima facie* issue.²⁵ He argues that this new view is implicit in the reasons the drafters gave for dropping a provision that would have allowed an arbitral respondent at any time to petition a court to declare the tribunal without jurisdiction. The drafters rejected that provision because it was “not in harmony with the principle underlying article 16 (the Kompetenz-Kompetenz article) that it was initially and primarily for the arbitral tribunal to decide on its competence, subject to ultimate court control.”²⁶ While consistent with a *prima facie* review standard at Stage 1, that language hardly requires it. Note, that the drafters did not return to Article 8(1) to add

²⁴ See H.M. Holtzmann & J.E. Neuhaus, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 303 (1989); J. Lew, L. Mistelis, & S. Kröll, COMPARATIVE INTERNATIONAL ARBITRATION 349 para. 14-61 (2003); P. Binder, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION IN UNCITRAL 91, para. 2-088 (2ded. 2005). Model Law Article 8(1) provides:

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

The rejected proposal was to add “manifestly” before “null and void, inoperative or incapable of being performed.”

²⁵ See F. Bachand, “Does Article 8 fo the Model law Call for Full or *Prima Facie* Review of the Arbitral Tribunal’s Jurisdiction?” 22 Arb. Int’l 463, 465 (2006).

²⁶ See Born Treatise, Vol. I, at 1084 (quoting from *Report of the Working Group on International Contract Practices on the Work of the Seventh Session*, U.N. Doc. A/CN.9/246, XV UNCITRAL Y.B. 189, 195 (1984).

the “manifestly” language they had previously rejected. The better view thus seems to be that the Model Law is inconclusive on the Stage 1 standard of review. It is best understood as permitting, but not requiring, *prima facie* review at Stage 1.²⁷

Given that both the Convention and the Model Law are inconclusive on the negative-effect doctrine, one would expect to find a variety of approaches to the doctrine in different Convention countries, and that is exactly what has happened. In the following section, I will discuss some of the most prominent approaches to the doctrine in leading arbitration jurisdictions with the aim of assessing the advantages and drawbacks of each. In the concluding section I will discuss some ideas for convergence at the transnational level around what might be considered a preferred approach.

Leading Approaches to Negative Effect in Different Jurisdictions

This section organizes the following discussion of differing national approaches to the negative effect of *Kompetenz-Kompetenz* according to whether a particular national approach reflects a strong or a weak approach to the doctrine. We start with two national approaches at opposite ends of the spectrum: French law, which represents a very strong version of the doctrine, and German law, which follows perhaps the opposite approach of giving little, if any, force to the negative-effect concept. We will also analyze the different national approaches with respect to two other factors: (i) the extent to which the national arbitration law favors a more rule-oriented or a more discretionary approach; and (ii) the extent to which the arbitration law allows more or less party control over negative-effect issues.

A Strong Negative-Effect Doctrine—France

French law is widely recognized as exceptionally pro-arbitration in many respects, including in its approach to the negative-effect doctrine. The French approach is articulated clearly in Article 1448 of the French Code of Civil Procedure as amended in 2011,²⁸ and is more rule oriented than discretionary. It expressly rejects any role for party autonomy in shaping the negative-effect rules articulated in Article 1448:

“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.

“A court may not decline jurisdiction on its own motion.

“Any stipulation contrary to the present article shall be deemed not written.”

Two points in these provisions are especially noteworthy. First, if an arbitral tribunal has already been seized of the dispute when court action is initiated, then the court must refuse jurisdiction. A party

²⁷ See Born Treatise, Vol. I, at § 7.03 pp. 1076-1087.

²⁸ Earlier versions of Article 1448 contained essentially the same provisions, but they were limited to domestic arbitration. Nevertheless, pre-2011 French court decisions applied the same principles to international arbitration by deriving them from the implicit meaning of the *compétence-compétence* principle. See *American Bureau of Shipping v. Jules Verne et al.*, Cour de cassation (1st Civil Chamber, June 26, 2001) (English translation in 17 Mealeys Int'l Arb. Rep. 30 (Jan. 2002)). The current version of Article 1448 applies expressly, however, to domestic and international arbitration.

wishing to challenge the existence, validity or scope of an alleged arbitration agreement may not opt for obstruction by waiting for a tribunal to be formed and then challenging its jurisdiction in a Stage 1 court. The respondent must initiate court proceedings before an arbitral tribunal is constituted. Otherwise, jurisdiction will be decided in the first instance by the arbitrators, and judicial review will come only at Stage 3 (award enforcement). The goal is plainly to protect against potential respondent obstructionism.

Second, and most important, even when a Stage 1 court is seized ahead of tribunal formation, the court must still decline jurisdiction—upon the respondent’s motion—unless the non-existence, invalidity or inadequate scope of the arbitration agreement is “manifest”. A *prima facie* showing that the parties are bound by an arbitration agreement will suffice to halt judicial proceedings and send the parties to arbitration. A party opposing arbitration will not be able to tie up an opponent in extended court litigation over factual or legal uncertainties concerning the enforceability of the arbitration agreement.²⁹ The first instance forum for any such contest will be the arbitral tribunal.

Of course, permitting a Stage 1 proceeding to go forward in court would not directly bar continuation of Stage 2 arbitral proceedings. The two could continue in parallel. However, the claimant would be forced to give major attention to the court proceedings, and possibly even stay arbitration. That is because a court decision denying tribunal jurisdiction—at least if it occurs at the arbitral seat—would lead to nullification of any favorable arbitral award and thus pose a serious obstacle to enforcement of any resulting award throughout the New York Convention system.³⁰ In effect, the arbitration proceeding would be more or less pointless.

The French doctrine comes down heavily on the side of arbitral efficacy and is clearly pro-arbitration. What then of the competing values inherent in the opposite pole—fairness and procedural efficiency goals? Consider the French standard of review at Stage 3.

Despite the French doctrine’s pro-arbitration stance at Stage 1, French courts at Stage 3 (award enforcement) do not defer in any way to the tribunal’s prior decision on jurisdiction. At this last stage, French courts decide the jurisdiction issues entirely for themselves, *de novo*.³¹ Given that arbitrators have a personal stake in collecting fees if they affirm the tribunal’s jurisdiction, and hence cannot be said to be entirely unbiased on the jurisdiction issue,³² the *de novo* standard at Stage 3 makes especially good sense.

²⁹ If factual or legal uncertainties exist to any material degree concerning the enforceability of the arbitration agreement, then the court must decline jurisdiction and refer the parties to arbitration. See, e.g., Cass. 1^{re} civ., 21 sept. 2016, n° 15-28941 (BK Medical APS et Analogic Corporation v. Tux Ultrasound).

³⁰ New York Convention Article V(1)(e) allows parties to the Convention to refuse to recognize and enforce an award that has been set-aside at the seat.

³¹ See Fouchard, Gaillard, Goldman, ON INTERNATIONAL COMMERCIAL ARBITRATION 930, para 1608 (E. Gaillard & J. Savage eds., 1999). See, e.g., Arab Republic of Egypt v. Southern Pacific Properties, Ltd. & Southern Pacific Properties (Middle East), Ltd., 23 Int’l Legal Materials 1048, (1984) (setting aside an award because the court found *de novo* that Egypt was not a party to the arbitration agreement).

³² Born, a leading arbitrator himself, rejects the notion that arbitrators may be biased on the jurisdiction issue, since they stand to benefit through fees when they take jurisdiction. Born Treatise, Vol. I, at 1234-1236 (“This analysis [suggesting likely bias] * * * reaches a mistaken conclusion.” Id. At 1234.) Born points out that short term incentives to gain fees in a particular case are generally counterbalanced by long term incentives to maintain a valued professional reputation for objectivity and avoidance of jurisdictional overreaching. He also notes that at times fees that are based on the amount in controversy can be maximized by a less-time consuming early decision against taking jurisdiction. However, sometimes fees are calculated on an hourly rate basis and sometimes even in the case of fees determined in part by the amount in controversy, the final amount may depend on the time

At the same time, however, it may seem to undercut the French position at Stage 1. If French courts will ultimately decide the jurisdiction issues for themselves at the award enforcement stage, then why not have them decide the issue up front at Stage 1 and save the parties the time and expense of arbitration when arbitral jurisdiction is lacking—the procedural efficiency goal. French commentators have offered an insightful answer to that question, to which we now turn.

An arbitral tribunal confronted with a challenge to its jurisdiction may exercise its *Kompetenz-Kompetenz* power by deciding the jurisdiction issue either in a preliminary award or in the final award on the merits. If the tribunal upholds its jurisdiction in a preliminary award, however, the party opposed to jurisdiction can immediately seek to have the decision annulled at the arbitral seat.³³ This allows for an early *de novo*³⁴ judicial decision on the tribunal's jurisdiction and does not force the litigants to incur the full costs of arbitration if the court rules against jurisdiction. Following a negative court ruling on jurisdiction, the arbitrators would presumably terminate the arbitral proceedings—at least if France were the arbitral seat—even if they had preliminarily continued the proceedings during judicial review. Why? This is because, as mentioned above, if a court at the seat sets aside a jurisdictional award it would inevitably set aside any later final award. And an award annulled at the seat would generally not be enforced by any national courts under the New York Convention system.³⁵ Thus, French practice strikes a reasonable compromise, under which the tribunal would decide its own jurisdiction in the first instance

demands involved in the arbitration. See, e.g., International Chamber of Commerce 2012 Arbitration Rules, Appendix III: Arbitration Costs and Fees, Article 4: Scales of * * * Arbitrator's Fees (giving a minimum and maximum range within which the ICC will normally fix the arbitrator's fees, depending in part on the time demands of the arbitration). Also, Born's points may have more relevance in the case of very experienced, leading arbitrators who generally have a full calendar of pending arbitrations, so that cutting one arbitration short on a failure of jurisdiction ground merely frees up time to be devoted to another arbitration that will also generate fees. But of course this logic does not necessarily apply to a less experienced and less-sought-after professional arbitrator. Thus to this writer, Born's points are best understood as qualifying and perhaps reducing the seriousness of the concern over potential arbitrator bias on the jurisdiction issue—in some circumstances—rather than as defeating the argument altogether. In any event, Born also agrees that in a Stage 3 enforcement proceeding, courts should generally apply a *de novo* standard on the jurisdiction issue (except where the parties have reserved the issue for final determination by the arbitrators). See Born, *Id.* at 1235-1236.

³³ See Gaillard 410-413. Model Law Article 16(3) seems to provide for the same pattern. Commentators have noted, however, that it is not clear under the Model Law whether a tribunal's preliminary decision on jurisdiction should be considered an award or something else. See V. Pavić, "Appropriate Compromise: Article 16(3) of the Model Law and its Progeny," in Kröll, Mistelis, Perales and Rogers, eds., *INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION* 387-410 (2011). Gaillard believes such a preliminary decision should be considered an award. See Gaillard 740-741, para. 1359. Born reaches the same result. See Born Treatise, Vol. I, at 1099. Whether it is considered an award or something *sui generis* will raise a number of significant issues under the Model Law. For a full discussion of these issues see Pavić, *id.* Even without trying to resolve all of these issues definitively, the main thrust of Model Law 16(3) for our purposes seems clear. A tribunal may decide the jurisdiction issue in the form of a preliminary decision issued early in the proceedings. That decision is then subject to immediate review in a first instance court of the seat jurisdiction, and that court decision—presumably taken *de novo*—is final. Any subsequent final award inconsistent with this early and final judicial decision would be set aside at the seat.

³⁴ In most jurisdictions judicial review of jurisdiction at Stage 3 would be *de novo*. As we will see below in the discussion of the U.S. approach to the negative-effect issue, U.S. law can be an exception to this rule in some limited circumstances. But in such a case the parties would still receive an early dispositive decision on jurisdiction, rendered in this scenario by the tribunal and not by a court.

³⁵ See N.Y. Convention Article V(1)(e).

and articulate its reasoning. That reasoning, though not binding on a reviewing court, could nevertheless be persuasive. A reviewing court still makes the final *de novo* decision on jurisdiction early in the proceedings. Note also that arbitrators, convinced that the opposing party's objections are mostly dilatory and without merit, would be free to continue the arbitral proceedings without interruption during judicial review. On the other hand, a tribunal faced with a serious jurisdictional challenge might choose to stay proceedings to await the reviewing court's dispositive decision.

Two aspects of this French rationale for a strong negative-effect doctrine might seem disquieting. First, what if the arbitrators decide against a preliminary award and reserve a decision on jurisdiction until the final award? If a Stage 3 court at the seat decides the arbitrators lacked jurisdiction and annuls the final award, the parties will have wasted considerable time and expense in the arbitration that an earlier judicial decision could have prevented. This risk—the procedural-efficiency issue—seems unavoidable where arbitrators are forced to defer resolution of the jurisdiction issue until the final award, because, for example, factual or legal issues relevant to jurisdiction would at the same time resolve fundamental merits issues. A case in point would arise if liability (and arbitral jurisdiction) were to turn on whether the basic commercial transaction containing an arbitration clause ever came into existence in the first place. If no contract at all was formed between the parties, then at the same time there would be no contractual liability and no arbitral jurisdiction.

Note, however, that the envisioned scenario is also one in which a respondent might gain the most from tactical obstructionism, because allowing a Stage 1 court to decide jurisdiction, simultaneously allows the court also to decide one or more aspects of the merits. In this pattern it might seem sensible to allow some level of court discretion in deciding the force of the negative-effect rules. Thus, for example, if the preliminary evidence seemed to favor arbitral jurisdiction, the Stage 1 court might defer to the arbitrators, and vice versa if the available evidence suggested a weak case for arbitral jurisdiction. The French rules, however, do not allow for this kind of discretion.

In other cases, where jurisdiction issues are not bound up with the merits, it is difficult to see why arbitrators would not decide to issue a preliminary decision on jurisdiction, either of their own volition or because one of the parties requested it. Certainly if both parties agree on their desire for a preliminary decision on jurisdiction, the arbitrators would be required to proceed accordingly, because it is widely established that by agreement the parties can control arbitral procedure.³⁶ Moreover, since the preliminary decision on jurisdiction is designed to protect a respondent opposed to the tribunal's jurisdiction, if the claimant agrees to a preliminary decision, a respondent who fails to agree would be waiving an option designed for its own protection—a scenario that raises no particular concerns. In the reverse pattern, where the respondent seeks a preliminary decision, it is difficult to see how the claimant could give an acceptable reason for not agreeing.³⁷

³⁶ See UNCITRAL Model Law Articles 18 and 19. One exception to the general rule stated in the text would be any limitation imposed by public policy. Thus, the parties cannot agree to a procedure that violates fundamental procedural fairness or due process. *Id.* Swiss commentators have expressly noted that arbitrators must honor a party agreement requiring (or disallowing) a preliminary award on jurisdiction. See B. Berger & F. Kellerhals, *INTERNATIONAL COMMERCIAL ARBITRATION* para 700 pp.250-51; para 709, pp. 253-54 (3d ed. 2015). The English Arbitration Act expressly provides for this outcome concerning issuance of a preliminary decision on jurisdiction. English Arbitration Act Article 31(4).

³⁷ Certainly the arbitrators cannot be expected to allow a claimant to force merits-based arbitration costs on a respondent who wants an early decision that the tribunal has no jurisdiction.

Secondly, what if the party opposing arbitration is the claimant who wants to resolve its claim in a local court. Under the French approach, unless the arbitration agreement is manifestly null, the claimant will be forced to begin arbitration proceedings and participate in selecting arbitrators only for the purpose of asking the tribunal to decide that it lacks jurisdiction to hear the case. The delay involved would seem unavoidable, but at least if the claimant is successful in challenging arbitral jurisdiction, the arbitral expenses would presumably be awarded against the respondent. Some might consider the delay a small price to pay for a pro-arbitration policy. Here again, however, a more discretionary approach might seem to offer advantages. In the scenario posited, a Stage 1 court might be granted the discretion to retain jurisdiction—even though the “manifest nullity” test could not be met, if, for example, the available evidence strongly suggested that the putative arbitration agreement never came into existence, or was invalid, or did not cover the dispute in question. As I will discuss in the concluding section to this chapter, other discretionary considerations might also come into play.

Finally, it seems that party autonomy will have no role in French negative-effect doctrine. Certainly as to the basic provisions of the French procedure code Article 1448, quoted above, the article provides expressly that its provisions cannot be altered by party agreement. What about the possibility that the parties might want to provide that the arbitral tribunal’s decision on jurisdiction is final and unreviewable? That point, the standard of review at Stage 3, is not dealt with in Article 1448 and hence its refusal to allow parties to alter its provisions does not address the Stage 3 standard of review question. There is considerable reason to believe, however, that French courts will not allow party autonomy to determine the standard of review at Stage 3.³⁸ In the reverse situation the French Supreme Court (Cour de cassation) has refused to enforce, as against public policy, a party stipulation seeking to expand the standard of review at Stage 3.³⁹ The stipulation sought to require a court to review the merits of any resulting award—a standard not included in the French procedure code.⁴⁰ Given this result, one would assume that French courts would not enforce a party stipulation disallowing court review of a tribunal’s jurisdictional ruling.⁴¹

A Weak Negative-Effect Doctrine—Germany⁴²

³⁸ See Born Treatise, Vol. III, at 1115- 1116.

³⁹ Cass. Civ. 1re, 13 March 2007, reported in 2007 Revue de l’Arbitrage 498-500; note by Laurent Jaeger, 500-505.

⁴⁰ French Code of Civil Procedure Article 1520 (2011 revision). The code provisions applicable pre-2011 were essentially the same,

⁴¹ It is true that in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), the U.S. Supreme Court refused to enforce under the Federal Arbitration Act a party stipulation seeking to expand the standard of review of the merits at Stage 3, while at the same time ruling in *First Options* and *Howsam* that party agreement can determine (expand or restrict) the Stage 3 standard of review applicable to a tribunal’s jurisdictional award. However, unlike the Cour de cassation ruling in France, the *Hall Street* Court did not base its ruling on mandatory public policy. The Court expressly ruled only that the parties could not achieve their objective under the provisions of Federal Arbitration Act, but could conceivably do so by proceeding under different federal or state legislative authority. See generally, J. Barceló, “Expanded Judicial Review of Awards After *Hall Street* and in Comparative Perspective,” in P. Hay, L. Vékás, Y. Elfana & N. Dimitrijevic, eds., *RESOLVING INTERNATIONAL CONFLICTS—LIBOR AMICORUM*, TIBOR VÁRADY 1- 19 (CEU Press, 2009); also published on line in Cornell Law School Legal Studies Research Paper Series, No. 09 - 014, available at SSRN: <http://ssrn.com/abstract=1427447>

⁴² For a thorough discussion of the German approach to the negative-effect doctrine, see K.-H. Böckstiegel, S. Kröll, & P. Nacimiento, eds., *ARBITRATION IN GERMANY* 116-132; 215-225 (2d ed. 2015).

The German Civil Procedure Code, like its French counterpart, determines the German approach to the negative-effect doctrine and does not allow party autonomy to alter the given rules.⁴³ The German code reflects, however, a very different balance of the competing policy goals—*arbitral efficacy* versus *fairness/procedural efficiency*. It gives greater weight to the latter policy. Whenever a claimant seizes a German court with an “action” that may be subject to an arbitration agreement, the court will only send the parties to arbitration, if the respondent so requests and the court concludes, after a full review, that the arbitration agreement exists and is enforceable.⁴⁴ It will not defer to an arbitral tribunal for a first instance decision on jurisdiction—as most often happens in France. A plaintiff seeking judicial resolution of its claim in a German court will not be required to go forward with arbitration merely to request an arbitral tribunal to decline jurisdiction.

Also a party may file a special petition—called an “application”—seeking only a ruling whether a dispute must be submitted to arbitration.⁴⁵ Such an “*application*”—to be distinguished from an “*action*” seeking a substantive remedy⁴⁶—must be filed, however, before an arbitral tribunal has been formed to hear a dispute.⁴⁷ This timing condition thus seems to respond to the efficacy goal when procedural efficiency considerations favoring an early court decision on jurisdiction are minimized. If the tribunal has already been formed, it would not entail much further delay or expense to require the party seeking a ruling on jurisdiction to raise this issue in the first instance before the tribunal. The German rules envision that the tribunal will render its jurisdiction decision as a preliminary ruling, which ruling can then be challenged immediately⁴⁸ before a German court applying de novo review.⁴⁹

The timing condition does not technically apply, however, to a plaintiff who files an “action” seeking a German court remedy on a substantive claim—presumably including a claim requesting a declaratory judgment that the petitioner is not liable in the underlying dispute. This might seem to open an avenue for obstructionism if a later-filed “action” (especially a declaratory “action”) would be allowed to usurp the efficacy of an advanced-stage arbitral proceeding. It seems likely, however, that when an arbitral tribunal has already been constituted, a German court would actually stay its proceedings—even on an “action”—to await a first instance arbitral decision on jurisdiction. Its authority to do so could be based on the *lis alibi pendens* provisions of the German procedural code.⁵⁰ Those provisions would allow (but not require) a court to suspend its proceedings to await the result of a parallel proceeding on the same issue in another forum. Thus, even in the case of an “action”, if arbitral proceedings are first-filed

⁴³ See K.-H. Böckstiegel, S. Kröll, & P. Nacimiento, eds., *ARBITRATION IN GERMANY* 118 & 216 (2d ed. 2015).

⁴⁴ Note if the respondent participates in the first oral hearing without raising a claim that the dispute should be referred to arbitration, the respondent forfeits its opportunity to do so thereafter. In effect, in this situation the respondent has agreed to the jurisdiction of the German court.

⁴⁵ German Code of Civil Procedure, section 1032(2).

⁴⁶ The German code in section 1032 uses “Antrag” for an “application” and “Klage” for an “action”.

⁴⁷ *Id.*

⁴⁸ The challenge must be filed within one month of written notice of the preliminary ruling. German Code of Civil Procedure section 1040(3).

⁴⁹ *Id.*

⁵⁰ See German Code of Civil Procedure section 148: “Where the decision on a legal dispute depends either wholly or in part on the question of whether a legal relationship does or does not exist, and this relationship forms the subject matter of another legal dispute that is pending, * * *, the court may direct that the hearing be suspended until the other legal dispute has been dealt with and terminated, * * *.”

and reach the stage of seizing a constituted tribunal with the case, a German court is likely to defer to a first instance jurisdictional decision by the arbitrators.

Another aspect of the German rules can be seen as protecting arbitral efficacy. Even if an “action” is first in time, the German rules allow arbitration to be commenced and to go forward in parallel with court proceedings. However, the pro-efficacy effect is not strong. An obstructionist party can still impose litigation costs on an opponent by seizing a German court with a substantive claim—at least before the arbitral tribunal is constituted. The pro-arbitration party would be more or less forced to enter the proceedings to challenge jurisdiction, because a German court may not defer to arbitration on its own motion.⁵¹ Furthermore, the arbitral claimant is not likely to want to press ahead simultaneously with arbitration—unless exceptionally confident of good arbitral jurisdiction. Otherwise, further expense devoted to arbitration could be wasted. Thus, one might characterize the German approach as almost the mirror image of the French. If a court action is filed before an arbitral tribunal is constituted, arbitration is likely to be paused while a German court gives full review to the jurisdiction question, unless the absence of court jurisdiction is “manifest” (at least to the arbitral claimant).

Privileging Party Autonomy—the U.S. Approach

The U.S. negative-effect doctrine contrasts with the French and German rules in several respects. For one thing, it is not based on clear-cut legislative provisions and has thus been developed by decisions of the U.S. Supreme Court. For another—which I will address below—the U.S. approach allows party autonomy to shape the doctrine—a result seemingly not allowed in either France or Germany, as discussed above.

There are, of course, legislative provisions on arbitration in the U.S. In the case of international arbitration, Chapter 2 of the Federal Arbitration Act [FAA] adopts the New York Convention as internal U.S. law. Thus, Article II of the Convention applies, and of course it provides in paragraph II(3) that if a court has before it an action allegedly governed by an arbitration agreement, the court “shall *** refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”⁵² As discussed above, under the better view the Convention is ambiguous and leaves it to the discretion of each member country whether at Stage 1 a court should assess jurisdiction under a full review (German practice) or *prima facie* (French practice) standard—or possibly under some other approach.

Were the putative seat in the U.S., one might reason that FAA Chapter 1 would apply,⁵³ in which case Chapter 1 section 4 would seem to call for full review at Stage 1: “If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.” However, if a transaction has an international dimension, even when the seat is in the U.S., Chapter 2 still applies,⁵⁴ and in the case of a conflict between Chapters 1 and 2, Chapter

⁵¹ Section 1032(1).

⁵² New York Convention Article II(3).

⁵³ The FAA Chapter 1 was enacted in 1925 and was clearly intended for arbitration with a U.S. seat—see sections 9 and 10—although perhaps not exclusively.

⁵⁴ FAA section 202.

2 prevails.⁵⁵ Thus, on the applicable negative-effect doctrine at Stage 1, we are referred back to the ambiguous language of the New York Convention Article II(3).

Of course one could argue that in the situation just contemplated—seat in the U.S. involving international arbitration—both Chapters 1 and 2 apply, and since Chapter 2 allows Convention countries to choose their preferred standard of review at Stage 1, the two FAA chapters are not in conflict, and therefore Chapter 1 prevails as the U.S. choice in favor of full review. However, the U.S. Supreme Court has never based its negative-effect rulings on this reasoning. The upshot is that in the U.S. no legislative provision clearly defines the applicable negative-effect doctrine, and hence the U.S. position has been left to court interpretation, namely to decisions of the U.S. Supreme Court.

Two U.S. Supreme Court decisions are central to understanding the U.S. approach to negative effect: *First Options of Chicago v. Kaplan*⁵⁶ and *Howsam v. Dean Witter Reynolds, Inc.*⁵⁷ I should point out that the U.S. Supreme Court cases do not use the concepts “competence-competence” or the “negative effect”. They also refer to the “arbitrability” of a dispute, using that term to mean that the dispute is arbitrable if the parties have entered a binding and applicable arbitration agreement requiring them to arbitrate the disputed issues. The Supreme Court’s use of “arbitrability” is much broader than the meaning that courts and scholars in many other jurisdictions, particularly in Europe, would give to the term. For Europeans, the term “arbitrability” refers to whether public policy prohibits the dispute—or particular issues in the dispute—from being resolved in arbitration and reserves jurisdiction instead for national courts on those issues. Thus, in European usage “arbitrability” refers to a specific public policy reason for invalidating an arbitration agreement, in whole or in part. For convenience, in the discussion below, I will follow the broader U.S. usage of “arbitrability”. Thus, a dispute is “arbitrable” when the relevant parties have entered into an arbitration agreement, the agreement is valid, and the particular issue in dispute is covered by the agreement (existence, validity and scope).

Another important feature of the U.S. Supreme Court jurisprudence is the linkage it entails between Stages 1 and 3—a point I will discuss later in this subsection. There is no such linkage in the French and German approaches, in both of which at Stage 3, review of the tribunal’s jurisdiction is de novo, irrespective of the review standard at Stage 1. Another difference is that in the U.S. party agreement is the touchstone of the doctrine, whereas—as discussed above—it seems to play no role on negative effect in France and Germany. Indeed, in the U.S. it is the preeminence the Court gives to party autonomy that explains the linkage between Stages 1 and 3.⁵⁸

Both the intertwining of Stages 1 and 3 and the decisiveness of party agreement in the U.S. approach are apparent in *First Options*.⁵⁹ The case involved domestic arbitration, but as a later U.S. Supreme Court decision, *BG Group*,⁶⁰ demonstrates,⁶¹ it also governs the U.S. approach to international arbitration.

⁵⁵ FAA section 208.

⁵⁶ 514 U.S. 938 (1995).

⁵⁷ 537 U.S. 79 (2002).

⁵⁸ This was once a feature of German law, but now has been abandoned. See K.-H. Böckstiegel, S. Kröll, & P. Nacimiento, eds., *ARBITRATION IN GERMANY* 216 (2d ed. 2015).

⁵⁹ *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).

⁶⁰ *BG Group v. Argentina*, 572 U.S. ____; 134 S.Ct. 1198 (2014).

⁶¹ See the discussion of *BG Group* in the text below accompanying fns 78-82.

First Options is a Stage 3 case in which the U.S. Supreme Court considered only what review standard a U.S. court should apply to the arbitrability issue when asked to enforce an arbitral award. If the tribunal did not have good jurisdiction, then the award would be rejected. In its final award the *First Options* arbitral tribunal had ruled that the parties were bound by a valid arbitration agreement. The Court agreed to decide how much deference the enforcing U.S. court should give to this prior tribunal finding.

In answering that question, the *First Options* Court turned primarily to the intent of the parties during contract negotiations and added an all-important presumption. The Court first asked whether concerning any future dispute the parties intended a court or the arbitral tribunal to decide the existence, validity, or scope of the arbitration agreement they were negotiating. Reasoning that the parties rarely ever even think of this “rather arcane” issue—the “Who Decides Arbitrability?” question—the Court instructed lower courts to presume that the parties intended the normal pattern to apply—a court should decide. That presumption could be countered only by “clear and unmistakable” evidence⁶² that the parties intended to refer the threshold decision on arbitrability (existence, validity and scope of the arbitration agreement) to the arbitrators. Since in *First Options* the Court found no such “clear and unmistakable” evidence, de novo review applied.

The reasoning in *First Options* clearly implies that had the parties unmistakably agreed to arbitrate arbitrability, then at the award enforcement stage the Court would have called for deference to the tribunal’s finding of good jurisdiction. This follows from the Court’s treatment of an agreement to arbitrate arbitrability as on a par with the parties’ agreement to arbitrate the merits. It is broadly accepted in international commercial arbitration that a tribunal’s conclusions on merits issues are essentially unreviewable at Stage 3. In a later somewhat analogous case,⁶³ discussed further below, the Court confirmed that it had in mind rather sweeping deference to a prior tribunal decision on “jurisdiction”. This aspect of the *First Options* decision is, however, rather problematic. A far better approach would have been to treat a simple agreement to arbitrate arbitrability as meaning only that the arbitrators would be given a chance to reach a first-instance decision on jurisdiction, not a final decision. For finality, the Court should have called for more explicit party intent to that effect. We will delay that discussion, however, until later. First, it seems necessary to take up the logical consistency issue inherent in the Court’s reasoning—reasoning that privileges party agreement on “Who Decides?” contained in the very agreement being challenged as non-existent or invalid.

Bifurcation of the Arbitration Agreement. The logical problem inherent in the *First Options* reasoning is this. If one party claims that the putative arbitration agreement either does not exist or is invalid, how could that very arbitration agreement determine *ex ante* who should decide those claims? Of course the actual outcome of *First Options* seems to finesse this issue, because the Court found no “clear and convincing evidence” of an agreement on “Who Decides”. What if, however, the Court had come to the opposite conclusion?

Of course, the logical difficulty does not arise if the agreement to arbitrate arbitrability is contained in an entirely separate arbitration agreement that envisions subsequent contractual

⁶² 514 U.S. 938, 944.

⁶³ BG Group v. Argentina, 572 U.S. ____; 134 S.Ct. 1198 (2014).

arrangements containing arbitration clauses, or that is formed after the dispute arises and addresses specifically the “Who Decides” issue. But the difficulty does arise if the claimed agreement to arbitrate arbitrability is said to be found within a clause or subsection of the basic arbitration agreement itself included in one or more clauses of a larger agreement—an international sale, distribution contract or other transaction.

Under those circumstances, for logic’s sake one would have to understand the Court’s reasoning as contemplating two distinct agreements contained within a single broad arbitration agreement: one delegating to the arbitral tribunal the initial decision on arbitrability and the other dealing with the “core” elements of arbitration—such as how the arbitrators are to be appointed; the choice, if any, of the seat or applicable institutional rules, and the scope of substantive issues to be arbitrated (those other than arbitrability). For convenience I will call the first of these two, the “delegation” agreement⁶⁴ and the second, the “core” arbitration agreement.

The Court’s insistence on “clear and convincing evidence” that the parties thought about and agreed to arbitrate arbitrability helps to distinguish between such an agreement (the delegation agreement) and the agreement concerning more “core” elements. Concerning the core agreement, there is no requirement that evidence of intent be “clear and convincing”—a preponderance of the evidence will do. Moreover, the Court’s presupposition that parties rarely ever think about the “Who Decides?” issue seems consistent with an analysis that assumes that if the parties do actually think about the “Who Decides?” question and can be shown with “clear and convincing” evidence to have agreed on that point, then they themselves must have been thinking about two separate agreements, one on “Who Decides” arbitrability and a separate one on the “core” elements of any ensuing arbitration.

Of course, the delegation agreement could itself be challenged as to its existence or validity. Moreover, a challenge to the delegation agreement could be implicit in the grounds alleged for the nonexistence or invalidity of the whole arbitration agreement or even of the larger commercial contract containing the arbitration clause. This is especially so, if the ground for challenge were based on non-existence, as opposed to invalidity. For example, suppose the respondent alleges that the whole arbitration clause containing both the *delegation* agreement and the *core* agreement is a forgery, fraudulently added by one of the parties after the contract was negotiated and signed—an “existence” issue. Or suppose that the individual who negotiated and signed the larger commercial contract (sale, joint venture, distribution agreement, etc.) on behalf of a disputing party is alleged to have had no actual or apparent authority to bind that party. This again raises an “existence” issue, although this time in a challenge to the whole underlying commercial agreement. In these cases the respondent’s claim of non-existence implicitly applies simultaneously and directly (not derivatively) to the existence of both the *delegation* agreement and the *core* agreement. If the arbitration agreement was forged, for example, there was just as much forgery of the delegation agreement as there was of the core agreement. Such a

⁶⁴ Here I am following the lead of the U.S. Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), in which the Court analyzed a larger arbitration agreement as containing two distinct agreements, the agreement to arbitrate arbitrability—which it called the “delegation” agreement—and the rest of the arbitration agreement. The Court concluded that the *Prima Paint* separability doctrine (*Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967)) applied as well to the delegation agreement, which it treated as itself an arbitration agreement, separate and distinct from the rest of the broader arbitration agreement.

dispute could not logically be governed by the delegation agreement and under *First Options* would fall to a Stage 1 U.S. court for decision.

Were the opposing party to challenge the *validity*—as opposed to the existence—of the core arbitration clause, however, the challenge might not implicitly impugn the separable delegation agreement. For example, the law applicable to the delegation agreement could be different from the law applicable to the core agreement, so that different results would be possible. For another example, suppose the core agreement called for institutional arbitration, but as to any damages claim required the named institution to use the rules of a different institution. The alleged pathology of the core agreement would apply only as to a damages claim, and not as to the delegation agreement.

These points exactly parallel how one should analyze the traditional separability principle when applied to the larger commercial agreement containing an arbitration clause. A challenge to the *existence* (as opposed to *validity*) of the entire commercial agreement would as a rule implicitly impugn the existence of the arbitration agreement. Hence, in such a case the separability principle could not save the dispute for decision by the arbitrators.⁶⁵ On the other hand, a challenge to the validity of the larger commercial contract would not necessarily impugn the validity of the arbitration clause itself (other than derivatively)—hence the challenge could be sent to the arbitrators.

Note that if the party resisting arbitration does so only respecting a scope issue—namely, that a disputed issue is not within the scope of the arbitration clause—then there would be no need to bifurcate the arbitration agreement in order to enforce a provision delegating the scope issue to the arbitrators. In such a situation, the parties are in agreement on the existence and validity of the arbitration agreement as a whole; the only disputed issue is the scope of the clause. As long as “clear and unmistakable evidence” shows that the parties intended for the arbitrators to decide scope issues, then the scope dispute should go to the arbitrators. Otherwise, the scope issue would be for the court.⁶⁶

⁶⁵ Of course a strong negative-effect doctrine based in legislation and not relying on party autonomy and notions of separability could still operate to assign to the arbitrators the first instance decision on an existence challenge. This would be the result, for example, in France as long as there were *prima facie* evidence of an existing arbitration agreement between the parties.

⁶⁶ Note that since the *First Options* Court found no delegation agreement, in effect it ruled that scope issues were for the court to resolve, not the arbitrators. However, the *First Options* opinion contains language that must be read very closely to avoid confusion on this point. In *First Options* the Court said:

“[T]he law treats silence or ambiguity about the question “who (primarily) should decide arbitrability” differently from the way it treats silence or ambiguity about the question “whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement” —for in respect to this latter question the law reverses the presumption. See *Mitsubishi Motors*, *supra*, at 626 * * * (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”) 514 U.S. 938, 944-45.

The parenthetical language is important and must be read closely to understand the Court’s meaning. In the cited *Mitsubishi Motors* case the Court had before it the issue of whether the scope of the arbitration agreement encompassed a statutory antitrust claim. The Court decided, yes, and hence that the arbitrators should decide the antitrust claim. In other words, the Court decided the scope issue for itself (with a presumption that close questions on scope should be decided in favor of arbitrability). The Court did not rule that the dispute over the scope of the clause was to be sent to the arbitrators for them to decide scope. In *Howsam* the Court reiterated this point: “[A] disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

Indeed, one commentator argues that *First Option's* privileging party autonomy should be understood as limited to scope issues.⁶⁷ However, as I believe the discussion immediately above demonstrates, it is not necessary to limit party autonomy in this way. Understanding the arbitration agreement as potentially bifurcated more fully privileges party autonomy—one of arbitration's touchstones—and is for that reason an advantage. It allows the parties to delegate, at a minimum, both validity and scope issues⁶⁸ to the arbitrators.

Rent-A-Center. In *Rent-A-Center, Inc. v. Jackson*,⁶⁹ the U.S. Supreme Court applied precisely the analysis we have just sketched in order to enforce a delegation agreement. The case involved domestic arbitration, but the Court's reasoning should apply equally to international arbitration.

In *Rent-A-Center* the arbitration clause contained a core agreement and also an explicit provision delegating the arbitrability issue to the arbitral tribunal for decision. The plaintiff, an employee of Rent-A-Center, brought an employment discrimination claim against his employer. The arbitration clause in the employment agreement contained a provision stating that:

"The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of [the arbitration agreement] * * * including * * * any claim that all or any part of this Agreement is void or voidable."⁷⁰

The Court labeled this provision a "delegation" agreement that was *separable* from the rest of the arbitration agreement. Because it was a written provision clearly intended as part of the parties' agreement, it met the "clear and unmistakable" evidence test that *First Options* said was required for the parties to delegate the arbitrability issue to the arbitrators.

In a footnote, Justice Scalia, writing for the majority, explained that the "clear and unmistakable evidence" test of *First Options* applied only to the parties "intent" to include this competence allocating provision in their agreement and not to the "validity" of that agreement.⁷¹ One commentator has found this distinction untenable,⁷² and yet, it seems perfectly sound. The *First Options* Court introduced the

Given these rules of interpretation it seems relatively unimportant whether parties agree to delegate scope issues to the arbitrators. If they do, then arbitrators will decide, and they are very likely to include within arbitral scope any issue reasonably related to other issues indisputably included. This is the reasonable and efficient thing to do. If the parties do not so delegate scope issues, then a Stage 1 or Stage 3 court will decide scope questions. But once again the Court instructs lower courts to decide all close scope questions quite liberally in favor of arbitrability. Thus, either way the result should be the same.

⁶⁷ Born Treatise, Vol. 1, at 1166. Born notes that logical problems can be avoided by restricting to scope issues alone *First Option's* endorsement of party choice.

⁶⁸ The discussion several paragraphs above dealt with the difficulties confronting the delegation theory in respect of "existence" issues. In very improbable circumstances, however, even an existence issue could be delegated to the arbitrators if, for example, the respondent alleged that only the core agreement or parts of it were forged.

⁶⁹ 561 U.S. 63 (2010).

⁷⁰ 561 U.S. 63, 66

⁷¹ 561 U.S. 63, fn 1.

⁷² Born Treatise, Vol. I, at 1161-62. At one point, Born claims that according to the majority opinion in *Rent-A-Center*: "a challenge to the validity of the parties' agreement to arbitrate arbitrability disputes will not suffice to prevent submission of those disputes to arbitration: only a challenge to the parties' 'manifestation of intent' will be grounds for not submitting arbitrability disputes to arbitration." Id. at 1162. This conclusion seems inconsistent with express language in Justice Scalia's *Rent-A-Center* majority opinion: "[U]less Jackson [the plaintiff in the

requirement of “clear and unmistakable evidence” of a delegation agreement because the Court had presumed that parties negotiating an arbitration agreement generally do not even think about the possibility that they could fall into dispute over the existence or validity of the arbitration clause, much less about who would decide such a dispute. Once there is “clear and convincing evidence” that the parties did, indeed, think about these issues and intended to provide for them, as was the case in *Rent-A-Center*, then all countering presumptions fade away, and the parties then confront normal burdens of proof concerning the validity of the relevant written provisions in the contract. Thus, *Rent-A-Center’s* ruling limiting the “clear and unmistakable evidence” test to party intent and not to the “validity” of the delegation agreement seems perfectly understandable.

The Court’s doing so, however, does not mean that the delegation agreement would be immune from challenge. The challenge to the validity of the delegation agreement itself need only be specifically articulated—or, presumably, unavoidably implicit in the opposing party’s challenge to the validity of the broader arbitration agreement.

The Link Between Stage 1 and Stage 3. Note that the *First Options* decision technically deals only with a Stage 3 issue—that is, when deciding whether to enforce an award, what deference, if any, must a court give to the arbitrators’ prior ruling on arbitrability. Nevertheless, the Court’s reasoning in the case also explains what role, if any, the negative-effect doctrine plays in a U.S. court at Stage 1. At that stage the doctrine’s effect is decided by the parties’ intent and the presumption the Court applies. Unless there is “clear and unmistakable” evidence that the parties intended the arbitrators to decide arbitrability, the

underlying action] challenged the delegation provision specifically, we must treat it as valid *** and must enforce it ***, leaving any challenge to the Agreement [meaning the arbitration agreement] as a whole for the arbitrator.” 561 U.S. 63, 72 (2010). Scalia’s opinion repeatedly emphasized that Jackson’s substantive unconscionability claims in the courts below were always asserted to apply to the arbitration agreement as a whole, and never specifically to the delegation provisions. See 561 U.S. 63, 72-77. For example, Scalia notes that one claim of unconscionability was based on the provisions that limited arbitrability to claims the plaintiff was likely to make and not those that Rent-A-Center was likely to make—an argument that clearly applies only to the core agreement and not to the delegation agreement. *Id.* at 73. Scalia also notes that two other unconscionability claims made by Jackson—that arbitration fees were to be split and that discovery was to be limited—were always articulated as invalidating the entire arbitration clause and were more readily convincing if applied to the core agreement as opposed to the delegation agreement. He suggests that had those claims been leveled—in addition—specifically at the delegation agreement itself, then those claims could conceivably have been reserved for court determination. *Id.* at 74. Indeed, Scalia expressly mentions one substantive unconscionability claim that Jackson did, in fact, raise expressly against the delegation clause alone—that the *quid pro quo* for that clause had been a “plenary post-arbitration judicial review” provision that was invalidated by a later Supreme Court decision. However, because that claim had not been raised in the lower courts, the Court refused to consider it. *Id.* at 75-76.

Note that Scalia’s reasoning does not seem to treat the requirement of leveling any invalidity claim specifically at the delegation agreement as simply a technical pleading requirement. Although Scalia does not expressly make this point, it would seem logically sufficient were the challenge to the whole arbitration agreement *implicitly* to apply at the same time specifically to the delegation agreement and not merely by derivation. For example, had Jackson argued that under the law applicable to the validity of the arbitration agreement some technical requirement had not been fulfilled, that argument would simultaneously have applied to both the core agreement and the delegation agreement, because the Court considered both of these to be arbitration agreements.

court at Stage 1 decides arbitrability under full review. Hence, in such a situation at Stage 3—if there has been no prior Stage 1 court decision⁷³—the court decides de novo.

In *Howsam v. Dean Witter Reynolds, Inc.*,⁷⁴ decided a few years after *First Options*, the Court qualified the *First Options* holding in an important way. *Howsam* presented the Court with the question whether the *First Options* rule still applied when the issue was not technically the jurisdiction of the arbitral tribunal—the existence, validity, or scope of the arbitration agreement—but rather whether the claimant had followed agreed-upon procedures concerning the arbitral claim. Had the claimant presented her claim within the six year time period set out in the applicable arbitral rules? This time the Court drew a distinction between what it called “substantive arbitrability” of a dispute (encompassing the existence, validity, and scope issues) on one hand, and “procedural arbitrability,” on the other. The *Howsam* Court ruled that “procedural arbitrability” issues—including time limits, notice requirements, mandatory prior mediation obligations, estoppel, and waiver of the right to arbitrate—were governed by a different rule. On “procedural arbitrability” issues—of the kind involved in *Howsam*—the parties are presumed to have intended to give the primary decisional authority to the arbitral tribunal, not the courts. Once again, however, the presumption could be overcome, but only where there was “clear and convincing evidence” that the parties intended to reserve primary decisional authority for the courts.

The Court’s procedural arbitrability doctrine would seem to be based on how it imagined parties negotiating an arbitration agreement would have expected claims-related procedural issues to have been decided. The Court seems to have perceived claims-related procedural issues, which are clearly not merits issues, as nevertheless closely related to merits issues, because claims-related issues concern whether the claimant’s handling of the claim might have forfeited its right to proceed. These issues do not deal fundamentally with which institution, court or arbitrator, should decide the merits of the dispute. Seen in this light, procedural arbitrability issues seem to fall more naturally within the jurisdiction of the arbitrators.

Here it is important to see the overlap between the U.S. Supreme Court’s concept of “procedural arbitrability” and what civil law jurisdictions like France and Germany would classify as claim “admissibility” issues. In both France and Germany, for example, the list of “procedural arbitrability” issues one finds in *Howsam* would generally be treated as “admissibility issues”.⁷⁵ In both countries admissibility issues are the province of the arbitrators and, like merits issues, are not reviewable by the courts. Admissibility issues are not classified as jurisdiction questions that ask which institution, court or arbitrator, should have decisional authority. Instead they ask whether the claimant handled the claim properly—an issue for the arbitrators if there is an existing and valid arbitration agreement.

There is one important difference, however, between *Howsam*’s “procedural arbitrability” concept and the civil law concept of “claim admissibility”. In France and Germany, as just discussed, admissibility issues are for the arbitrators—if the underlying claim is arbitrable—and at Stage 3 the admissibility issue is just as non-reviewable as merits-based questions. These outcomes do not depend upon the intent of the parties as expressed in their arbitration agreement. In the U.S., on the other hand,

⁷³ Had there been a prior Stage 1 U.S. court decision, then the matter would have been settled in the U.S. by the principle of res judicata.

⁷⁴ 537 U.S. 79 (2002).

⁷⁵ See J. Barceló, “Arbitrability Decisions Before, During, and After Arbitration” in J.C. Betancourt, ed., *DEFINING ISSUES IN INTERNATIONAL ARBITRATION* 74 para 7.29 (2016) and authorities cited id. in fn 16.

an express and clear-cut provision in the arbitration agreement reserving “procedural arbitrability” questions for the courts will be respected, and in such a case at Stage 3 courts will decide the issue *de novo*.

The Degree of Court Deference When Arbitrators Decide Arbitrability. In the U.S. when a Stage 3 court is required to give deference to the tribunal’s own prior decision on its competence, how much deference is called for? That question, not addressed explicitly in *First Options*, was clarified years later in the relatively recent *BG Group* case.⁷⁶ In *BG Group* the dispute concerned a *procedural arbitrability* question⁷⁷ that the Court decided was subject to the standard presumption privileging the tribunal. There the Court ruled that deference entails reviewing only whether the arbitrators based their ruling—concerning whether the claimant properly handled the claim—on the arbitrators’ interpretation of the terms of the parties’ arbitration agreement, instead of dispensing “their ‘own brand of justice’.” That standard is of course easily met and thus entails a sweeping degree of deference. The standard is similar to the non-reviewability of merits issues at Stage 3. If, in deciding the merits, the arbitrators apply their “own brand of justice”, instead of interpreting the parties’ agreement or applying the relevant law, the award would certainly be set-aside at the seat (or refused recognition and enforcement in other jurisdictions) because the arbitrators failed to follow proper procedure⁷⁸—or, “exceeded their powers,” as the point would be put for a seat in the U.S.⁷⁹

Given the Court’s reasoning in *BG Group* equating deference when arbitrators are privileged (concerning procedural arbitrability) to deference on the merits, presumably the same degree of deference would also apply at Stage 3 concerning substantive arbitrability whenever the parties have unmistakably agreed to privilege the arbitrators.⁸⁰ Following the Court’s articulated assumption in *First Options* that negotiating parties hardly ever even think about who should decide substantive arbitrability,

⁷⁶ *BG Group v. Argentina*, _ U.S. _; 134 S. Ct. 1198 (2014).

⁷⁷ *BG Group* involved an investor-state claim and concerned whether the tribunal’s award in favor of the investor was unenforceable in the U.S., the seat, because the investor had failed to litigate its claim for at least 18 months in the host state’s courts, as the Bilateral Investment Treaty seemed to require. The tribunal had ruled that under the circumstances of the case, especially because of the behavior of the host state, the pre-arbitration litigation requirement was not enforceable. Thus, the dispute involved *procedural arbitrability*, concerning which the *Howsam* precedent called for an enforcing court to privilege the tribunal’s decision—there having been no explicit party agreement to the contrary. Thus, the Court confronted the question of how much deference was required when the tribunal is privileged. The Court’s answer called for the reviewing court merely to satisfy itself that the tribunal had attempted—presumably in good faith—to interpret the parties’ agreement—as opposed to applying its own brand of procedural justice.

⁷⁸ For set-aside at the seat for failure to follow agreed-upon procedure, see Model Law Article 34(2)(a)(iv). For refusal to recognize and enforce an award because agreed-upon procedure was not followed, see N.Y. Convention Article V(1)(d).

⁷⁹ See FAA Chapter 1 sec. 10(a)(4).

⁸⁰ In effect, I am assuming in the text that in a *substantive arbitrability* case requiring privileged treatment of the tribunal’s decision because of an express party-agreement to that effect, the same Stage 3 standard of review would apply as that applicable to privileged tribunal decision-making when the issue concerns *procedural arbitrability*, as in *BG Group*. Nothing in the Court’s analysis in *BG Group* would suggest that the Court would distinguish between the two cases of privileged tribunal decision-making.

one would expect examples of an unmistakable arbitrator-privileging agreement to be exceedingly rare.⁸¹ Recent very troubling decisions at the U.S. Court of Appeals level, however, give the lie to that expectation.

In those cases, the parties incorporated into their agreement a standard set of institutional rules containing a provision acknowledging the Kompetenz-Kompetenz principle. Virtually all modern sets of institutional rules contain such a provision.⁸² The provision is intended to affirm the universally applied principle of positive Kompetenz-Kompetenz, meaning, as we discussed above, that in the face of a challenge to arbitral jurisdiction, arbitrators may decide the issue for themselves and then continue or dismiss the proceedings as they see fit. Arbitrators are not required to halt all proceedings until a national court rules on the arbitrators' jurisdiction. The Kompetenz-Kompetenz principle does not mean that the arbitrators' decision is final. It merely avoids excessive delay when arbitrability challenges are raised early in the arbitral proceedings. Nevertheless, a number of U.S. cases at the Court of Appeals level have held that the Kompetenz-Kompetenz provision included in institutional rules that the parties incorporated by reference had the effect of delegating final jurisdictional decision-making to the arbitrators.⁸³

The upshot of these recent Court of Appeals decisions in the U.S. is thus startling and surely misguided.⁸⁴ First, parties typically include a set of respected institutional rules in their arbitration agreement almost as a matter of course, especially if some future dispute may involve large sums of money. Second, those rules will virtually always contain a standard Kompetenz-Kompetenz provision. Thus, under these recent appellate interpretations, U.S. courts will give deferential finality to arbitrators' own views of their jurisdictional authority in a large number of cases. Hence, potentially biased decision makers on the jurisdiction issue will have the final word most of the time. This outcome seems unwise and unlikely to have been intended by parties when they opt for institutional arbitration.

It will fall to the Court itself to correct this error in a future decision. Inclusion of institutional rules containing a standard Kompetenz-Kompetenz provision should not even mean that the parties wanted a Stage 1 court to defer the initial jurisdictional decision to the arbitrators,⁸⁵ much less that the arbitrators' decision should be final. Instead, to find that parties have delegated to the arbitrators the first-instance decision on jurisdiction, the Court should require truly "*unmistakable*" evidence of specific

⁸¹ At least this might be so for domestic arbitration, but perhaps less so in international arbitration involving sophisticated commercial parties, presumably well advised by counsel.

⁸² See, e.g., ICC Rules Article 6(5); AAA Rules Article 19(1); LCIA Rules Article 23.1

⁸³ See, e.g., *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011).

⁸⁴ See P. Mayer, "L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence," in *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW*, Vol. 217 Part V, at 340 (Year 1989). Mayer notes that a party agreement to confer finality on a tribunal's own ruling on jurisdiction should be very rare and that it certainly should not be found to exist merely because the parties have adopted the ICC Arbitration Rules, which themselves acknowledge the Kompetenz-Kompetenz principle.

⁸⁵ The Kompetenz-Kompetenz provision included in Article 16 of the UNCITRAL Model Law, for example, has never been understood to require first-instance decision making by the arbitrators. The Model Law is of course a model *lex arbitri*, not a set of institutional rules. But if even a *lex arbitri* provision should not be taken to mean deference to the arbitrators for a first-instance decision, then *a fortiori* institutional rules with the same provision should not be given that effect. Article 16(1) assumes that the arbitrators have been seized of the case and merely provides that they "may rule" on their own jurisdiction. In other words, they need not stay proceedings to await a court decision on jurisdiction. The provision does not require a state court to defer to arbitrators for a first instance decision on jurisdiction. Institutional rules containing a standard Kompetenz-Kompetenz provision should be understood the same way.

party intent to that effect, not just ordinary inclusion of institutional rules containing a Kompetenz-Kompetenz clause. Secondly, such a specific delegation to the arbitrators, where it exists, should generally be understood to mean only that the parties wanted the arbitrators to have a first-instance opportunity to rule on jurisdiction—a ruling that would still be subject to judicial review. The parties should be taken to intend finality for the arbitrators’ decision—excluding judicial review—only if there exists unmistakable evidence that they actually intended *that* result—not just that the arbitrators would be allowed to decide on their own jurisdiction or even that they should be given a first-instance priority to do so.⁸⁶ And even when parties clearly and expressly intend finality, jurisdictions may decide that such agreements are unenforceable as against public policy.⁸⁷

This difficulty has arisen, I believe, because the Supreme Court in *First Options* treated a delegation agreement within a broader arbitration clause⁸⁸ as exactly parallel to a core arbitration agreement assigning merits issues to the arbitrators. Parties and their legal advisers broadly understand that merits issues submitted to arbitration will be decided conclusively by the arbitrators and will not be subject to judicial review. The same is not generally so for arbitral jurisdiction. Plainly in the New York Convention scheme, arbitral jurisdiction is treated differently from merits issues. At Stage 3, although merits issues may not be reviewed, Article V(1)(a) provides that a court may refuse to recognize and enforce an award if the court finds that the arbitration agreement is invalid. Under Convention Article

⁸⁶ ICC Arbitration Rules Article 34(6) providing that parties waive “their right to any form of recourse [against the award] insofar as such waiver can validly be made” should not be understood to satisfy a test requiring “clear and unmistakable” evidence that the parties intended to insulate the tribunal’s jurisdictional decision from judicial control. For one thing, the provision itself is equivocal (“insofar as such waiver can validly be made”). In addition, inclusion of institutional rules by reference should not be understood as meeting the required test of “clear and unmistakable evidence” of an intent to waive important protections.

The Swiss approach to an agreement waiving set aside of a Swiss award is illuminating. The Swiss Private International Law Act allows such a waiver in Article 192(1) if no party is domiciled in Switzerland and the waiver is accomplished “by an express statement in the arbitration agreement * * *.” Swiss courts have held that incorporating institutional rules providing that the award is “final and binding” is not sufficient as a waiver because it does not meet the requirement of an “express statement in the arbitration agreement”. See Born Treatise, Vol. III, at 3371 and cases cited therein. For a U.K. case in which the court would have allowed the parties to give the arbitrators final authority on jurisdiction, but only if they agreed expressly to that effect (which the court held they had not done), see *LG Caltex Gas Co Ltd v. China National Petroleum Corp.*, [2001] EWCA 788 (Ct of Appeal).

⁸⁷ Considerable authority for this view seems to exist in Germany. See K.-H. Böckstiegel, S. Kröll, & P. Nacimiento, eds., *ARBITRATION IN GERMANY* 216 para. 3 (2d ed. 2015). Some commentators consider that agreements to exclude court control over an award to be against public policy, unless there is a specific national law provision permitting the exclusion. See J. Lew, L. Mistelis, & S. Kröll, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 683 (2003). As discussed in the previous footnote, the Swiss PILA allows a waiver of set-aside jurisdiction only if: (i) no party has a Swiss domicile and (ii) the waiver is included in an “express statement in the arbitration agreement or in a subsequent written agreement”. Even then, the PILA insists on significant judicial review of arbitral jurisdiction by providing that the N.Y. Convention rules on recognizing and enforcing a foreign award will apply “by analogy”.

In France ample grounds exist to believe that the courts will refuse to enforce an agreement granting arbitrators final authority over jurisdiction, although the point seems not to have been expressly addressed in French jurisprudence. See Born Treatise Vol. I, at 1115-1116; See also, discussion *supra* in fn 38 and accompanying text.

⁸⁸ Presumably the same reasoning would apply to a delegation agreement reached after the dispute arose or one contained in an entirely separate, free-standing agreement preceding and contemplating subsequent commercial transactions that might include an arbitration clause.

V(1)(c) the same applies if an enforcing court finds any aspect of an award to exceed the arbitration agreement's proper scope. Thus, jurisdiction issues may be reviewed at Stage 3, but not merits issues.

In summary, what is especially significant about the U.S. approach to the negative-effect doctrine is the strong role the U.S. Supreme Court accords to party autonomy. We turn now to the Swiss approach to the negative-effect issue, because it raises the related issue of whether putative party choice of the seat should influence the force and effect of the negative-effect doctrine.

Privileging the Importance of Seat Location—the Swiss Approach

In Switzerland the Private International Law Act [PILA] of 1987 governing international matters merely adopts the N.Y. Convention Article II(3) language concerning a national court's obligation to decline jurisdiction and enforce an arbitration agreement: "unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed * * *". Thus, the Swiss statute retains the same ambiguity one finds in the New York Convention concerning the proper level of review at Stage 1.⁸⁹ In the light of this ambiguity, the Swiss Supreme Court has adopted an interpretation of the statutory language that introduces a significant variation on the strong French *prima facie* review doctrine. If the putative arbitral seat is in Switzerland, a Stage 1 Swiss court must apply *prima facie* review. However, if the putative seat is not in Switzerland, then a Stage 1 Swiss court is instructed to apply full review.⁹⁰

Does this Swiss variation highlight an important distinction? First, note that it raises to some degree the logical difficulty—discussed above—entailed in taking account of a provision in an arbitration agreement (selection of the seat), which agreement is itself challenged as nonexistent or invalid. In the context of the Swiss variation, however, this difficulty is not especially serious. Note that in adopting the "Swiss variation" the Swiss courts are debating only whether to apply a *prima facie* or a full review standard at Stage 1. If the putative arbitration agreement would not even pass a *prima facie* test, then plainly a Swiss court would take jurisdiction of the underlying dispute. But if the putative agreement seems *prima facie* valid, but also provides for a foreign seat, then at Stage 1 a Swiss court will engage in a full review to decide jurisdiction. Thus, the *prima facie* valid seat selection affects only the level of review a Swiss court will apply, because if the dispute is ultimately found arbitrable, there will be a foreign seat. But why should it matter that the seat would be foreign if the dispute is arbitrable?

⁸⁹ In the case of domestic arbitration the Swiss Code of Civil Procedure in Article 61(b) expressly calls for *prima facie* review, but the provision's wording has apparently caused the Swiss Supreme Court to require *de novo* court review of the existence of an arbitration agreement and of the dispute's "arbitrability" (in the European sense). Hence *prima facie* review in domestic arbitration seems to apply only to the issues of scope and non-arbitrability claims of invalidity.

"Art. 61 Arbitration agreement

"If the parties have concluded an arbitration agreement relating to an arbitrable dispute, the seised court shall decline jurisdiction unless:

- a. the defendant has made an appearance without reservation;
- b. the court holds that the arbitration agreement is manifestly invalid or unenforceable; or
- c. the arbitral tribunal cannot be constituted for reasons that are manifestly attributable to the defendant in the arbitration proceedings."

See B. Berger & F. Kellerhals, *INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND* 112, para. 335 (3d ed. 2015).

⁹⁰ See B. Berger & F. Kellerhals, *id.* at 110-113 and Swiss cases cited therein; Born Treatise, Vol. I, at 1117-1120.

Commentators have explained the “Swiss variation” in the following terms. If a Swiss court stays its proceeding in the face of a prima facie valid arbitration agreement choosing a foreign seat, then only the courts in the foreign seat will have jurisdiction to annul an award finding good arbitral jurisdiction. In this situation, it is said, the award might be enforced at the seat and in other jurisdictions without the Swiss courts ever having an opportunity to review the arbitrators’ jurisdictional decision.⁹¹ Thus, if the putative seat is abroad, commentators have argued Swiss courts are well advised to engage in full jurisdictional review at Stage 1.

This reasoning is hardly persuasive. First, consider that a court at a foreign seat with annulment jurisdiction can preempt jurisdictional review in other jurisdictions only if the foreign court annuls the award, not if it confirms the award.⁹² Moreover, any such preemption seems only *permitted*—not required—by N.Y. Convention V(1)(e).⁹³ Furthermore, if the foreign court confirms the award, the litigant seeking access to a Swiss court may still petition the Swiss court to take up its case. At this point the opposing party would be forced to interject the confirmed preliminary award seeking its recognition by the Swiss court for the purpose of a res judicata argument. In this posture, the Swiss court’s decision on recognition of a foreign award would be governed by the N.Y. Convention,⁹⁴ and Convention article V(1)(a) authorizes the Swiss court to refuse recognition and enforcement if the court finds the arbitration agreement invalid. Thus, in the award recognition proceeding the Swiss court could decide for itself, de novo, whether the arbitral tribunal had good jurisdiction. Hence, deferring to arbitrators seated abroad for a first instance decision on arbitrability does not seem to run the risk of excluding all options for a Swiss court to rule de novo on its own jurisdiction.

One Swiss commentator, B. Berger, has justified maintaining the current “Swiss variation” on a different ground. Calling attention to a Swiss case involving a potentially pathological arbitration clause and a reference to arbitration “through the American Arbitration Association” (implying a U.S. seat), Berger noted that the case had been tied up in extensive U.S. litigation.⁹⁵ The AAA—technically the ICDR (International Center for Dispute Resolution)—had refused to administer the arbitration, because the arbitration agreement called for the application of the ICC Arbitration Rules. The AAA concluded that it had no means to administer an arbitration to be governed by ICC Rules—in effect considering the arbitration agreement pathological and unenforceable. The party wanting arbitration then sought a U.S. court order affirming the arbitrability of the dispute. That petition led to extended U.S. litigation involving a District Court rejection of arbitration, followed by an Appeals Court reversal and remand to the District Court for further proceedings. The party seeking access to Swiss courts in this case was a Swiss national. Berger thus noted that applying a prima facie test as a basis for sending parties to foreign arbitration could deny a Swiss plaintiff a full hearing on jurisdiction in a Swiss court for years, while expensive proceedings continued in a foreign jurisdiction.

⁹¹ See B. Berger; F. Kellerhals, *supra* fn 90 at 111; Born Treatise, Vol. I, at 1119-1120.

⁹² See New York Convention Article V(1)(e).

⁹³ The New York Convention provides in the chapeau to Article V(1): “Recognition and enforcement of the award *may* be refused * * *.” (emphasis added). Article V(1)(e) allows refusal if the award has been set aside where made.

⁹⁴ See Swiss Private International Law Act Article 194. (“The recognition and enforcement of a foreign arbitral award is governed by the New York Convention * * *.”)

⁹⁵ B. Berger, “Kritische Gedanken zur Revision von Art. 7 IPRG im Lichte eines praktischen Beispiels,” 29 ASA Bull. 33 (2011).

Taking Berger's objection into account, other Swiss commentators have favored extending the *prima facie* test of jurisdiction even to foreign seated arbitrations, subject, however, to a further exception. Kaufman-Kohler, for example, has proposed that the *prima facie* test for deference to the arbitral tribunal's first-instance decision on jurisdiction should depend upon the arbitral tribunal being constituted within a reasonable period of time.⁹⁶ The lesson here is that rules for dealing with the negative-effect issue should not be formulated too rigidly—excluding all discretion to consider exceptional circumstances. The importance of maintaining some flexibility of approach seems especially important in the context of the policy dilemma underlying the negative effect issue—to which as Born has acknowledged: "There is * * * no perfect approach."⁹⁷ I will return to this point in the concluding section below. Discretion to vary from generally applicable rules or presumptions is also the hallmark of the English approach to the negative-effect issue, to which we turn in the next subsection.

One final element of Swiss arbitration law merits comment. We noted above that the U. S. concept of "procedural arbitrability" maps rather closely—perhaps even perfectly—onto the civil law concept of "admissibility". Under either concept, Stage 1 courts—at least in France, Germany and the U.S.—relegate to the arbitral tribunal all issues concerning whether the claim was handled correctly in bringing it to arbitration. Even at Stage 3, courts in the U.S. and in civil law jurisdictions—at least in France and Germany—defer to the tribunal's resolution of those issues in the same way that they would defer to a tribunal's rulings on the merits. Here, however, Switzerland is an outlier. In a well-known Swiss Supreme Court decision in *Maran Coal*⁹⁸ the Court decided that it would review for itself a procedural "admissibility" issue—in that case whether, as a matter of law (not facts), the parties had properly exhausted pre-arbitration procedural requirements. The Court would have deferred to the arbitrators had fact issues been involved. The decision has been criticized,⁹⁹ but it could cause Switzerland to be an attractive seat jurisdiction for parties seeking assurances that mandatory pre-arbitration procedures will be taken seriously.¹⁰⁰

A Discretionary Approach Distinguishing Existence and Scope from Validity — English Law

Some jurisdictions whose arbitration law adopts the N.Y. Convention Article II(3) wording have concluded that it gives no guidance on whether a Stage 1 court should review jurisdiction under a full review or *prima facie* standard. A 2007 U.K. first instance court, however, has perceived some guidance

⁹⁶ See M. Wirth, "Chapter 12 PILA—Is It Time for Reform? If Yes, What Shall Be Its Scope?" in C. Müller & A. Rigozzi, eds., *NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION* 2011 64 (2011).

⁹⁷ Born Treatise, Vol. I, at 1222.

⁹⁸ *Transport En Handelsmaatschappij "Vekoma" B.V. (Netherlands) v. Maran Coal Corp., Switzerland*, Bundesgericht [Federal Court], 1995, unpublished (discussed by Paul Friedland in 13 *Journal of International Arbitration*, March, 1996, at 111). See also 1966 ASA Bulletin 673; 8 *Arb. & Dispute Resolution J.* 87 (1999). For an English translation of the case, see T. Varady, J. Barceló, S. Kröll & A. von Mehren, *INTERNATIONAL COMMERCIAL ARBITRATION—A TRANSNATIONAL PERSPECTIVE* 1006 (6th ed. 2015).

⁹⁹ See J. Paulsson, *THE IDEA OF ARBITRATION* 87-88 (2013).

¹⁰⁰ See J. Barceló, "Substantive and Procedural Arbitrability in Ad Hoc Investor-State Arbitration—BG Group v. Argentina," Chapter 18 in A. Rovine, ed., *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION—The Fordham Papers* 2014, 355-369 (2015); also published online in Cornell Law School Legal Studies Research Paper Series, No. 14-25, <http://ssrn.com/abstract=2487865> (August, 2014).

in the language, concluding that it calls for a distinction between the existence and scope of the arbitration agreement, on one hand, and the agreement's validity, on the other.

In *Nigel Peter Albon v. Naza Motor Trading*,¹⁰¹ the U.K. plaintiff seized an English court on its claim for reimbursement of a contractual overpayment. The respondent, relying on a putative arbitration agreement, requested a stay. The plaintiff resisted the stay on the ground that its signature on the ostensible agreement was forged—clearly a “formation of contract” or “existence” issue. Article 9(4) of the English Arbitration Act calls for the court to stay pending proceedings in the face of a putatively applicable arbitration agreement, “unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.” In parsing this language, the court concluded that “null and void, inoperative, or incapable of being performed” was best understood as referring to the substantive *validity* of an *existing* arbitration agreement and did not cover disputes over the “existence” or “scope” of the agreement. Thus, the court concluded that Article 9(4) presumed the “existence” of an arbitration agreement that covered the given dispute, because only a relevant and existing arbitration agreement could become “inoperative” or “incapable of being performed” or “null and void”—essentially on the basis of substantive invalidity, such as fraud, duress, mistake, or “non-arbitrability” (in the European sense). That meant that the court had to decide for itself under a full review standard whether the arbitration agreement came into existence and covered the dispute. After such a conclusion, the force of the “Kompetenz-Kompetenz” principle expressly affirmed in Article 30 of the English Arbitration Act would operate requiring the court to apply only a *prima facie* test to any substantive validity issues. Thus the arbitral tribunal would—by statute—be seized with a more intensive first-instance scrutiny of substantive validity issues, but not with formation or scope questions.

This analysis, however, did not end the matter. The *Albon* court went on to reason that although the English Arbitration Act itself did not provide in Article 9(4) for a *prima facie* test of the existence or scope issues, a U. K. court nevertheless had “inherent jurisdiction” to apply such a test when appropriate—that is, when the exercise of discretion called for it. What factors should govern that discretion? Here the court mentioned several considerations favoring a stay: (i) if the court were “virtually certain” that the arbitration agreement had been concluded (not the case in *Albon*); (ii) if the disputed issue concerned “scope” and the contested issue was “bound up” with other issues clearly subject to arbitration (again not the case in *Albon*); (iii) if the arbitration proceedings preceded the court action (in *Albon* the court action came first); and (iv) if any arbitral decision on jurisdiction would have been subject to court review. Concerning this last point, the seat was in Malaysia, and the *Albon* court claimed on the basis of expert testimony that court review equivalent to review under sections 30(2), 67 and 72 of the 1996 English Arbitration Act would not be available in Malaysia.¹⁰²

¹⁰¹ [2007] EWHC665 (Ch) (High Court of Justice). *Albon* was cited with approval and its analysis followed by the Court of Appeal in *Joint Stock Co. Aeroflot—Russian Airlines v. Berezovsky & Ors.*, [2013] EWCA Civ. 784; [2013] 2 C.L.C. 206.

¹⁰² *Nigel Peter Albon v. Naza Motor Trading SDN BHD & ORS* (No. 3), [2007] EWHC 665 (Ch): “[A]ccording to the Brief Agreed Summary of the expert evidence) the courts in Malaysia have no statutory jurisdiction equivalent to that afforded in domestic arbitrations by Sections 30(2), 67 and 72 of the [English Arbitration] Act to review or interfere with any decision by arbitrators in Malaysia as to the conclusion of the arbitration agreement and probably have no inherent jurisdiction to do so: at best any inherent jurisdiction is in doubt.” *Id.* at para. 25.

The clear wording of the 2005 Malaysian Arbitration Act—which apparently would have applied to the 2007 *Albon* decision—seems to contradict this assertion.¹⁰³ Nevertheless, if one accepts the court’s factual premise, its logic, while not further articulated in the opinion, seems clear. If the Malaysian courts had no jurisdiction to review a *preliminary* award accepting jurisdiction, then the party opposing jurisdiction would have to wait for the final award. This would entail the significant delay and expense of a complete set of arbitration hearings on the merits and issuance of a final award, before the opposing party could seek set aside of the award and thus obtain judicial review for the first time of the formation of contract issue. Note that this pattern would presumably not be especially infrequent where the seat jurisdiction failed to provide for review of a *preliminary* award on jurisdiction. This is because arbitrators have some incentive to overreach in close cases, since they would gain financially by finding good jurisdiction.¹⁰⁴ In such cases corrective judicial review would occur only after full arbitral proceedings had run their course and resulted in a final award.

The logic, then, of the *Albon* court’s four factors seems to be—taking account of the uncontested facts of each case at Stage 1—to balance the interests, on one hand, of disputants who truly contracted for arbitration, against, on the other hand, the interests of those who did not truly contract for arbitration. The first two *Albon* considerations focus on whether the court—taking account of uncontested facts—could be almost certain (i) that an arbitration agreement had been formed between the disputants or (ii) that the disputed issue was indeed within the scope of the arbitration agreement. A positive conclusion on either point weighs in favor of sending the case to the arbitrators for an initial decision on jurisdiction. The third consideration focuses on the basic logic of a *lis pendens* rule—the first to file normally goes first to judgment. The fourth consideration turns on whether the putative seat jurisdiction would allow an early court review of a preliminary award finding good jurisdiction. If such early review is available, then the potential unfairness and inefficiency of sending a non-consenting party to arbitration is significantly reduced. If a tribunal overreaches in favor of jurisdiction, judicial review is readily available to correct the error with little loss of time and expense. The importance of early review at the seat ties in of course to the likely wide-spread refusal by other jurisdictions to enforce an award set-aside at the seat for lack of arbitral jurisdiction.¹⁰⁵

Note that this fourth consideration operates only when the arbitrators in fact decide to render a preliminary award on jurisdiction. If the case does not truly allow that option, because for example one cannot resolve the jurisdiction issue without at the same time effectively resolving a relevant merits issue, there is then no way to insert judicial review of jurisdiction at an early stage in the tribunal’s proceedings. In such a situation a jurisdiction with a strong negative-effect doctrine—such as prevails in France—would simply favor the interests of the party seeking arbitration. Under *Albon*, one might expect a U.K. court in this situation to conclude that the fourth factor weighs against deferring to arbitrators at Stage 1. However, again under *Albon*, there are at least three other considerations that

¹⁰³ The Malaysian Arbitration Act of 2005 follows the Model Law quite closely. Where the seat is in Malaysia, Article 18(8) provides that if the arbitral tribunal rules, either in a preliminary or final award, that it has jurisdiction, any party can appeal to the Malaysian High Court for it to “decide the matter”. A previous Malaysian arbitration act did not contain an express provision for judicial review of a tribunal’s ruling on jurisdiction. See Malaysian Arbitration Act of 1952, as amended in 1980, available on line at arbitrationlaw.narod.ru/laws/Malaysia_Arbitration.htm, last consulted 8-28-17.

¹⁰⁴ See the previous discussion of this issue *supra* in fn 32.

¹⁰⁵ See N.Y. Convention Article V(1)(e).

might cut the other way. The French result calls for less discretion and is thus more predictable. The English law result is tailored more to the specifics of each case, and thus might seem fairer. But it adds costs inherent in reduced predictability.

Discretion Turning on Law vs. Fact Questions—the Canadian (Quebecois) Approach

The Supreme Court of Canada adopted a different variation on the negative-effect doctrine in *Dell Computer Corporation (Canada) v. Union des Consommateurs (Canada)*.¹⁰⁶ In *Dell Computer* the claimant filed a class action against Dell in a Quebecois court on behalf of consumers who tried to purchase Dell computers at a low price that Dell had mistakenly offered on line. Dell refused to honor the low price. Because a single purchaser's damages could not have supported a law suit, the claimant relied on a class action (not generally available in arbitration). On the basis of an alleged arbitration clause in the various sale contracts, Dell petitioned the court to refer the parties to arbitration.

Dell's petition brought into play Article 940.1 of the Quebec Code of Civil Procedure. That provision contains language patterned on Article II(3) of the New York Convention:

"940.1 Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or *It finds the agreement null.*" (Emphasis added)¹⁰⁷

The fundamental question of course is whether "finds the agreement null" calls for prima facie or full review of the existence, validity and scope of the alleged arbitration agreement.

The Canadian Supreme Court began its analysis by establishing a general presumption in favor of first-instance review by the arbitrators. It noted that this made sense, because an arbitral decision on jurisdiction could be immediately reviewed by a court—entailing little delay. The Court reasoned, however, that that presumption would be overcome if the issue concerned only a question of law, and not one of facts or mixed law and fact—that is, unless the fact issue could be resolved on the basis of documentary evidence in the record. The logic here is again an attempt to balance the competing considerations underlying the "arbitral efficacy—fairness/procedural efficiency" dilemma as applied in a specific context. If law questions alone are involved, then procedural efficiency considerations weigh heavily in favor of an early court decision because judges are expert at such issues and they would be the final arbiters in any event. Besides, the delay would be minimal, and court access in this context would not allow an obstructionist to impose extensive fact-finding burdens purely for tactical advantage.

It is important to note, however, that the *Dell Computer* case involved domestic arbitration, concerning which any legal issues would be governed by Quebecois law. The law-fact distinction is not so persuasive when applied to international arbitration, which will more often involve foreign law, concerning which arbitrators are likely to be more expert than local judges. The lesson is once again the

¹⁰⁶ 2007 SCC 34; [2007] 2 R.C.S. 801.

¹⁰⁷ Available on line at legisquebec.gouv.qc.ca/en, last consulted, 8-28-17.

importance of context in the search for an optimum balance of the “efficacy versus fairness/procedural efficiency” conundrum.

A PREFERRED TRANSNATIONAL APPROACH?

Drawing on some of the insights to be found in the diverging national approaches just canvassed above, this concluding section will suggest some of the features that might comprise a “best practices” transnational approach to the negative-effect issue—one that might be urged upon national jurisdictions, perhaps by UNCITRAL, to foster greater transnational uniformity. Before we turn to those suggestions, what follows is a brief re-cap of the major features of the national systems discussed above.

The French and German approaches rely on legislative rules—as opposed to case-by-case judicial discretion—and thus enhance predictability. They allow some flexibility (the *prima facie* test in France, and the first-in-time privilege for arbitrators in Germany), but not a large amount. It seems that neither accepts any role for party autonomy. They also stress opposite ends of the “efficacy–fairness/efficiency” conundrum. The French code favors arbitral efficacy, while the German code privileges fairness and procedural efficiency.

The U.S. judge-made doctrine aligns more closely with the German stress on the fairness-efficiency goal. It tempers that starting presumption, however, by affirming a role for party autonomy. The U.S. approach also allows party autonomy to affect the standard of review at Stage 3, although what exactly is required in the “delegation” agreement to achieve a Stage 3 effect is still somewhat unclear.

The Swiss approach, while generally aligning with that of France, shifts to the German stress on fairness and efficiency when the putative seat is abroad. The discussion above suggests that this distinction—turning on the location of the putative seat—is not particularly persuasive, and, thus, does not seem a good candidate for a preferred transnational doctrine.

The English doctrine, based on judicial interpretation of the 1996 English Arbitration Act, distinguishes between, on one hand, existence and scope issues (both requiring full review), and, on the other hand, validity issues (calling for *prima facie* review). Although the *Albon* court bases this distinction on a plausible interpretation of the N.Y. Convention Article II(3) language, included in the English Act (“null and void, inoperative, or incapable of being performed”),¹⁰⁸ an alternative (and I think better) interpretation of Article II(3) reads it as non-committal on the Stage 1 standard of review.¹⁰⁹

The *Albon* court also confirms, however, that English courts possess a general discretionary power, depending on the circumstances of each case, to defer the first-instance jurisdictional decision to the arbitrators. The court’s discussion of various relevant factors and how they might affect the court’s exercise of discretion is instructive. The *Albon* discretionary factors could provide helpful guidance for any national system that is willing to introduce discretionary flexibility into its negative-effect doctrine.

Finally, the Canadian Quebecois approach, again keying on language in the Quebec procedure code that is roughly equivalent to N.Y. Convention Article II(3), adopts the French *prima facie* test as a

¹⁰⁸ 1996 English Arbitration Act Article 9(4).

¹⁰⁹ See discussion in the text *supra* at fn 19.

general rule, but includes an exception for purely law questions—as opposed to fact or mixed law and fact questions. The most instructive element in this reasoning is the emphasis it places on the institutional appropriateness of the decision-maker. As we noted above, the *Dell Computer* case involved domestic arbitration and an underlying dispute governed by Quebecois law. In international arbitration, foreign law is more likely to be applicable to the underlying dispute, and hence in those circumstances the arbitrators might well be privileged, because they could be better qualified than judges to interpret and apply that law.

Priority to Arbitration If First In Time

A good starting point for a “best practices” approach would be one shared by a number of countries, especially when included in an international agreement or set of guidelines seeking greater uniformity. Given that both the New York Convention and the UNCITRAL Model Law appear inconclusive on the negative-effect issue, the 1961 Geneva Convention¹¹⁰ seems to present the next best option. The most relevant provision occurs in Article VI(3) of the Convention:

Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator’s jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.

An approximation to this provision can be found in both the French and German approaches to the negative effect doctrine, even though in a fundamental sense they come at the negative-effect issue from opposite poles. At Stage 1, the French code generally privileges arbitral efficacy—by favoring a *prima facie* test of arbitrability—whereas the German code, in contrast, generally privileges fairness and procedural efficiency—by favoring full review. Both the French and German procedural codes, however, gravitate more toward the arbitral efficacy pole whenever arbitral proceedings occur first in time.

Under Article 1448 of the French code, if arbitrators have been seized of the case before the opposing party files a Stage 1 court proceeding, the court must simply refuse to take up the case until after the arbitrators have ruled on jurisdiction. The court will not even test the arbitration agreement under a *prima facie* standard.

Under the same circumstances, Article 1032(2) of the German code disallows the code’s special petition procedure (an “application”) seeking a court ruling on arbitrability. Although a German court could technically still entertain an “action” on the merits even in the face of a first-filed arbitration proceeding, as we discussed above,¹¹¹ German *lis pendens* rules would probably cause a German court to defer to the arbitrators for a first-instance decision—at least if the arbitral tribunal had already been constituted.

¹¹⁰ U.N. Treaty Series, vol. 484, p 349; on line at <https://treaties.un.org>. As of 8-28-17 there are 31 parties to the convention.

¹¹¹ See text *supra* accompanying fn 50.

The 1961 Geneva Convention might seem to require greater deference to first-filed arbitration, but even the Convention includes flexibility. It allows an exception to the normal rule, the rule favoring a first-instance decision by arbitrators, if a Stage 1 court has “good and substantial reasons to the contrary.”¹¹²

Note that the French and German procedure codes trigger the first-filed effect at the moment when the tribunal—having been formed—is seized of the action. The Geneva Convention, on the other hand, uses *initiation* of arbitral proceedings as the trigger. Because formation of the tribunal could involve considerable delay, the Geneva Convention provision should probably be conditioned on the tribunal being formed within a reasonable period of time.¹¹³ Otherwise, a litigant seeking a court remedy could be stymied at length because of extended litigation abroad over tribunal formation.

Two further desirable provisions appear non-controversial. First, an arbitral tribunal should as a general rule be expected to decide on jurisdiction in the form of a preliminary award.¹¹⁴ Thus, if the tribunal is formed within a reasonable period of time and rules preliminarily in favor of jurisdiction, de novo court review would be forthcoming without much delay—a reasonable compromise of efficacy and fairness/efficiency considerations.

Second, a set-aside challenge filed against a preliminary award on jurisdiction should not bar continuation of the arbitral proceedings. If the arbitrators are confident enough of jurisdiction to continue the proceedings, an opposing party, who may only be obstructing, should not be able to stymie the arbitral complainant. Both the Model Law in Article 16(3) and the German procedure code in Article 1040(3), as examples, provide that arbitration may continue during any challenge to a preliminary award on jurisdiction.

Priority for Courts If Litigation Is First-Filed

What if court proceedings are lodged first? Should the initial presumption favor full review (the German position), or prima facie review followed by—if the prima facie test is met—first-instance full review before arbitrators (the French approach)? Here, commentators¹¹⁵ and national jurisdictions¹¹⁶ differ.

¹¹² Geneva Convention Article VI(3).

¹¹³ See discussion *supra* in text accompanying fns 95 & 96.

¹¹⁴ The Swiss Private International Law Act contains a good example of such a provision in Article 186(3): “The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.” The German code provides another example in Article 1040(3): “If the arbitral tribunal considers that it has jurisdiction, it rules on a plea [challenging the tribunal’s jurisdiction] in general by means of a preliminary ruling.”

¹¹⁵ Gary Born is one of the most prominent commentators favoring full review, if promptly sought, in a Stage 1 court, although he also calls for discretion to privilege, instead, first-instance tribunal decision making where *lis pendens* factors sufficiently support this result. See Born Treatise, Vol. I, at 1222-32. Commentators favoring prima facie review include Gaillard, see Fouchard, Gaillard, Goldman, ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard & J. Savage, eds., 1999, at 412, para. 682; Bachand, *supra* fn 25, and Kaufmann-Kohler, *supra* fn 96 and accompanying text.

¹¹⁶ France and Switzerland (for arbitrations in Switzerland) are the leading proponents of the prima facie approach. Germany and the U.S. are the leading examples of full review. Indeed, the U.S. favors full review even when court

The 1961 Geneva Convention does not seem to take a position when court proceedings are filed first. The provision in Article VI(3) calling for a first-instance decision by the tribunal is expressly stated to apply where arbitration proceedings are filed first. Where instead judicial proceedings are first-filed, the previous two paragraphs of Article VI clearly contemplate that a Stage 1 court will reach a decision on jurisdiction. However, those provisions do not expressly deal with the standard of review to be applied. One might argue reasonably that without an express limit of court review to a *prima facie* standard, full review would be expected. On balance, however, the Convention appears to leave this issue open.

The starting point presumption would not be so significant in this pattern, if the presumption were weak and easily countered by countervailing considerations. For example, drawing on some of the factors articulated in the U.K. discretionary scheme discussed above, a court might reverse the initial presumption—if it favored full review at Stage 1—if the following factors sufficiently favored arbitral efficacy: (i) the existing evidence strongly suggested the existence of a valid arbitration agreement; (ii) the tribunal could be formed within a reasonable period of time, the tribunal would be likely to issue a preliminary award on jurisdiction, and such a preliminary award would be subject forthwith to *de novo* review by a court at the seat; (iii) the existence, validity or scope of the arbitration agreement would be governed by foreign law, concerning which arbitrators could be chosen for their expertise in the applicable law; (iv) the first-filed substantive claim sought declaratory, rather than affirmative, relief, especially if the national court seized were not at the putative seat;¹¹⁷ (v) the disputed issue concerned “scope” and cost and convenience considerations favored arbitration because the contested issue was “bound up” with other issues clearly subject to arbitration.

If, on the other hand, the initial presumption favored *prima facie* review, that presumption might be countered if the factors enumerated above cut in the opposite direction. Thus, this approach would provide some predictability, but would be governed also by court discretion based on articulated guidelines aimed at reasonably balancing the competing interests underlying the “efficacy—fairness/efficiency” conundrum.

Note, that another consideration might lead one to expect that over time, national jurisdictions would increasingly favor a *prima facie* test as the operative initial presumption—the French approach. That is because jurisdictions have an incentive—likely to be supported by the local arbitration bar—to compete for a pro-arbitration reputation. Parties negotiating an arbitration agreement have a strong incentive to choose a pro-arbitration jurisdiction. If they opt for arbitration, they would presumably prefer a seat that would not leave much room for obstructionist tactics. Thus, negotiating parties, over time, should favor arbitrating in jurisdictions that opt for a *prima facie* test at Stage 1 as the initial presumption. Thus, even if the *First Options* Court was on sound ground to assume that parties rarely even think about the “Who Decides?” question—a point more likely to be so for domestic than for international arbitration—in the international context, parties—or their counsel—are indeed generally aware of which jurisdictions have a reputation for being pro-arbitration.

proceedings are not first in time. See Born Treatise, Vol. I, at 1221-22, for a list of countries following one approach or the other.

¹¹⁷ This pattern would seem to lend itself to obstructionist tactics, because a potential respondent at a neutral arbitral seat could always pursue delay and national advantage by filing for a declaratory judgment in its home courts, provided personal jurisdiction over its opponent were available.

The Role of Party Autonomy

Given that party autonomy is the central touchstone of international arbitration, it is hard to see why parties should not be free to decide for themselves whether to privilege courts or arbitrators as first instance decision-makers on jurisdiction. As we have seen, the U.S. approach in *First Options* and *Howsam* favors a central role for party autonomy. The party-autonomy approach, however, is controversial. It is not expressly mentioned in the N.Y. Convention, the Model Law, or the '61 Geneva Convention. It also appears to be rejected in both France and Germany.¹¹⁸

It is true, as discussed above, that giving force to party autonomy raises logical problems when the party resisting arbitration claims that the arbitration agreement either never came into existence or was invalid. Those problems can be dealt with, however, by employing the logic of the separability concept to the arbitration clause itself. A delegation clause within a larger arbitration clause, or set of clauses, need not be nullified *derivatively* because of alleged defects in the larger arbitration agreement—defects that do not apply directly also to invalidate the delegation agreement. If parties include a delegation clause, it seems that they must have been thinking of it as operating apart from the core arbitration agreement, because it sets up a mechanism for deciding the validity of the core agreement.

Any such delegation agreement should generally be interpreted, however, as calling only for arbitrators to have a *first-instance* opportunity to rule on jurisdiction—not to rule with finality. Giving finality to the arbitrators' (perhaps biased) decision on jurisdiction should require a further express and unambiguous provision to that effect. Some jurisdictions might, with reason, disallow finality agreements as against public policy. And of course the arbitrators could never be given the authority to decide with finality on non-arbitrability (in the European sense), because this issue turns on public policy considerations.

CONCLUSION

In summary a preferred approach to the negative-effect issue could be formulated in the following terms. If arbitral proceedings are first filed, and the arbitral tribunal has been formed, the initial presumption should favor a *prima facie* test of jurisdiction at Stage 1. A more pro-arbitration approach would extend this *prima facie* test also to the case in which the arbitral tribunal, though not in place, could be expected to be constituted within a reasonable period of time.

If a court claim for substantive relief (other than a declaratory judgment of non-liability) is first-filed, then a presumption in favor of full court review at Stage 1 would seem reasonable, especially if the presumption were weak and could be reversed in favor of *prima facie* review in the face of a range of relevant factors (canvassed above).¹¹⁹ Even the presumption in favor of *prima facie* review where arbitration is first-filed should be subject to reversal in the face of the same factors just mentioned if they cut in the opposite direction.

¹¹⁸ Concerning France, see *supra*, fn 38 and accompanying text. Concerning Germany, see *supra*, fn 43.

¹¹⁹ See the discussion in the text, *supra*, before and after fn 117.

Finally, parties should be empowered to decide in a putative arbitration agreement whether to delegate to arbitrators or to a court the first instance decision on validity or scope of the arbitration clause. Whether finality of decision on jurisdiction could be delegated to the arbitrators should depend on each state's public policy views.