JURISDICTION OF ARBITRATION TRIBUNALS: A
COMPARATIVE STUDY

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<th>Description</th>
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<tr>
<td>AAA</td>
<td>American Arbitration Association</td>
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<tr>
<td>DAC</td>
<td>Departmental Advisory Committee Report,</td>
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<td>ICC</td>
<td>International Chamber of Commerce</td>
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<tr>
<td>LCIA</td>
<td>London Court of International Arbitration</td>
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<td>Model Law</td>
<td>UNCITRAL Model Law on International Commercial Arbitration</td>
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<tr>
<td>New Decree</td>
<td>Decree No 2011-48 of 13 January 2011 (France)</td>
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<tr>
<td>New York</td>
<td>Convention on the Recognition and Enforcement of</td>
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<td>Convention</td>
<td>Foreign Arbitral Awards</td>
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<td>The Act</td>
<td>Arbitration Act 1996 (UK)</td>
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<td>U.K.</td>
<td>United Kingdom</td>
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SUMMARY

This thesis relates to international commercial arbitration as it examines the jurisdiction of arbitral tribunals to rule on their own jurisdiction in an international and comparative context. The main purpose of this thesis is to analyse arbitral jurisdiction in the three countries under review. The thesis offers a comparative analysis and considers the principle of arbitral jurisdiction as applied by the courts. Although this principle is recognised in the national arbitration laws of the France, U.K. and the U.S., there are some important differences.

To this end, an examination of the French, United Kingdom and United States legislation, case law and practice is undertaken. The extent and the stage at which court intervention occurs in each jurisdiction is examined. Particular emphasis is placed on the grounds for challenging arbitral jurisdiction.

In conclusion, it is argued the best practice is the French approach to giving priority to the jurisdiction of the arbitral tribunals. This renders States which support such an approach a more attractive venue for international arbitration. This thesis also considers options for reform of international commercial arbitration laws to create a more harmonised standard for the determination of jurisdiction of an arbitral tribunal. It concludes the United States and the United Kingdom should develop an approach similar to the French.
STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis submitted for the award of any other degree or diploma.

No other person’s work has been used without due acknowledgment in the main text of the thesis.

The thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

Date: 10 May 2012  Signature: Ozlem Susler
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Chapter One

DETERMINING JURISDICTION OF ARBITRATION TRIBUNALS: A COMPARATIVE PERSPECTIVE ON THE AMERICAN, FRENCH AND ENGLISH FRAMEWORKS

1.1 Background

Arbitration is an important tool in alternative dispute resolution. It is defined as a binding resolution of a dispute through the ruling of one or more individuals, appointed by the parties. It has long been the dispute resolution method of choice in the construction, energy and insurance fields. It is used in the areas of banking, intellectual property, financial service sectors and complex commercial disputes. At a fundamental level, parties use international arbitration to resolve disputes using an arbitrator. By selecting arbitration, parties effectively waive their rights to litigation.

The frequently cited advantages of arbitration include efficiency, procedural flexibility, neutrality of arbitral procedure and cross border enforcement of decisions. Essentially, arbitration permits commercial parties to tailor the dispute resolution process to their needs. The arbitrator is usually able to oversee the case from commencement to resolution, which is not always the case in public courts. The arbitrators become familiar with the parties and - in the event that a negotiated settlement is possible - the tribunal is ideally placed to effect a resolution. There are limited avenues of appeal to national courts from an arbitral tribunal’s decision on the merits, which is attractive to commercial parties, who usually prefer swift closure of disputes. In contrast, courts use

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5 See Survey ‘International Arbitration: Corporate Attitudes and Practices’ Queen Mary School of International Arbitration and Price Waterhouse Coopers, (2006) 2. (‘Queen Mary survey’). Procedural flexibility means the ability to modify the rules of arbitration to suit the needs of the parties and their dispute. Often arbitration institutions offer flexible rules and if the parties are having an ad hoc arbitration, they can customize their own rules.
6 Alan Redfern, Martin Hunter and Murray Smith, Law and Practice of International Commercial Arbitration (Sweet and Maxwell, 1991) 23.
established procedures and do not have discretion to modify the rules depending on the circumstances of the parties. Arbitration carries real economic and social benefits.7

The national laws and policies regarding international commercial arbitration have implications for each nation’s economic and political standing.8 National systems of law govern disputes in different ways.9 This raises questions as to the law that applies and the procedural rules to be followed.10 A fundamental principle is that an arbitral tribunal may only resolve disputes that the parties have agreed it should resolve.11 As Redfern and Hunter state:

It is the parties who give to a private tribunal the authority to decide disputes between them; and the arbitral tribunal must take care to stay within the terms of its mandate. The rule to this effect is expressed in several different ways. Sometimes it is said that an arbitral tribunal must conform to the mission entrusted to it; or that it must not exceed its mandate; or that it must stay within its terms of reference, competence or authority.12

Such authority is referred to as arbitral jurisdiction or the principle of compétence-compétence. This thesis examines core attributes of the arbitration process in France, the United Kingdom and the United States. An objective of this thesis is to offer a comparative analysis and consider the principle of compétence-compétence as applied by the courts. The term compétence-compétence – also referred to as compétence sur la compétence or kompetenz-kompetenz – confers a right on arbitrators to decide their own jurisdictional authority to hear a dispute and is essential to the practice of international commercial arbitration.13

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10 Ibid 6.
11 Nigel Blackaby et al, above n 8, 341.
12 Ibid.
13 The principle of compétence-compétence is defined as the arbitrators’ power to determine their own jurisdiction, to hear and determine the dispute before them. Thomas E Carbonneau, Cases and Materials on the Law and Practice of Arbitration (Juris, 3rd revised ed, 2003) 21. The German principle of Kompetenz-Kompetenz will not be used in this thesis because this term was traditionally employed to denote the Kompetenz-Kompetenz clause which is a particular agreement to empower the arbitral tribunal to rule on its own jurisdiction. Such a ruling is final and cannot be examined by national courts at the phase of challenge or enforcement of the award. Under the current German law, such a clause is not enforceable and is not discussed in this thesis. See Zivilprozessordnung (ZPO) Code of Civil Procedure (Germany) arts 1025-1048.
As shall be seen, although *compétence-compétence* is recognised in the national arbitration laws of France, U.K. and the U.S., there are some important differences.\(^{14}\)

The main purpose of this thesis is to highlight and analyse *compétence-compétence* in the three jurisdictions under review. Particular emphasis is placed on the grounds for challenging arbitral jurisdiction. Such challenges frequently relate to the existence or validity of the arbitration agreement.\(^{15}\)

The analysis pursued in the following chapters shows that courts play a key role in determining the ability of an arbitral tribunal to rule on its own jurisdiction. At one end of the spectrum are national courts which provide maximum discretion to the arbitral tribunal to determine its own jurisdiction, only intervening if there is a serious defect in the arbitration agreement.\(^{16}\) At the other are national courts which view arbitral jurisdiction as an optional right to be determined by judicial review.\(^{17}\)

There are significant differences in the extent of court intervention permitted by the United States, United Kingdom and France.\(^{18}\) Arguably, the French approach is less interventionist than that of the United States and United Kingdom.\(^{19}\) French courts have held that jurisdictional challenges are only permissible in a narrow set of circumstances – such as where the arbitration agreement is manifestly void.\(^{20}\) Conversely, English courts are more ready to intervene.\(^{21}\) The U.S. approach is less interventionist than the


\(^{16}\) The French courts are an example of such a liberal approach.


\(^{20}\) *Décret no 2011-48 du 13 Janvier 2011* [Decree No 2011-48 of 13 January 2011] (France) JO 14 January 2011, art 1448. (‘*New Decree*’). The *New Decree* took effect from 1 May 2011. Article 1448 provides that: ‘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 at its own motion.’

English, yet fails to provide the progressive approach of the French.22 The manner in which courts address compétence-compétence affects the popularity of the jurisdiction as a venue for arbitration.23

1.2 Thesis Question and Hypothesis
This thesis poses the following question: *Which of the three countries offers the best practice with respect to compétence-compétence in particular and international arbitration in general?* To answer the question, the laws and principles in each country are measured on the basis of how well they meet the following criteria:

1. The extent that the country recognises international conventions including flexible proceedings recognising arbitral jurisdiction;
2. The extent that the national courts of the country provide for the maximum independence of arbitral tribunals to operate without interference from the courts;
3. That the national courts review arbitral jurisdiction using a *prima facie* approach rather than a *full review*;
4. That the national courts have a record for enforcing arbitration awards.

Based on these four criteria, this thesis claims that the approach adopted by the United States and the United Kingdom does not provide the same level of certainty as the French model.24 Therefore, these two jurisdictions may look to the French to find the ‘best practice’ in relation to the extent of judicial intervention. To this end, this thesis examines the extent to which the French approach is applicable in the United Kingdom and United States.25 More specifically, the degree of transferability will be assessed.

In order to answer which of the three countries offers the best practice with respect to compétence-compétence in particular and international arbitration in general, this author

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24 The four ‘best practice’ criteria are chosen on the basis that they set goals to be achieved through meeting the criteria. One such goal is to facilitate development of a pro-arbitration environment in order to attract more arbitration to the jurisdiction. Another goal is to afford the greatest independence to arbitral tribunals thereby giving effect to various international instruments including the *New York Convention*, arts II(3), III and V.
considers the significance of *compétence-compétence* in the arbitral process. The question is under what circumstances should the authority to rule on jurisdiction lie with the arbitral tribunal or the national courts? This question will be decided on the basis of minimum intervention by the courts in the arbitral procedure, whilst maintaining the rights of parties to due process.\textsuperscript{26} In addressing this question, the thesis analyses the stage at which national courts review jurisdiction. This, in turn, leads to an examination of the degree of intervention and varying levels of judicial control.

### 1.3 The Significance of the Thesis

There has been no known study at a doctoral level in the English language on the jurisdiction of the arbitral tribunal. However, numerous journal articles have been written on the topic and virtually all commercial arbitration textbooks refer to the subject.\textsuperscript{27} The significance of this thesis lies in the conduct of a comparative and contextual analysis on a comprehensive scale and the resulting proposals for reform which have been arrived at independently.

### 1.4 Choice of Arbitration Jurisdictions: Contrasting the Common Law and Civil Law Approaches

The choice of two common law jurisdictions and a civil law jurisdiction was made for various reasons. Arbitration practice in the United States, United Kingdom and France has had a major impact on arbitration globally.\textsuperscript{28} The United Kingdom provides a model for the common law approach to arbitration law and has influenced African and Asian legislation. Conversely, the French model has been influential in the Middle East and, to an extent, in Africa as well.\textsuperscript{29}

Another reason for choosing these countries is that they belong to different legal traditions. The French belong to the civil law tradition, while the United Kingdom and United States are predicated on the common law tradition.\textsuperscript{30} Moreover, notwithstanding

\textsuperscript{26} See John Lurie, ‘Court Intervention in Arbitration: Support or Interference (2010) 76(3) *Arbitration: Journal by the Chartered Institute of Arbitrators* 447, 447.


\textsuperscript{29} Ibid.

\textsuperscript{30} When the term ‘civil law countries’ is used, it refers primarily to countries which have inherited the Romano-Germanic tradition which have been integrated into the civil law tradition. From a theoretical perspective, systems emanating from a civil law tradition have a differing view of precedent vis-à-vis common law traditions. For instance, the *French Code of Civil Procedure* article...
their common law origins, the United States and United Kingdom have discernible
differences.\textsuperscript{31}

1.5 Research Methodologies

Previous scholarship has shown that comparative law can be used as a research method
and a powerful tool of law reform.\textsuperscript{32} Alan Watson describes comparative law as the
study of the relationship between legal systems or between rules of more than one
system in the context of a history.\textsuperscript{33} This thesis utilises some crucial insights from
comparative arbitration law.\textsuperscript{34} The major methodologies used are legal analysis, case
studies, and comparative law. Case studies from different legal jurisdictions assist in
exploring best practices and provide a basis for the evaluation of contemporary legal
principles.

Specifically, the objective is to evaluate the applicability of the French approach to the
United Kingdom and United States.\textsuperscript{35} The analysis is selective and only covers issues
that shed light on \textit{compétence-compétence}. To this end, reference is made to
international treaties, conventions and agreements. International commercial contracts,
the focus of this thesis, are distinguished from ‘adhesion’ contracts which are standard
form non-negotiable contracts, such as insurance policy contracts.\textsuperscript{36}

1.6 Thesis Structure

This thesis is divided into seven chapters. The thesis begins by providing an overview
of the current legal framework for arbitration. This is followed by Chapter 2, which
discusses the operation of laws in international commercial arbitration.

\begin{footnotesize}
\begin{itemize}
\item prohibits judges from formulating broad rules. See especially Peter de Cruz, \textit{Comparative Law in a
\item Patrick Glenn, \textit{Legal Traditions of the World: Sustainable Diversity in Law} (Oxford University
\item See Konrad Zweigert and Hein Kötz, \textit{Introduction to Comparative Law} (Oxford University
Press, 1998) 16; Peter de Cruz, \textit{Comparative Law in a Changing World} (Routledge Cavendish, 3rd
ed, 2007) 17, 23.
\item Alan Watson, in Peter De Cruz, \textit{Comparative Law in a Changing World} (Routledge Cavendish, 3rd
\item See Konrad Zweigert and Hein Kötz, above n 31, 16; Peter de Cruz, above n 29, 30.
\item The term ‘United Kingdom’ is defined as the ‘United Kingdom of Great Britain and Northern
Ireland’ in the status document for ratification of the \textit{New York Convention}.
\item The phrase ‘contract of adhesion’ originated in the law of insurance and is attributed to Edwin W.
\end{itemize}
\end{footnotesize}
Chapter 3 turns to arbitration and separability.\textsuperscript{37} It analyses the doctrine of separability and highlights its links with \textit{compétence-compétence}. The chapter provides a discussion of case law and looks at the positive and negative effect of \textit{compétence-compétence}.

Chapters 4, 5 and 6 examine national laws and how these laws are interpreted by the respective courts. This provides the framework for subsequent comparison.

Chapter 4 focuses on the French approach to \textit{compétence-compétence}. It provides a detailed discussion of the legislation and recent cases. The aim is to contextualise \textit{compétence-compétence} and consider its application in France.

Chapter 5 considers the regulation of arbitration in United Kingdom.\textsuperscript{38} The chapter begins with an analysis of the historical evolution of arbitration in the United Kingdom. Chapter 5 then turns to examine the legislation and case law. The goal of the chapter is to provide a comprehensive analysis of \textit{compétence-compétence} in a common law jurisdiction.

Chapter 6 is concerned with the U.S. approach to \textit{compétence-compétence}. As will be shown, U.S. arbitration case law has evolved since the enactment of the \textit{Federal Arbitration Act} in 1925.\textsuperscript{39} The cases analysed in Chapter 6 indicate that U.S. courts often diverge in their approach.\textsuperscript{40} This has resulted in an inconsistent jurisprudence and substantial uncertainty.\textsuperscript{41}

The thesis concludes with concrete suggestions for reform. It is argued that the current arbitration laws and the judicial approach in the United States and United Kingdom are in need of further reform.\textsuperscript{42} The thrust of the suggestions is that U.K. and American law

\begin{itemize}
  \item The doctrine of ‘separability’ provides that the arbitration agreement may be separated from the contract in which it is found, commonly referred to as the ‘main contract’. This doctrine applies provided the invalidity which affects the main contract, does not specifically affect the arbitration agreement. Accordingly, the arbitration agreement is still valid and binding on the parties notwithstanding the invalidity of the main contract. See Jean François Poudret and Sébastien Besson, \textit{Comparative Law of International Arbitration} (Sweet & Maxwell, 2\textsuperscript{nd} ed, 2007) [164].
  \item The relevant legislation for the United Kingdom is the \textit{Arbitration Act 1996 (UK)}.
  \item See First Options of Chicago Inc v Kaplan, 514 US 938 (1995).
have significant shortcomings and should adopt key features of the French judicial approach. This will not only promote greater unity between the current arbitration models, but also foster greater co-operation between the tribunals and courts.\(^{43}\)

1.7 **Significance of Arbitration**

Arbitration is the preferred method of resolving international commercial disputes.\(^{44}\) A foreign court can be a peculiar setting for a business person due to his/her unfamiliarity with the practices, applicable laws and attitudes of the judges. Arbitration enables parties from different legal systems to provide for a procedure which is mutually agreeable. They can change the applicable law(s) and are free to appoint arbitrators who have expertise and relevant skills.\(^{45}\) The attraction of arbitration is that it upholds the parties’ freedom of contract and reinforces certainty. National courts which uphold these rights are considered to be arbitration-friendly, whereas courts that restrict such rights are classified as either interventionist or hostile.\(^{46}\) The attitude of the courts has implications for parties who select the laws of a particular jurisdiction to govern the arbitration process.\(^{47}\) If the courts do not have an arbitration-friendly approach to jurisdiction, the tribunal’s ruling regarding its own jurisdiction may be challenged. In some instances, courts may usurp the jurisdiction of the tribunal or intervene unnecessarily.\(^{48}\)

1.8 **Literature Review**

The first part of this literature review asks what is international commercial arbitration? Here, essential terms and definitions of international arbitration laws are identified. This is followed by a historical background of arbitration in the second part. The final part addresses criticism of international commercial arbitration as a method of dispute resolution.

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\(^{47}\) Welser, above n 23, 4.

Drawing on the existing literature, the author attempts to convey a balanced picture. The evolution of international arbitration has led to the emergence of certain concepts and doctrines which require exploration.\footnote{One of these key principals is compétence-compétence - the significance of which is evident when referring to the fundamental international sources of arbitration law such as the New York Convention, arts II and V in particular; UNCITRAL Model Law on International Commercial Arbitration, UN Doc A/40/17 (11 April 1980) arts 16, 34, 36. (‘Model Law’). See Welser, above n 23, 4.} The discussion below not only identifies these doctrines, but also points to the challenges they present. Having regard to these basic principles is essential for the subsequent analysis of compétence-compétence. Furthermore, this will shed light on the meaning of key principles and terms used throughout this thesis.\footnote{This section is not intended for the arbitration expert. It is designed to familiarize the non-expert reader with the key terms of arbitration.}

1.9 Definitions

1.9.1 Definition of ‘International’

The term ‘international’ is used to distinguish between national arbitrations and those which transcend national borders - also referred to as ‘transnational’.\footnote{Phillip Jessup was the first to coin the term ‘transnational’. See Peer Zumbansen ‘Transnational Law’ in Jan Smit (ed) Encyclopedia of Comparative Law (Edward Elgar Publishing, 2006) 738, 738.} The distinction has practical implications in that a State may apply stricter control over domestic arbitrations. The term ‘international’ may be used to define a commercial arbitration if the dispute involves international trade, if the parties’ nationality or location of residence is abroad or the corporate entity has its central control abroad.\footnote{Redfern, Hunter and Smith, above n 6, 15.} Whether an arbitration can be defined as ‘international’ may be based on other factors relating to an agreement between the parties.

A contract between a corporation registered in China selling goods to a company incorporated in the U.S. can be described as an international commercial transaction. Accordingly, an agreement to submit disputes to arbitration between two such parties would be capable of being defined as an ‘international commercial arbitration’. In national or institutional rules for arbitration, the concept of ‘international’ is further developed. Thus, the explanatory booklet issued by the International Chamber of Commerce (ICC) in Paris states:

The international nature of the arbitration does not mean that the parties must necessarily be of different nationalities. By virtue of its object the contract can nevertheless extend beyond national borders, when for example a contract is concluded...
between two nationals of the same State for performance in another country, or when it is concluded between a State and a subsidiary of a foreign company doing business in that State.\textsuperscript{53}

The \textit{Model Law} defines the term ‘international,’ in more detail. It provides that an arbitration is international if:

(a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) One of the following places is situated outside the State in which the parties have their places of business:

(i) The place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.\textsuperscript{54}

This broadens the definition of the term ‘international’ to include more than merely the parties having places of business in different states. There is also the secondary criterion of the internationality of the dispute itself. The place with which the subject matter of the dispute is most closely related may be foreign to the parties. For instance, the parties to the dispute may both be incorporated in the same country; however, the goods may be sold to a country abroad, rendering the dispute ‘international’.

Lastly, there is the aspect of internationality which may arise from the choice of a foreign place of arbitration.\textsuperscript{55} Both parties may be incorporated in Australia yet the arbitration may be agreed to be conducted in Singapore. Ultimately, the question of whether arbitration is considered ‘international’ will be subject to the relevant laws governing the arbitration.

\textsuperscript{53} Ibid 16. An example of national rules for arbitration is the \textit{Arbitration Act 1996 (UK)}.\textsuperscript{54}\textit{Model Law}.\textsuperscript{55} Redfern, Hunter and Smith, above n 6, 18.
1.9.2 The Definition of ‘Commercial’ in the Context of Arbitration

The distinction between a commercial contract and a non-commercial one generally carries greater significance in civil law traditions. This is because only disputes emanating from commercial contracts are capable of being referred to arbitration. A ‘commercial’ contract may be defined as the type of contract entered into by business parties in the usual course of commerce. Such contracts are usually subject to specific codes of commercial law in addition to broader laws.

Although there is no internationally accepted meaning of the word ‘commercial’ it is part of the parlance. Protocols signed as early as 1923 - such as the Geneva Protocol - recognised that each contracting State must acknowledge the validity of the arbitration agreement. In contemporary international arbitration circles, the tendency is to construe the term ‘commercial’ as broadly as possible.

1.9.3 The Definition of Arbitration

Although there is no single definition of arbitration, arbitration may be generally defined as follows:

a private court based on party autonomy comprising one or more arbitrators, to whom, by means of private agreement, the resolution of legal disputes is transferred instead of the [national] courts.

Essentially, arbitration is an effective method of obtaining a final and binding decision on a dispute, without reference to any courts of a State.

1.10 The Historical Development of Arbitration

There is no definitive general history of arbitration. Writing such a history would be akin to completing a mammoth jigsaw puzzle, with many of the pieces gone astray. A broad history would mean examining the progress of arbitration around the world and over a very long time period. Suffice to say that the origins of international arbitration

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56 For example, in Costa Rica non-commercial disputes are non-arbitrable i.e. – not capable of being resolved by arbitration.
57 Similarly, criminal law matters are not capable of being resolved by arbitration in the United Kingdom, United States or France.
58 Bühring-Uhle, Kirchhoff and Scherer, above n 2, 33. See also New York Convention art 1 (3) which states that only commercial arbitrations are governed by it.
60 Redfern, Hunter and Smith, above n 6, 21.
62 Blackaby et al, above n 8, 4.
are traced to many parts of the world including China during 2100 to 1600 BC. Dating back to the period of antiquity, international arbitration has been a dispute resolution tool for disputes between states and state-like entities. The majority of scholars agree that the ancient Greeks and Romans frequently resorted to international arbitration to resolve disputes between city-states. Essentially, arbitration is the oldest method for the peaceful settlement of international disputes.

International arbitration between state-like entities in Europe increased during the middle ages. An example is the arbitration presided by Pope Alexander VI in 1494, where the boundaries between the Spanish and Portuguese colonies were decided. The procedures used during arbitral proceedings today mirror the practice from this era. Respective parties presented arguments through counsel and evidence. Testimony was received by the tribunal and a written award was issued. During the middle ages, merchants resolved disputes amongst themselves by nominating an arbitrator who was familiar with the specific trade customs of the industry from which the dispute emanated. This served well as it provided efficient resolution without resorting to the courts which were relatively inefficient and unfamiliar with the trade customs of the different industries.

In England, merchants have resorted to arbitration since the early stages of national and international trade during the middle ages. Business agreements were typically made on bills of exchange and other credit terms. The English courts offered little assistance for merchants since contracts and debts incurred overseas were unenforceable by national courts. Traditional courts were unsuitable for merchants for many reasons, including their inflexibility and slowness. Moreover, merchants frequently travelled between jurisdictions and required timely resolution. Such factors meant merchants preferred special tribunals, which paved the way for the contemporary system. In contrast to courts, these tribunals were fast, had procedural flexibility and were composed of men who were familiar with the trade from which the dispute arose.

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65 See the Treaty of Tordesillas which related to the ownership of newly discovered land in the Americas.
67 Bühling-Uhle, above n 2, 30-31.
69 Ibid.
During the development of the common law, arbitration regressed at the hands of English courts until the enactment of the Arbitration Act 1889 (UK).\(^{70}\) In the eighteenth century, agreements to arbitrate were considered against public policy on the basis that they ousted the jurisdiction of courts. Following the enactment of the Statute of Fines and Penalties 1687 (UK), agreements to arbitrate were divested of all their juridical power.\(^{71}\) Among other things, the rationale for such action was that arbitral awards were unenforceable in equity and did not provide any discernible cause of action.\(^{72}\)

There is evidence to indicate that arbitration was fairly common in the U.S. colonies. Massachusetts was the first to enact laws recognising arbitration in 1632.\(^{73}\) Akin to the English, traders in the United States viewed arbitration as a more efficient alternative to national courts.\(^{74}\) This situation changed during the 17\(^{th}\) and 18\(^{th}\) centuries. English courts became disdainful of arbitration, and a similar trend can be observed in the U.S.\(^{75}\) By the late 19\(^{th}\) and early 20\(^{th}\) centuries, the legal establishment and the judiciary became mistrustful of arbitration and the capacity of arbitration to yield fair legal outcomes.\(^{76}\)

The antipathy towards arbitration by the United States courts persisted well into the 20\(^{th}\) century.\(^{77}\) U.S. courts relegated commercial arbitration to a subordinate role vis-à-vis litigation. Business disputes were primarily resolved through court litigation at state and federal level. Arbitration was restricted to informal commercial arbitration under the supervision of the American Arbitration Association and reserved only for minor commercial disputes.\(^{78}\) It was not until the early 1980s that judges and in-house counsel became vocal about the high volume of cases before courts and the significant costs of

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\(^{71}\) Statutes of Fines and Penalties 1687 (UK) 8 and 9 Will, III c II, s.8.


\(^{75}\) Born, *International Commercial Arbitration*, above n 26, 11.

\(^{76}\) Noussia, above n 68, 13.


litigation. This dissatisfaction gradually led to the development of commercial arbitration as a feasible alternative to litigation in the United States.\textsuperscript{79}

Similar to the evolution of arbitration in the United Kingdom and the United States, arbitration did not receive continuous support in France. The courts of the middle ages viewed arbitration with skepticism. Subsequently in 1566, the Decree of the Moulins made arbitration the exclusive and mandatory method of resolution of commercial disputes in France.\textsuperscript{80} Following the French revolution in 1789, the enactment of the Law of 17-24 August 1790 prohibited any obstruction to arbitration. Soon after, arbitration began to be misused leading Napoleon to enact the Code of Civil Procedure in 1806. The Code set out restrictions to arbitration including any matter which involved the public authorities. The French Supreme Court known as Cour de Cassation also held in 1843, that any agreement submitting future disputes to arbitration was null and void. The rationale for the decision was that it was risky for parties to waive the right to a court hearing. Due to the antagonism created by such laws and rulings, arbitration did not flourish until the early 20\textsuperscript{th} century in France.\textsuperscript{81}

Following World War I, the business community around the world began to show more interest in arbitration, as national courts were unable to provide the flexibility and speed required by commercial parties. The first protocol addressing arbitration following the end of World War I was the Geneva Protocol of 1923.\textsuperscript{82} The establishment of arbitral institutions which followed also facilitated the emergence of modern arbitration.\textsuperscript{83}

\textbf{1.11 The Evolution of Arbitration: Factors driving growth}

It is undisputed that arbitration has experienced significant growth over the past several decades.\textsuperscript{84} One of the drivers of growth has been the preference of traders to submit their cross-border disputes to an arbitration tribunal where they can expect to be treated fairly by a neutral forum and parties can exercise substantial control over the procedure.\textsuperscript{85} Another important driver for growth is parties’ need for enforceability of

\begin{itemize}
\item \textsuperscript{79} Ibid 154.
\item \textsuperscript{80} Noussia, above n 68, 14.
\item \textsuperscript{82} Geneva Protocol, above n 58. The Geneva Protocol entered into force on 24 September 1923.
\item \textsuperscript{83} Noussia, above n 67, 14.
\item \textsuperscript{85} Rowley and Swaroop, above n 7, 278, 279.
\end{itemize}
arbitral awards. The adoption by most countries of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards fulfils this need in large part, because it provides for the widespread enforceability of awards by nationals courts of signatory States.\textsuperscript{86}

Other drivers for the growth of arbitration are developments in communications, transport and technology because these increase international trade. These factors have resulted in arbitration becoming the most preferred method of dispute resolution in international business, as it offers an effective and flexible alternative to expensive and prolonged litigation.\textsuperscript{87}

1.12 Critiques of Arbitration: Is Arbitration Facing a Crisis of Confidence?
In recent times, arbitration has been subject to extensive criticism. It has been alleged that international commercial arbitration faces a crisis of confidence. In particular, the principle of compétence-compétence has been called a ‘judicial fiction’ by Brekoulakis who claims there is no basis for the tribunal’s power to determine whether it has jurisdiction.\textsuperscript{88} He argues that a tribunal has no jurisdiction unless its power is ascertained pursuant to the arbitration agreement first.\textsuperscript{89} Conversely Born and Lurie contend that if the parties have conferred the tribunal with power to rule on its jurisdiction, this should be upheld in accordance with the general principle of freedom of contract.\textsuperscript{90} In the majority of jurisdictions, the courts still reserve the right to intervene in limited circumstances – judicial review is not absolutely ousted.\textsuperscript{91}

The court’s right to intervene provides a safety net for the parties in the event that the tribunal lacks jurisdiction to rule on the dispute or exceeds its scope of jurisdiction.\textsuperscript{92} The significance of the function of national courts was stated by Lord Mustill who opined that ‘it is only a court with coercive powers that could rescue an arbitration


\textsuperscript{87} Rana and Sanson, above n 9, 24.

\textsuperscript{88} Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’ Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.

\textsuperscript{89} Ibid.


\textsuperscript{91} See, e.g. Arbitration Act 1996 (UK) ss. 42, 66, 68, 69. See also Federal Arbitration Act, 9 USC §§ 10-11 (1925).

\textsuperscript{92} Lurie, above n 27, 447.
which is in danger of foundering’. In this context, national courts fulfill a crucial role in ensuring that:

(a) arbitral tribunals act within the powers conferred on them;
(b) support is provided for the arbitral procedure and
(c) rights of the parties are not abrogated.

At times, the involvement of national courts tends to hinder the arbitral process rather than offer support. In some cases, supervisory and judicial powers are misused, the casualties of which are the parties to international arbitrations. This has led to concern amongst the relevant stakeholders – i.e. the law firms, arbitral institutions and locations which have a financial interest in the continued proliferation of arbitration.

Other reasons for the alleged crisis of confidence are that the traditional benefits of arbitration such as efficiency, procedural flexibility and low costs do not necessarily hold true. Arbitration is frequently costly and may be slow in practice. Cost and speed are subject to a number of factors. Users of arbitration have attributed delays on the restricted availability of top-tier arbitrators and their meticulous concern for due process. There is a benefit to the users of arbitration in this finding, as it implies top-tier arbitrators seek to provide accuracy and fairness which should decrease the likelihood of undue cost and further delay in appeals of awards to courts. Costs may inevitably escalate if the dispute is complex and involves multiple parties. This is no different to the escalating costs of such a dispute if it were heard by a court. More importantly, scholars such as Reed argue that a majority of the criticism regarding cost

93 In Coppee Lavalin SA NV v Ken-Ren Chemicals and Fertilisers Ltd [1995] 1 AC 38, 64 (Lord Mustill).
94 See Born, International Commercial Arbitration, above n 26, 976.
95 See Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd [2004] EWHC 479 (Comm). In Cetelem SA v Roust Holdings Ltd [2005] EWCA 615 (Civ) the court criticized the judgment of Hiscox for being too interventionist. See also Lew, ‘National Court Involvement’ above n 45, 489.
96 See PT Branita Sandhini v PT Panen Buah Emas (unreported) Commercial Court of Indonesia, 6 January 2004. See also Habas [2010] EWHC 195 (Comm).
and efficiency of arbitration is aimed at arbitrations where states are the investors, which entails a more transparent and political procedure than international commercial arbitration.\textsuperscript{102}

Moreover, well-known arbitral institutions generally have time limits on aspects of the arbitral procedure to ensure efficiency.\textsuperscript{103} A major study was conducted by Queen Mary School of International Arbitration and Price Waterhouse Coopers in 2006 to investigate attitudes and practices among users of arbitration.\textsuperscript{104} Although the Queen Mary survey findings place high costs and length of time as the two major disadvantages of international commercial arbitration, ninety five percent of corporations surveyed stated that they would continue to use international arbitration because the benefits outweighed the disadvantages.\textsuperscript{105} This finding dispels the purported crisis of confidence. It is more accurate to say that problems exist in arbitration and it is not perfect, but this is equally applicable to other methods of dispute resolution.

Despite the Queen Mary survey indicating that arbitrations have an 18 per cent additional cost overhead, such overheads must be offset by other cost efficiencies or by other non-financial advantages of arbitration.\textsuperscript{106} Beerbower states that large scale arbitrations may be conducted faster than judicial proceedings with appeals, but the preliminary ruling on the merits does not take place faster in arbitration.\textsuperscript{107} When assessing speed the arbitration should be viewed in its entirety, as preliminary rulings are only one component of the arbitral procedure. To assess each aspect of the arbitration in isolation may distort the overall outcomes, when compared to litigation.

A further criticism has been leveled by Beerbower, who claims there has been inadequate use of procedural flexibility.\textsuperscript{108} This criticism is inconsistent with the results of the Queen Mary survey, where in-house counsel who were surveyed indicated

\textsuperscript{102} Reed, above n 100.
\textsuperscript{103} See International Chamber of Commerce (‘ICC’) Arbitration and ADR Rules Article 22, 24(2) and (3). In force as of 1 January 2012. <http://www.iccwbo.org/court/arbitration/id4199/index.html>.
\textsuperscript{104} Queen Mary Survey, above n 5, 2.
\textsuperscript{107} John E Beerbower, ‘Arbitration: Can We Realise the Potential?’(2011) 27(1) Arbitration International 75, 75.
\textsuperscript{108} Ibid.
procedural flexibility as one of the greatest advantages of arbitration. The second aspect of Beerbower’s criticism refers to claims that special expertise has had limited benefits. Conversely, the outcomes of the Second Queen Mary Survey published in 2008 signal that eighty six percent of corporate counsel claim the depth of expertise of arbitrators as one of the major advantages. Further, there are numerous specialist arbitration institutions which are currently thriving, such as the London Maritime Arbitrators Association. Again, there are specific rules such as the Construction Industry Arbitration Rules under the American Arbitration Association that are tailored for construction disputes. There is also anecdotal evidence from expert arbitrators that they are specifically and consistently nominated to arbitrate based on their expertise and specialist skills.

There is widespread criticism in the literature that counsel acting for parties in international commercial arbitrations make inadequate use of the flexibility of procedural rules, as they tend to conduct arbitrations similar to litigation. This criticism carries weight, especially in relation to arbitrations conducted by common law lawyers, who tend to use court-like procedures. Similar views have been voiced by numerous practitioners and lawyers. One of the reasons why arbitral procedure is beginning to resemble litigation may be that arbitrations are becoming increasingly complex. Multiple contracts have become common. Further, international projects have more parties as joint venturers who have distinct responsibilities. Such parties often have competing interests when a dispute emerges. Frequently, parties to a dispute

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109 Queen Mary Survey, above n 5, 2.
110 Beerbower, above n 107, 75-76.
111 Mistelis and Baltag, above n 105, 319-323.
114 During the author’s interviews with numerous expert arbitrators such as Mr Colin Wall the former President of the Chartered Institute of Arbitrators, there is a strong indication that arbitrators are appointed based on their expertise relating to the subject-matter of the dispute.
are from different political and legal backgrounds, thus there is less agreement on how the arbitration ought to be conducted.\textsuperscript{118} Lastly, previously inarbitrable subject matter such as consumer disputes are now capable of being arbitrated in some jurisdictions.\textsuperscript{119}

Matters such as consumer arbitrations usually receive close judicial review and public attention due to the need to safeguard due process and public policy.\textsuperscript{120} Where parties are from different legal and cultural backgrounds, this may also result in longer and increasingly complex arbitration cases. In these circumstances, arbitrators require effective practices to identify the facts of the dispute, which must be clear to parties from different legal systems. Consequently more documents are required to be reviewed, a higher number of witnesses may have to be examined and a wider range of laws must be considered.\textsuperscript{121}

1.13 Enforceability of Arbitration Agreements and Awards

The alleged weaknesses of arbitration are to a certain extent counter-balanced by the enforceability of awards in a majority of countries which are signatories to the \textit{New York Convention}.\textsuperscript{122} In contrast, a judgment by a court is generally more limited in its enforceability beyond its own jurisdiction. There are also a number of doctrines and principles in place to support the arbitral process and provide it with the authority it requires for becoming the preferred method of resolving international commercial disputes. The increase in debate regarding arbitration in the last ten years is evidence of its growth.\textsuperscript{123}

The principle of \textit{compétence-compétence} concerns the arbitrator’s power to rule on a dispute being conferred by agreement between the parties. This is the essence of the \textit{compétence-compétence} principle.\textsuperscript{124} Accordingly, party autonomy is a factor. Such conferral of power by the parties typically includes the power of the arbitrators to

\textsuperscript{118} Rivkin, above n 98.
\textsuperscript{119} The term ‘inarbitrable’ simply means not capable of being resolved by arbitration. For instance, the United States allows for arbitration of consumer disputes. See \url{http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen05.shtm}
\textsuperscript{121} Rivkin, above n 98.
\textsuperscript{122} Provided the country where the award is issued is a signatory to the \textit{New York Convention}. There are currently approximately 143 countries which are party to the \textit{New York Convention}.
\textsuperscript{123} Park, ‘Arbitration in Autumn’ above n 100, 1-2.
decide their own jurisdiction. There is widespread recognition that this is a necessity.\textsuperscript{125} This matter can be seen in international treaties, institutional rules and national laws which provide for \textit{compétence-compétence} to differing extents.\textsuperscript{126} For example, Article 21 of the UNCITRAL Rules of Arbitration confers power to the arbitral tribunal to determine the validity of objections to its jurisdiction, including challenges regarding the existence or validity of the arbitration agreement.\textsuperscript{127} Moreover, major institutions for arbitration such as the London Court of International Arbitration also uphold the principle of \textit{compétence-compétence} in their procedural rules.\textsuperscript{128}

There are sound policy reasons for conferring power on an arbitral tribunal to review the validity or existence of an arbitration agreement, even when one of the parties contests such power.\textsuperscript{129} It ensures the dispute is heard in only one forum and is efficiently ruled upon. It also upholds the parties’ agreement to arbitrate their dispute whilst discouraging dilatory tactics.\textsuperscript{130} The jurisprudence of arbitration has further developed the principle of \textit{compétence-compétence} to ensure that parties who attempt to use dilatory tactics are discouraged from doing so.\textsuperscript{131} Generally, at the stage of forming a contract, the parties will agree to arbitration to resolve any future disputes arising from or connected to the contract.\textsuperscript{132} Although \textit{compétence-compétence} does not necessarily eliminate all dilatory tactics, it tends to discourage parties from challenging jurisdiction without legitimate grounds.

\textbf{1.14 Summary} \\
This chapter has shown that arbitration is a pre-eminent form of dispute resolution in the world of international commerce. Although it presents some disadvantages, it is still preferred by a majority of international commercial parties.\textsuperscript{133} Key terms and a historical background of arbitration have been outlined to provide a context for the

\begin{footnotesize}
\begin{enumerate}
\item See Model Law, art 16(1) and Arbitration Act 1996 (UK) s 30(1).
\item Gaillard, above n 124, 3.
\item London Court of International Arbitration LCIA Rules, art 23. Effective 1 January 1998.
\item If the arbitration is conducted under the rules of a particular institution, then the institutional rules will generally stipulate the powers of the arbitrators. See Jones, above n 19, 56.
\item Brekoulakis, above n 88.
\item See for example the New York Convention Article II (1) where it states that there must be an agreement in writing to arbitrate disputes.
\item Queen Mary Survey, above n 5, 2.
\end{enumerate}
\end{footnotesize}
thesis. The next chapter will discuss the current legal framework, conventions, model laws and other relevant concepts.
Chapter Two

THE CURRENT LEGAL FRAMEWORK FOR ARBITRATION

2.1 The Operation of Laws in International Commercial Arbitration

This chapter looks at the broader context within which international commercial arbitration functions. It explores sources of law and how they interact. Following an analysis of the need for an arbitration agreement, this chapter provides reasons for upholding arbitration agreements and concludes that such principles are essential for the viability of international commercial arbitration.

By reviewing the international commercial arbitration literature, this chapter examines the sources of law which enable arbitration to be practised and ensure its awards are enforceable. The concepts explored are intended for the reader who is unfamiliar with arbitration and the legal regime surrounding it. Research indicates that international arbitration has evolved to become the dominant method of resolving disputes between States, persons and corporations in areas of international trade, commerce and investment.\(^1\) Institutions that undertake arbitration are recording ever-increasing business; each year new arbitration centres are established to seize the economic benefits from this popular trend.\(^2\) Moreover, many countries have revised their laws to create an environment which is generally supportive of arbitration.\(^3\) Major law firms have incorporated arbitration as a key area of practice.\(^4\) Training courses and conferences have increased dramatically and arbitration has become part of the

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4 See <http://www.whoswholegal.com/news/analysis/article/28777/most-highly-regarded-firms-arbitration-2011/>. This site provides a list of some of the most prestigious law firms around the world which are recognized for their arbitration services.
curriculum in upper tier universities. During its progress in the last several decades, international commercial arbitration has developed within a matrix of international conventions, national laws, institutional rules, guidelines and principles.

2.2 The Existence of the Arbitration Agreement
Arbitration is a creature of contract. An arbitration agreement is an undertaking whereby the parties consent to have disputes arising from or related to their contract submitted to a private system of adjudication in lieu of national courts. The consensual and voluntary nature of arbitration has been crucial to legitimise it as a method of private adjudication. An arbitration agreement does not exist in a legal vacuum. It requires the support of the judicial system to which it is connected. There must also be reference to laws or rules. Whether and to what degree arbitral rules will be applied must be answered by resorting to a body of law that renders them effective and enforceable. As Carbonneau states ‘the enforceability of contractual obligations arises from the coercive authority of the legal system in which they are embedded’. The fundamental starting point, however, for any arbitral procedure is the need to establish an agreement to arbitrate between the parties. There is no one form for an agreement to submit disputes to arbitration. A basic but effective statement of agreement may be set out as follows:

Any dispute or difference whatsoever arising out of or in connection with this contract shall be and is hereby submitted to arbitration in accordance with, and subject to, the UNCITRAL Arbitration Rules. The appointing and administering body shall be The Institute of Arbitrators & Mediators Australia (IAMA). There shall be one arbitrator,


9 Ibid 100.

the language of the arbitration shall be English, the place of the arbitration shall be (Sydney in Australia).  

The arbitration cannot proceed without evidence of the parties’ agreement to arbitrate their disputes. At this stage, questions as to the validity of the agreement may also arise. Such challenges are generally brought before the tribunal or the national court by a party to the dispute.

2.3 The Validity of the Agreement
The issue of formal validity of the arbitration agreement is intimately connected to party consent. The purpose of the formal requirements for arbitration agreements is to ascertain parties’ actual consent to arbitrate. Accordingly, disputes regarding completion of the formal requirements and provision of consent to arbitration are usually addressed together. Occasionally, notwithstanding the existence of an agreement to arbitrate, courts may accept jurisdiction to hear a dispute due to the fact that the agreement fails to satisfy the requisite formal requirements. The significance of formal requirements is evidenced by a majority of international legal conventions and national laws, which make it mandatory that arbitration agreements be in writing.

The reasoning for the requirement of writing is two-fold. Firstly, the arbitration agreement may mean revocation of the parties’ fundamental entitlement to have their disputes adjudicated by a court. Secondly, the written agreement facilitates proof of the existence and substance of the agreement. Significant international conventions make reference to the necessity of finding an arbitration agreement. The New York Convention for example, provides a narrow definition of the term ‘writing’ in Article II(2) stating that ‘the term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams’.

In contrast, the UNCITRAL *Model Law* provides a much wider provision for the writing requirement in Article 7 which stipulates that the arbitration agreement shall be in writing.\(^\text{15}\) The agreement in writing requirement is fulfilled by an electronic communication if the information is accessible for subsequence reference. Pursuant to Article 7(4) of the *Model Law*, the term ‘electronic communication’ includes any communication that the parties make by means of data messages which are sent, received or stored by electronic, magnetic, optical or similar means. Furthermore, an arbitration agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, or other means of telecommunication which evidences a record of the agreement.\(^\text{16}\)

The reference in a contract to a document containing an arbitration clause generally suffices to amount to an arbitration agreement, provided the contract is in writing and the reference is such as to make that clause part of the contract.\(^\text{17}\) On this point, the *Model Law* provides more flexibility to include contemporary modes of telecommunication vis-à-vis the *New York Convention*.\(^\text{18}\) This does not, however, negate the broad support the *New York Convention* provides for the recognition and enforcement of arbitral awards. Once a prima facie review indicates the existence of an arbitration agreement between the parties, there could still be grounds to challenge the agreement. These grounds are outlined in the following section to provide a broad overview.

### 2.4 Grounds for Challenging Arbitration Awards

There are usually two stages at which parties may challenge the arbitration: one is during the early stages of the arbitral procedure; the second is following the issuing of the award by the tribunal – at the enforcement stage. Parties may challenge arbitral proceedings at the early stages of the hearing on the grounds of jurisdiction. Typically, such challenges go to the existence, scope or validity of the agreement to arbitrate. Most international and national laws have time limits on bringing such challenges before national courts.\(^\text{19}\) Alternatively, during the enforcement stage, the losing party may

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\(^{15}\) *Model Law*, art 7.

\(^{16}\) Ibid art 7(4).


\(^{18}\) *New York Convention*.

\(^{19}\) See Article 21(3) of the UNCITRAL Arbitration Rules which provides that a challenge to the jurisdiction of the arbitral tribunal must be raised not later than in the statement of defence or, in relation to a counter-claim, in the reply to the counter-claim. *Arbitration Act 1996* (UK) s 31(1) stipulates that any challenge to the jurisdiction of the arbitral tribunal, must occur no later than the time the relevant party takes the first step in proceedings to contest the merits of any matter regarding the challenge.
challenge the award on jurisdictional grounds before a national court. In such circumstances, typically the losing party may seek to have the award set aside. Table 1 provides an overview of the ways in which arbitration awards may be challenged. There are five bases upon which it may be possible for a national court to set aside an arbitration award:

- jurisdictional grounds
- procedural grounds
- substantive grounds
- arbitrability.

<table>
<thead>
<tr>
<th>Grounds</th>
<th>Key Arguments</th>
</tr>
</thead>
</table>
| Jurisdictional grounds | • absence of a valid and binding arbitration agreement  
|                      | • award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration |
| Procedural grounds   | • deficiencies in the way in which the arbitral tribunal was appointed  
|                      | • lack of due process  
|                      | • the procedure adopted in the arbitration is not in accordance with the agreement of the parties |
| Substantive grounds  | • enforcement of award is contrary to public policy (e.g. competition law)  
|                      | • enforcement of award would lead to a mistake of law or a mistake of fact (in limited jurisdictions) |
| Arbitrability        | • the subject matter of the dispute is not capable of settlement by arbitration |


2.5 Jurisdictional Challenges
The principle of compétence-compétence typically arises where a challenge has been brought on jurisdictional grounds. In this category, disputes relating to the formation, validity and interpretation of arbitration agreements are a common occurrence. Jurisdictional challenges during the early stage of an arbitral hearing, often result in national court proceedings. Frequently, the arbitral tribunal itself may be asked by the

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20 Hereinafter the term ‘arbitral awards’ will be used in lieu of ‘arbitration awards’. The term ‘award’ refers to a decision issued by the arbitral tribunal concerning the dispute. The award is typically a written decision with reasons provided. The term ‘arbitral’ means in relation to ‘arbitration’.

21 The term ‘adjudicability’ refers to whether a dispute is capable of resolution by a court. Similarly the term ‘arbitrability’ refers to whether a dispute is capable of resolution by an arbitral tribunal.
parties to resolve the issues of jurisdiction. The notion of jurisdiction in the context of arbitration refers to the scope of the arbitral tribunal’s power to examine and determine the facts, interpret and apply the law and issue a written judgment, known as an ‘award’. The jurisdiction of the tribunal is usually stipulated in the contract between the parties, along with any laws that govern the arbitration procedure and the substantive laws that govern the contract. An example in the context of arbitration is given by Redfern and Hunter, who qualify jurisdiction by stating that it:

contemplates a situation in which an award has been made by a tribunal that did have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it.

Where institutional arbitration is selected by the parties, the rules of the institution will generally set out the powers of the tribunal. Most institutional arbitration rules provide expressly that the arbitral tribunal has the authority to rule on its own jurisdiction. For example, the tribunal has the option to rule on the issue of jurisdiction as a preliminary question by issuing an interim award on jurisdiction. Alternatively, the tribunal may determine the jurisdictional question with the merits in its final award. Whether the question of jurisdiction is determined in an interim or final award is subject to a number of factors. These include the will of the parties, the complexity of the case and the degree to which jurisdictional issues are enmeshed with the merits. If jurisdiction is challenged by one of the parties, the most efficient response is to undertake a preliminary proceeding to address the issue.

If the tribunal undertakes a preliminary jurisdictional proceeding, it will normally issue an interim award upholding their jurisdiction, or a final award declining jurisdiction.

23 ‘2010 International Arbitration Survey: Choices in International Arbitration’ (Survey, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London and White & Case, 2010) 1, 2. (‘White & Case Survey’).
24 This falls within the second key argument under ‘Jurisdictional Grounds’ in Table 2.1. Nigel Blackaby et al, Redfern and Hunter on International Commercial Arbitration (Oxford University Press, 2009) 598.
26 Ibid.
27 LCIA Arbitration Rules, art 23(3).
Generally, such an award may then be subject to court action to dismiss it, normally only in the country where the award was made. Alternatively, if it becomes apparent that the issues are interrelated with the merits, a determination on jurisdiction may be reserved until a final award is issued by the arbitral tribunal. At the other end of the spectrum, a losing party may oppose enforcement of the award in the national courts where the winning party seeks to have it enforced.

There are tactical reasons why parties may choose to wait until the enforcement stage to challenge jurisdiction. One may be that the party challenging the existence or validity of the agreement does not wish to be bound by the possibility that the court at the seat may find the tribunal has jurisdiction. They would rather reserve the challenge for the enforcement proceedings. Such challenges may be partial or total challenges to jurisdiction of the tribunal.

2.6 Partial or Total Challenges to Jurisdiction
There are numerous ways in which jurisdictional authority may be challenged. For instance, a party could contend that the dispute is not within the terms of the arbitration agreement. The argument here is that the agreement does not apply to the particular dispute in question. Alternatively, where there are multiple disputes, parties may argue that the arbitrator has jurisdiction over dispute X but has no jurisdiction over dispute Y. In such circumstances, a challenge to jurisdiction may be partial.

A partial challenge raises the question of whether certain (but not all) of the claims or counterclaims which have been submitted to the arbitral tribunal are within its jurisdiction... [This type of] challenge is usually dependent on whether the particular matters referred to arbitration fall within the scope of the arbitration agreement; a total challenge usually questions whether there is a valid arbitration agreement at all.

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30 See *Dallah Real Estate and Tourism Holding Co v Pakistan* [2010] UKSC 46. (‘Dallah’).
31 The term seat refers to the national arbitration laws which govern the procedural aspects of the arbitration. Its significance is discussed later in this chapter. Conversely, the court where enforcement may be sought is usually in a different jurisdiction to that of the seat.
32 In fact, this is what occurred in *Dallah* where the seat of the arbitration was in France and enforcement proceedings were held in the United Kingdom. The national courts of the two countries ruled differently as to the validity of the arbitral award.
33 A partial challenge essentially describes Key Argument 2 indicated in Table 2.1 under ‘Jurisdictional Grounds’ for challenging an arbitration award. A total challenge would fall within Key Argument 1 under Jurisdictional Grounds in Table 2.1.
35 Blackaby et al, above n 24, 341.
36 Ibid. A partial challenge would fall within Ground 2 under ‘Jurisdictional Challenges’ in Table 2.1. A total challenge falls within Ground 1 under ‘Jurisdictional Challenges’ in Table 2.1.
Where there is a partial challenge, the parties may agree that certain claims or counterclaims outside the scope of the initial reference should be brought within the arbitration.\(^{37}\) This is usually done to expedite proceedings, but may require the consent of the arbitral tribunal. Alternatively they may bring a total challenge against the tribunal, on the grounds that the tribunal totally lacks jurisdiction to determine any dispute arising from the contract. ‘Total challenges to jurisdiction are only likely to arise in practice where the authority – or purported authority – of the arbitral tribunal is derived from an arbitration clause.’\(^{38}\) Parties may argue that arbitration agreements which confer jurisdiction are invalid or otherwise non-binding.

One of the alleged parties to an arbitration agreement may argue that it is not bound by the agreement, because the arbitration clause was contained in a document to which only the other party had consented; or it may claim that the legal entity signing the agreement was a different and distinct legal person … [Alternatively] the respondent may say that the claim is time-barred or that for some other reason the arbitration clause is inoperative or incapable of being performed. \(^{39}\)

If an arbitration agreement itself is invalid, the arbitral tribunal lacks competence or authority to review the matter. \(^{40}\) Conversely, if the main contract within which the arbitration agreement is incorporated is invalid, this does not automatically invalidate the arbitration agreement. The agreement to arbitrate is capable of surviving such invalidity. This doctrine of separability is the focus of the following analysis.

### 2.7 Separability

When examining arbitration agreements or clauses, tribunals may have to determine the validity of the arbitration agreement. In particular ‘whether the arbitration clause can be regarded as having an independent existence of its own, or only exists as part of the contract in which it is contained.’\(^{41}\) If the tribunal finds that the parties have consented to arbitration, then the invalidity of the contract in which it is found – the main contract – should not change the agreement to arbitrate. In \textit{Fiona Trust v Yuri Privalov}\(^{42}\) the

\(^{37}\) Blackaby et al, above n 24, 343, 344.

\(^{38}\) This falls within Ground 1 under ‘Jurisdictional Challenges’ in Table 2.1.

\(^{39}\) As in \textit{Dallah} the Government of Pakistan claimed that they were not a signatory to the arbitration agreement and challenged enforcement on these grounds. See Nigel Blackaby et al, above n 24,344.

\(^{40}\) The term ‘arbitration clause’ is used interchangeably with the term ‘arbitration agreement’ in this thesis. Both terms refer to a provision for arbitration, which forms part of the contract between the parties.

\(^{41}\) If the arbitration clause is considered to be valid by the tribunal – that the parties validly consented to arbitration, then the arbitration clause is capable of surviving the invalidity of the ‘main contract’ i.e. the contract in which it is incorporated.

\(^{42}\) \textit{Fiona Trust & Holding Corporation & ors v Yuri Privalov} [2007] EWCA Civ 20, 24 January 2007. This case was appealed to the House of Lords whereupon its name changed to \textit{Premium Nafta Products Ltd (Respondents) v Fili Shipping Company Ltd (Appellants)} [2007] UKHL 40.
court had to determine whether such alleged invalidity of the main contract which incorporated the agreement to arbitrate, invalidated the arbitration agreement. Contracts may be invalid for a range of reasons, including:

- lack of legal capacity;
- illegality;
- misrepresentation;
- duress;
- the contract coming to an end as result of repudiation or performance; and
- unconscionability.

Separability means the validity of the arbitration clause does not depend on the validity of the contract. The doctrine provides for the survival of the arbitration clause regardless of the invalidity, nullity or termination of the main contract. In this way, it provides a legal basis for the appointment of an arbitral tribunal and maintains the jurisdiction of the tribunal to rule on the validity of the arbitration clause.

2.8 Alternative Grounds for Challenging the Arbitration

Challenges based on separability constitute one reason to contest arbitrations on jurisdictional grounds. Typically, jurisdictional claims also concern alleged incapacity of the tribunal to hear the claim or the tribunal’s excess of powers. This discussion, however, would be incomplete if the other grounds for challenge outlined in Table 2.1 were omitted. In order to provide a better understanding of some court decisions in the following chapters, it is necessary to provide a brief overview of the alternative grounds upon which cases may be brought before national courts. As indicated in Table 2.1 above, apart from jurisdictional grounds, there are several other grounds upon which parties may bring an action before the national courts. Parties may often rely on these other grounds in their application to national courts or use them as an alternative cause of action. It is common for parties to rely on one or more grounds, depending on the law applicable in their jurisdiction.

Procedural grounds and/or substantive grounds may be used as a basis for challenging awards. An example of a procedural ground is the parties claim that they have not been

43 Born, above n 29, 859.
given proper notice regarding the appointment of an arbitrator. Procedural standards must be complied with if international arbitration is to be conducted fairly and properly. Examples of procedural standards include: the right to be heard; to attend any oral hearings; to be represented; and to submit evidence to the tribunal. The aim of such standards is to:

- ensure that the arbitral tribunal is properly constituted;
- that the arbitral procedure is in accordance with the agreement of the parties (subject to any mandatory provisions of the applicable law);
- and that the parties are given proper notice of the proceedings, hearings and award.44

A substantive ground for challenging an arbitration may be for reasons of public policy. Awards may also be set aside on the basis of incompatibility with it. Some courts have held that agreements which do not conform to fundamental notions of justice offend public policy.45 Different states have different conceptions of ‘public policy’ and may set aside arbitration agreements which may be considered as valid in other states.46 A majority of the laws concerning international arbitration include a small number of mandatory provisions which the parties are not able to oust. An example of such a provision is Article 1498 of the French New Code of Civil Procedure, which stipulates that for an international award to be recognised in France, it must comply with international public policy.47

Under French law, for example, some grounds for refusal to enforce an award include contracts performed in bad faith and contractual duties of an indefinite duration.48 Derogation from a compulsory legislative provision would most probably result in a court review of the award for setting it aside. Most contemporary arbitration laws offer a framework for the parties’ and the arbitrators’ independence on the proviso of adherence with fundamental provisions such as compliance with public policy.49

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44 Blackaby et al., above n 24, 600.
49 Jean François Poudret and Sébastien Besson, Comparative Law of International Arbitration (Sweet & Maxwell, 2nd ed, 2007) [114].
Parties may also challenge arbitral procedure or the award on the basis there has been a mistake of law or fact by the tribunal. The award may be set aside for manifest disregard of the law.\textsuperscript{50} In such circumstances, allowing an appeal to a national court from the award of the tribunal is seen as being in the public interest. It must be noted, however, that errors of fact or law are rarely part of any major national law scheme for review of awards in international arbitration. They are not mentioned in the Model Law or the New York Convention.\textsuperscript{51} An arbitral award may also be challenged on the basis of arbitrability of the claim. The party challenging the arbitration may contend that the dispute is not capable of being resolved by arbitration.\textsuperscript{52} That is, a party may claim that the subject-matter of the dispute is inarbitrable – not capable of being resolved by arbitration or that the parties did not agree to arbitration.\textsuperscript{53} An example of an inarbitrable dispute is a criminal offence, which must be heard in the national court of the relevant jurisdiction.\textsuperscript{54}

These alternative grounds for challenging the arbitration or the resulting award cannot be dealt with in detail in this thesis, however, they should not be dismissed as numerous challenges are presented before national courts on these bases. For the purposes of this thesis the focus will only be on the jurisdictional grounds because the principle of \textit{compétence-compétence} falls within this category.

\textbf{2.9 The Role of Courts in the Reputation of a Jurisdiction}

Regardless of the grounds upon which an arbitration or award is challenged in a national court, there are usually consequences of court intervention. General perceptions are held by the users and providers of arbitration regarding courts of particular jurisdictions.\textsuperscript{55} In the White and Case Survey of international arbitration, the majority of

\begin{footnotes}
\item[50] ‘Manifest Disregard’ was a key argument in \textit{Hall Street Associates LLC v Mattel Inc.} 128 S Ct 1396 (2008). This defence is no longer acceptable under the \textit{Federal Arbitration Act 1925} (U.S.) 9 USC but has been supported in \textit{Citigroup Global Markets Inc v Bacon}, 562 F 3d 349 (5th Cir 2009).

\item[51] The \textit{Arbitration Act 1996} (UK) recognises a right of appeal on errors of law, although it rarely applies in international arbitrations because of the exclusion of such rights of appeal in most institutional rules.


\item[53] Ibid.

\item[54] In \textit{Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc}, 473 US 614, 638 (1985) the court permitted the arbitration of a dispute concerning competition law but reminded the parties that the resulting award would be subject to judicial review at the enforcement stage, to ensure compliance with the U.S. anti-trust laws. See also Luca D Radicati Di Brozolo, ‘Arbitration and Competition Law: The Position of the Courts and of Arbitrators’ (2011)27 (1) \textit{Arbitration International} 1, 3.

\item[55] See White & Case Survey, above n 23.
\end{footnotes}
interviewees stated that the ‘formal legal infrastructure’ of the seat is the most significant factor in selecting the law to govern the arbitral procedure. The term ‘formal legal infrastructure’ includes the national arbitration law, the track record of the courts in that particular jurisdiction in enforcing arbitration agreements and awards. It also incorporates the perceived impartiality and neutrality of the judiciary in a particular jurisdiction. The seat means the national law applicable to the arbitral procedure. National courts play a major role not only in interpreting the national laws on arbitration, but also with respect to the general approach adopted by the courts. In this way, the reputation of any given jurisdiction is influenced to a considerable degree by the attitude of its national courts.

If a jurisdiction is regarded as arbitration-friendly it will be preferred by parties and frequently recommended by legal counsel to clients. Conversely, some jurisdictions are deemed as indifferent to or even anti-arbitration. Generally speaking, the national courts in all jurisdictions play a key role in the degree to which they permit the arbitral tribunal to rule on its own jurisdiction. Some courts adopt a more liberal approach by providing more discretion to the arbitral tribunal and only intervene if there is a serious defect in the arbitration or parties’ rights are being abrogated. The effects of court intervention differ depending upon the grounds of the challenge and the relevant law. Commonly, courts have the following options when an award is brought before it:

- confirm the award;
- refer it back to the arbitral tribunal for reconsideration;
- vary the award; or
- set it aside, in whole or in part.

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56 Ibid 1, 17. The term seat denotes the arbitration law which governs the procedure of the arbitration. This key concept is analysed in greater detail later in this chapter. See Subheading 2.13 The Seat.
57 See Subheading 2.13 The Seat.
60 An ‘arbitration-friendly’ jurisdiction is one which where possible, tends to permit the tribunal to rule on its own jurisdiction and aids the tribunal where requested. For example, issuing an anti-suit injunction against a party to the arbitration. Such a jurisdiction is also typified by a track record for enforcing international arbitral awards.
61 Albert Jan van den Berg, ‘Enforcement of Arbitral Awards Annulled in Russia’(2010) 27(2) *Journal of International Arbitration* 179, 179.
62 Gary Born, above n 29, 851, 853.
63 Blackaby et al, above n 24, 617.
The majority of national arbitration laws view the arbitral tribunal as being able to decide its jurisdiction over a particular dispute.\(^{64}\) This does not exclude the national court at the seat or the court enforcing the award from the right to review jurisdiction at the enforcement stage of the award. It merely provides a priority for the tribunal to rule on the question first and the tribunal usually need not stay proceedings if the matter is concurrently before a national court.\(^{65}\) This is the essence of the *compétence-compétence* principle. If a tribunal has jurisdiction, its award will generally be final and binding on the parties.\(^{66}\)

There is an efficiency argument which draws on the doctrine of separability and *compétence-compétence*. Both serve to uphold the independence of the arbitral process and function to discourage dilatory tactics, such as challenging the jurisdiction of the arbitral tribunal in order to stall the process. National courts which support these two concepts provide a jurisdiction which is favoured by users and providers. The providers of international commercial arbitration are typically multi-national law firms who provide a specialist practice.\(^{67}\) Their aim is to give effect to the agreement of the parties, thereby upholding party autonomy.

### 2.10 Freedom of Contract and Party Autonomy

Why is it necessary to uphold arbitration agreements? This question is of theoretical and pragmatic significance for a number of scholars.\(^{68}\) Theoretically, the necessity may be viewed through the principle of freedom of contract, which supports the autonomy of the parties to form their own bargains. The principle is linked to three key concepts which may be posed as follows:

1. that the law should respect the freedom of contracting parties to pursue their own purposes and to set their own terms;

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\(^{64}\) Most developed countries recognise the principle of *compétence-compétence* in their arbitration laws as many of them have adopted the *UNCITRAL Model Law*.

\(^{65}\) See *Arbitration Act 1996 (UK)* s 32(4). See also the *CPC Book 4, Chapter 1 (France)* art 1458. See also *Décret no 2011-48 du 13 Janvier 2011* [Decree No 2011-48 of 13 January 2011] (France) JO 14 January 2011, art 1446. (‘New Decree’).

\(^{66}\) Jurisdiction is not the only ground subject to review by courts, however, generally there are limited grounds for review of an arbitration award as discussed earlier in this chapter. See Table 2.1.

\(^{67}\) <http://www.whoswholegal.com/news/analysis/article/28777/most-highly-regarded-firms-arbitration-2011/> provides a list of some of the most prestigious law firms around the world which are recognized for their arbitration services.

2. that the law should respect the freedom of eligible parties to choose their own partners;
3. that where agreements have been freely formed, the parties should be held to their bargains.69

Freedom of contract has been described eloquently by Sir George Jessel MR:

If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.70

Generally speaking, the principle of freedom of contract is aligned with the rationale underlying *compétence-compétence*. The concept carries significance for arbitration in that it provides a jurisprudential basis for the courts to refrain from unnecessary intervention. The autonomy of private parties to form their own contracts on their own terms is the core aspect of classical contract law.71 It is crucial that the arbitration agreement be consensual. When sophisticated commercial parties strike a bargain they generally do not require paternalistic intervention from national courts.

Autonomy stems from the parties’ ownership of the arbitration process.72 By consenting to a private arbitral process, the parties ensure they maintain control over who will arbitrate their dispute whilst simultaneously restricting the scope of the arbitrator’s power to rule on particular issues. Conferring power on the arbitrator to decide jurisdictional questions is generally the prerogative of the parties and is a crucial aspect of party autonomy.73 Control by the parties may be lost only if the court hears a challenge by one of the parties.74

From a pragmatic perspective, there is an equally important reason to uphold arbitration agreements. It ensures the efficacy of arbitration as a viable method of dispute

70 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462.
resolution and assists in flexible and efficient resolution of disputes. According to a study conducted by the University of London, the overwhelming majority of those surveyed indicated a strong preference to avoid litigation in national courts. In that survey, eighty six percent of legal counsel for corporations expressed satisfaction with international arbitration. Once the validity of the arbitration agreement is determined, the most important issue is to select the law governing the substance of the dispute.

### 2.11 The Substantive Law of the Dispute
A fundamental freedom that parties have is the right to select the law to apply to the substance of their contract. The parties are free to select only one jurisdiction to apply to the entire contract or alternatively, may designate laws from different jurisdictions to govern different parts of their contract. Often the parties will have stipulated the applicable substantive law in their arbitration agreement. It may be the law of one of the parties to the contract although in a contract for the sale of goods, it may be an international law such as the United Nations Convention on Contracts for the International Sale of Goods. If they have not chosen a governing substantive law, then generally the tribunal will apply the law which is determined by the applicable conflict of laws rules.

The choice of governing substantive law is influenced by the perceived impartiality and neutrality of the legal system in relation to the parties and their contract. Other factors considered by the counsel for the parties is the suitability of the law for the particular contract and the parties’ familiarity with it. Research indicates that the choice of governing law is a complicated question and most of the interviewees take a carefully considered approach to it. The most frequently used law according to the 2010 White and Case Survey was English law followed by the law of New York.

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75 ‘International Arbitration: Corporate Attitudes and Practices’ Survey Queen Mary School of International Arbitration and Price Waterhouse Coopers, (2006) 5. (‘Queen Mary Survey’).
76 Lagerberg, above n 68, 455.
80 White & Case Survey, above n 23, 1, 7.
reason for choosing English or New York law was familiarity, predictability, certainty and a well established jurisprudence. The governing substantive law is one of the major factors which influences the choice of the seat.

2.12 The Seat of the Arbitration

The seat of the arbitration is the jurisdiction whose national laws apply to the arbitral procedure. If there is a challenge to the jurisdiction during the arbitration, it will have to be brought before the national courts at the seat. Similarly if the tribunal or the parties require assistance from the court they will seek it from the court at the seat. Although the seat is also referred to as the place of arbitration, this does not mean the physical venue or location of the arbitration. The arbitral proceedings may be physically conducted in a country other than the seat. To keep matters simple, however, the physical location of the arbitration should also be the seat of the arbitration. By choosing the seat, the parties in effect agree that the national laws of that jurisdiction will apply to the arbitration procedure. For example, parties may have selected the United Kingdom as the seat of the arbitration. This means the Arbitration Act 1996 (UK) will govern how the arbitration is conducted. Because the law of the seat governs the procedure of the arbitration, it is also referred to as the ‘procedural law’.

This choice of seat means the parties agree to submit to the arbitration laws of that country, including any mandatory provisions found within its arbitration laws. A majority of the national arbitration law provisions are mandatory unless specifically stated as optional, thus must be complied with. The significance of the seat also lies in the fact that the courts of the seat are the only courts which can set aside the award. If the court at the seat sets aside an award this presents a compelling reason for a court in

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82 Ibid 14.
83 Ibid 17. The law which governs the main contract (‘governing substantive law’).
84 Poudret and Besson, above n 49, [134].
85 See Arbitration Act 1996 (UK) ss 2(2) and 2(3) for mandatory provisions which apply even if the seat is outside England and Wales or Northern Ireland or no seat has been determined.
88 Based on the list provided under heading 2.4 Grounds for Challenging Arbitration Awards on page 25, setting aside the award is within the exclusive jurisdiction of the seat. The enforcing court cannot set the award aside, although it may refuse to enforce it. See Spier v Calzaturificio Tecnica SpA, 71 F Supp 2d 279 282 (SDNY 1999) where the court refused to enforce an award that had been set aside at the seat.
a different enforcing jurisdiction to refuse enforcement pursuant to the *New York Convention*.89

There are basically two different laws that parties to an arbitration agreement should select: the governing substantive law of the contract and the law of the *seat*. Standard-form arbitration agreements generally only provide for two laws. A typical arbitration agreement may stipulate that ‘this contract is to be governed by the laws of France. All disputes are to be resolved by arbitration in London’. According to this arbitration agreement, the laws of France will be the governing substantive law of the main contract between the parties. London is the selected *seat* therefore the arbitration procedure will be governed by the *Arbitration Act 1996* (UK).90 Note here that French law will only govern the substantive issues in the main contract, which is quite distinct from the laws that apply to the procedure of the arbitration.

Parties are free to choose any laws they wish, although there should be careful consideration given to these choices by the legal practitioners advising the parties. When selecting the seat consideration is usually given to whether it is arbitration-friendly, including the degree of support its national courts provide for arbitrations. Frequently, the *seat* chosen will be a neutral State without any connection to the dispute. Moreover, the substantive law of a different jurisdiction may be more favourable to a particular contract, hence, the governing substantive law may be different to that of the *seat*. If there is a dispute as to jurisdiction of the tribunal during the arbitral procedure, the national courts at the *seat* will have jurisdiction to hear such challenges. Further, if the award is challenged on jurisdictional grounds during the enforcement stage, then the national court in the jurisdiction where enforcement is sought may review the challenge to jurisdiction. Thus, curial review of jurisdiction is not exclusive to the national courts at the *seat*.

It is possible for an arbitral tribunal sitting in France governed by French law as the law of the *seat*, to apply the law of New York as the substantive law of the contract. Moreover, the seat may impact the law that applies to any future challenge of the

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89 *New York Convention*, art V (1)(e). The Model Law also provides for the same in Art 36(1)(a)(v). See the *CPC* (France) art 1502 which provides that the courts at the *seat* are the only courts that can set aside the award. Melanie Willems, ‘Dallah v Pakistan’ (2011) August *The Resolver* 7.

award. If a dispute arises between the parties, it is the laws of the seat which will determine the law applicable to the arbitration. Essentially, if a challenge is raised during the arbitral procedure, the court at the seat will rule on issues such as validity and scope of the arbitration agreement. The importance of choice of seat is evidenced in studies where interviewees consider the legal infrastructure of the seat as the most important factor in selection. The legal infrastructure includes the national laws of arbitration, the track record of its courts in enforcing arbitration agreements and awards, as well as perceived neutrality and impartiality.

If the seat has a culture of judicial corruption or is anti-arbitration, this may amount to a genuine obstacle for the party seeking assistance from national courts. Parties may thus mitigate the risks of judicial corruption by opting for arbitration and ensuring the seat is arbitration-friendly. The seat may be described as the element which binds the parties to the courts of a particular jurisdiction and to a national law of arbitration. There are also arbitration rules which provide more guidance and detail in governing the arbitral procedure.

2.13 Arbitration Rules

The seat provides broad laws which apply to the arbitration procedure, however, they should be supplemented by more specific rules. The parties have the freedom to select the rules applicable to the arbitral procedure. They may select institutional rules, ad hoc rules or formulate their own. Institutional rules vary from one institution to another but are generally quite detailed with respect to the process. If the parties select institutional arbitration, then normally the rules of that institution will govern the procedure, such as the International Chamber of Commerce Arbitration Rules.

It is possible that there may be a degree of conflict between the national arbitration laws at the seat (procedural law) and the rules of arbitration. In such circumstances, the

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93 White & Case Survey, above n 23, 17.
arbitration rules should prevail over the procedural law provisions. Pryles delineates the distinction by stating:

It is true that the arbitral procedural law may deal with many matters concerning the conduct of an arbitration which can be addressed in procedural rules selected by the parties to apply to the arbitration. In a sense, therefore, the arbitral procedural law may deal with matters which the parties have failed to address, either by not selecting any arbitration rules (institutional or otherwise) or because those rules are deficient. Where the parties do select arbitral rules, they are likely to prevail over the ‘fall-back’ [default] provisions made by the law governing the arbitral procedure. This is because the latter will be regarded as non-mandatory and liable to be displaced by the parties express provision to the contrary.97

The will of the parties also extends to modification of the non-mandatory provisions of arbitration rules. Often institutional and ad hoc arbitration rules will have a default language which states ‘unless otherwise agreed by the parties’.98 Thus, if the parties have agreed on a specific issue, their agreement will generally prevail over the default rules of arbitration.99 In summation, the parties have a considerable degree of autonomy concerning the selection of applicable rules and any institution which is to conduct the arbitration, on the proviso that parties are treated fairly. Typically, these rules and procedures will be provided for in the parties’ arbitration agreement. A crucial factor in choosing the applicable rules and procedures are the laws and services provided by the jurisdiction. Governments have realised the potential contribution arbitration can make to their economy and are competing to attract more revenue from provision of arbitration services.

2.14 Courting the Parties

2.14.1 The Rise of Arbitration

Since the 1970’s, international commercial arbitration has evolved into a lucrative legal business on a huge scale rapidly becoming the accepted tool for resolving international business disputes. Examples of arbitrations from the 1970’s and 1980’s are the nationalization of oil concessions, international construction projects such as the tunnel under the English Channel and the French sinking of the Rainbow Warrior on its Greenpeace mission.100

99 Moses, above n 58, 5.
The lack of transnational courts of civil procedure conferred with jurisdiction to resolve international private disputes has resulted in a vacuum which international commercial arbitration is filling.\textsuperscript{101} International commercial arbitration provides substantial revenue for venues which are popular destinations for the conduct of arbitral proceedings. For example, during 2002, the amount of money in dispute in arbitrations where international law firms provided a service from London, had a combined value in excess of $40 billion.\textsuperscript{102} The popularity of arbitration as a tool of international dispute resolution today is evinced by a marked increase in the number of international commercial arbitrations taking place and new international arbitration institutions being established.\textsuperscript{103}

<table>
<thead>
<tr>
<th>Table 2.2: Increase in Number of International Commercial Arbitrations</th>
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<tr>
<td>Institution</td>
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<td>CIETAC\textsuperscript{104}</td>
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Given that most arbitral hearings take place at the \textit{seat}, the jurisdiction of the \textit{seat} stands to benefit financially from evolving into a host site for arbitration hearings to take place and as a \textit{seat}.\textsuperscript{108} Parties who use arbitration to address international business disputes stand to benefit from having impartial national courts and high quality legal services to serve arbitrations. Studies indicate that high calibre legal services provided in a country increases affluence for that State.\textsuperscript{109} Parties generally choose to hold arbitral hearings in locations where high quality legal services, transportation services


\textsuperscript{102} USD$40,000,000,000. ‘International Dispute Resolution in London’ \textit{International Financial Services London} (October, 2006) 6.

\textsuperscript{103} See <http://www.kluwerarbitration.com>.

\textsuperscript{104} China International Economic and Trade Arbitration Commission: <www.cietac.org>.

\textsuperscript{105} ICC Court of International Arbitration: <http://www.iccwbo.org/index_court.asp>.

\textsuperscript{106} London Court of International Arbitration: <http://www.lcia-arbitration.com>.

\textsuperscript{107} Stockholm Chamber of Commerce: <http://www.sccinstitute.com/uk/Hom>.


\textsuperscript{109} White & Case Survey, above n 23, 19.
and accommodation are provided. People are attracted to such services for arbitration, thus contributing to the growth of the economy in that location.\textsuperscript{110}

The arbitration community, the providers of legal and dispute resolution services and the wider service economy all stand to benefit from such activity.\textsuperscript{111} The attraction of a particular venue to the parties not only as a venue for hearings, but also as a seat, hinges on a number of factors as follows:

- enforceability of the award\textsuperscript{112}
- flexibility in arbitral procedure,
- confidentiality,
- party autonomy,
- impartiality and quality of judiciary,
- availability of legal expertise, particularly advocacy
- specialist expertise, e.g. in construction,
- availability of support services and;
- availability of suitable premises.\textsuperscript{113}

In the overall scheme, the most significant factor in choice of arbitration venue and seat is a user-friendly legal climate as this is likely to influence the end result of the dispute.\textsuperscript{114} Hence, court decisions relating to arbitration disputes will either add credibility to awards issued in that jurisdiction and reinforce the venue as arbitration-friendly, or render it a tenuous venue and seat for future parties. For example, decisions such as \textit{Fiona Trust} have been hailed as providing significant reassurance to parties who are signatories to international arbitration agreements to select the United Kingdom as the seat where doctrines such as separability are likely to be enforced by the judiciary.\textsuperscript{115} This is corroborated by the White and Case Survey where England was found to be the most popular seat whereas the International Chamber of Commerce in Paris was found to be the most preferred and widely used institution.\textsuperscript{116}

\textsuperscript{110} Ibid 19.
\textsuperscript{111} Ibid 19-21.
\textsuperscript{112} The award issued must be enforceable in other jurisdictions as well. It must therefore adhere to all laws at the seat and comply with the rules of arbitration whether they be institutional or ad hoc rules.
\textsuperscript{113} ‘International Dispute Resolution in London’ above n 101, 5.
\textsuperscript{114} Ibid.
\textsuperscript{116} White and Case Survey, above n 23, 3.
An equally significant factor for parties choosing a jurisdiction as the seat is the political stability of the jurisdiction where awards are issued, as this has a direct impact in maintaining the status of a particular jurisdiction as pro arbitration or otherwise.\textsuperscript{117} Upon analysis, it seems clear that the credibility of arbitration awards generated by any given country is subject to numerous factors and developing any jurisdiction to become pro-arbitration is a long term strategy, which is also closely linked to economic stability.\textsuperscript{118}

Further, policy considerations found in the judgments of the courts tend to reflect current values in society.\textsuperscript{119} Therefore, it is expected that the judiciary will continue to support arbitralion in traditionally arbitration-friendly jurisdictions. One major indicator of becoming a pro-arbitration jurisdiction is ratifying the New York Convention. There are approximately one hundred and forty three countries which are signatories to the New York Convention which suggests a general desire by most States to be a member of the international arbitration community and support arbitration.\textsuperscript{120}

### 2.14.2 International Laws in Arbitration

Two protocols have been significant in shaping international arbitration. The significance of these lies in the number of countries which have become signatories to them, thus the national courts of these countries must rule in accordance with the obligations pursuant to them, wherever relevant. This ensures a basic degree of consistency and predictability for the parties who have their arbitration related disputes heard by those national courts. The first is the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, generally known as the New York Convention.\textsuperscript{121} The harmonising effect of the New York Convention cannot be understated, due to its ratification by many countries.\textsuperscript{122} It has enabled arbitration to become an effective alternative to litigation. Second is the adoption of the Washington Convention on the Settlement of Investment Disputes between States and Foreign Investors of 1965, by more than one hundred and forty three countries

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\textsuperscript{117} See <http://www2.standardandpoors.com>. This is especially relevant to foreign investments in any given ‘host’ nation and the potential investment arbitrations which may ensue.


\textsuperscript{120} New York Convention.

\textsuperscript{121} Ibid.

including many developing ones. Generally known as the ICSID Convention, it has facilitated the growth and harmonisation of investment arbitration among signatory States.

To these two conventions, must be added the 1985 *UNCITRAL Model Law on International Commercial Arbitration* which had an overwhelming influence on the progress of national legislation and the operation of international arbitration. Implementation of the Model Law contributed substantially to steering commercial disputes away from congested courts to arbitration. Although the Model Law is merely a recommended text for national legal jurisdictions, numerous countries have adopted it into their national arbitration laws. This has resulted in increased harmonisation among national laws around the world. Any jurisdiction is at liberty to use the Model Law as the foundation for its national legislation on arbitration. If the parties have not selected any law to govern their arbitration, the law of the seat of arbitration will apply to the arbitral procedure. If the seat of the arbitration is in a country which has adopted the Model Law, then the Model Law will generally apply by default.

Apart from international laws and conventions, another factor which liberated arbitration from the scrutiny and regulation of the national court systems was ‘regulatory competition’. This arose with the development of the market in arbitration and resulting competition among various national and international arbitral institutions. Once the International Chamber of Commerce began to secure more of the high calibre international commercial arbitrations in the 1970’s, competition among arbitral institutions commenced. This competition was facilitated by the forum-

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128 Greenberg, Kee and Weeramantry, above n 80, 16.
129 Moses, above n 57, 6. It is interesting that the *Model Law* does not define the term arbitration either. See for example the *Model Law*, art 2 which refers to arbitration but omits the definition of it. It is also noted that some countries such as Australia and Singapore allow parties to exclude the Model Law if the arbitration agreement has been entered into prior to a particular date. In Australia this date is before 6 July 2010
130 Dezalay and Garth, above n 100, 3, 6.
shopping opportunities for major U.S. multinational law firms who were able to select among laws, rules, institutions and locations based on the interests of their clients. Consequently, various countries in Europe enacted new statutes for arbitration with the objective of rendering their laws more attractive for users. The competition continues as arbitration is still a highly lucrative business and the number of institutional arbitrations is rising.\textsuperscript{131} One other factor contributing to the reputation a jurisdiction enjoys as a popular \textit{seat} for arbitration, is the degree to which its national courts take into account mandatory laws such as international public policy.

\textbf{2.14.3 The Effect of Mandatory Laws on Arbitration}

In order to capitalize on the benefits of international arbitration, there is a requirement that parties relinquish to arbitrators the authority to make determinations which may involve rights – such as anti-discrimination law – in addition to private ones. Mandatory laws are imperative provisions of law that are imposed on arbitrating parties regardless of their choice of law. However, it is seldom that a mandatory law will apply to an arbitration. If, however, they do apply it may result in the intervention of the national courts and the award being set aside for breach of a mandatory law. Such laws only apply if there is an essential public policy question before the arbitral tribunal.\textsuperscript{132} An example of a mandatory law is the law concerning corruption. Such laws are to protect the public interest and cannot be opted out of by the parties. For the purposes of international commercial arbitration, mandatory laws which are likely to have an impact on commercial transactions include but are not limited to competition laws, securities laws and laws pertaining to corruption.\textsuperscript{133}

For any mandatory law to apply to an arbitration, the dispute must be closely linked to the legal system which enacts the mandatory law in question. Consider, for example, an arbitration between parties from France and England regarding the acquisition of a company in the United States. Assume the arbitration agreement between the parties has its \textit{seat} of arbitration in Australia. A dispute arising from such an agreement will not warrant the application of mandatory Australian laws on competition or trade practices.

\textsuperscript{131} See \url{http://www.hkiac.org/show_content.php?article_id=9}. See also Rima Evans, ‘Keeping Costs Under Control’ (2011) February \textit{The Resolver} 6, 6.
\textsuperscript{132} Greenberg, Kee and Weeramantry, above n 80, 119.
\textsuperscript{133} Donovan and Greenawalt, above n 7 11,13.
This is because there is an insufficient factual connection between the dispute and the application of mandatory laws of Australia.\textsuperscript{134}

Given that mandatory laws usually pertain to statutory rights, the courts will refer to the relevant legislation. The key issue is to ascertain whether the statute includes a non-waiver of rights provision, which clearly prohibits the party to refer to arbitration. Conversely, if both parties agree to arbitrate a dispute which is inarbitrable, theoretically the dispute could proceed to arbitration. Nevertheless, the tribunal is empowered to declare its lack of jurisdiction. Government bodies are also capable of intervention on the grounds of inarbitrability. Finally, the losing party may contest the enforcement of the award on the same basis.\textsuperscript{135}

The court in these circumstances must have regard to the intention of the contracting parties as well as contract construction and ordinary principles of contract law. The court will use such considerations to ascertain the scope of the arbitral clause. For instance, the court may have to construe the meaning of phrases such as “any dispute arising under this agreement.” Carbonneau states that:

\begin{quote}
A general reference to arbitration leaves unresolved the question of whether the parties intended to include statutory disputes in their reference to arbitration (an issue of contractual inarbitrability) and whether the law allows them to enter into an arbitration agreement when such rights are involved (an issue of subject-matter inarbitrability).\textsuperscript{136}
\end{quote}

Where in Anglo-American tradition the term ‘public policy’ is used, in civil law countries, the phrase ‘ordre public international’ denotes the notion of public policy as applied in private international law. It is essentially that part of the public policy of a State which prevents the parties from disposing of particular principles that the State considers as inviolable.\textsuperscript{137} The refusal of an award by a national court on these grounds is supported by the \textit{New York Convention} which provides that recognition and enforcement of an award can be refused where it would be contrary to the public policy

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\textsuperscript{134} Greenberg, Kee and Weeramantry, above n 80, 120. See also \textit{Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd} [2007] FCA 881, 41.


\textsuperscript{136} Ibid.

\end{flushleft}
of that country. 138 The second meaning of international public policy is the component which belongs to public international law. International public policy carries significant implications – as the breach of it may become grounds for the annulment of the award at the seat and the recognition and enforcement of the award at the place of seeking enforcement. 139 One instance of international public policy is the sanctions imposed against a State by the Security Council of the United Nations. 140 It has been said that public policy is a fluid concept, evading clear definition. Husserl has described it by stating that:

Public policy belongs to the body of legal phenomena which cannot be construed under a rigid formula. Public policy is necessarily variable. It changes with changing conditions. It is a function of time and space.141

Another frequently used term for international public policy is ‘transnational public policy’ which can be defined as the group of legal principles, not belonging to the law of a particular State, that may be utilized by an arbitrator either as an obstacle to the enforcement of an international commercial contract, or, tacitly, as a bar to the application of the State law normally applicable to such contract. This begs the question of whether there exists a legal system, separate from the States and from international law, which obliges its subjects to honour the principles and rules on which it confers a public policy character. The literature refers to this as lex mercatoria. 142

2.14.4 Lex Mercatoria
The lex mercatoria is also known as the ‘new law merchant’ or ‘transnational law’. It has been defined as the legal system spontaneously arising from the community of international merchants. 143 Essentially:

the lex mercatoria is a doctrine of laissez faire. In … many parts of the world it is considered that the exercise of free consent by individual parties must be subordinated to broader economic and political considerations bearing on international trade. 144

This is reinforced by Lando who states that ‘the binding force of the lex mercatoria does not depend on the fact that it is made and promulgated by State authorities but that
it is recognized as an autonomous system by the business community and by State authorities’.\footnote{Ole Lando, \textit{The Lex Mercatoria in International Commercial Arbitration} (1985) 34 \textit{International and Comparative Law Quaterly} 747, 753.} It can be said therefore, that the rules of the \textit{lex mercatoria} are of a normative nature and are autonomous of any national legal system. They are unlike any national rules applied by a national court or arbitrator.

It has been argued that \textit{lex mercatoria} is a set of legal rules but not a legal system. The primary reason for this assertion is that unlike a legal system, it lacks a judiciary and relevant institutions with powers of coercion. It has been asserted that \textit{lex mercatoria} is a fiction without substance.\footnote{Carbonneau, above n 8, 78.} Some have claimed that due to its fragmented nature, it must be thought of as a method of decision making and not a list of pre-determined principles. Therefore, in the process of applying \textit{lex mercatoria}, resort may be had to elements such as customs and usages, uniform laws, legal codes and fundamental rules of law.\footnote{Hook, above n 73, 175, 176.}

Carbonneau contends that:

\begin{quote}
Just because the \textit{lex mercatoria} is theoretically available as a source of interpretation and amplification of contractual clauses does not make it law. In my view, it is not a system of law, but rather – at most – a set of \textit{principia mercatoria}. The concept of \textit{principia mercatoria} more correctly reflects the nature, application, and content of the law merchant than any suggestion that it amounts to an inchoate or undiscovered legal system that exists outside national jurisdictions.\footnote{Carbonneau, above n 8, 100.}
\end{quote}

In practice, parties will usually reach an agreement concerning the selection of national and international law to govern the arbitration. Alternatively, the parties can confer jurisdiction on the arbitral tribunal to select the \textit{lex mercatoria} to apply to their contract. An example of \textit{lex mercatoria} may be the \textit{UNIDROIT Principles of International Commercial Contracts}. Selection of the \textit{lex mercatoria} is not typical between two private parties.\footnote{Moses, above n 58, 69.} Moreover, it has been more widely accepted in the civil law world than it has in common law jurisdictions.\footnote{Hanotiau, above n 1, 89, 97.}

Transnational public policy is a component of the \textit{lex mercatoria}. It has been contended that it stems from the position of the arbitrator which confers on him/her the freedom to
resort to the principles s/he considers as applicable.\textsuperscript{151} It is, therefore, within the discretion of the arbitrator whether or not to apply transnational public policy. Essentially, it may be described as a tool which enables the arbitrator to refuse to enforce a contract, or to apply a law which violates principles that s/he, in compliance with values shared by the arbitration community generally and reinforced by legislators, considers to be fundamental.

The relevance of the \textit{lex mercatoria} is that it reflects the preferences of the business community by permitting trade usages and general principles of commercial arbitration to be used in the decision-making process by tribunals.\textsuperscript{152} Regardless of the law applied to the dispute by the tribunal, the general principles of arbitration within the \textit{lex mercatoria} enable the efficient resolution of disputes. This, in turn, facilitates increased party autonomy as it decreases the need for connection to a particular national law. The broad objectives of arbitration - freedom of contract and party autonomy - are therefore supported by the \textit{lex mercatoria}. The same principles are also supported by the \textit{New York Convention} and the \textit{UNCITRAL Model Law}, which are more likely to apply given the high number of signatory countries in the world.\textsuperscript{153}

\textbf{2.15 The New York Convention}

The \textit{Convention on the Recognition and Enforcement of Foreign Arbitral Awards}, commonly referred to as the \textit{New York Convention}, is a rare example where a transnational commercial law instrument has become a genuine success story.\textsuperscript{154} It was the first Convention following World War II to signify that the world was prepared to improve international relations through harmonisation of commercial law.\textsuperscript{155} The most significant advantage of arbitration vis-à-vis litigation is the degree of certainty a party can have that the resulting award will be recognised and enforceable in most countries.\textsuperscript{156} This recognition and enforceability is due largely to the \textit{New York Convention}: there is no international instrument which provides the equivalent

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{151} Mistelis and Lew, above n 7, 64.
\item \textsuperscript{152} Another example of \textit{lex mercatoria} is the \textit{United Nations Convention on Contracts for the International Sale of Goods}, UN Doc A/Conf 97/19 1489 UNTS 3. (11 April 1980). (‘\textit{CISG}’).
\item \textsuperscript{153} \textit{New York Convention}.
\item \textsuperscript{154} Ibid.
\item \textsuperscript{156} Ibid 1, 2.
\end{itemize}
\end{footnotesize}
recognition and enforcement of court judgments. Generally, national court judgments are only enforceable in the jurisdiction in which they are issued. They do not necessarily apply in the courts of other jurisdictions. Typically, parties may require enforcement of the award in more than one jurisdiction, as assets of the losing party may be located in different jurisdictions. A new lawsuit must then be commenced in all the jurisdictions where the judgment requires enforcement, which can result in substantial delays and very high costs.

Problems with enforceability of arbitration awards are a significant factor as to why a majority of parties will select a jurisdiction which recognises and applies the New York Convention. Although an award issued in a State which has ratified the New York Convention must be enforced by the courts of other contracting States, this will depend on whether or not the State enforcing the award has a pro-enforcement approach. Some signatory States are more pro-enforcement than others, which is why selecting the appropriate seat and the jurisdiction in which the award will be enforced are critical to the success of an international commercial arbitration and the resulting award.

The New York Convention is sensitive to the requirements of the international business community. It creates an international structure of dispute resolution in which parties to international agreements may agree to submission of their disputes to arbitration, opt for procedural rules which will govern the arbitration, nominate the seat which, in turn, determines the national jurisdiction and court governing the proceedings. This generally ensures that the award will be enforceable in any signatory nation.

2.15.1 The New York Convention and Compétence-Compétence
When the widely accepted legal doctrine that courts are obliged to enforce the parties’ choice of law is coupled with the New York Convention, it serves to provide an aligned and effective system of international business regulation whereby parties mitigate the intrinsic risk in international transactions by agreement to arbitration and rules to

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157  Ibid.
159  Ibid. Some courts in the U.S are more supportive of the arbitral process than others, thus there may be variation in the approach of the national courts even within the same jurisdiction.
160  Suter v Munich Reinsurance Co. 223 F 3d 150, 155.
161  Donovan and Greenawalt, above n 7, 11, 12.
govern the merits of the dispute.\textsuperscript{162} Except for Article II (1), which relates to form requirements, the \textit{New York Convention} has no provision which outlines the conditions for the validity of the arbitration agreement. It only requires that courts respect the existence of an arbitration agreement. Article II (3) of the \textit{New York Convention} provides for the court asked to determine the matter, to refer the parties to arbitration unless the court finds the arbitration agreement to be null and void, inoperative or incapable of being performed.\textsuperscript{163}

The \textit{New York Convention} is silent on the issues of existence, validity or scope of the arbitration agreement.\textsuperscript{164} Nor does it stipulate whether these jurisdictional issues should receive a \textit{prima facie} or \textit{full} review by the national courts. Rather, it leaves the matter to the discretion of national legal systems.\textsuperscript{165} This has resulted in a divergence of approach in the application of \textit{compétence-compétence} under the \textit{New York Convention} and created opportunity for unwelcome judicial review in some jurisdictions.

It has been argued that the pro-arbitration nature of the \textit{New York Convention} ought to encourage courts to provide a narrow reading of Article II (3) which requires contracting States to refer parties to arbitration unless the agreement is null, void or incapable of being performed.\textsuperscript{166} A narrow reading would mean that the arbitration agreement is invalid only in ‘manifest cases’.\textsuperscript{167} If an agreement is manifestly null, void, or incapable of being performed, this would be sufficiently clear even upon a \textit{prima facie} review.

\begin{flushright}
\textsuperscript{162} Ibid 11, 12.
\textsuperscript{163} Poudret and Besson, above n 49, [296].
\textsuperscript{165} \textit{Prima facie} review and full review will be discussed in chapter 4. \textit{Prima facie} review entails the court conducting a brief examination of the arbitration agreement to find that it is valid and binding on the parties. A \textit{full review} on the other hand, requires a comprehensive examination of the arbitration agreement by the court to determine the validity of the arbitration agreement. See Guido Carducci, ‘\textit{Arbitration, Anti-Suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and New York Convention} (2011) 27(2) \textit{Arbitration International} 171, 185.
\textsuperscript{166} It is also postulated that Article II(3) of the \textit{New York Convention} is solely applicable if the arbitration occurs in another country to that of the court seized with the dispute. This is the prevalent consensus in relation to the scope of Article II(3)
\end{flushright}
This narrow reading has been adopted by French and Swiss jurisdictions.\textsuperscript{168} The French \textit{New Decree} stipulates that if a dispute which is the subject matter of an arbitration agreement is brought before a national court, the court lacks jurisdiction unless the arbitral tribunal has not commenced proceedings and the agreement is manifestly void or manifestly inapplicable.\textsuperscript{169} Swiss law takes a slightly different approach. In particular, Article 7(b) of Switzerland’s \textit{Federal Statute on Private International Law} expressly relates to the existence and validity of the arbitration agreement. It provides that:

> If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.\textsuperscript{170}

Both of these provisions stipulate a low threshold requirement for finding that a \textit{prima facie} agreement to arbitrate exists. They do not suggest a full review by the national courts.\textsuperscript{171} The reason for this may be that, in a majority of cases a \textit{prima facie} review will suffice to determine the existence or validity of the arbitration agreement.

The broad policy objectives of the \textit{New York Convention} to limit judicial review is also evidenced in Article V(1) which provides for discretionary judicial refusal to recognise or enforce an award. In line with the aims of the \textit{New York Convention}, it is suggested that national courts should take a narrow approach in deciding to refuse to recognise or enforce an award.\textsuperscript{172} It should be borne in mind that the \textit{New York Convention} is incorporated into the national laws of all States which have ratified it and the national laws usually provide further guidance. To this end, the UNCITRAL \textit{Model Law} also recognises the jurisdiction of the arbitral tribunal.\textsuperscript{173}

\textsuperscript{168} See \textit{CPC art 1458}. See also the \textit{Federal Code on Private International Law 1987} (Switzerland) arts 7 and 186. The Swiss Federal Tribunal has clearly acknowledged the requirement to safeguard the arbitrator’s power to determine its own jurisdiction by barring courts from intervening with such power and delaying the courts’ review until the tribunal has made a ruling. See the judgment of \textit{Fondation M. v Banque X.}, Swiss Federal Tribunal, (1996), ATF 122 III 139.

\textsuperscript{169} \textit{New Decree} art 1448.

\textsuperscript{170} \textit{Federal Code on Private International Law} (Switzerland) 1987, art 7(b).

\textsuperscript{171} A \textit{prima facie} review is as the term suggests, a basic review to ensure that an arbitration agreement exists and is not manifestly void or inapplicable to the dispute. Conversely, a \textit{full} review is a more in-depth review by the national court to ascertain the existence, validity and scope of the arbitration agreement. This type of review could usurp the jurisdiction of the arbitral tribunal from ruling on its own jurisdiction.

\textsuperscript{172} Kronke, above n 155, 1, 9.

\textsuperscript{173} \textit{Model Law}. 
2.16 The UNCITRAL Model Law on Compétence-Compétence

Whilst the *New York Convention* is the prevailing instrument for recognition and enforcement of international arbitration awards, the *Model Law* provisions serve as a paradigm for national laws as to the procedural aspects of arbitration, such as the arbitration agreement, the composition of the tribunal and the making of awards. As a corollary of the progress in national laws on arbitration, the *Model Law* enshrines the principle of *compétence-compétence*, whilst providing for concurrent control by national courts.\(^{174}\)

The *Model Law* has been widely utilized as a paradigm for national laws since its adoption by the United Nations Commission on International Trade Law.\(^{175}\) It provides for the principle of *compétence-compétence* as well as for the independence of the arbitration clause.\(^{176}\) If, as many scholars argue, there is a world-wide consensus that the principle of *compétence-compétence* ought to be applied notwithstanding the *seat* of the arbitration, then Article 1(2) of the *Model Law* must be amended to reflect such a view.\(^{177}\)

Pursuant to section 16 of the UNCITRAL *Model Law*, an arbitral tribunal possesses the power to rule on its substantive jurisdiction and ought to be the first to do so.\(^{178}\) The language adopted by the *Model Law* places a firm prohibition on court intervention, although it is argued the *Model Law* position does not apply *compétence-compétence* as

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174 Article 6 of the Model Law provides for concurrent control. Further in the UNCITRAL Arbitration Rules arts 21(1), 21(2) acknowledge both the power of the arbitrator to determine its own jurisdiction and the separability of the arbitration agreement.


176 The *Positive Effect* may be defined as the jurisdiction of the tribunal to rule upon its own jurisdiction. That is, to decide matters pertaining to the existence, validity and scope of the arbitration agreement. This is discussed in detail in Chapter 3.

177 The *Model Law* art 1(2) states that the Model Law applies (with the exception of some provisions) to arbitrations only if the place of arbitration (i.e. *seat*) is in the territory of this State. These excepted provisions do not include the provision with respect to *compétence-compétence* found in art 16. See Gabrielle Kaufmann-Kohler, ‘When Arbitrators Facilitate Settlement: Towards a Transnational Standard’ (2009)25(2) *Arbitration International* 187, 188.

178 Only the *Model Law* and Dutch law exclude all forms of challenge or court applications against a decision by the arbitrators which incorrectly declines jurisdiction. Such a decision would end the arbitration agreement in the Netherlands.
strictly as some national laws do.\textsuperscript{179} Instead, the \textit{Model Law} takes a middle road between permitting application to the judiciary concerning the question of jurisdiction in the early stages of the arbitral process and deferring it until the award has been issued.\textsuperscript{180} Articles 5, 8(1), 8(2), 16(1) and 16(3) in particular are relevant. The first restriction on the intervention of national courts is through the operation of Article 5, which states that in matters governed by the \textit{Model Law}, a court shall not intervene except as provided for by the \textit{Model Law}.\textsuperscript{181} This provision is consistent with the \textit{New York Convention}, as the terms of Article 5 are in harmony with Article V (2) of the former.\textsuperscript{182}

Article 8(1) provides further detail and addresses the role of the court concerning a valid arbitration agreement by providing that:

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.\textsuperscript{183}

Although no guideline is provided regarding the standard which may be utilized for a determination, the Working Group on the \textit{Model Law} declined to amend the wording of Article 8(1) to incorporate the term ‘manifestly’ prior to the words ‘null and void’. If the amendment had been made, it would have restricted the court to a \textit{prima facie} determination on the validity of the arbitration agreement. A \textit{prima facie} review was definitively refuted by the drafters of the \textit{Model Law}.\textsuperscript{184} The rationale underpinning Article 8(1) of the \textit{Model Law} was that the national courts ought to fully resolve the question of existence and scope of the arbitration agreement prior to referring the parties to arbitration.\textsuperscript{185} Moreover, Article 8(1) is similar to the language used in Article II (3) of the \textit{New York Convention}, which includes the same phrase in the provision

\textsuperscript{179} The \textit{Model Law}, art 5 provides: ‘in matters governed by this Law, no court shall intervene except where so provided in this Law’. See discussion under Chapter 4.

\textsuperscript{180} Doug Jones, ‘Kompetenz-Kompetenz’ (2009) 75(1) \textit{Arbitration: The Journal by the Chartered Institute of Arbitrators} 56, 59.

\textsuperscript{181} \textit{Model Law}, art 5.

\textsuperscript{182} \textit{New York Convention} art V(2) states that: recognition and enforcement of an award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the issue is not capable of settlement by arbitration in the law of that country or recognition or enforcement of the award would be in breach of the public policy of that country.

\textsuperscript{183} The \textit{Model Law}, Art 8(1) uses the same language as the \textit{New York Convention} Art II (3) concerning the validity of the arbitration agreement.


\textsuperscript{185} Ibid.
‘unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed’. What is considered to be null and void or incapable of being performed according to the laws of one country may vary in another, resulting in divergence among jurisdictions.

Article 8(2) of the Model Law empowers the arbitral tribunal to commence or continue with proceedings whilst the matter is simultaneously before a national court, by providing that ‘… an action [in] arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court’. It has been suggested that if as per Article 8(2), judicial review of the tribunal’s jurisdiction occurs whilst the tribunal is permitted to continue its proceedings, this could lead the court to defer the entire matter to the tribunal, or to provide a prima facie review of the arbitration agreement. If the court defers the entire matter to the tribunal, it may place the parties’ interests at risk. Although Article 8(2) does not clearly establish as a priority compétence-compétence, it attempts to provide some weight to the principle by providing concurrent jurisdiction between the national court and the arbitral tribunal.

Article 16(1) relates to the positive effect of compétence-compétence by providing that ‘[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.’ Conversely, Article 16(3) of the Model Law qualifies jurisdiction further by stipulating that:

The arbitral tribunal may rule on a plea [regarding the jurisdiction of the tribunal] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

186 New York Convention, art II(3).
187 See Kahn Lucas Lancaster v Lark International Ltd 186 F 3d 210 (2nd Cir, 1999) where the Federal Arbitration Act 9 USC, §1 was interpreted as failing to fulfil the New York Convention art II(2) that an agreement to arbitrate must be signed by the parties or contained in an exchange of letters or telegrams. This was a very narrow reading of art II(2) by the U.S. Federal Court.
188 The Model Law art 8(2).
189 Barcelo, above n 175, 1129.
190 Model Law, art 16(1). As defined in footnote 177 above, the ‘Positive Effect’ may be defined as the jurisdiction of the tribunal to rule upon its own jurisdiction. That is, to decide matters pertaining to the existence, validity and scope of the arbitration agreement. This is discussed in detail in Chapter 3.
191 Model Law, art 16(3). The phrase ‘preliminary question’ in the above quote, refers to a preliminary award regarding jurisdiction issues. The phrase ‘award on the merits’ refers to a final award which is based on the merits of the case.
It has been suggested that Article 16(3) promotes *compétence-compétence* by supporting tribunals to determine their own jurisdiction as a preliminary question. This allows for expedited judicial review of the tribunal’s ruling, which would not be open to further appeal. In conclusion, Article 16(3) may be interpreted as a compromise between the more extreme positions where judicial review is authorized during the arbitral process.\(^\text{192}\)

Article 16(3) only provides for the situation where the tribunal accepts its jurisdiction however, not where it refutes it. Article 34 does not stipulate any basis for setting aside a decision by the tribunal which refutes its jurisdiction. The *Model Law* has contributed to the modernisation and harmonisation of arbitration procedures among the countries which have adopted it. It does not, however, provide guidance regarding situations where jurisdictional questions such as existence or validity of the arbitration agreement should be decided by the tribunal.

There is tension between the court power to refer parties to arbitration by staying conflicting court proceedings pursuant to Article II(3) of the *New York Convention* and Article 8 of the *Model Law* and the principle of *compétence-compétence*. Under these provisions a court may refuse to stay its proceedings where an arbitration agreement is invalid yet, under almost all principles of *compétence-compétence* such as Article 16(1) of the *Model Law* the tribunal has the power to address this question. The tension created by these competing provisions may be resolved by firstly ascertaining the intention of the parties. If the parties agreed for the tribunal to resolve the question of jurisdiction, then the tribunal should provide an initial finding which may be subjected to subsequent curial review. This may not be regarded as true concurrent jurisdiction, as the court defers the matter to the tribunal only to review it subsequent to the tribunal’s finding. It is argued, however, that this approach is more pragmatic and promotes the interests of the parties, primarily because parties are less likely to challenge the tribunal’s finding unless they have a genuine concern regarding the validity of the arbitration agreement.

\(^{192}\) Jones, ‘Kompetenz’ above n 180, 56-60.
An alternative to overcome the above-mentioned tension may be by ad hoc arbitration. Parties are free to provide as much jurisdictional power to the tribunal as they like, if they conduct an ad hoc arbitration. This presents an alternative to institutional arbitration, where parties are usually bound by the rules of the institution conducting their arbitration.

2.17 Ad Hoc Arbitration or Institutional Arbitration
There are generally two kinds of arbitration: institutional or ad hoc. Each brings its own benefits and risks and parties usually provide for one or the other in their agreement. Ad hoc arbitration may be described as a more ‘tailor-made’ option to cater for the specific needs of the dispute. Despite the absence of institutional costs in ad hoc arbitrations which may result in a saving of costs, the major costs in any arbitration are almost always the fees of the legal counsel and experts for the parties. If parties prefer to save time and money in drafting their own arbitral rules, they are at liberty to adopt or modify rules from an institution to suit their needs. Subject to the type of procedure selected, the process may be less adversarial and savings may be realised in parties’ time and costs.

Essentially ad hoc arbitration is independent of all institutions. In the event that parties have failed to specify the type of arbitration they prefer, ad hoc arbitration will occur by default. Hence, it is crucial to specify the nature of the arbitration in the agreement. If there is a failure to specify an institution, typically the default clauses at the seat will be used. This, once again, highlights the significance of legal counsel selecting the seat which is most advantageous to their client’s interests. Although each institution has its own system for governing the arbitral process, ad hoc arbitration does not.

Parties to an ad hoc arbitration have the most freedom to customize their own procedures, on the proviso that it is in compliance with the compulsory laws at the seat of arbitration. Such matters would include the procedure to be used to appoint

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197 Lew, Mistelis and Kroll, above n 12, 32.
arbitrators and the timetable to which parties will adhere. They can also create ‘equity’ clauses setting out general principles of law or equity that the arbitrators may apply to the proceedings. The final say regarding the validity of such clauses rests with the national court at the seat or the court where enforcement is sought. 198

In ad hoc arbitration, parties are equally at liberty to draw the parameters of the arbitral tribunal’s jurisdiction. They may empower the tribunal with authority to decide all questions on jurisdiction and exclude judicial review of jurisdictional issues. Occasionally, there may also be a requirement to utilize the services of an arbitral institution for the appointment of the arbitrators. This usually occurs when parties disagree on the method for nominating an arbitrator. 199

It is common for the UNCITRAL Arbitration Rules to be utilized in ad hoc arbitrations. 200 There may be benefits in conducting an ad hoc arbitration if one of the parties is a State and a greater degree of flexibility is required during the proceedings. Generally, sovereign entities are disinclined to submit to the authority of an arbitral institution as it may be deemed to undermine its sovereignty. This stems from the perception that particular institutions are subjective or the location of the institution may not be neutral. 201

Similar to institutional arbitration, parties to ad hoc arbitrations may use dilatory tactics too. In such an event, parties may be compelled to resort to national courts to facilitate a speedy resolution of the dispute. The approach the national court adopts with respect to arbitration becomes critical at this point. If the courts in the jurisdiction have an arbitration-friendly approach, then they would not interfere, but encourage the parties to resolve the matter in accordance with their arbitration agreement. Conversely if the courts interfere in the arbitration, notwithstanding a valid arbitration agreement between the parties, this could result in further delays and escalating costs.

199 Lew, Mistelis and Kroll, above n 12, 34.
201 Lew, Mistelis and Kroll, above n 12, 35.
On the other hand, institutional arbitrations enjoy the benefit of established rules designed to ensure efficacy in resolution of disputes. There are typically timelines for procedures and monies are usually paid in advance to the institution. Institutional arbitration has played a vital role in decreasing the role of national courts. The detailed rules of large institutions address numerous situations which, if absent, would compel the parties to approach the court for a resolution.202

An advantage of institutional arbitration is the expertise and experience of the institution. Although it is the arbitrators who rule on the issues, the institution has rules applicable to the tribunal’s conduct and the award that is issued. Virtually every modern institution provides for a degree of recognition of the jurisdiction of the tribunal.203 It is the role of legal counsel to research and suggest the most appropriate institutional rules for their client. It is common for institutions to provide assistance to the parties and fees are usually fixed by rules and tariffs, which means arbitrators do not need to negotiate their fees, thereby providing them with a degree of detachment from the dispute.204

Further, the parties stand to benefit from the fixed fees of the institution, as it provides greater certainty for estimating their expenses. Awards issued by arbitral institutions are typically complied with.205 This means there is less necessity to apply to a national court where enforcement proceedings are sought. Consequently higher costs and time delays are avoided, another advantage of institutional arbitration.

2.18 Arbitral Institutions
There are numerous arbitral institutions around the world and it is not possible to provide an exhaustive list or description of each here. Each arbitral institution has aspects which are unique to it. For example, there may be differences in the calculation of arbitrators’ fees and the degree of administration. Arguably the greatest benefit of opting for institutional arbitration is the prestige of the institution which issues the award. If the institution is well-respected internationally, it is more likely that its award will be enforced by the courts.206

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202 Evans, above n 198, 295, 296.
203 See ICC Rules of Arbitration Rule 14 and LCIA Rules of Arbitration rule 10 which provide a strict time limit within which to raise any challenge to the respective institution.
204 Lew, Mistelis and Kroll, above n 12, 37.
205 Evans, above n 198, 295.
206 Moses, above 58, 9.
The eminence of the institution becomes more relevant in countries where the judiciary and the laws are not favourable to arbitration and parties need to have their awards enforced.207 This may become of critical importance if the losing party owns assets in such a country and the successful party needs to make a claim against those assets.

Arbitral institutions play a key role in the administration of both national and international arbitrations. They are generally private entities which are not subject to public control. The International Chamber of Commerce (ICC), with its headquarters in Paris, is currently the preferred institution for international arbitrations, having been established in 1919 to serve the international business community.208 The American Arbitration Association is often referred to as the ‘AAA’ and has established itself internationally. Similarly, the London Court of International Arbitration, the (LCIA) is well respected.209

To have disputes arbitrated by the ICC, AAA or LCIA does not necessarily mean the arbitration will take place in Paris, New York or London respectively. It merely means that these institutions will be engaged to oversee and administer the arbitration for a fee. The hearings may occur anywhere and the parties have autonomy to alter the non-mandatory institutional rules to suit their needs. The institutions offer a framework for the procedure and administrators who supervise the conduct of the arbitral proceedings.210 Ad hoc arbitration may still be an advantage where one of the parties is a State and does not wish to be bound by institutional rules. There are of course other issues relating to the arbitration such as whether the subject matter lends itself to being resolved by arbitration. Arbitrability and related issues are the focus of Chapter Three.

2.19 Summary
This chapter has demonstrated that international commercial arbitration operates within a complex matrix of laws and is not practised in a vacuum. Some of the most important features of international arbitration are the substantive law governing the contract and the seat of the arbitration. The substantive law of the contract is important, as it sets out the rights and obligations between the parties pursuant to their contract. The

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207 Lew, Mistelis and Kroll, above n 12, 36.
208 White & Case Survey, above n 23, 1, 7.
210 Ibid.
significance of the *seat* is the extent to which its laws support arbitration and their approach to the question of arbitral jurisdiction. The selection of a jurisdiction as the *seat* is dependent on a number of factors such as the legal infrastructure and the arbitration laws. Ideally, the *seat* should have arbitration-friendly laws which favour enforcement of agreements and a track record for upholding them.

The jurisdiction of the tribunal may be challenged during the arbitral procedure or alternatively, parties may raise a challenge once the award has been issued. In either case, the national courts at the seat may review questions of jurisdiction. If the national courts at the seat provide the necessary support for arbitrations, there should be a considerable degree of certainty and predictability for the parties. The jurisdiction of the tribunal may also be challenged during the enforcement stage. The court asked to enforce an award may be in a different jurisdiction to the seat. Enforcement may be sought in a particular jurisdiction if, for example, the losing party has assets in that jurisdiction.

Another major factor in the widespread acceptance of the general principles of arbitration and arbitral jurisdiction has been international conventions such as the *New York Convention* and the *Model Law*. The high numbers of countries which have adopted these international instruments have contributed to the recognition and harmonisation. As a result, countries which have adopted the *Model Law* and signed the *New York Convention* recognise the key principles of *separability* and *competence* – *competence*, albeit to varying degrees. There is general consensus with respect to applying the mandatory laws of the *seat* to arbitrations on the basis of public policy. Concerns regarding breach of public policy, however, are not common.

The *lex mercatoria* continues to capture the attention of scholars and practitioners alike, although it is defined as a set of legal rules rather than a part of any legal system itself. It may be applied if the parties fail to select laws to govern their arbitration. As a tool of dispute resolution, arbitration offers a wide choice for parties: they may choose institutional arbitration or ad hoc. In either case, there must be provisions providing for the tribunal’s jurisdiction. Parties may select the laws and rules to govern both

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211 See *Dallah Real Estate and Tourism Holding Co v Pakistan* [2010] UKSC 46.
procedure and substance. Compared to litigation, arbitration offers widespread recognition and enforcement of an award and for this reason is a sought after option.
Chapter Three

SEPARABILITY AND COMPÉTENCE-COMPÉTENCE

3.1 Introduction
This chapter continues to establish the context within which international commercial arbitration functions. It builds on the previous chapter by exploring cornerstone concepts such as separability and compétence-compétence in light of the New York Convention and the Model Law.¹ These principles form the basis of subsequent chapters concerning the approach of the three jurisdictions. This chapter provides a comparative analysis of the doctrine of separability in the United Kingdom, United States and France. It offers an examination of compétence-compétence under international and national laws, including the distinction between the prima facie and full review methods used by national courts and an exploration of the negative effect. The chapter concludes that the prima facie review rather than the full review is best practice.

3.2 The Doctrine of Separability
Prior to an analysis of the doctrine of separability, it is appropriate to provide a typical institutional arbitration clause by way of example:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.²

Usually, more detail will be included such as the law governing the substantive contract and the seat of the arbitration. The law of contract forms the foundation of international commercial transactions and arbitration. It reflects the ideal of reciprocal undertakings to ensure mutually valuable transactions. The arbitration agreement and the main contract in which it is incorporated are both contractual in nature. According to principles such as party autonomy and freedom of contract, individuals should be free to regulate their contract including the consequences, if a dispute arises from their legal relationship.³ Fundamental tenets of arbitration are underlined by these two principles.⁴

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³ René David, Arbitration in International Trade (Kluwer Law, 1985) 64.
If parties agree the arbitration agreement is to be separable from the main contract, then this should be binding upon the parties and upheld by the courts. Among other benefits, this facilitates commercial certainty for the international business community and economic progress. The separability of the arbitration agreement is supported by the vast majority of institutional arbitral rules. If parties submit to the rules of such an institution, separability should be upheld by default.

Prior to the notion of separability, parties began using the contractual nature of arbitration to challenge the validity of the agreement. By claiming that the main contract which contained the arbitration agreement had been invalidated by fraud, for example, parties have had the arbitration set aside by judicial review. The doctrine of separability was introduced to preserve the contractual bargain the parties had consensually entered into.

This doctrine enables the tribunal to hear the arbitration despite the invalidity or termination of the main contract. The validity of the arbitration agreement is assessed separately from the validity of the main contract. This enables the tribunal to rule upon its own jurisdiction in addition to determining the existence or validity of the contract. Schwebel states that one of the underpinnings of the rationale of separability is that ‘when parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement’.

Separability has been defined as the arbitration clause/agreement in a contract that is deemed to be separate from the main contract of which it forms part and, as such,

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5 See International Chamber of Commerce Rules of Arbitration art 6(4) addresses separability issues. See also London Court of International Arbitration (‘LCIA’) Arbitration Rules art 23.1.
8 Jean François Poudret and Sébastien Besson, Comparative Law of International Arbitration (Sweet and Maxwell, 2nd ed, 2007) [163]. The ruling upon the tribunal’s jurisdiction is the principle of compétence-compétence which will be discussed later in this chapter.
survives the termination of that contract.10 In the decision of Sojuznefteexport v Joc Oil, Broches describes the doctrine of separability as:

the arbitration clause included in an agreement (the main agreement) means that the arbitration clause will be treated as an agreement separate from the main agreement and will therefore not necessarily follow the fate of the main agreement. Separability of the arbitration clause means that an arbitrator who has been validly appointed and who stays within the limits of the jurisdiction conferred upon him by the arbitration clause, may decide on the invalidity of the contract in which the arbitration clause is contained without thereby losing his jurisdiction.11

It follows that the arbitration agreement is capable of surviving the nullity, termination, repudiation or novation of the main contract. The arbitration clause thus confers authority on the tribunal to determine the state of the substantive contract and its implications.12 Redfern et al state:

A contract which contains an arbitration clause constitutes two separate contracts. The main or primary contract concerns the commercial obligations of the parties; the secondary or collateral contract contains the obligation to resolve any disputes arising from commercial obligations by arbitration. This secondary contract may never come into operation. If it does, it forms the basis for the appointment of an arbitral tribunal, which will then determine the rights and obligations of the parties under the main contract.13

The doctrine of separability facilitates the balancing of competing demands on the legal order to safeguard arbitration from dilatory tactics on one hand and to permit genuine disputes concerning the tribunal’s jurisdiction to be determined by a court on the other.14 The objective is to increase the standing of arbitration by diminishing the possibility for subterfuge by the parties. It is at this juncture that separability and compétence-compétence overlap.15 The two may, however, be distinguished by their legal nature: the separability of the arbitration agreement amounts to a matter of

12 Poudret and Besson, above n 8, [164].
13 Alan Redfern, Martin Hunter and Murray Smith, Law and Practice of International Commercial Arbitration (Sweet & Maxwell, 1991) 175.
15 The principle is also known as Kompetenz-Kompetenz in German or Compétence sur la Compétence in French.
substance and compétence-compétence to a matter of procedure. 16 Separability must be established prior to the tribunal ruling on its jurisdiction in accordance with the arbitration agreement. Although the two are closely linked, they are distinct principles.17

3.2.1 Separability in International Law - Some Critical Comments

In current international arbitration practice the widespread acceptance of separability is primarily attributed to a number of factors - such as being recognised in the world’s leading institutional arbitration rules, its virtually unanimous acceptance in national arbitration legislation, its recognition in arbitration case law globally and its espousal in contemporary decisions of national courts.18

Separability also provides the efficiency of a single decision making process which is underpinned by the commercial presumption that the parties did not intend the inconvenience of having disputes being heard in different fora.19 In the judgment of Fiona Trust v Yuri Privalov, Lord Hoffman stated that the construction of an arbitration clause should be premised on the assumption that the parties as rational business persons are likely to have intended that any disputes arising from their legal relationship which they had formed or intended to form be determined by the same tribunal.20 This approach was supported in Comandate Marine Corp v Pan Australian Shipping Pty Ltd by Allsop J, delivering the majority judgment.21 His Honour stated that such an approach is particularly applicable where the parties originate from different countries and legal systems, because it provides party autonomy.22

18 Separability is known in France as l’autonomie de la clause compromissoire. In the U.S. it is also referred to as ‘severability’ or ‘autonomy’ of the arbitration clause. Albert Jan van den Berg, ‘7 July 1989 – Court of Appeal Bermuda’ in Albert Jan van den Berg (ed) Yearbook Commercial Arbitration 1990 (Kluwer Law International, 1990) vol XV, 413. For international law, see Model Law art 16. For national legislation on separability see International Arbitration Act 1974 (Cth) Sch 2 Article 16(1).
21 Comandate Marine Corp v Pan Australian Shipping Pty Ltd [2006] FCAFC 192, [165] (Allsop J). (‘Comandate’).
22 Ibid.
The judgments made by courts are based on numerous national arbitration laws and institutional arbitration rules having incorporated separability by adopting the Model Law or using it as the basis of their legislation.\(^\text{23}\) The Model Law recognises and supports the doctrine of separability.\(^\text{24}\) In particular, Article 16(1) of the Model Law enshrines separability by stipulating that:

For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms within the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Article 8(1) of the Model Law goes a step further and provides the circumstances in which an arbitration agreement should not be referred to an arbitral tribunal by stipulating that:

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 [arbitration] agreement is null and void, inoperative and incapable of being performed.\(^\text{25}\)

Articles 16(1) and 8(1) of the Model Law can be reconciled by that fact that if the main contract is null and void this does not mean the same applies to the arbitration agreement. Pursuant to Article 8(1), it is only where the arbitration agreement itself is null and void, inoperative or incapable of being performed, that a national court may decide on the matter.

Similarly the New York Convention and numerous national arbitration laws provide that national courts need not refer a matter to arbitration if the court rules that the arbitration agreement is ‘null and void, inoperative or incapable of being performed’.\(^\text{26}\) In pro-arbitration jurisdictions, this phrase would be construed narrowly and pursuant to the New York Convention an independent construction should preclude national variations.\(^\text{27}\)

\(^{23}\) See International Arbitration Amendment Act 2010 (Cth), pt I s 2D(e).
\(^{24}\) The Model Law is incorporated in the Australian International Arbitration Act 1974 (Cth), Schedule 2.
\(^{25}\) A similar provision can be found in the Australian International Arbitration Act 1974 (Cth) s7 (5).
\(^{26}\) New York Convention art II(3).
3.3 The Case of Non-Existent Arbitration Agreements

The terms ‘null’ and ‘void’ used in both the *New York Convention* and the *Model Law* denote instances where the agreement to arbitrate is affected by any kind of invalidity from the commencement. For instance, if the arbitration agreement fails to refer to a particular legal transaction this would be construed as ‘null’ or ‘void’. Other grounds for setting aside the agreement may be for misrepresentation or duress. Finally, if the dispute is referred to an uncertain or non-existent arbitral institution, the court is likely to find the agreement to arbitrate unenforceable.

It is noted that Article 8(1) of the *Model Law* does not mention the term “non-existent” which may imply by omission, that if challenges are mounted concerning the existence or validity of the arbitration agreement, (for example, that the arbitration agreement did not exist), it is within the ambit of the arbitral tribunal to rule upon it, unless the court determines the arbitration agreement to be prima facie invalid. In such a case, the court should refuse to grant a stay of court proceedings and rule on the question itself.

A case on point is *Downing v Al Tameer Establishment*. Here, the parties executed a joint venture agreement according to which Al Tameer, a Saudi Arabian corporation, was to utilise Downing’s invention for commercial gain. This contract contained an arbitration agreement whereby any disputes would be settled by the application of United Kingdom laws. Subsequently a dispute arose between the parties which could not be resolved by way of settlement. Al Tameer denied that a contractual relationship existed between the parties, stating that it was neither bound by the agreement to arbitrate nor the main contract. One of the key issues for the Court of Appeal to decide was whether the defendant had committed a repudiatory breach of the arbitration agreement.

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28 *New York Convention* art II(3) and *Model Law* art 16(1).
29 Lew, Mistelis and Kroll, above n 27, 342.
30 *Albon (trading as N A Carriage Co.) v Naza Motor Trading SDN BHD* [2007] All ER (D) 501.
31 *Downing v Al Tameer Establishment* [2002] EWCA Civ 721. (‘*Downing*’). In this case, the court referred the matter to the arbitral tribunal upon finding an arbitration agreement which was not *prima facie* invalid.
32 *Downing* [2002] EWCA Civ 721.
33 Ibid [16].
In deciding this issue, the Court of Appeal applied contract law principles. However, the court acknowledged that the application of such principles is problematic where it is necessary to decide whether an arbitration agreement has been repudiated.\textsuperscript{34} Potter LJ opined that giving the court the power to decide whether an arbitration agreement has been repudiated or not, is in conflict with the arbitrator’s authority to determine its own jurisdiction pursuant to section 30 of the \textit{Arbitration Act 1996} (UK).\textsuperscript{35} In his judgment, he also encouraged parties in arbitration disputes before the court to continue ‘upon the basis that conventional contractual principles must be applied although those principles are not easy to apply in the case of a secondary contract.’\textsuperscript{36} The term ‘secondary contract’ referred to the arbitration agreement.

The statements made by Potter LJ, reinforce the ever-present challenge to balance the competing demands of conferring \textit{compétence-compétence} on the arbitral tribunal on the one hand and the need to provide the parties with due process by the courts where required on the other. It further highlights the difficulty courts face when applying ordinary principles of contract law to arbitration agreements.

The Court of Appeal held that Downing had acted correctly in asking the court to determine whether Al Tameer had repudiated the arbitration agreement and ruling on whether Downing had undoubtedly accepted it.\textsuperscript{37} The court also found that Al Tameer had committed a repudatory breach of the agreement and Downing had accepted the repudiation, hence the only course of action available to Downing was to bring judicial proceedings.\textsuperscript{38} In this decision, Al Tameer’s claim that no contract existed, combined with a refusal to co-operate in the appointment of arbitrators was sufficient to free Downing to institute and maintain court proceedings.

Due to early judicial intervention, arbitration agreements risk being subjected to judicial proceedings and legal rules which are not appropriate to international commercial arbitration disputes.\textsuperscript{39} The decision of the Court of Appeal has been criticised for confounding judicial application of ordinary principles of contract law to international

\begin{thebibliography}{99}
\bibitem{34} Ibid [25].
\bibitem{35} Ibid [33].
\bibitem{36} Ibid [25].
\bibitem{37} Ibid [25].
\bibitem{38} Ibid [26].
\end{thebibliography}
arbitration, as this may undermine arbitration and result in burgeoning numbers of applications to courts by parties, who may use such recourse as a dilatory tactic. The preferred practice would be to permit arbitral tribunals to rule on questions of separability and jurisdiction, at least initially. By doing so, it would confer the necessary compétence-compétence on the arbitrators and the priority for arbitral tribunals to determine the issues.

3.4 Separability in the United Kingdom

Separability of the arbitration agreement is applicable wherever English law governs the arbitration agreement. Since the enactment of the 1996 arbitration laws, it may be argued that although there have been significant judicial decisions in support of separability, the English judiciary have, on occasions, inconsistently applied this principle. Before 2007, the courts had provided technical interpretations of arbitration clauses which depended on the exact wording of the arbitration clauses to determine if the arbitration clause could be separated from the main contract. This was the case especially prior to the decision of Fiona Trust v Yuri Privalov. In general terms, English judges have wavered in their support for provisions inspired by the Model Law. Downing is a case on point.

The leading House of Lords case in support of separability was Heyman v Darwins where the agreement between the parties included an arbitration clause. When a dispute arose, Heyman issued a writ against Darwins, who sought to have a stay of judicial proceedings pursuant to the Arbitration Act 1889 (UK). Heyman alleged Darwins had repudiated the main contract thus there was no basis for arbitration. The House of Lords held that if there had been a total breach of the agreement by one party so as to relieve the other party of any further obligations, then, if the terms of the arbitration clause are sufficiently broad, it still survives notwithstanding the acceptance

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40 Ibid 221.
41 English law governs the arbitration agreement pursuant to the Arbitration Act 1996 (UK) ss 2(5) and 7.
42 In support of separability see Heyman v Darwins [1942] AC 356. (‘Heyman’). See also Harbour Assurance [1993] QB 701. For decisions against separability, see Anglia Oil Ltd v Owners/Demise Charterers of the Vessel “Marine Champion” [2003] All ER 879, 895 (Gross J) and Downing [2002] EWCA Civ 721.
43 Fiona Trust & Holding Corporation v Yuri Privalov [2007] EWCA Civ 20. (‘Fiona Trust’). Arbitration Act 1996 (UK) s 7 states: ‘An arbitration agreement which forms or was intended to form part of another agreement shall not be regarded as invalid, nonexistent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective’.
44 Downing [2002] EWCA Civ 721 [26].
of the repudiation by the innocent party leading to discharge of the contract.\footnote{Ibid 374.} The severability of the arbitration clause received particular consideration by Lord MacMillan in \textit{Heyman} who opined that the arbitration clause:

\begin{quote}
survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.\footnote{Ibid.}
\end{quote}

This opinion clearly suggests that the arbitration clause is not one of the objects of the contract but rather a stand-alone clause which should not be affected by the frustration or invalidation of the contract. Approximately five decades later, but prior to enactment of the Arbitration Act of 1996, separability was re-examined in the decision of \textit{Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd.}\footnote{\textit{Arbitration Act} 1996 (UK). \textit{Harbour Assurance} [1993] QB 701, 897.} In this case, the plaintiffs contended that a reinsurance contract including an arbitration agreement was illegal hence void on the basis that, the defendants had failed to comply with regulations pertaining to the insurance industry.\footnote{\textit{Harbour Assurance} [1993] QB 701, 897.}


The challenge in \textit{Harbour Assurance} is similar to the objections raised in the \textit{SNE} case where the defendant Joc Oil argued that the contract was void for failure to obtain the signatures of two authorized officials in accordance with Soviet law.\footnote{Ibid.} Steyn J in the court of first instance for \textit{Harbour Assurance}, dismissed the defendants’ application for a stay of court proceedings on the basis that the separability of an arbitration clause could not be extended to permit the arbitrator to decide on the issue of initial illegality of the main contract.\footnote{\textit{SNE (Bermuda)} Award in Case No. 109/1980 of 9 July 1984; Bermuda Court of Appeal, Arbitration No. 109/1980.}

This decision was subsequently overturned by the Court of Appeal which granted a stay of court proceedings in favour of arbitration, holding that the issue of initial illegality of the contract, which was not in direct breach of the arbitration clause, fell within the ambit of the arbitral tribunal.\footnote{\textit{Harbour Assurance} [1993] QB 903.} The arbitration was a separate and collateral contract and the alleged illegality of the main contract did not impact on the validity of the
arbitration agreement.\textsuperscript{53} Therefore the invalidity of the main contract did not deprive the arbitral tribunal of jurisdiction to rule on the question of illegality of the main contract.

One of the watersheds for the development of separability since \textit{Harbour Assurance} was the enactment of the \textit{Arbitration Act 1996} (UK). The new legislation enshrined the principle of separability as well as the jurisdiction of arbitrators to hear disputes concerning allegations of non-existence of main contracts in the United Kingdom.\textsuperscript{54} An example of arguing that a main contract is non-existent may be that the person who signed the contract had no authority to do so.\textsuperscript{55} Section 7 of the \textit{Arbitration Act 1996} (UK) provides that:

\begin{quote}
Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective and it shall for that purpose be treated as a distinct agreement.
\end{quote}

Since the judgment in \textit{Harbour Assurance}, major case law has developed in relation to the separability of arbitration agreements from the main contract. Recently, the House of Lords decision in \textit{Fiona Trust & Holding Corporation v Yuri Privalov} was hailed by the President of the Chartered Institute of Arbitrators as ‘fundamentally important’.\textsuperscript{56} The broad facts of \textit{Fiona Trust} relate to disputes which stemmed from a number of charter parties entered into by a number of chartering companies (the Charterers) and a group of Russian shipowners (the owners). Allegations of bribery were made by the owners against the charterers that the charterers procured contracts by way of bribery. The charterers instigated arbitration proceedings pursuant to the terms in their contract. Subsequently, the owners attempted to restrain the arbitration proceedings.

The court at first instance had to determine the following arguments: firstly, the owners claim that the arbitration clause was not apt to determine a dispute as to whether the charter party was lawfully rescinded for fraud and bribery. Secondly, that as a

\begin{footnotes}
\item[53] David Joseph, \textit{Jurisdiction and Arbitration Agreements and their Enforcement} (Sweet and Maxwell, 2005) [4.36].
\item[54] \textit{Harbour Assurance} [1993] QB 701, 897. An example of the ‘non-existence’ of the main contract is if the contract was not signed by the relevant parties.
\end{footnotes}
consequence of the rescission of the charter parties the arbitration clause had ‘gone’. Conversely, the charterers alleged that the clause was sufficiently broad and notwithstanding, the arbitration clause survives the attempted rescission of the contracts, since it is a separate and distinct bargain between the parties that survives termination of the contract in which it appears.\textsuperscript{57}

Morison J in the Queen’s Bench, declined to stay the claims for rescission and granted interlocutory injunctions to restrain the arbitration proceedings pending a court trial.\textsuperscript{58} His Honour also held that the arbitrator lacked jurisdiction to hear the dispute although he opined that ‘the modern approach is to adopt a “generous” interpretation of dispute resolution clauses and to apply a presumption in favour of one stop adjudication’.\textsuperscript{59}

The Court of Appeal rejected the arguments advanced in favour of restraining the arbitration and held that the issue of alleged bribery was arbitrable and ‘the arbitration clause is a separate (and unrescinded) agreement unimpeached by the claim to set aside the charter parties and wide enough to determine whether the charter parties can indeed be set aside.’\textsuperscript{60} The Court of Appeal accordingly ordered a stay of the rescission claim in litigation and the application to stay the arbitration was dismissed. The matter was then appealed to the House of Lords at which point it was renamed \textit{Premium Nafta Products v Fili Shipping Ltd} (2007).\textsuperscript{61} The House of Lords had three issues to determine: the first was in relation to the construction of the arbitration agreement; the second issue was concerning separability\textsuperscript{62} and the third issue was with respect to sections 9 and 72 of the \textit{Arbitration Act 1996} (UK).\textsuperscript{63}

\begin{footnotesize}
\begin{enumerate}
\item[Fiona Trust] [2007] EWCA Civ 20 (24 January 2007).
\item[Morison J] stated at paragraph 25 of his judgment: ‘The arbitrator does not have jurisdiction to decide this issue. The Court alone does’. \textit{Arbitration, Practice and Procedure Law Reports} 10/2/2006.
\item[Fiona Trust & Holding Corporation v Privalov] [2006] EWHC (Comm) 2583 (Morrison J).
\item[Fiona Trust] [2007] EWCA (Civ) 20 (24 January 2007). [41] (Longmore LJ).
\item[On appeal to the House of Lords, the Fiona Trust case came under the decision of Premium Nafta Products Ltd (Respondents) v Fili Shipping Company Ltd (Appellants)] [2007] UKHL 40. (‘Premium Nafta’).
\item[The provision for separability is found in the \textit{Arbitration Act 1996} (UK) s 7.]
\item[Section 9 relates to stay of legal proceedings and section 72 relates to saving for rights of person who takes no part in proceedings as per the \textit{Arbitration Act 1996} (UK) in Hew Dundas and David Altaras, ‘Bribery and Separability: Who Decides? The Tribunal or the Courts? Fiona Trust & Holding Corp v Yuri Privalov’ (2007) 73 (2) \textit{Arbitration: The Journal by the Chartered Institute of Arbitrators} 70.]
\end{enumerate}
\end{footnotesize}
The House of Lords clearly stated its position with respect to arbitration clauses in *Premium Nafta* when it stated ‘there is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals.’

It was held that the ‘law and litigation’ clause in the contract did not contain any exclusion of disputes which related to the validity of the contract, whether on the basis that it was procured by fraud, bribery, misrepresentation or anything else. The principle of separability enacted in section 7 of the *Arbitration Act* denotes that the invalidity or rescission of the main contract did not necessarily entail the invalidity or rescission of the arbitration agreement.

Further, the House of Lords found that the arbitration agreement had to be treated as a ‘distinct agreement’ and could be void or voidable only on grounds which related directly to the arbitration agreement. This expansive approach to separability was subsequently reinforced in the case of *El-Nasharty v J Sainsbury*, where the plaintiff alleged that he signed the contract - which included the arbitration agreement, under duress.

### 3.5 Separability in the United States

In the United States, the principle of separability was first stated in the case of *Robert Lawrence Co. v Devonshire Fabrics* which held the requirement to arbitrate meant that any challenge to the main contract had to go before an arbitrator, not just disputes over possible breaches of contract. A challenge to the arbitration clause on the other hand could be initially challenged in court. The *Federal Arbitration Act* of the United States provides for arbitration clauses being upheld wherever possible. It states in § 2 that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such

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64 *Premium Nafta* [2007] UKHL 40 [14].
65 Ibid [15], [32], *Arbitration Act 1996* (UK).
66 *Premium Nafta* [2007] UKHL 40 [17].
67 *El Nasharty v J Sainsbury Plc* [2007] EWHC (Comm) 2618 (‘*El Nasharty*’).
a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.70

Article 3 of the same Act provides that a federal court in which a suit is brought upon an issue referable to arbitration by an arbitration agreement, must stay the court action pending arbitration, once it has decided that the issue is arbitrable under the agreement; and, in § 4, that a federal court whose assistance is invoked by a party seeking to compel another to arbitrate, if satisfied that an arbitration agreement has not been honoured and that ‘the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue’, shall order arbitration.71

3.5.1 The Ruling on Separability in Prima Paint

The first federal case where the principle of separability was discussed is Prima Paint Corp v. Flood & Conklin Manufacturing.72 This decision became the cornerstone for the Court's expansion of the scope of the Federal Arbitration Act and firmly established the doctrine of separability.73 F & C sold its paint enterprise to Prima Paint (Prima). In addition, the defendant F & C, agreed to perform consulting and other services for Prima. As part of their agreement, the defendant delivered a list of its customers to Prima and provided assurance that it would not sell paint to those customers for a period of six years.74 In return, Prima would pay the defendant a certain percentage of receipts from its sales, during a specified period.

The agreement that F & C would provide consulting services to Prima included an arbitration clause. However, Prima failed to make payments as per the consulting agreement and contended that it had been induced fraudulently to enter an agreement with the defendant, in the belief that F&C was solvent at the time of executing their agreement and had the capacity to perform under their contract.75 F&C was insolvent

70 Ibid.
71 Ibid §§ 3- 4.
75 Ibid.
and planned to declare bankruptcy shortly following its execution of the agreement with Prima.\footnote{Ibid 401.}

Due to the failure of Prima to pay the percentage owed from sales receipts, F&C served a notice of intention to arbitrate in accordance with their consulting contract. Prima commenced court action to rescind their contract, alleging rescission of the consulting agreement on the grounds of fraudulent inducement and contemporaneously seeking a stay to the arbitration proceeding.\footnote{Ibid.} Consequently, F&C made a cross application to stay the court application by Prima, pending arbitration.\footnote{Ibid 399.} The question to be determined by the Court was ‘who should determine if the parties’ dispute is subject to arbitration’? Prima argued that since the contract incorporating the arbitration clause was invalid due to being fraudulently induced, this negated the legal basis to compel arbitration.\footnote{Ibid 408.}

The Supreme Court held that the contract evidenced a transaction involving interstate commerce and came within the ambit of the \textit{Federal Arbitration Act}.\footnote{Ibid 399. \textit{Federal Arbitration Act}, 9 USC (1925).} It also found that in order to succeed in avoiding arbitration, claims of fraud in the inducement of the arbitration clause per se, must particularly go ‘to the making of the agreement to arbitrate’ itself, not to the whole agreement generally.\footnote{Prima Paint 388 US 403-404 (1967).} This is due to the fact that the phrase “arbitration agreement” as referred to in §4 of the \textit{Federal Arbitration Act} makes specific reference to the arbitration clause itself as opposed to the main contract in which the arbitration clause is found.\footnote{Federal Arbitration Act, 9 USC § 4 (1925).} The Supreme Court held that in relation to an application for a stay of arbitration under § 3 of the \textit{Federal Arbitration Act}, a federal court may not consider a claim of fraud in the inducement of the contract generally, but ‘may consider only the issues relating to the making and performance of the agreement to arbitrate’.\footnote{Prima Paint 388 US 402-404 (1967).} Accordingly, Prima’s application was dismissed by the Supreme Court and the judgment of the Court of Appeal was affirmed.
Rau contends that *Prima Paint* does not simply refer to the courts challenges which are limited to just the arbitration clause alone but, rather, it allocates for the courts any claim that calls a contract for arbitration into issue.\(^8^4\) Essentially, *Prima Paint* created a rebuttable presumption that the parties to a contract incorporating an arbitration agreement intended to grant arbitrators the authority to determine the validity of the main contract.\(^8^5\)

Some circuit courts have distinguished *Prima Paint* on the basis of void/voidable contracts.\(^8^6\) California,\(^8^7\) Alabama\(^8^8\) and the Third Circuit Court of Appeals\(^8^9\) are some jurisdictions that have denied enforcement of arbitration agreements where the challenge was to the existence of the contract as opposed to a claim that the entire contract was voidable. Judgments in other circuits have refused to recognize the void/voidable distinction and state that *Prima Paint* is applicable in all circumstances on the proviso that the challenge is not directed particularly to the arbitration clause in the contract.\(^9^0\) Moreover, the court in *Southland Corporation v Keating* held that one of the objectives of the *Federal Arbitration Act* is to ensure that neither courts, nor statutes would thwart the expectation of parties to an arbitration agreement involving interstate business.\(^9^1\)

### 3.5.2 The progress of Separability in Buckeye

Almost four decades after the judgment of *Prima Paint*, the principle of separability was revisited in the case of *Buckeye Check Cashing v Cardegna* where the issue before the court was whether a party can avoid arbitration by challenging the validity of the main contract which includes an arbitration clause, rather than challenging the validity of the arbitration clause per se.\(^9^2\) John Cardegna used the services of Buckeye Check

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\(^{8^4}\) Rau, above n 19, 4


\(^{8^7}\) See *Rosenthal v Great W Fin Sec Corp,* 926 P 2d 1061-1074 (Cal, 1996).

\(^{8^8}\) See *Allstar Homes, Inc v Water* 711 So. 2d 924- 929 (Ala, 1997).

\(^{8^9}\) See *Sandvik AB v Advent Int l Corp,* 220 F 3d 99-112 (3rd Cir, 2000).

\(^{9^0}\) Mark Berger, ‘Arbitration and Arbitrability: Toward an Expectation Model’ (2004) 56:3 Baylor Law Review 782,785. See also *Teledyne Inc v Kone Corp,* 892 F.2d 1404-1010 (9th Cir, 1989) where the court ruled that since Kone did not mount an independent challenge to the arbitration agreement per se, an arbitrator should determine whether the parties finalised the 1986 draft contract.


\(^{9^2}\) *Buckeye Cashing Inc v Cardegna* 546 US 440 (2006). (‘Buckeye’).
Cashing to cash personal cheques which were subject to a finance charge. For each transaction, Cardegna signed an agreement that included a provision for arbitration in the event of any dispute. Subsequently, Cardegna and others commenced class action against Buckeye on the grounds that it charged high rates of interest which breached Florida state laws.93

Buckeye filed for a motion to compel arbitration and for a stay of the proceedings pending arbitration, in accordance with the agreements signed by Cardegna and others. The Trial Court denied the motion by Buckeye to arbitrate, opining that a court, not an arbitrator should settle a claim that a contract is illegal and void ab initio. The Florida appellate court reversed, and was in turn subsequently reversed by the Supreme Court. The reasoning of the Supreme Court was that enforcing an agreement to arbitrate in a contract challenged as unlawful per se would effectively breach state public policy and contract law.94

The Supreme Court of the United States held in favour of Buckeye stating the challenge to the main contract had to go before an arbitrator before it could be considered in the courts.95 Buckeye held that the rule in Prima Paint applies in state courts and contains no exception for contracts held void pursuant to U.S. state law. It also confirmed that the validity of the contract is to be resolved initially by the arbitrators. The rulings from Prima Paint and Southland v Keating were applied to find that as a question of federal substantive law, the arbitration provision is separable from the main contract.96 Thus, federal law recognizes the doctrine of separability, which requires the arbitral tribunal to rule on general challenges to the validity of a contract. Moreover, it is discernible from Buckeye that when a party challenges the existence of the main contract, such challenge will not diminish the tribunal’s power to rule on the question, on the proviso that the arbitration agreement itself remains valid. It will also be for the tribunal to determine whether a pre-arbitration condition has been fulfilled.97

3.5.3 Separability and the Federal Arbitration Act

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93 Ibid.
94 Ibid.
95 Ibid.
97 See JPD Inc D/B/A Northland Medical Pharmacy v Chronimed Holdings 539 F 3d 388 (6th Cir, 2008).
The United States Supreme Court requires the application of ‘ordinary state-law principles’ that govern contract formation for arbitration agreements. This is predicated on the fact that there is an absence of federal contract law in the United States. Principles of federal law become relevant if the issues fall within the ambit of the Federal Arbitration Act.\textsuperscript{98}

Since the United States Congress enacted the Federal Arbitration Act in 1925, it has been the position of the national courts that if parties are at liberty to enter contractual obligations, accordingly, they are at liberty to agree to resolve their disputes privately. It is on this basis, coupled with the Supreme Court’s declaration of an emphatic federal policy in favour of arbitral dispute resolution that there has developed a matrix of legislative provisions and judicial precedents which support the entitlement to enter into arbitration agreements. The legislature and precedents also aim to fulfill such an entitlement by procedures, standards and presumptions which support rapid resolution of arbitral disputes with minimum intervention by the judiciary.\textsuperscript{99}

3.5.4 Separability in the U.S. and the New York Convention

The United States policy in support of arbitration applies with ‘special force’ within the matrix of international disputes governed by the New York Convention.\textsuperscript{100} The United States Government signed the New York Convention in 1970 and the Federal Arbitration Act applies to the Convention as U.S. law.\textsuperscript{101}

Case law in the United States generally adopts a narrow interpretation of the scope of application of the New York Convention in determining whether to compel arbitration. It has established four broad criteria referred to as the Sedco test or the Ledee test.\textsuperscript{102} If the following criteria are met, the New York Convention is deemed applicable:

1. there exists an agreement in writing to arbitrate the dispute;
2. the agreement provides for arbitration in the territory of a Convention signatory;
3. the agreement arises out of a commercial legal relationship; and

\textsuperscript{98} William W Park ‘Non-Signatories and International contracts: An Arbitrator’s Dilemma’ in Alan Rau (ed), Multiple Parties in International Arbitration (Oxford University Press, 2009) 6.


\textsuperscript{100} Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc, 723 F 2d 155, 631 (1983). (‘Mitsubishi’).

\textsuperscript{101} Federal Arbitration Act, 9 USC §§ 201-208 (1925).

\textsuperscript{102} Sedco Inc v Petroleos Mexicanos Mexican Nat'l Oil Co, 767 F 2d 1140, 1144-1145 (5th Cir, 1985). Ledee v Ceramiche Ragno, 684 F 2d 184, 186-87 (1st Cir, 1982).
4. a party to the agreement is a non-U.S. citizen or the parties’ commercial relationship has a reasonable relation with a foreign country.\textsuperscript{103}

The last criterion is particular to the law in the United States and restricts the scope of application of the \textit{New York Convention} notwithstanding the courts emphasis on federal policy which is pro-arbitration. It is argued by some that criterion four is not in keeping with the \textit{New York Convention} due to its restrictive application.\textsuperscript{104} The general approach, however, adopted by the U.S. courts is to construe the phrase ‘null and void’ under Article II(3) in a uniform manner and only declare an arbitration agreement as invalid on the grounds of defences such as fraud, mistake or duress.\textsuperscript{105} The courts restriction of the grounds on which parties may challenge the doctrine of separability is in keeping with the broad objectives of the \textit{New York Convention}.

Although Article II(3) requires the court to decide if an arbitration agreement exists and if it is valid and applicable, it does not provide for any priority of the arbitral tribunal to determine these questions.\textsuperscript{106} The aim of the \textit{New York Convention} is to secure the recognition of arbitration agreements and awards rather than to prescribe the circumstances of application of the principle of \textit{compétence-compétence}.

\textbf{3.5.5 Separability and Public Policy in the U.S.}

The risk for national courts in permitting disputes to be resolved by arbitration is that this could lead to arbitrators replacing courts and ruling on issues of public policy law, carrying with it the risk of under-enforcement or incorrect application of U.S. public policy. On the other hand, any party intending to delay the arbitral process, could apply to court on the grounds of mandatory rules such as public policy or fraud which arise from their agreement. Given the costs and time delays involved in court processes in the United States, this could create an opportunity for parties reluctant to go to arbitration to use mandatory rules as a dilatory tactic. Any issue which relates to questions of public policy or fraud is considered mandatory to be dealt with by national courts to ensure due process and protect the public interest.

\textsuperscript{103} Poudret and Besson, above n 8, [490].
\textsuperscript{104} Ibid.
\textsuperscript{105} See \textit{Bautista v Star Cruises}, 396 F 3d 1289, 1301-1302 (11th Cir, 2005).
\textsuperscript{106} \textit{New York Convention} art II(3).
The Supreme Court of the U.S. addressed this matter in *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth*.\(^{107}\) The *Mitsubishi* case is a landmark decision handed down in 1985 concerning the willingness of the U.S. courts to demonstrate their support for international commercial arbitration. This case aligned the United States with the reforms which occurred in the 1970’s and 1980’s in places such as London and Stockholm where international arbitration was granted more autonomy. With *Mitsubishi*, the U.S. Supreme Court radically modified the relationship between the judiciary, the federal government and the regulation of private commerce. The status quo for resolution of international business disputes in the United States experienced a major shift.\(^{108}\)

The amicus brief submitted by the American Arbitration Association to the Supreme Court in *Mitsubishi* emphasized that the United States as a major trading nation should not be dismissive of international arbitration. The brief was undersigned by some of the most highly esteemed lawyers practicing in the United States. The American Arbitration Association’s position was further buttressed with the brief submitted by the International Chamber of Commerce to the U.S. Supreme Court, which played a symbolic role. One of the arbitrator’s who supported the ICC brief was the retired U.S. Supreme Court Justice Potter Stewart. These efforts were aimed to assert that the Supreme Court become cognizant of the value of international commercial arbitration and the high caliber of arbitrators involved in international commercial arbitration.\(^{109}\)

The dispute in the case originated from a contract between a Japanese automobile manufacturer – Mitsubishi – and Soler Chrysler-Plymouth which was a Puerto Rican distributor. The distribution agreement between the parties did not include a third party, Chrysler SA; however, the sales agreement did. The sales agreement provided for arbitration in Japan pursuant to the rules of the Japanese Commercial Arbitration Association. Soler failed to fulfil its minimum sales volume per contract and Mitsubishi declined to allow Soler to transfer vehicles for sales to the U.S. and Latin America. Mitsubishi instigated two actions: (1) it commenced arbitral proceedings in Japan; and (2) filed for litigation against Soler in the US to compel Soler to arbitration. The U.S.

\(^{107}\) *Mitsubishi* 723 F 2d 155, 631 (1983).


\(^{109}\) Ibid 158.
Supreme Court held that ‘any doubts concerning the scope of arbitral issues should be resolved in favour of arbitration’.  

Most importantly, the Court maintained that arbitration was a reliable dispute resolution method. The Court held that ‘parties could bind themselves in advance to submit claims arising under the Sherman Act to international arbitration.’ The purpose of the Sherman Act is the broad public interest in safeguarding society by preventing monopoly and increasing the extent of competition in industry and commerce. Further, the Court stated that provided the arbitrators had heard and ruled on those claims, U.S. courts were unable to review the arbitrators’ decisions on those claims.

Essentially, the Mitsubishi holding provides that if parties to an arbitration agreement agree to waive the court’s adjudication of claims and the arbitrators are willing to rule on those matters, then they should be allowed to do so. The decision by the arbitral tribunal should be enforced by courts. This decision is consistent with the general national policy supporting arbitration and the tendency for courts ruling on an arbitrability question, to resolve uncertainties regarding the scope of the parties’ intention to arbitrate in favour of arbitration.

Mitsubishi recognized the prevailing power of international commercial arbitration over the national enforcement of antitrust laws. This case is also significant for facilitating an increase in the number of choices accessible to commercial parties and their lawyers, debunking the misconception that arbitration had to be informal and over small sums. Indeed, following the judgment in Mitsubishi, the domestic arbitration market for major commercial disputes and other avenues of alternative dispute resolution proliferated.

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110 Mitsubishi 723 F 2d 155, 626 (1983).
111 Ibid 631. Sherman Antitrust Act, 15 USC (1890). Matters under the Sherman Act may involve issues of public policy given that this legislation pertains to anti-competitive conduct. See Northern Securities Company v United States, 193 US 197, 327 (1904) ‘that freedom and commerce which Congress intended to recognise and protect, and which the public is entitled to have protected.’
115 The term ‘antitrust’ is the U.S. equivalent to what is termed ‘competition law’ in Australia.
116 Dezalay and Garth, above n 108, 161.
3.6 Separability in France

In French arbitration law, separability is often referred to as the ‘autonomy of the arbitration agreement’.\(^{117}\) The doctrine of separability was developed via decisions by French courts and represents one of the most crucial elements of arbitration law in France. In addition to the doctrine of separability, the Cour de Cassation has created the ‘principle of validity’ in relation to the arbitration agreement. According to this principle, which was applied in decisions such as Hecht v Buisman, an arbitration agreement is governed by international rules such as public policy, regardless of the applicable rules of national law.\(^{118}\) In particular, the French courts look to the common intention of the parties with respect to the arbitration agreement, whilst excluding provisions in the national laws applicable to the validity of the arbitration agreement. The application of the principle of validity generally results in preventing the court from ruling on the existence or validity of the arbitration agreement thus making it incumbent upon the tribunal to address such questions.\(^{119}\)

3.6.1 The Development of Separability and the Principle of Validity

In Hecht, the court referred to the principle of validity of the arbitration agreement.\(^{120}\) This was one of the cornerstone judgments in the development of international commercial arbitration in France. The disagreement pertained to the validity of an arbitration clause incorporated within an international commercial agency contract which was subject to the national laws on commercial agency.\(^{121}\) The defendant argued that the arbitration clause was invalid owing to the French statute which forbade agreements to arbitrate between merchants and non-merchants.\(^{122}\) The court found that an arbitration agreement is governed by international rules notwithstanding the applicable rules of national law.\(^{123}\)


\(^{118}\) The three judgments by the Cour de Cassation which expounded the principle of validity were Ets Gosset v Maison Freres Carapelli Cour de Cassation [French Court of Cassation], 7 May 1963 reported in (1963) Rev Arb, 60; (‘Gosset’); Hecht v Buisman, Cour d’Appel [Paris Court of Appeal], 19 June 1970, (1972) reported in (1970) Rev Arb, 67 (‘Hecht’); Municipalite de Khoms El Mergeb v Societe Dalico, Cour de Cassation [French Court of Cassation], 20 December 1993 reported in (1994) Rev Arb, 116, 117. (‘Dalico’).

\(^{119}\) Castellane, above n 14, 371, 372.


\(^{121}\) National French Decree on Commercial Agency 1958.

\(^{122}\) Emmanuel Gaillard and John Savage (eds), Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer, 1999) [418].

\(^{123}\) The international rules include ‘international public policy’ which is decided by the presiding court. This is provided for pursuant to Décret no 2011-48 du 13 Janvier 2011 [Decree No 2011-48 of 13 January 2011] JO 14 January 2011, (France) art 1514. (‘New Decree’). See Castellane, above n 14, 371, 372.
The Court of Appeal dismissed the challenge by the defendant regarding the invalidity of the arbitration clause stating that, regardless of the applicability of French national laws, the parties had the right to include an arbitration agreement in circumstances unauthorised by domestic statutes. This holding was predicated on the doctrine of separability and party autonomy. The court also applied the principle of validity by determining the validity of the arbitration agreement from the parties’ intentions alone and by not applying any national statutes. The judgment in *Hecht* unequivocally recognises the principle of separability in relation to the validity of international arbitration agreements.124 During the 1970’s a series of judgments by French courts affirmed the doctrine of separability, such as the ruling in *Quijano Aguero v Marcel Leporte*.125

In *Quijano*, the Paris Court of Appeal found that the law applicable to the main contract was not applicable to the arbitration agreement due to the doctrine of separability.126 Similar to the reasoning in *Hecht*, the court affirmed the agreement to arbitrate by inference from the parties’ intention and their selection of institutional arbitration rules omitting any reference to national statutes.127 The principle of validity (of the arbitration agreement) was subsequently reaffirmed by the Court of Appeal in the *Menicucci v Mahieux* decision, where the Court quashed a previous judgment which held that an arbitration agreement incorporated in a contract signed by two French nationals for the sale of products overseas was void.128 The court of first instance had predicated its decision on two findings: that the contract was between a merchant and a non-merchant and the finding that the contract was not international in nature. The Paris Court of Appeal affirmed that it was a contract between a merchant and a non-merchant and hence the arbitration agreement was disallowed pursuant to French statute. The Court of Appeal found, however, the agreement to arbitration was contained in an international

126 Ibid.
128 *Menicucci v Mahieux*, Cour de Appel [Court of Appeal], 13 December 1975, reported in (1976) Rev Crit. (*Menicucci*).
commercial contract and therefore held that the barring of an international arbitration pursuant to the *Code of Civil Procedure* was erroneous.\(^\text{129}\) The Court held that:

> In order to admit a plea of lack of jurisdiction, it is not necessary to determine the law governing the contract ... or indeed the arbitral proceedings and the award .... It need only be established that, in light of the principle of the autonomy of the arbitration agreement providing for arbitration in an international contract, the latter is valid independently of any reference to a national law.\(^\text{130}\)

### 3.6.2 The Ruling on Separability and the Principle of Validity in Dalico

The principle of validity continued to be expanded in rulings by the French courts during the late 80’s and early 90’s. For example, the finding of the court regarding separability in *Menicucci* was reaffirmed by the highest court in France in the decision of *Municipalite de Khoms El Mergeb v Societe Dalico*.\(^\text{131}\) The *Cour de Cassation* in *Dalico* held that French courts only need to find an arbitration agreement in existence between the parties. Provided the arbitration agreement is compliant with the French perspective of international public policy, it will be upheld by the courts. The court stated that:

> by virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties’ common intention, there being no need to refer to any national law.\(^\text{132}\)

Pursuant to the decision in *Dalico*, general rules of contract are not applicable to arbitration agreements and the validity of arbitration agreements cannot be challenged on such grounds.\(^\text{133}\) The French Supreme Court - *Cour de Cassation* - has consistently held that international arbitral awards do not belong to the national legal order of the place where they were issued (the *seat*) thus the setting aside of the award by courts at the *seat* will not prevent French courts from enforcing them.\(^\text{134}\) Although this has

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\(^\text{130}\) Gaillard and Savage, above n 122, [418].


\(^\text{133}\) Ibid 116, 117.

\(^\text{134}\) See *Societe Hilmarton v Societe OTV*, Cour de Cassation [French Court of Cassation], 23 March 1994 reported in (1994) Rev Arb, 327, 328. See also Phillipe Pinsolle, ‘The Status of Vacated Awards in France: The Cour de Cassation decision in Putrabali’ (2008) 24(2) *Arbitration International* 277, 277. See also the most recent decision of *Dallah Real Estate and Tourism Holding Co v Pakistan* [2010] UKSC 46 where the English courts held the award could not be enforced but the French courts disagreed.
caused much debate among academics and arbitration practitioners, it continues to be the practice by the French judiciary.\textsuperscript{135} To sum up, the existence, validity and scope of an arbitration agreement which includes questions on separability, is determined by the courts of France based on the common intent of the parties, subject only to mandatory provisions of French law and international public policy.\textsuperscript{136}

\subsection*{3.6.3 Separability in the New Decree}

The \textit{Cour de Cassation} elaborated on the doctrine of separability in the more recent decision of \textit{American Bureau of Shipping v Copropriété Maritime Jules Verne} where it reiterated that courts are barred from conducting a \textit{full review} of the arbitration agreement before the tribunal has ruled on the matter.\textsuperscript{137} This is also codified under Article 1448 of the \textit{New Decree} which provides that a court must decline jurisdiction when a dispute subject to an arbitration agreement is brought before it.\textsuperscript{138} The only exception to decline jurisdiction under this provision is if the tribunal has not been constituted properly or if the arbitration agreement is manifestly void or manifestly not applicable.\textsuperscript{139}

This is a very liberal approach to enforcing arbitration agreements in general and the doctrine of separability in particular. French courts perceive arbitration agreements as valid and enforceable whilst excluding the application of traditional principles of French contract law and non-mandatory provisions of national law. The policy underpinning this approach is that the contractual nature of arbitration is frequently used by parties to stall the arbitral process and a clear provision for enforcing arbitration agreements should be an effective strategy against such tactics.\textsuperscript{140} According to Article 1447 of the \textit{New Decree} which codifies prior French case law, the arbitration clause remains valid, even if the main contract is void due to invalidity, inexistence or termination.\textsuperscript{141}

\begin{itemize}
\item[\textsuperscript{135}] Cuniberti, above n 6, 435.
\item[\textsuperscript{137}] \textit{American Bureau of Shipping v Copropriété Maritime Jules Verne} Cour de Cassation [French Court of Cassation] 7 June 2006 reported in (2006) Rev Arb 946. (‘\textit{ABS}’).
\item[\textsuperscript{138}] \textit{New Decree} art 1448.
\item[\textsuperscript{139}] Ibid.
\item[\textsuperscript{140}] Cuniberti, above n 6, 420.
\item[\textsuperscript{141}] \textit{New Decree}, art 1447.
\end{itemize}
More importantly, the New Decree provides that there are no specific formal requirements before an arbitration agreement is considered to be valid.\textsuperscript{142} An arbitration agreement may be found to be valid based on the clear intent of the parties, even if there is no written agreement.\textsuperscript{143} This is in contrast to the New York Convention which pursuant to Article II requires evidence of an arbitration agreement in writing.\textsuperscript{144} Moreover, although French law supports the doctrine of separability and \textit{compétence-compétence}, it is interesting to note that the Model Law has not been incorporated in French arbitration law. Despite this, French law remains the most progressive in enforcement of arbitration agreements and awards.

3.7 The Principle of Compétence-Compétence

Professor William Park observed that the principle of \textit{compétence-compétence} ‘possesses a chameleon-like quality that changes colour according to the national and institutional background of its application’.\textsuperscript{145} When the principle is adopted into the national laws of a country, the legal culture of that jurisdiction impacts on how \textit{compétence-compétence} is interpreted.\textsuperscript{146} This principle has made substantial progress in terms of application since it first received recognition in the \textit{Statute of the International Court of Justice}.\textsuperscript{147} \textit{Compétence-compétence} has also been the subject of much scholarly research and debate. More importantly, many countries have provided for it in their legislation, albeit with divergence in levels of recognition and differences as to the extent and stage at which judicial intervention occurs.\textsuperscript{148}

A majority of institutions already recognise it in their rules.\textsuperscript{149} The jurisdiction of the tribunal is vital to the authority and decision-making power of the arbitrators. Awards which lack jurisdiction are invalid. A lack of jurisdiction is one of the few acknowledged grounds for a court to set aside or refuse recognition and enforcement of

\begin{footnotesize}
\textsuperscript{142} See New Decree, art 1507. See also Société Bomar Oil v Entreprise Tunisienne d’ activités Petrolières Cour de Cassation [French Court of Cassation], 9 November 1993 reported in (1994) Rev Arb, 108.
\textsuperscript{143} New Decree art 1507 which provides that: ‘an arbitration agreement shall not be subject to any requirements as to form.
\textsuperscript{144} New York Convention art II(2).
\textsuperscript{146} See China Minmetals Materials Import and Export Co Ltd v Chi Mei Corp 334 F 3d 274, 288 (3rd Cir, 2003). (‘China Minmetals’).
\textsuperscript{147} Statute of the International Court of Justice art 36(6).
\textsuperscript{149} See International Chamber of Commerce (‘ICC’) Rules of Arbitration art 6(4). See also American Arbitration Association (‘AAA’) r 7.
\end{footnotesize}
an award. Therefore, it is frequently essential to address the question of jurisdiction during the early stages of the dispute.\textsuperscript{150} \textit{Compétence-compétence} is defined as the conferral of inherent power on the tribunal to determine whether it has jurisdiction to hear the dispute and subsequently on the existence of the main contract.\textsuperscript{151} This principle goes to the heart of the arbitral process.

If parties to a dispute were permitted to undermine the jurisdiction of an arbitral tribunal by merely alleging that the arbitration agreement is void or inapplicable, arbitration would cease to be an effective tool for the resolution of disputes. This is clearly a policy consideration which calls for the recognition of \textit{compétence-compétence}. The policy considerations also account for why this principle is frequently described as a ‘legal fiction’. The rationale for the introduction of the principle was to confer more powers on the arbitral tribunal, although not necessarily to restrict the powers of national courts. The \textit{positive effect} permits the tribunal to determine the existence, validity and scope of the arbitration agreement. It is thus the \textit{positive effect} which comprises the core of the principle of \textit{compétence-compétence} and receives wide recognition in national legislation and international legal instruments.\textsuperscript{152}

Parties do not need to invoke the jurisdiction of a national court to rule on issues of validity of the arbitration agreement or existence of the main contract. The principle of \textit{compétence-compétence} has been justified on two grounds: first, there is a rebuttable presumption that such jurisdictional authority has been conferred by the parties, and secondly the principle is inherent in all judicial bodies and essential to their capacity to operate.\textsuperscript{153}

3.7.1 Variations in Application of the Principle of Compétence-Compétence
France, United Kingdom and the United States have recognised the principle of \textit{compétence-compétence} and developed their own versions, evidenced in their respective approaches. Some of these are outlined in Table 3.1 on the following page.

\begin{itemize}
\item \textsuperscript{150} Lew, Mistelis and Kroll, above n 27, 329.
\item \textsuperscript{151} Poudret and Besson, above n 8, [162].
\item \textsuperscript{152} Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’ Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.
\end{itemize}
### Table 3.1: Variations in Application of Compétence-Compétence

<table>
<thead>
<tr>
<th>Variations to Arbitrator’s Power</th>
<th>Key Features</th>
</tr>
</thead>
</table>
| Power to continue with arbitral proceedings despite one party’s challenge to arbitration agreement. | • Notwithstanding a party’s challenge that the arbitration agreement is invalid, the tribunal continues to hear dispute.  
• Jurisdictional challenge does not *ipso jure* deprive tribunal of jurisdiction.154 |
| Concurrent power to determine challenge to arbitration agreement, subject to subsequent curial review. | • Tribunal permitted to rule on challenges to their jurisdiction during the proceedings.  
• Tribunal allowed to rule on issues of formation, validity and scope of the parties’ arbitration agreement.155  
• Either party may seek immediate or subsequent review of jurisdiction.  
• If concurrent proceedings on foot in tribunal and courts, each may rule on a stay of its own proceedings.  
• Once award on jurisdiction issued, it may be reviewed by the court. |
| Exclusive power to determine preliminary challenge to arbitration agreement, subject to subsequent curial review. | • Exclusive power under a preliminary award to determine a challenge to its jurisdiction.  
• Courts prohibited from ruling on challenges to jurisdiction until the tribunal determines its jurisdiction first.  
• Once the tribunal issues award on jurisdiction, it may be subject to curial review.  
• Alternatively, no curial review of a jurisdictional determination by the tribunal would be allowed until a final award on the merits was issued by the tribunal. |
| Exclusive power to decide challenges to arbitration agreement. | • Tribunal has exclusive power to determine challenges to its jurisdiction, subject to minimal or no curial review.  
• Courts restricted from ruling on a challenge to an arbitration agreement, until an award was issued on the challenge.  
• Curial review would be possible only on limited grounds. Otherwise no curial review possible. |


These variations will be discussed when the divergent approaches adopted by various legal jurisdictions are examined in chapters four, five and six.

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3.7.2 **Determination of Jurisdiction by Arbitration Tribunals**

A challenge to jurisdiction may arise regarding the validity of an arbitration agreement and thus, contest the entire basis on which an arbitral tribunal purports to hear the dispute. A challenge may for instance question the proper assent to and execution of the arbitration agreement. Alternatively, a challenge may be based on allegations that some of the issues before the tribunal are beyond the scope of the arbitration agreement.\(^{156}\)

Before it can decide on the substantive issues in dispute a tribunal must ascertain that it has jurisdiction. If a valid arbitration agreement is found, the tribunal is empowered to determine the dispute and provide a binding award which has a *res judicata* effect.\(^{157}\) Conversely, lack of jurisdiction means that the award will be unenforceable.\(^{158}\)

Determining their own jurisdiction does not require arbitrators to make a comprehensive inquiry into all aspects of their jurisdiction. Generally, where both parties participate in the appointment of the tribunal and bring their respective claims and counterclaims without reservations, jurisdiction will not be an issue. Where the tribunal is concerned regarding the scope of the arbitration agreement, and where there is a jurisdictional challenge, it may ask the parties to confirm the jurisdiction of the tribunal regarding the issue before it.\(^{159}\)

Numerous arbitration laws in force today deem any participation in proceedings on the merits without challenging the jurisdiction of the tribunal, as submission to arbitration. For instance, Article 16(2) of the *Model Law* stipulates that any objection to the jurisdiction of an arbitration tribunal has to be raised no later than the statement of defence. After this time there is considered to be acceptance of the arbitration and a later challenge to jurisdiction would be estopped.\(^{160}\)

A majority of countries which have adopted the *Model Law* have enacted national arbitration laws, which accept the authority of the arbitral tribunal to determine its


\(^{157}\) The term *res judicata* means a judicially decided matter. The rule that if a dispute is judged by a court of competent jurisdiction, the judgment of the court is final and conclusive as to the rights and duties of the parties involved. *Res judicata* is a bar to a subsequent suit for the same cause of action.

\(^{158}\) See *Arbitration Act 1996* (UK) s 66(3).

\(^{159}\) Lew, Mistelis, and Kroll, above n 27, 329.

\(^{160}\) See *Arbitration Act 1996* (UK) ss 31(1) and (2) which stipulate that time is of the essence in raising a challenge to the tribunal’s jurisdiction, whether at the outset of the arbitral proceedings or during the arbitration. See *New Decree*, art 1458 which only permits a challenge if the tribunal has not yet been constituted or, if the arbitration agreement is manifestly void or inapplicable.
compétence-compétence as a preliminary question or in a final award on the merits.\textsuperscript{161} Generally, the question of jurisdiction is dealt with as a preliminary matter. However, the question may be intimately linked with the merits rendering it sensible to address it in the final award. A challenge on jurisdiction brought before the court will not usually result in an order to stay the arbitration. If the arbitral tribunal confirms its jurisdiction by issuing a preliminary award, it can usually continue with the proceedings. In the event that the tribunal finds it lacks jurisdiction, it is required to charge for costs and end the proceedings. The parties may bring such a decision to judicial review.\textsuperscript{162}

Broadly, an arbitral tribunal determines its competence cognisant that it may be challenged before a court at the seat. The decision regarding jurisdiction by the arbitral tribunal is subject to the control of the national courts at the seat. This is why some scholars refer to the tribunal’s ruling on jurisdiction as an initial ruling. Alternatively, the award may be challenged on jurisdictional grounds at the court where enforcement is being sought. If the parties have waived beforehand all setting aside actions against the award, or where no action for setting aside the award has been commenced within the relevant time period, the decision of the tribunal becomes final.

A tribunal confronted with the question of its own jurisdiction must initially determine whether it is competent to deal with the particular jurisdictional question or whether it must be referred to the court. In national courts, the tribunal's jurisdiction may become an issue at various stages. It could arise before the arbitration has commenced, during the arbitral proceedings or after the award has been made. In the first case, where one party has begun court proceedings the court may be asked to decline jurisdiction in favour of arbitration, pursuant to Article II(3) of the New York Convention or a similar provision in the applicable national arbitration laws. The question of jurisdiction may arise where a court is requested to act in support of arbitration, for example, where a party seeks a declaration on the tribunal's jurisdiction.\textsuperscript{163}

3.8 The Question of Prima Facie or Full Review by Courts
A typical scenario of parties in a dispute before a court may be as follows: a seller in a commercial contract instigates court proceedings to retrieve the price of goods sold. In

\textsuperscript{161} Model Law (1985). See www.uncitral.org/uncitral/en/uncitral_texts. See also International Arbitration Amendment Act 2010 (Cth) sch 1, pt 1, s 2D(e).(Australia).
\textsuperscript{162} Poudret and Besson, above n 8, [474].
\textsuperscript{163} Lew, Mistelis and Kroll, above n 27, 329.
response, the buyer claims the goods were faulty and moves to stay litigation, alleging that the parties had assented to arbitration of their disputes arising from their contract. The seller subsequently claims before the court, that the arbitration agreement was void. Under such circumstances, the court has three options. It may (a) refer the issue to the arbitral tribunal to determine; (b) conduct a prima facie review of the arbitration agreement and if it finds a valid arbitration agreement, refer it to the tribunal or; (c) undertake a full review of the arbitration agreement and refer it to the tribunal if it finds the arbitration agreement to be valid.

If a party to an arbitration raises a challenge against the jurisdiction of the tribunal, it is commonplace for the tribunal to issue a preliminary ruling on the question in order to proceed. The tribunal may alternatively issue its ruling on jurisdiction in the final award. An argument that an arbitration agreement is void, invalid or incapable of being performed, amounts to a direct challenge to the authority of the tribunal to hear the dispute. Where a party to an arbitration has raised a jurisdictional challenge in a national court, if the court finds it must review the jurisdiction, there are essentially two recognised methods: prima facie review or full review. Divergence among national law emerges in relation to the methods of review.

The method of review may be stipulated by the applicable national arbitration laws, but it is also subject to how the courts interpret the legislation and the general position adopted. The prima facie review is, as the term suggests, a basic review to ensure that an arbitration agreement exists and is not manifestly void or inapplicable.

The term ‘prima facie’ is defined by Black’s Law Dictionary as ‘at first sight, on first appearance but subject to further evidence or information’.

Alternatively, it can be defined as an evidentiary standard that is ‘sufficient to establish a fact or raise a presumption unless disproved or rebutted’. In practice, it is a more limited inquiry by the courts as to whether an arbitration agreement prima facie exists. Following a prima facie review, if the court is satisfied that an agreement exists, the judicial proceedings will be stayed and the matter referred to arbitration. There is an argument for saving

165 Ibid.
public and private resources if courts conduct a prima facie review and only conduct a full review where necessary, for example if the arbitration agreement is manifestly null, void or inapplicable.

There may be a saving of public resources if the courts are not required to conduct a full review. Further, the parties may also realise a saving in that they do not need to pay for legal costs associated with a court conducting a full review in addition to the costs of arbitration. A court may exercise its discretion to depart from a prima facie review, if the question falls within one of the exceptions mentioned above, or a prima facie review is insufficient to determine the question.

In some circumstances, a prima facie review may prove insufficient. For example, if there is a complex multi-party dispute which involves non-signatories to the arbitration agreement who may in fact be bound by it. A full review is a more in-depth judicial scrutiny to ascertain the existence, validity and scope of the arbitration agreement. The risk of a full review is that it may usurp the jurisdiction of the arbitral tribunal from ruling on its own jurisdiction. Unless there are legitimate reasons to conduct a full review, it is inconsistent with the principle of compétence-compétence.

If one were to turn to the Model Law for guidance on which method of review to apply, it is of little assistance. National courts in Model Law jurisdictions are in dispute regarding whether Article 8 provides for prima facie or full review. There are curial decisions in some jurisdictions where full reviews have been conducted which are at odds with the prima facie method. It is argued by Bachand that the prima facie review is more closely aligned to the legislative history, framework and underlying objectives of the Model Law. One of the reasons he cites for this view is that full review typically takes a long time for courts to determine and this may serve the party who uses it as a tactic to stall or frustrate the arbitral process.

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170 Bachand, above n 168, 464.
Courts should be cautious to avoid an interpretation which undermines competence by conducting a full review unless it is warranted by the particular circumstances of the case. Moreover, it would be unreasonable for legislation to be too prescriptive in this regard. There should be some discretion granted to the judiciary to conduct a full review where a prima facie one will be detrimental to the parties’ interests. This raises the competing interests at play for the court. The court has a dual role with respect to arbitration. On one hand, it has the role of assisting the arbitration procedure yet, on the other, it has the role of controlling it. If the courts become too controlling, for example undertaking a full review as standard procedure, it risks undermining the integrity and efficacy of arbitration as a tool of dispute resolution. It will also result in a waste of public and private resources. Conversely if the court becomes reluctant to intervene it may undermine the effectiveness of both arbitration and the courts.

Since agreements to arbitrate are essentially substantive contracts, critics question why such agreements should have a lower threshold to prove consent of the parties. It is argued that the threshold should be no different to any other contract. Moreover, critics assert that the prima facie review method, fails to establish validity. The prima facie review is criticised, therefore, on the grounds that it will find most agreements valid, only ruling out saliently void agreements. To confer validity to arbitration agreements in this way is mistaken.\(^{171}\)

Notwithstanding criticism of the prima facie review method, it remains the best option. There is an efficiency argument in that the resources of courts should not be wasted conducting a full review as standard procedure. The most substantial ground for upholding the prima facie review is that unless otherwise stated by the parties, by assenting to the arbitration agreement, the parties empower the arbitral tribunal to rule on all issues relating to their dispute. Although the judicial system reserves the authority to oversee the arbitral tribunal’s decision (to set aside or enforce the award) it does not substitute for the arbitral tribunal.\(^{172}\)

In conclusion, the prima facie method is more amenable to maintaining the integrity and efficiency of arbitration whilst preventing undue delay and expense for the parties.

\(^{171}\) Brekoulakis, above n 152.
\(^{172}\) Poudret and Besson, above n 8, [458].
More importantly, the *prima facie* method is supportive of the *negative effect* of *compétence-compétence*. Lord Mustill eloquently elaborated on the role of courts and arbitral tribunals likening it to a relay race where one passes the baton to the other according to the nature of the challenge.\(^\text{173}\)

### 3.9 Contesting the Award during the Enforcement Stage

Generally, parties will bring the challenge before the arbitral tribunal or the national courts. The final stage a court may be asked to recognise and uphold an award is at the enforcement stage. If jurisdiction is being challenged after an award has been issued, it will have to be challenged before the national courts where recognition and enforcement is being sought. Any challenge will be raised pursuant to the law in the jurisdiction where enforcement is being sought.\(^\text{174}\) During the enforcement phase, the arbitral tribunal is no longer a participant, its function usually ceasing after issuing the award. Occasionally losing parties may attempt to avoid the award by challenging the enforcement of it, asking the court to set it aside.

Generally, however, there are only a few grounds for challenge at the recognition and enforcement stage. One of the grounds is public policy.\(^\text{175}\) The court of enforcement may also conduct judicial review regarding jurisdiction. There is divergence among courts of different jurisdictions as to the degree of judicial review.\(^\text{176}\) Therefore the attitude of the national courts in supporting valid arbitration awards is crucial.

### 3.10 The Negative Effect of the Principle of Compétence-Compétence

There are two effects of the principle of *compétence-compétence*, positive and negative. The *positive effect* is to permit arbitral tribunals to make a ruling on their own jurisdiction to hear the dispute. By emphasising the jurisdiction of the tribunal, the *positive effect* sets out a framework of concurrent jurisdiction between courts and arbitral tribunals.\(^\text{177}\) The *negative effect* on the other hand is more controversial and rests on the notion that the arbitral tribunal should have a chronological priority to rule on its jurisdiction before the courts.\(^\text{178}\) The *negative effect* thereby restricts the function

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\(^\text{175}\) Ibid 67.

\(^\text{176}\) See *Dallah Real Estate and Tourism Holding Co v Pakistan*, [2010] UKSC 46. (‘*Dallah*’).

\(^\text{177}\) (‘*Positive Effect*’).

\(^\text{178}\) Kawharu, above n 156, 243. (‘*Negative Effect*’).
of the court so as to provide the tribunal with the first opportunity to determine its own jurisdiction and the validity of the arbitration agreement. The negative effect bars a court from reviewing the merits of the dispute when deciding on the existence or validity of the arbitration agreement prior to the arbitral tribunal.  

According to the negative effect, a national court may review the jurisdiction of a tribunal at the enforcement stage. Such prioritisation of tribunals over national courts concerning the review of validity is an essential feature of the negative effect. Although both the New York Convention and the Model Law provide for courts to conduct a complete review prior to the award being issued, the negative effect is receiving gradual recognition in many countries.

The basis for compétence-compétence is the intention of the parties to grant the arbitrators authority to determine every issue related to their dispute, including questions of jurisdiction. Such authority usually appears in the language of the arbitration agreement. Meanwhile, the courts still possess the authority to supervise the ruling of the tribunal but not to be a substitute. The empowerment of the tribunal to determine its own jurisdiction in the first instance is tempered by granting the tribunal’s ruling a provisional status, which is reviewable by the court. Courts reserve the power to conduct a review once an award is issued, to either set the award aside or enforce it.

In order to give full efficacy to the negative effect, priority must be given to the arbitral tribunal if the same subject matter is pending a decision in court. Concomitantly, the court should refrain from intervening until a jurisdictional ruling by the tribunal. Further, this must be combined with the barring of judicial proceedings to determine the validity of a tribunal’s jurisdiction as well as any determination on the merits of a dispute. Jurisdiction may be reviewed by a court whether it is addressed in a preliminary or a final ruling issued of the tribunal. Alternatively, jurisdiction may be

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179 Poudret and Besson, above n 8, [488]. Most national arbitration laws prevent courts from reviewing the merits of arbitral awards. See New Decree, art 1493.
180 Brekoulakis, above n 152. See New York Convention, art II(3) and the Model Law art 8. Although some contend that the Model Law art 8 permits national courts to perform a prima facie review of an arbitration agreement: see Rio Algom Ltd v Sammi Steel Co Ltd, [1991] 47 CPC (2d) 251 (Ontario Court of Justice). See also Pacific International Lines Ltd v Tsinlien Metals and Minerals Co Ltd [1993] 2 HKLR 249.
181 Jones, above n 7, 57.
reviewed at the enforcement stage. The *negative effect* does not provide an absolute priority, only a priority for the tribunal to rule on jurisdiction prior to the court.\(^{182}\)

The majority of jurisdictions examined do not provide for express recognition of the *negative effect* in their laws. The *European Convention on International Commercial Arbitration* appears to recognise the *negative effect* in Article VI (3):

> 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.\(^{183}\)

The expression in the above provision ‘unless they have good and substantial reasons to the contrary’ where arbitration proceedings already have been commenced, suggests that the prima facie approach is enshrined here. By contrast, the *New York Convention* does not make any express provision for the *negative* or *positive effect* of *compétence-compétence*.

The question of jurisdiction is typically a preliminary matter for the arbitral tribunal.\(^{184}\) Whether a dispute ought to be determined by a tribunal rather than a court is subject to questions such as whether an arbitration agreement exists, whether it is valid and whether the dispute lies within the scope of the arbitration agreement.\(^{185}\)

Collectively these questions are often referred to as the ‘arbitrability’ question, particularly in the United States.\(^{186}\) There, the term has been used to decide whether as a matter of construction of the arbitration agreement, a tribunal possesses the jurisdiction to hear a dispute.\(^{187}\) This includes whether the tribunal may hear a dispute which has

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\(^{182}\) Poudret and Besson, above n 8, [458].  


\(^{184}\) Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte GmbH [1954] 1 QB 12, 13 (Devlin J).  


previously been determined in a different forum. This is the sense in which the term ‘arbitrability’ is used in this thesis.\(^{188}\)

In contrast to courts, the jurisdiction of an arbitration tribunal is not always governed by the provisions of one set of laws. Owing to the complex interaction between the applicable law and the terms of the arbitration agreement, the matter of the tribunal’s jurisdiction often becomes contentious. In order to reinforce the jurisdiction of the tribunal and reduce challenges being used as a dilatory tactic, national arbitration laws use different techniques to empower the tribunal.\(^{189}\)

The *compétence-compétence* principle enables the tribunal to rule that an arbitration agreement is invalid and to issue an award that it lacks jurisdiction without contradicting itself.\(^{190}\) Thus, a question may arise as to how a tribunal exclusively relying on the arbitration agreement is able to determine that very agreement to be void. The answer lies at the foundation of the principle of *compétence-compétence*. This principle is not premised in the arbitration agreement, but rather in the arbitration laws of the *seat* and more widely in the arbitration laws of any jurisdiction in which enforcement will be sought.\(^{191}\)

One rationale for *compétence-compétence* is to offer a disincentive to those who wish to use jurisdictional challenges as a dilatory tactic. The second rationale is to give effect to the principles of party autonomy and the freedom of contract. Where there is a genuine challenge to jurisdiction, the contesting party will most likely proceed with the challenge. This is especially so if their legal counsel contends that there is a serious doubt. Just as it is essential to uphold parties’ agreements to arbitrate, it is equally crucial to protect the rights of parties who did not agree to arbitration and provide them with due process in the national courts. The *negative effect* receives recognition in Article 5 (3) of the *European Convention*:

\[
\text{Subject to any subsequent judicial control provided for under the lex [arbitrii], the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration to rule on his own jurisdiction and to decide upon the existence or the}
\]

\(^{188}\) In other jurisdictions ‘arbitrability’ may be referred to as ‘jurisdictional issues’.

\(^{189}\) Lew, Mistelis and Kroll, above n 27, 332.

\(^{190}\) Examples of national law which enshrine *compétence-compétence* are the *Arbitration Act 1996* (UK) s.30; *International Arbitration Act 1974* (Cth) Sch. 2, Art 16(1). In the Model Law, *compétence-compétence* is also enshrined in Article 16(1).

\(^{191}\) Gaillard and Savage, above n 121, [658].
validity of the arbitration agreement, or of the contract of which the agreement forms part. ¹⁹²

Where national arbitration laws confer authority on the tribunal, courts in those states are obligated to enforce an award issued by the tribunal relating to their own jurisdiction, on the proviso that *compétence-compétence* is recognised in their national arbitration laws. ¹⁹³ There are numerous differences in standards and tests applied to determine questions of validity. The interpretation of the *New York Convention* and the *Model Law* differs among the courts of member states, in respect to *compétence-compétence*.

The approaches of national courts to the negative effect are not just attributable to the various arbitration laws but also to national policy rationales. One rationale for the *negative effect* is to prevent dilatory strategies used by parties. ¹⁹⁴ Another rationale is to achieve centralisation of court proceedings to rule on questions of the existence and validity of the arbitration agreement. ¹⁹⁵ There is divergence among jurisdictions in the extent of recognition of the *negative effect*. For instance, in France the *negative effect* is clearly codified in national arbitration laws. ¹⁹⁶ The United Kingdom does not provide as much deference as the French. Pursuant to the *Arbitration Act* of the U.K., the court may concurrently hear a dispute on jurisdiction whilst the matter is being heard by the tribunal. ¹⁹⁷

As for the United States, the courts may engage in a full review of a tribunal’s jurisdiction irrespective of whether the arbitration has commenced or whether the court is asked to address the merits of the claims. ¹⁹⁸ These national differences are partially due to judiciary’s view of the negative effect and the impact it may have on the court’s ability to deliver due process to the parties. The following is a critique of the negative effect.

¹⁹² Article 5(3) of the *European Convention* 1961.
¹⁹³ See for example *Arbitration Act 1996* (UK) s 1(e).
¹⁹⁵ Gaillard and Savage, above n 121, [682].
¹⁹⁶ See *New Decree*, art 1448. Also *New Decree*, art 1465 which states that the tribunal shall have exclusive jurisdiction to determine objections to its jurisdiction.
¹⁹⁷ *Arbitration Act 1996* (UK) s 32.
¹⁹⁸ Park, ‘Determining an Arbitrator’s Jurisdiction’ above n 145, 141.
3.10.1 Some Critical Comments On The Negative Effect

The negative effect of compétence-compétence provides that the courts cannot rule on the existence of a valid arbitration agreement prior to the issue of an award by the tribunal determining its jurisdiction.\(^{199}\) Thus a priority is provided to the tribunal to determine the validity of the arbitration agreement, however, this does not ipso facto mean that a tribunal is able to make a final decision concerning jurisdiction.\(^{200}\)

Although the negative effect developed as a legal convention to reinforce the jurisdiction of arbitral tribunals, the principle is a legal conundrum according to some scholars.\(^{201}\) Contrary to some critics of compétence-compétence, the discretion of a tribunal to decide on its own jurisdiction does not necessarily oust the right of court review per se.\(^{202}\) Thus, far from being absolute, compétence-compétence may be qualified.

There is broad consensus on the positive effect of compétence-compétence which authorises a tribunal to determine its own jurisdiction, eliminating the need for a tribunal to stay its proceedings in order to seek a court ruling. By contrast, the negative effect has produced more variation in approach between jurisdictions and has generated more debate internationally. The negative effect is enshrined in the European Convention in Article VI (3), which restricts the courts from deciding whether the arbitration agreement ‘was non-existent or null and void or had lapsed’ unless they have ‘good and substantial reasons to the contrary’. From the phrase ‘good and substantial reasons to the contrary’ it may be deduced that the European Convention requires a prima facie review of the validity of an arbitration agreement, providing priority to tribunals to rule on the question.\(^{203}\)

Two controversial questions relevant to the negative effect are the circumstances in which a tribunal possesses the power to determine its own jurisdiction and the circumstances under which the court may determine the question of jurisdiction. To

\(^{199}\) Gaillard and Savage, above 121, [2].

\(^{200}\) The negative effect of compétence-compétence. (‘negative effect’).

\(^{201}\) Brekoulakis, above n 152.


\(^{203}\) European Convention art VI(3).
ascertain the degree to which the negative effect has been adopted by various jurisdictions, a relevant question is ‘at what stage during the arbitral process may the courts review the question of jurisdiction?’ 204 Different jurisdictions adopt divergent positions, which generate benefits and risks. For instance, a position which only permits judicial review subsequent to the issue of the tribunal’s award, may reduce intervention by the judiciary. It may also result in inequity by squandering the parties’ finances and time in the event that the tribunal never had jurisdiction.

Conversely, if judicial intervention were permitted during the early stages of the arbitral process with a view to minimising waste of the parties’ time and money, this may negate the efficiency of arbitration as an effective dispute resolution tool. It may also create an opportunity for parties to abuse the process by using dilatory tactics. 205 A balance must be struck between the parties being bound by their arbitration agreement and due process being provided by the courts where parties’ rights may be at risk.

Proponents of a prima facie review contend that the authority of a tribunal to determine its own jurisdiction is undermined by a court ruling upon the same matter simultaneously, with the same level of scrutiny. They argue that the limitation of courts to a prima facie review is a principle of compétence-compétence. 206 If a State court hears a jurisdictional challenge and the tribunal has to stay its own ruling on jurisdiction, it is contended that this weakens the arbitral procedure and diminishes the efficacy of compétence-compétence. 207

An analysis of the decisions made by national courts reveals the unique nature of international arbitration. International arbitration is distinctive in that awards transcend jurisdictions, especially where parallel proceedings are on foot within a national court hierarchy. Jurisdictional disputes emphasise the requirement for consistency across national borders, as decision-making in one jurisdiction may have an effect on a

204 Jones, above n 7, 57.
205 Ibid 59.
206 Ibid 62.
decision made in another.\textsuperscript{208} If consistency is to be achieved, a uniform body of international jurisprudence on should be developed.

### 3.10.2 Arguments against Compétence-Compétence

Opponents of \textit{compétence-compétence} have argued that court action is more efficacious and inexpensive in reaching a final decision regarding the jurisdiction. This is provided that litigation is commenced prior to substantial funds having been invested in arbitration. This may have some substance in nations where the court system is able to address disputes within a relatively short time, however, most courts have substantial backlogs and are unable to hear matters expeditiously.\textsuperscript{209}

Moreover, permitting the court to review a jurisdictional challenge whilst the issue is concurrently before the tribunal, enables parties who had agreed to arbitration but subsequently prefer to litigate, a means of stalling the arbitration. If the court and the tribunal simultaneously address jurisdictional challenges, this duplicates processes, increases delays and costs for parties.\textsuperscript{210}

A further criticism of \textit{compétence-compétence} maintains that if the agreement to arbitrate is null and void or non-existent, then the tribunal does not possess the authority to determine its jurisdiction. In this case, the power must be derived from the arbitration law at the seat.\textsuperscript{211} Some argue that to confer exclusive jurisdiction on the arbitral tribunal, where the existence or validity of the arbitration agreement is called into question is not legitimate. To confer exclusive jurisdiction indicates a manifest presumption of validity. Opponents of the negative effect argue that exclusive jurisdiction ought to be the legal outcome of a valid agreement to arbitrate. Accordingly, exclusive jurisdiction should be conferred on the tribunal only subsequent to determining the validity of the agreement.\textsuperscript{212}

Other critics of \textit{compétence-compétence} contend that arbitrators having priority over courts to determine the existence or validity of a contract provides arbitrators with an

\textsuperscript{208} See Dallah, [2010] UKSC 46 where the courts in France and the United Kingdom ruled in a conflicting manner on the same dispute.

\textsuperscript{209} Diane Steenkamp, ‘When Seeking Justice Expect a Waiting Room’ \texttt{http://www.vibewire.org/2010/07}. See also Vanda Carson ‘Date Set for Ken Done Court Brush’ The Sydney Morning Herald 16 June 2010.

\textsuperscript{210} Bachand, above n 168,465.

\textsuperscript{211} Poudret and Besson, above n 8, [458].

\textsuperscript{212} Brekoulakis, above n 152.
economic incentive to rule in favour of their own authority. There are, however, cases where the tribunal finds that it lacks jurisdiction to hear the dispute.\textsuperscript{213} The risks of addressing a dispute whilst the tribunal lacks jurisdiction can have far reaching and damaging effects for the arbitrators involved. The risks in such a situation would outweigh any potential benefits for the arbitrators.\textsuperscript{214}

Moreover, it is unlikely that members of an international arbitral tribunal would engage in unscrupulous conduct for the sake of short term economic gain as the repercussions could damage their career prospects. A tribunal that has its award set aside would potentially tarnish the reputation of the arbitrators involved, placing their standing and if applicable, the standing of any institutional arbitration body involved at risk.\textsuperscript{215} Contrary to some critics of \textit{compétence-compétence}, the discretion of an arbitral tribunal to decide on its own jurisdiction does not necessarily oust the right of the courts to review such a determination per se.\textsuperscript{216} Accordingly, far from being absolute, \textit{compétence-compétence} may be qualified.\textsuperscript{217}

The \textit{negative effect} has come under more criticism than the \textit{positive effect}. Critics claim that whilst the \textit{positive effect} is based on legitimate theoretical and policy requirements, the \textit{negative effect} is devoid of legitimacy and may even be counterproductive as it seeks to give chronological priority to the tribunal.\textsuperscript{218} The counter-productivity could arise where a party who never agreed to arbitration may need to wait until the tribunal has ruled on the issue before challenging the jurisdiction.\textsuperscript{219} Jurisdictions where the \textit{negative effect} is given deference appear to contradict this argument. As an example the French courts practice the \textit{negative effect} pursuant to the \textit{New Decree}.\textsuperscript{220} It is very rare

\begin{itemize}
  \item \textsuperscript{214} Pursuant to the \textit{New York Convention} art 1 (c) exceeding the arbitral tribunal’s jurisdiction is one reason for vacating an arbitral award. Having an award vacated could be very damaging to the reputation of the arbitrator who issued the award.
  \item \textsuperscript{215} A view endorsed by Colin Wall, immediate past president of the Chartered Institute of Arbitrators Worldwide and East Asia Trustee of the Chartered Institute of Arbitrators.
  \item \textsuperscript{216} Redfern and Hunter, above n 172, [5-39]. Some critics are Stephen J Ware, ‘Arbitration Law’s Separability Doctrine after Buckeye Check Cashing Inc. v Cardenga’ (2007) 8 (Fall) \textit{Nevada Law Journal} 107. See also Stephen J Ware’s proposal to abolish the separability doctrine found in Section 4 of the U.S. \textit{Federal Arbitration Act} 9 USC (1925). See Edward Brunet et al, \textit{Arbitration Law in America A Critical Assessment} (Cambridge University Press, 2006) 258, 263.
  \item \textsuperscript{217} Poudret and Besson, above n 8, [457]. See for examples of when an arbitral jurisdiction ruling may become final.
  \item \textsuperscript{218} Brekoulakis, above n 152.
  \item \textsuperscript{219} Park, \textit{Determining an Arbitrator’s Jurisdiction}, above n 145, 167.
  \item \textsuperscript{220} \textit{New Decree} art 1448.
\end{itemize}
for a tribunal to address a dispute in the absence of jurisdiction. France is one of the most popular jurisdictions to hold arbitrations and is frequently selected as the seat. 221

3.11 Summary
Key concepts such as separability play a significant role in the efficacy of arbitration as an effective tool for dispute resolution. Within the matrix of laws and principles supporting arbitration, separability ensures that parties cannot use the invalidity of the main contract as a reason to challenge arbitration. According to the doctrine of separability, the arbitration agreement survives any nullity, repudiation or defect of the main contract. Some argue that separability and the principle of compétence-compétence are a legal fiction, however, it is suggested they are imposed by force of policy considerations that are necessary for arbitration to remain a viable mechanism. 222

Separability has received widespread recognition. The international law and the case law from the three jurisdictions discussed in this chapter support this. The principle of compétence-compétence is viewed in terms of the positive effect and the negative effect. The positive effect permits the arbitral tribunal to make a ruling on its own jurisdiction. The negative effect restricts the function of the court to provide the tribunal with the first priority to determine its jurisdiction and the validity of the arbitration agreement. Both of these effects were discussed with reference to international and national laws. Although critics of compétence-compétence argue it confers unacceptable power on tribunals, provided that courts have discretion to intervene it poses no danger to the delicate balance between the power of courts and tribunals.

The negative effect combined with the prima facie review may present some risk, especially if the prima facie method is applied unscrupulously. If there is no valid arbitration agreement and the tribunal is granted exclusive jurisdiction to rule on the question of validity, this could result in a delay of due process by the courts and escalated costs for the parties. In disputes such as where there has been an assignment of an arbitration agreement from one party to another, it is not always clear who the current parties to the arbitration agreement are. In such circumstances, the prima facie review would be inadequate. Rather, a full review may be necessary to ascertain the

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221 ‘2010 International Arbitration Survey: Choices in International Arbitration’ (Survey, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London and White & Case, 2010) 19.
222 Brekoulakis, above n 152.
identity of the parties to the agreement. 223 The court should use its discretion in these circumstances. In conclusion the combination of the positive and negative effect provides best practice for international arbitration. French courts successfully apply both and it is recommended that the English and American systems follow suit.
Chapter Four

THE FRENCH APPROACH TO COMPÉTENCE-COMPÉTENCE

4.1 Introduction
Chapter 4 focuses on the French approach to *compétence-compétence*, a principle described in Chapter 3.¹ This chapter provides a detailed analysis of the approach. The objective is twofold: (1) to examine the circumstances in which a French court will intervene in the jurisdiction of the tribunal and (2) identify the circumstances under which an arbitrator’s power is supervised.² To this end, the chapter discusses a line of judicial cases. Particular emphasis will be placed upon voidness and manifest inapplicability of arbitration agreements. Secondary sources are relied upon for this chapter as the author does not read or write French. Moreover, French judicial judgments are typically short which calls for reliance upon secondary sources.

As shall be seen, civil law systems such as France have been more reliant upon legal codes than case law to establish a legal framework for the regulation of arbitration. The provisions for arbitration in the legal codes are specific. Judicial rulings seek to reinforce rather than adapt the statutory provisions. Consequently, law-making by the courts is consistent, disciplined and predictable.³

The French legal tradition is premised on a strict separation between private law and public law. These comprise two distinct systems each with their own courts, their own legal notions and authors. French law adopts a deductive process of reasoning, inferring its rules from broad axioms and developing solutions from those rules. This method is applied to private law on the basis of the Codes which emanated from the Napoleonic codification.⁴ In order to understand the popularity of France as a ‘seat’ and the ICC in

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¹ In Chapter 3 the *prima facie review* method was defined as where the judges make a limited inquiry into the arbitration agreement to ascertain there is prima facie an arbitration agreement in existence.
² This identification will be based upon Table 3.1: Variations in Application of *Compétence-Compétence*, Chapter 3, 87.
⁴ The Napoleonic Codes consisted of legal codes which reformed laws in France. The first code was introduced in 1801. Peter de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing, 3rd ed, 2006) 27.
particular as an institution for conducting international commercial arbitrations, the historical background of arbitration in France is examined.

4.1.1 The Historical Development of Arbitration in France

During the 1950s and 1960s, private justice was in a precarious position in France vis-à-vis England. Arbitration lingered on the margins of the legal profession. Neither the Court of Appeal nor the Tribunal of Commerce of Paris had any substantial involvement in resolving commercial disputes. These circumstances created an opportunity to introduce alternative dispute resolution regarding business disputes. The obstacles for entry into arbitration were low and protectionist attitudes from the Paris bar were virtually non-existent owing to the general antipathy for disputes intimately connected with business.\(^5\)

Accordingly, commercial disputes were free from any monopolization. The legal practitioners who specialized in commercial law were not powerful enough to object to the rise of arbitration or attempts to usurp their area of practice. With the exception of academics, a few judges and a small number of practitioners, there was a lack of interest in this new method of dispute resolution. These circumstances combined with the liberal attitude found in Paris culminated in the flourishing of the International Chamber of Commerce as a premier institution for the resolution of international commercial disputes.\(^6\) The arbitrators of the ICC were perceived as an elite group as some of them were prominent in international law and the Hague Court of International Justice. The eminence of these early arbitrators placed the ICC on the map internationally.\(^7\) During the 1970s, arbitrations conducted by the ICC proliferated, firmly establishing it as a credible alternative to commercial litigation.

In France, courts have developed a set of principles which seek to protect the effectiveness of arbitration. Substantive laws have been formulated including a rule stipulating the priority of the tribunal to rule on jurisdiction. In the case of *American Bureau of Shipping v Copropriété Jules Verne*, the Cour de Cassation held that:

> The principle of validity of the international convention to arbitrate and the principle that the arbitrator may rule on his jurisdiction are substantive rules of French international arbitration law which establish on the one hand the lawfulness of the

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\(^6\) Ibid.

\(^7\) Ibid 304.
convention to arbitrate independently from any reference to a national law and, on the other hand, the efficiency of arbitration by allowing the arbitrator, when his jurisdiction is disputed, to rule first.8

*Jules Verne* provided arbitrators with first priority to rule on jurisdiction, and the principle was codified under article 1448 in the *New Decree No 2011-48 of 2011.*9 Table 3.1 of Chapter 3 illustrates the variations in application of *compétence-compétence.* As can be seen from that Table, France confers the tribunal with exclusive power to determine challenges to its jurisdiction, subject to minimal or no curial review. Moreover, curial review is possible on limited grounds.10 Review does not include review on the merits of the award.

### 4.2 Sources of International Arbitration Law in France

The sources of arbitration law in France are: *Decree No 2011-48 of 13 January 2011*, the *Code of Civil Procedure*, international conventions, French case law and to a limited degree, arbitration awards.11 The *New Decree* amends the provisions of the *CPC.*12 Although it maintains the distinction between domestic and international arbitration, it sets out the basic principles and procedural framework for international arbitration with its seat in France. It codifies many developments in case law since 1981, making French arbitration law even more user-friendly.13 It widens the autonomy granted to parties to tailor their arbitration to meet their own requirements. Although France follows the civil law tradition, the judgments of the French courts are a valuable source for arbitration law.14

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10 See Table 3.1: Variations in Application of *Compétence-Compétence*, Chapter 3, 87.

11 New Decree. This Decree has comprehensively reformed the law of arbitration in France which is the *CPC*. The *CPC* is the French Civil Code which is a collection of statutes established by Napoléon I in 1804. The *New Decree* came into force on 1 May 2011 and codifies the case law. Not all arbitration awards are made public but some types of arbitrations such as investment arbitrations usually are.

12 *CPC* Book IV, Title V.


The highest court ruling on arbitral disputes is the French Supreme Court – *Cour de Cassation* - the apex of the judicial hierarchy. Below it, the Paris Court of Appeal – *Cour d’ Appel de Paris* - with its specialised chamber for hearing arbitral disputes, is a court where arbitration disputes are more commonly heard. The Court of First Instance of Paris – *Tribunal de Grande Instance* – is lower in the hierarchy. The president of the Court of First Instance has a key role and is authorised to grant orders for judicial assistance to the arbitration. Further, if the matter is an international arbitration, the jurisdiction of the Court of First Instance is exclusive.\(^{15}\)

Key French judgments are usually reported in the *Revue de l’Arbitrage*. Awards are seldom made public and if they are, they do not form binding precedents although they may have persuasive value.\(^{16}\) If they are published, the identity of the parties and other key information is concealed. Although France is an arbitration-friendly jurisdiction, it has not officially adopted the *Model Law*. There are also a number of international conventions to which France is a signatory, namely the *New York Convention*, the *European Convention* and the *Washington Convention*.\(^{17}\) These conventions will not be discussed in detail, although the *New York Convention* is relevant in the following section.\(^{18}\)

### 4.3 The Definition of Arbitration in French Law

The term “arbitration” is not defined in French law. If one turns to international conventions or treaties to which France is a signatory – such as the *New York Convention* – the concept remains undefined. Article II(1) of the *New York Convention* states as follows:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them.\(^{19}\)

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\(^{15}\) Delvolvé, Pointon and Rouche, above n 13, 9.

\(^{16}\) Kovacs, above n 14, 421.


\(^{18}\) *New York Convention*.

\(^{19}\) *New York Convention*, art II.1
The *Model Law* provides a broad definition by stating that arbitration means ‘any arbitration whether or not administered by a permanent arbitral institution.’\(^{20}\) Similar to the *New York Convention*, the International Court of Arbitration does not provide any guidance on this issue either.

### 4.4 The Right of Arbitration

A fundamental precept of French law is that parties may have disputes resolved either through the national courts or alternative dispute resolution mechanisms. Thus, the parties are entitled to refer their disputes for resolution by an arbitrator for the purpose of receiving a final determination that will bind the parties.

For parties to arbitrate there must be a freely concluded arbitration agreement and an arbitrator must be appointed to resolve a dispute by an award.\(^{21}\) The arbitrator must be appointed in accordance with the arbitration agreement. Further, the arbitrator must possess legal capacity and the necessary qualifications to fulfill his or her functions. Arbitrators are not judges of national courts and do not render judicial decisions. However, arbitral decisions have the same binding power as judicial determinations. An award is binding on the parties as soon as it is issued.\(^{22}\) In order to enforce an award, a party must obtain an enforcement order from the *Tribunal de Grand Instance* – the Court of First Instance at the seat.\(^{23}\)

### 4.5 Right of Appeal to Courts

One of the most significant changes in the *New Decree* is Article 1506, which states that unless the parties agree otherwise, certain provisions applicable to domestic arbitrations are equally applicable to international ones.\(^{24}\) Appeals against awards are heard before the Court of Appeal, pursuant to Article 1525. Unless the parties have waived the right to appeal, the Court of Appeal may also set aside the award if the **seat** of the arbitration is France.\(^{25}\)

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\(^{20}\) *Model Law*, art 2a.

\(^{21}\) In some circumstances, arbitration may be mandatory, and a specific arbitration agreement is not required. However, the circumstances in which mandatory arbitration applies, is not within the scope of this thesis.

\(^{22}\) *New Decree*, art 1484.

\(^{23}\) This is in accordance with *New Decree*, art 1487. An enforcement order will not be granted if it is contrary to public policy as per art 1488.

\(^{24}\) Article 1506 covers many provisions including but not limited to: 1446, 1447, 1448(1) and (2), 1449, 1452-1458, 1460, 1481 and 1482.

\(^{25}\) *New Decree*, art 1523. Under this provision, there is also a one month time limit from the date of service of the enforcement order in which a party must apply to court to seek to have the enforcement order set aside.
If the validity of an arbitration agreement has not been questioned, the issue of whether it applies to a dispute or solely to specific parts is not for the courts to determine. Equally, a French court would not refuse jurisdiction on its own volition; it would do so only if a party challenges the existence of the arbitration agreement. French arbitration law recognizes that parties must have a safety net in case there is an unfair arbitral hearing or a miscarriage of justice. A losing party may make an application to the Court of Appeal in a narrow set of circumstances. The purpose of such an appeal could only be to either have an award set aside or appeal an enforcement order. The grounds for appeal are found under Article 1520 of the New Decree. Pursuant to this provision, an award may be set aside only if:

(a) The arbitral tribunal wrongly upheld or declined jurisdiction; or

(b) The arbitral tribunal was not properly constituted; or

(c) The arbitral tribunal ruled without complying with the mandate conferred on it; or

(d) Due process was violated; or

(e) Recognition or enforcement of the award is in violation of international public policy.

Article V(1)(e) of the New York Convention stipulates that an award may be refused recognition and enforcement if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. French courts have held that since Article V(1)(e) does not fall under any of the grounds within Article 1520 of the New Decree, French law prevails over the New York Convention owing to Article VII. Therefore, Article VII confers a right on the parties which is clearly subject to the laws of the country where the award is appealed.

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27 New Decree, art 1520.
28 New Decree, art 1520.
29 New York Convention, art V(1)(e).
30 New York Convention, art VII.
This means that an award which has been set aside in the jurisdiction where it was made can still be enforced in France. In international commercial arbitrations, French courts are not obliged to take into consideration proceedings that have been commenced to challenge an award in the courts of the country where it was made or where the award has been suspended or annulled by another foreign court. Courts in France are not bound by the judicial opinions which are deemed to be the concern of the foreign court. There is no judicial comity applicable to this aspect of French law. This position is now codified in the \textit{New Decree} under Article 1526.\textsuperscript{32}

The \textit{Cour de Cassation} has qualified the French position by stating that the arbitral tribunal is international. Therefore, its rulings cannot be considered attached to the national legal order of the country where it was made.\textsuperscript{33} The position of the French judiciary is also evidenced in the courts’ refusal to examine the annulment of awards in the country where they were rendered. This was clearly enunciated in the \textit{Hilmarton v Omnium de Traitement et de Valorisation} case which concerned \textit{res judicata} of a previous enforcement of an award.\textsuperscript{34}

The case of \textit{Société PT Putrabali Adyamulia v Société Rena Holding} further reinforced the court’s position.\textsuperscript{35} Here, the court made it clear that the annulment of an award by the courts of the country where it is rendered does not prevent the award from being recognised and enforced by the courts in France. The \textit{Cour de Cassation} held that:

\begin{quote}
An international arbitral award which is not anchored in any national legal order is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought. Under Article VII of the [1958 \textit{New York Convention}], Rena Holding was allowed to seek
\end{quote}


\textsuperscript{32} \textit{New Decree}, art 1526 applies to awards made in France and elsewhere. It provides that: ‘Neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award. However the first president ruling in expedited proceedings or, once the matter is referred to him or her, the judge assigned to the matter, may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties.’


\textsuperscript{34} \textit{Hilmarton v Omnium de Traitement et de Valorisation} Cour de Cassation [French Court of Cassation], 23 March 1994 in Albert Jan van den Berg, \textit{Yearbook Commercial Arbitration, Vol XX}, (1995), (Kluwer, 1995), 663-665. (‘\textit{Hilmarton}\textsuperscript{\textregistered}’). The term ‘\textit{Res judicata}’ means the rule that if a dispute is judged by a court of competent jurisdiction, the judgment of the court is final and conclusive as to the rights and duties of the parties involved. \textit{Res judicata} constitutes an absolute bar to a subsequent suit for the same cause of action.

enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules. It could also base its request on the French rules on international arbitration, which do not provide that the annulment of an arbitral award by the courts of the country where it was rendered is a ground for refusing its recognition and enforcement.\textsuperscript{36}

The significance of the judgment in \textit{Putrabali} is two-fold. Firstly, the \textit{Cour de Cassation} verified that an international arbitral award is not indexed to any national system of law. Secondly, the court deemed the award to be an international judicial decision. The court reasoned that the award is independent from the laws of the place of arbitration, but also independent of all national legal systems. Accordingly, there is an arbitral legal order which operates autonomously from national legal systems. Acceptance of the award as a judicial decision brings with it the recognition of an international arbitral order.\textsuperscript{37}

The lack of significance attributed to judgments of the courts at the seat concerning the validity of a foreign award is not shared by the laws of many other countries, especially those from a common law tradition.\textsuperscript{38} A recent decision which is relevant on this point is \textit{Dallah Real Estate and Tourism Holding Company v Pakistan}.\textsuperscript{39} The English and French courts issued contradictory judgments pertaining to the enforceability of an international Chamber of Commerce award made against the Government of Pakistan (Government). Essentially the English court held that the ICC tribunal had erred in declaring jurisdiction over the Government because the Government was not a signatory to the arbitration agreement. The \textit{Cour d’Appel de Paris} – Court of Appeal of Paris – upheld the ruling by the tribunal that it had jurisdiction.

The facts of the case were as follows: The Government of Pakistan had established a pilgrimage trust (Trust) for the purpose of serving its citizens who performed pilgrimage in Mecca. Dallah executed a contract (Contract) in July 1996 with the Government for the construction of accommodation for Pakistani pilgrims who travelled to Mecca. The Contract was executed by the Trust. It provided for arbitration


\textsuperscript{37} Ibid 117-118.

\textsuperscript{38} Delvolvé, Pointon and Rouche, above n 13, 217, 220.

\textsuperscript{39} \textit{Dallah Real Estate and Tourism Holding Co v Pakistan} [2010] UKSC 46. (‘Dallah’).
by the ICC in Paris. However, the seat of the arbitration was unspecified. Subsequent to the dissolution of the Pakistani Government in 1996, the Trust also was dissolved.

In early 1997, the Secretary of the Ministry of Religious Affairs of the Government wrote to Dallah and alleged that it had failed to submit specifications for review and approval by the Trust. Curial proceedings were therefore brought against Dallah in the national court in Pakistan in the name of the Government.\(^{40}\) Dallah consequently sought arbitration by the ICC against the Government. Although the Government did not submit itself to the jurisdiction of the tribunal, the tribunal relying on competence-compétence, ruled that the Government was a party to the arbitration agreement. Accordingly, the tribunal ruled that it had jurisdiction to determine the claim made by Dallah.\(^{41}\)

The arbitral tribunal determined the dispute in favour of Dallah finding that the Government was a party to the agreement. The Government resisted enforcement in the courts of the United Kingdom on the grounds that the arbitration agreement was invalid under the laws of France. The Government argued that it was not a party to the arbitration agreement and therefore not bound by it.\(^{42}\) Given that there was no seat provided for by the parties, the laws of France were applied to the agreement since the award was made in France. In particular, the question of whether the Government was a party to the arbitration agreement had to be determined in accordance with French law.

Dallah sought to enforce the award issued by the ICC. On appeal from the Court of Appeal, the Supreme Court of the United Kingdom refused to enforce the award on the basis that the arbitral tribunal had erred in finding that the Government of Pakistan was bound by the agreement to arbitrate. The Government had successfully resisted enforcement in the United Kingdom on the basis that the arbitration agreement was invalid pursuant to the laws of the France.\(^{43}\) Article V(1) of the New York Convention states that recognition may be refused, at the request of the party against whom it is

\(^{40}\) Ibid [9] (Lord Mance).
\(^{43}\) Ibid [1] (Lord Mance).
invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought proof that:

the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Although both the United Kingdom and the French courts had to apply the same French test of ‘common intention of the parties’ to determine if the Government was a party to the arbitration agreement, the different legal approaches produced divergent results. The French expert for Dallah stated in his report that the ‘arbitrators must look for the common will of the parties, express or implied, since it is a substantive rule of French law that the courts will apply when controlling the jurisdiction of the arbitrators.’

Dallah sought to have the award enforced by the Tribunal de Grande Instance de Paris – the Court of First Instance of Paris which granted it the enforcement order. In response, the Government appealed to the Paris Court of Appeal seeking an annulment of the award on the basis that the tribunal had incorrectly ruled that it had jurisdiction over the Government. On 25 January 2009, the Supreme Court of the United Kingdom refused Dallah’s application to stay the proceedings pending a decision by the Paris Court of Appeal. Shortly following the judgment of the United Kingdom Supreme Court, the Paris Court of Appeal ruled that the establishment of the Trust was simply a formality and the Government was a party to the Contract. Accordingly, the Court of Appeal rejected the application by the Government for the annulment of the award.

The Paris Court of Appeal applied the Dalico doctrine whereby:

(1) An international arbitration is not governed by any national law but by French material rules of international arbitration and;

(2) The question of whether a party is bound by an arbitration agreement must be resolved by a factual inquiry, that is, the court must determine if the parties intended to go to arbitration.

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44 Ibid [17] (Lord Mance). The French expert was Yves Derains who provided an expert report to the Supreme Court of the United Kingdom.
46 Municipalite de Khoms El Mergeb v Societe Dalico, Cour de Cassation [French Court of Cassation], 20 December 1993 reported in (1994) Rev Arb, 116, 117. (‘Dalico’).
47 These ‘material rules’ are applied by French courts without a conflict of laws analysis.
The court then proceeded to closely review the successive stages of the project including the negotiations between the parties. It concluded that the Government was the sole negotiating counterpart to the Contract.49

4.6 Procedural Flexibility
There is a degree of flexibility in the application of procedural principles in arbitration. Arbitrators are not obliged to rigidly follow the procedural rules of litigation that national courts must apply. French law provides substantial freedom of choice to parties. Article 1464 of the New Decree states that unless otherwise agreed by the parties, arbitrators can define the procedure to be followed in the arbitration and it is not obliged to abide by the rules governing court proceedings.50 Thus, the New Decree lays down a rule of French substantive law, that in international arbitration the will of the parties is paramount in settling procedural rules.51 Where the parties have fixed the seat of arbitration in a specific country, there is a presumption that the procedural rules of that country would apply. Any presumption would normally yield to the intention of the parties, or where the parties have not made an express choice, the choice of the arbitrators.52 Fundamental principles such as parties and arbitrators acting in good faith are still applicable to all arbitrations made in France or where it is the seat.53

4.7 Manifestly Null or Manifestly Inapplicable Arbitration Agreements
According to the French notion of arbitration, there are two prongs to the principle of compétence-compétence. The first one is typically called the effet positif. This is referred to as the ‘positive effect’ in English. This enables arbitrators to determine their own jurisdiction if it is challenged, usually on the grounds of a void arbitration agreement or the issues being beyond the scope of the arbitration agreement. The second prong is the effet négatif, the ‘negative effect’ which bars French courts from examination of the validity or applicability of the arbitration agreement once the

49 Ibid.
50 New Decree, art 1464.
51 Delvolvé, Pointon and Rouche, above n 13, 105.
52 Ibid.
53 New Decree, art 1464 refers to other articles which set out specific principles applicable to arbitrations.
arbitrators’ have accepted their mandate.\textsuperscript{54} The \textit{negative effect} is applicable, on the proviso that the agreement to arbitrate is not manifestly null or manifestly void.\textsuperscript{55}

French courts have given a narrow interpretation to the manifest nullity and inapplicability of arbitration agreements in such cases.\textsuperscript{56} In \textit{Distribution Chardonnet v Fiat Auto France}, the Paris Court of Appeal found that the ‘manifestly null’ exception would be inapplicable even though both a choice of court and an arbitration clause had been incorporated into the one contract.\textsuperscript{57} Subsequently, in the \textit{La Chartreuse v Cavagna} decision, where a real estate lease contract included a choice of court and an arbitration clause, it was held that it was for a tribunal to decide which clause would prevail.\textsuperscript{58}

In a more recent Cour de Cassation judgment, a party contested the validity of an arbitration agreement on the grounds that the dispute was not capable of being resolved by arbitration - inarbitrable.\textsuperscript{59} The Court found that this did not amount to a ‘manifestly null’ arbitration agreement, therefore the ruling pertaining to validity would be exclusively for an arbitral tribunal to determine. This was held irrespective of the narrow wording of the arbitration agreement which left the question of validity beyond the scope of the arbitration agreement.\textsuperscript{60}

The cases which came before French courts where manifest inapplicability of the arbitration agreement was found, primarily concerned the scope of the arbitration clauses. In \textit{SA PT Andhika Lines v Axa Corporate Solutions Assurances}, the Cour de Cassation held that there was manifest inapplicability of an arbitration clause

\begin{itemize}
\item \textsuperscript{54} \textit{New Decree}, art 1456 defines the meaning of the tribunal being seized of the dispute as being when the arbitrators’ accept their mandate to act. As of that date, the tribunal is said to be seized of the dispute. After this point, the parties cannot bring the dispute to court until an award is issued.
\item \textsuperscript{55} \textit{New Decree}, art 1448 provides that: ‘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.’ This is a clear restriction for the court which is an application of the \textit{negative effect}. See Bertrand Derains, \textit{Recent Developments in French Arbitration Case Law} (2010) Executive View <http://www.executiveview.com/digital_guides.php?id=52>. See CPC (France) art 1458(2).
\item \textsuperscript{57} \textit{Distribution Chardonnet v Fiat Auto France}, Cour de Appel Paris [Court of Appeal] 29 November 1991 reported in (1993) Rev Arb 617. (‘\textit{Distribution Chardonnet}’).
\item \textsuperscript{58} \textit{La Chartreuse v Cavagna}, Cour de Cassation [Court of Cassation] 18 December 2003 reported in (2004) ASA Bull 796. (‘\textit{La Chartreuse}’).
\item \textsuperscript{59} Cour de Cassation [French Court of Cassation], 12 December 2007. (unpublished).
\item \textsuperscript{60} Ibid.
\end{itemize}
concerning a maritime freight shipment case. The facts related to booking notes which incorporated an arbitration clause and stated that the clauses would be annulled and replaced by the terms of bills of lading to be subsequently executed by the parties. The bills of lading included a clause which conferred exclusive jurisdiction on the national courts of the country in which the freight forward was located. The Court found that:

the arbitration clause, contained in the preliminary contracts which were the booking notes, had been replaced, through a new expression of the intent of the parties, by the terms of the bills of lading, in a way which meant that it had become manifestly inapplicable.

These cases suggest that only in a few narrow circumstances will an arbitration agreement be considered as manifestly, that is prima facie, null. What qualifies as ‘manifestly null or void’ has been qualified by the Court de Cassation through these decisions. Article 1448 of the New Decree has enabled French courts to continue to apply a radical approach of the negative effect, as it provides virtually unqualified priority to tribunals over courts in relation to the review of the validity of arbitration clauses. In contemplating the possibility for national courts in France to determine the arbitrators’ jurisdiction, it appears that Article 1448 and the case law of the French Cour de Cassation delineates between:

1. Whether the parties agreed to arbitrate at all; and,
2. The determination of the scope of the arbitration clause agreed to between the parties.

Even if the dispute relates to non-contractual claims relating to a contract incorporating an arbitration agreement, this is insufficient for a French court to deny the tribunal the power to initially rule on its jurisdiction pursuant to Article 1448. In the absence of a ruling that the arbitration agreement is manifestly null or manifestly inapplicable, the court is obliged to decline jurisdiction and refer the parties to arbitration. It is then for

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62 Ibid.
63 Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’ Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.
64 As did the CPC, art 1458 which similarly gave priority to tribunals to rule on jurisdiction.
66 *New Decree*, art 1448.
the tribunal to determine as an initial matter whether the scope of the arbitration agreement is sufficiently broad to encompass arbitration agreements.67

4.8 Judicial Assistance for Compétence-Compétence
An abundance of case law exists on arbitration issues from the specialised chamber of the Paris Court of Appeal and the Cour de Cassation. There has been a steady development of French case law which has provided unequivocal support for compétence-compétence. In a 2007 case, the Cour de Cassation held that the existence of two arbitration agreements referring to two separate arbitral institutions found within one agreement, was insufficient to prove the inapplicability of the parties’ agreement to arbitrate. The reasoning of the Cour de Cassation stated that the lack of intention to arbitrate was not found and the parties had not applied to the juge d’appui - the judge acting in support of the arbitration, who has the exclusive jurisdiction for resolving problems in the formation of the arbitral tribunal.68

The juge d’appui is a support judge, who works in conjunction with the arbitration procedure, providing assistance where required by issuing such court orders as may be needed to assist the arbitration or to enforce specific measures when other enforcement mechanisms are unavailable.69 Primarily, the authority of the arbitrators to decide compétence-compétence is expressly acknowledged for in both domestic and international arbitration agreements pursuant to Article 1448 of the New Decree.70 More importantly, compétence-compétence is strongly supported by the courts as an essential requirement of the practical norms of international arbitration.71

The intervention of a court in the jurisdiction of an arbitral tribunal introduces the issue of jurisdiction of the court at the seat of arbitration. The seat of arbitration influences the speed and efficiency of arbitration. The common practice is that jurisdiction lies with the courts at the seat to review the arbitration agreement. If there is no evidence as

67 Colaiuta, above n 65, 155.
69 New Decree, art 1460.
70 CPC art 1466 states: ‘if one of the parties challenges before the arbitral tribunal either its’ jurisdiction or the scope thereof, the arbitrators shall rule on the validity or limits of their powers’. Jean François Poudret and Sébastien Besson, Comparative Law of International Arbitration (Sweet and Maxwell, 2nd ed, 2007) [465]. The applicability of art 1466 is due to art 1495 of the New Decree.
to the *seat* of the arbitration, French laws stipulate for one or more secondary measures to determine jurisdiction of the courts. Pursuant to Article 1505, the courts of France have jurisdiction over an arbitration when it is conducted in France as well as when the arbitration has been submitted to French procedural law.\(^{72}\) The law of the *seat* and national courts in France are reluctant to interfere with the arbitral process unless there is an exception as per Article 1448.\(^{73}\)

### 4.9 Development of the Principle of Compétence-Compétence

From an international comparative perspective, the French legal position clearly takes a non-interventionist approach to the jurisdiction of the tribunal. Article 1448 of the *New Decree* enshrines the negative effect by providing inter alia that courts must delay any action if the arbitrators have accepted their mandate. Article 1448 extends this further by stipulating that not only must the arbitrators have not yet accepted their mandate but, also the arbitration agreement must be manifestly void or manifestly inapplicable.\(^{74}\) In fact, in *Impex v Malteria Adriatica* it was held that in the same way that the judge has the authority to determine his own jurisdiction, where the judge is an arbitrator whose authority is conferred by the parties’ agreement, the same power exists.\(^{75}\) Following the decision in *Impex*, it has become the norm to recognise that the arbitral tribunal for an international arbitration has the authority to determine its own jurisdiction.

Although the French *Cour de Cassation* is willing to acknowledge the potential inapplicability of an arbitration agreement, there are few cases where this has actually occurred. One such case is *DMN Machinefabriek BV v Tripette and Renaud*, where the *Cour de Cassation* annulled a ruling whereby, prior to the commencement of an arbitration procedure, a lower court had refused the arbitrators jurisdiction concerning a tort claim on the premise that such a claim was beyond the scope of the arbitration agreement.\(^{76}\)

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\(^{72}\) *New Decree*, art 1505. The other two situations where French courts may review the arbitration agreement are where the parties have expressly granted jurisdiction to French courts or one of the parties is exposed to a risk of denial of justice.

\(^{73}\) *New Decree*, art 1448.

\(^{74}\) *New Decree*, art 1448.

\(^{75}\) *Impex v Malteria Adriatica*, Cour de Cassation [French Court of Cassation], (1969) reported in (1969) Rev Arb 95. (‘*Impex*’).

In *Machinefabriek*, the Cour de Cassation annulled the determination of the lower court. The primary reason was that the only grounds which permit French courts to determine arbitrators’ jurisdiction prior to the constitution of the tribunal are manifest nullity or inapplicability of the arbitration clause. The interpretation provided by the lower court failed to demonstrate that the alleged nullity or inapplicability was manifest. In fact, the requirement to interpret the arbitration clause in itself, suggests that the nullity or inapplicability was not manifest. If a prima facie inspection of the arbitration agreement by the court does not indicate any nullity or inapplicability, by default it should be referred to the tribunal to determine. The *Cour de Cassation* accordingly upheld the arbitrator’s jurisdiction over the tortious claim.

This approach received further reinforcement in the *M Zanzi v M de Coninck* decision where the Court upheld the power of the arbitral tribunal to determine its own jurisdiction, defining *competence-compétence* as one of the guiding principles of French international arbitration law. The granting of chronological priority does not undermine the rights of parties as the tribunal may find it lacks jurisdiction. Alternatively, during the enforcement or annulment stage, the court will conduct a full review of jurisdictional issues. This non-interventionist approach to *competence-compétence* was reaffirmed in the judgment of *American Bureau of Shipping v Copropriété Maritime Jules Verne* where the Cour de Cassation enunciated how the ‘manifest’ aspect of the nullity or inapplicability of the arbitration agreement is to be perceived by opining that:

> Whereas the combination of the principles of validity and compétence-compétence prevents, as a result of their rationale, the French national judge from making a substantive and thorough analysis of the arbitration agreement regardless of where the arbitral tribunal is located or has its seat, the only grounds in view of which the judge may analyse the arbitration clause before he is asked to verify the existence or the

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77 Colaiuta, above n 65, 157.
78 CPC (France) art 1466 provides that if one of the parties challenges the principle or scope of the arbitrator’s jurisdiction, the arbitrator shall rule on the validity or scope of his or her jurisdiction. In the *New Decree*, art 1465 provides for a similar provision and applies to both domestic and international arbitrations.
validity of the clause in connection with a challenge of the arbitral award, are those of
the manifest nullity or inapplicability of the clause.\textsuperscript{81}

In reviewing the arbitration agreements in the above-mentioned cases, French national
courts indicate preference for a deferential approach to \textit{competence-compétence}. Moreover, when the courts review the tribunal’s jurisdiction it is typically a \textit{prima facie} method of review. This is addressed in the next section.

\textbf{4.10 The Prima Facie Approach}

The arbitrators’ jurisdiction is subject to their respective appointment predicated on the
agreement of the parties. Given that the majority of laws on arbitration recognise such
independence, this denotes that the jurisdiction of the court at the \textit{seat} of the arbitration
is secondary. This secondary characteristic in France means that when the parties have
assented to arbitration, the jurisdiction of the court at the \textit{seat} of the arbitration is
precluded until an application is made to court to set aside the award or seek recognition
and enforcement of it.\textsuperscript{82} This is what renders the French approach as non-
interventionist.

A court which is requested to appoint an arbitrator where there is a contest of the
arbitrator's jurisdiction, must at a minimum review the arbitration agreement to
ascertain its validity.\textsuperscript{83} If such review is conducted as \textit{prima facie} and without
prejudgment as to the ruling of the arbitral tribunal once formed, it should not
undermine the power of the arbitral tribunal to determine its own jurisdiction.
Moreover, the ruling by the court cannot have a \textit{res judicata} impact in these
circumstances.\textsuperscript{84} It may be subject to further review if necessary once the award is
issued.

There is no requirement in French law that the question of jurisdiction be determined by
a preliminary decision. There is however, a time limit in which a party may apply to
have the award set aside if the award has its \textit{seat} in France. Pursuant to Article 1519 of
the \textit{New Decree}, the parties have one month following the notification of the award to
make an application to the Court of Appeal. From an international comparative

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} \textit{Jules Verne}, Court de Cassation [French Court of Cassation], 03-12.034, 7 June 2006 reported in
\item \textsuperscript{82} Poudret and Besson, above n 71, [424].
\item \textsuperscript{83} \textit{New Decree}, arts 1452, 1453, 1454.
\item \textsuperscript{84} Poudret and Besson, above n 71, [469].
\end{itemize}
\end{footnotesize}
perspective, the French legal position clearly takes a non-interventionist, *prima facie* review approach to the jurisdiction of the tribunal. Article 1448 of the *New Decree* enshrines both the *positive* and *negative effect* by providing inter alia that courts must delay any action if the arbitrators have already accepted their mandate.\(^85\) The priority conferred by this provision on the tribunal is unequivocal. Article 1448 unambiguously asserts that the arbitrators must be the first judges of their own jurisdiction, thereby enforcing the priority of the tribunal.\(^86\)

Uniform application of the *prima facie* approach, however, may present a potential risk. If there is no valid arbitration agreement and the tribunal is granted exclusive jurisdiction to rule on the question of existence or validity of the arbitration agreement, this could result in parties being denied their legitimate right to timely judicial review. Consequently this will mean increased costs and delay for the parties in dispute. In particular disputes, such as where there has been an assignment of an arbitration agreement, it is not always clear who the parties to the arbitration agreement are. In such circumstances, the *prima facie* approach to examination of the arbitration agreement would be inadequate to determine the question. Rather a complete review may be necessary to ascertain the identity of the parties to the arbitration agreement.\(^87\)

### 4.11 The Negative Effect

The *negative effect* encapsulated in Article 1448 provides that French courts only possess the power to review jurisdictional issues after the issue of the award, which may then be set aside or enforced by the court.\(^88\) Therefore once a tribunal has been appointed, jurisdictional interference is limited to cases where a *prima facie* review verifies that the arbitration agreement is clearly unenforceable. This does not bar the parties from challenging the award of the tribunal, on the grounds of jurisdictional matters once the award has been issued.\(^89\) The language of Article 1448 effectively provides a chronological priority to tribunals on the issue of jurisdiction, unless the exception of being ‘manifestly null and void’ applies to the arbitration agreement. The

\(^{85}\) *New Decree*, art 1448.

\(^{86}\) Although Article 1458 (which is the predecessor of the *New Decree*, art 1448) was part of the section governing domestic arbitration in the *CPC*, the court tacitly applied it to international arbitrations. Following the decision in *Eurodif Corporation v Islamic Republic of Iran Cour de Cassation*, [French Court of Cassation] 14 March 1984 reported in (1989) Rev Arb 653, the court expressly recognised that Article 1458 of the *CPC* is applicable to international arbitrations.

\(^{87}\) *Brekoulakis*, above n 63.

\(^{88}\) *New Decree*, arts 1419, 1514 for setting aside and enforcement respectively.

\(^{89}\) *CPC*, art 1444(3) also provides that the judge called on to appoint the arbitrator(s) may determine that the arbitration clause is manifestly void and may declare that no appointment should be made.
underlying policy reason for such a provision may be that once a tribunal delivers its award, the parties are less inclined to challenge the jurisdiction of a tribunal in bad faith.90

In *Copradag v Dame Bohin*, the *Cour de Cassation* applied a rigorous interpretation of the *negative effect*, granting the tribunal full confidence to determine the issue of validity of the arbitration agreement.91 The court of first instance in *Copradag* ruled that an arbitration agreement was void and the arbitral tribunal should not be constituted, notwithstanding that one party had filed arbitral proceedings. The Court of Appeals upheld this decision however the *Cour de Cassation* reversed it holding that:

The President of the Tribunal of First Instance cannot declare that the arbitrators should not be appointed on the basis that the arbitration agreement is clearly void unless there is a problem involving the constitution of the arbitral tribunal; the arbitral tribunal alone has jurisdiction to rule on the validity or limits of its appointment, on the proviso that the issue has been brought before it. 92

This was an unambiguous victory for the *negative effect*, which has been consistently upheld in the French jurisdiction. Article 1448 provides credence to the priority of the tribunal which does not negate the right of review the court reserves, if the arbitration award is appealed on valid grounds. Subsequently, in the case of *Renault v. V2000* this approach was supported by the *Cour de Cassation* which held that the arbitrators must implement the arbitration clause subject to future judicial review.93

### 4.12 Construction of Arbitral Jurisdiction by the Courts

Court interference in the arbitral process is limited through the consistent application of the principle of *compétence-compétence*. Deference to the principle has meant that there is a significant degree of predictability and certitude with respect to the enforceability of arbitral awards. Recent case law illustrates that courts are aware of the need to construe exceptions to *compétence-compétence* narrowly.

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92 Ibid.
For example, in *Prodim v Lafarge*, the French Cour de Cassation took a stringent approach to finding exceptions.\(^{94}\) In this case, Mr and Mrs De Abreu executed a franchise agreement with Prodim. The contract included an arbitration clause that provided for any dispute resulting from the interpretation and the performance of the agreement to be submitted to arbitration. Subsequently, the business of De Abreu went into liquidation and the liquidator took steps to have the agreement declared null and void.\(^{95}\)

The liquidator brought its claim against Prodim before the Commercial Court. Prodim challenged the court’s jurisdiction by relying on the arbitration clause in the contract and asked the court to enforce it by referring the parties to arbitration. Both the Commercial Court and the Court of Appeal, found that it had jurisdiction to rule on the dispute. The Court of Appeal reasoned that the scope of the arbitration clause was confined to disputes concerning the interpretation and performance of the contract and therefore was not applicable to the liquidator’s claim pertaining to validity of the contract.\(^{96}\)

The *Cour de Cassation* effectively overturned the decision of the Court of Appeal. The *Cour de Cassation* ruled that an arbitration agreement stipulating for disputes arising as to the interpretation or enforcement of the contract also extended to disputes concerning the validity of the contract.\(^{97}\) The Court also opined that the basis upon which the Court of Appeal decision was made failed to adequately show that the arbitration clause was either manifestly null and void or manifestly inapplicable.

What *Prodim* indicates for the French approach to *compétence-compétence* is that where an arbitration clause refers solely to disputes emanating from the interpretation and performance of the contract, a challenge to the validity of the contract is not deemed to be prima facie beyond the scope of arbitral jurisdiction. Given that nullity and performance claims are contractual issues which are closely interlinked, when a party challenges the contract for being null and void, it will often result in preventing


\(^{96}\) Ibid.

the performance of the contract. The benefit of this narrow construction is that it permits the court to defer priority to the arbitral tribunal to decide its own jurisdiction.\(^{98}\) The narrow construction to the exceptions found in articles 1458 and 1460 of the \textit{CPC} circumvent any dilatory tactics the parties may resort to in order to stall or prevent arbitration.

An express reference to \textit{compétence-compétence} was also made recently by the \textit{Cour de Cassation} in the case of \textit{Jules Verne}, where an appeal against a judgment by the Paris Court of Appeal was permitted on the grounds that it had failed to consider the negative effect of \textit{compétence-compétence}.\(^{99}\) In \textit{Jules Verne}, a syndicate of French investors entered into a contract with Tencara – an Italian shipyard – for the construction of a boat. The contract stipulated for the vessel to be constructed according to the standards of the American Bureau of Shipping (‘ABS’).\(^{100}\) Subsequently, Tencara submitted a Request for a Classification Survey and Agreement with ABS. Part of ABS’ general conditions incorporated an arbitration agreement stipulating that disputes must be heard in New York. ABS issued a Final Certificate of Classification for Hull on 29 April 1993. On 27 March 1993, the vessel suffered damage to the hull whilst sailing in international waters off the Italian coast.\(^{101}\)

Legal action was instigated in France, Italy and the United States. In 1999, the United States Court of Appeals for the Second Circuit affirmed a decision of the U.S. District Court in favour of ABS. This decision compelled the owners, their insurers and Tencara to arbitrate in New York. The matter proceeded through a number of courts in France. The Paris Commercial Court held that it had jurisdiction to hear the matter which was affirmed by the Paris Court of Appeal. The \textit{Cour de Cassation}, however, reversed the decision, holding that it was necessary to consider the validity of the arbitration clause. The \textit{Cour de Cassation} found the manifest nullity of the arbitration agreement to be:

\(^{98}\) Kleiman, above n 95.
\(^{100}\) ABS is a private organisation responsible for the inspection of vessels and compliance with safety standards.
the only barrier to the \textit{compétence-compétence} principle that establishes priority of arbitral competence to rule on the existence, the validity and the scope of the arbitration agreement.\footnote{Ibid. See also Emmanuel Gaillard and Yas Banifatemi, \textquote{Negative Effect of Kompetenz-Kompetenz: The Rule of Priority in Favour of the Arbitrators} in Emmanuel Gaillard and Domenico di Pietro (eds), \textit{Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice} (Cameron May, 2008) 260.}

The \textit{Cour de Cassation} emphasised that the tribunal should decide the issue of jurisdiction, unless the court finds a manifest nullity in the arbitration agreement. Accordingly, the \textit{Cour de Cassation} referred the matter back to the Court of Appeal which ultimately reversed the decision of the Commercial Court.\footnote{Jules Verne, \textit{Cour de Cassation} [French Court of Cassation], T03 – 12.034, 7 June 2006 reported in (2007) Yearbook of Commercial Arbitration XXXII, (Kluwer, 2007) 290.} The Court of Appeal found that it had no jurisdiction over the matter and referred the parties to arbitration in New York. In doing so, the Court highlighted that according to substantive rules of French international arbitration laws, it is for the arbitrator to rule on his/her jurisdiction. The Court concluded:

\begin{quote}
French state courts \textit{[are prohibited] from conducting a substantive and in-depth analysis of the arbitration agreement, regardless of the arbitral tribunal’s seat; the only case in which the judge can examine the arbitration clause, before it is requested to review its existence or validity in the context of an action to set aside or refuse enforcement of an award, is where the arbitration clause is manifestly null or inapplicable, so as to avoid, in order to save time and costs, conducting a procedure doomed to failure.}\footnote{White & Case LLP, \textit{International Dispute Resolution; Recent Developments in International Dispute Resolution Around the World} (March 2004), \url{http://www.ogel.org/article.asp?key=1193}.}
\end{quote}

In \textit{Groupama Transport v MS Regine Hans und Klaus Heinrich KG}, Deher Freres entered into a contract with MS Regine Hans and Klaus Heinrich KG for the carriage of a yacht to the Antilles.\footnote{Groupama Transport v. MS Regine Hans und Klaus Heinrich KG, Cour de Cassation [French Court of Cassation], 21 November 2006 reported in (2007) Yearbook of Commercial Arbitration XXXII (Kluwer, 2007) 294.} The booking note used for the transport of the yacht incorporated special conditions providing for arbitration of any disputes in Hamburg, Germany. The yacht was damaged whilst being loaded onto the transport vessel, leading to a dispute between Freres and Heinrich. Groupama Transport took legal action on behalf of Freres against Heinrich in a French court. The court held that it lacked jurisdiction owing to the arbitration clause provided for in the booking note. This decision was affirmed by the Court of Appeal and reaffirmed by the \textit{Cour de Cassation}. The \textit{Cour de Cassation} followed the \textit{New York Convention} which provides for the application of a national law that is more favourable to the recognition of the validity of arbitration agreements. Accordingly, the court applied national law. French law
prevents state courts from determining the existence, validity and scope of an arbitration clause before an arbitral tribunal has decided on the issue. The court is only authorised to verify that the agreement to arbitrate is not null and void or manifestly inapplicable. In its holding the court found that Freres was cognizant of the contents of the booking note which incorporated the arbitration clause and hence was bound by it. 106

A similar recognition of the general principle of *compétence-compétence* was enunciated in the case of *Gefu Kuchenboss Gmbh und Co. Kg v Corema*. 107 The *Cour de Cassation* established that the voidness or manifest inapplicability of the arbitration clause are the only bases upon which courts may interfere with the arbitral tribunal’s power to rule on its jurisdiction. In this case, the agency agreement between the German company, Gedunker Funke (Gefu Kuchenboss) and the French company, Corema, incorporated an arbitration clause. This clause stipulated that the parties must jointly appoint an arbitrator within twelve weeks following the notification of a dispute, otherwise, jurisdiction would be granted to the Commercial Court of Toulouse. On 24 May 2005, Corema notified Gefu that it had appointed an arbitrator and asked Gefu to make its own appointment. Following Gefu’s non-compliance with this request, Corema applied to the *Tribunal de Commerce de Toulouse* – Commercial Court of Toulouse. Gefu unsuccessfully objected to the court’s jurisdiction on the basis that Corema had failed to adhere to the procedure stipulated in the arbitration clause. Corema had in fact properly notified Gefu.

The approach adopted by the French courts and arbitrators to *competence-competence* is one of deference, coupled with a policy of avoiding strict application of national laws to international arbitrations. This is supported by the French legal expert’s report in *Dallah Real Estate & Tourism Holding Co v Pakistan* where it was submitted that ‘it is open to an arbitral tribunal [with its seat] in Paris in an international arbitration to find that the arbitration agreement is governed by transnational law.’ 108 The term transnational law incorporates *lex mercatoria*. 109 Most arbitration legislation and rules of international

106 Ibid.
108 *Dallah Real Estate & Tourism Holding Co v Pakistan* [2010] UKSC 46. The French expert was Yves Derains appearing for Dallah, who provided an expert report on French law to the Supreme Court of the United Kingdom, 14.
arbitral institutions require the arbitrators to provide a preliminary award concerning jurisdiction. In the majority of instances a preliminary award will be expeditiously issued. This permits a party to the dispute to subsequently apply for judicial review of the matter. In France, an annulment review will be conducted de novo in accordance with Article 1052 of the French Code, which provides the court with opportunity for a full verification of the award.  

Article 1448 is capable of serving as a model in other jurisdictions, where the negative effect is construed more widely. The French position provides higher priority for ensuring the arbitral process proceeds without intervention. Further, in the majority of cases, it is in the interests of efficiency for a tribunal to have a chronological priority over a court to rule on questions concerning the validity and existence of a contract. The priority of the tribunal to rule on its jurisdiction should, at a minimum, be granted until an award on jurisdiction has been issued. Cases such as Prodim and Jules Verne cement the narrow approach adopted by French courts in relation to ‘manifest nullity or inapplicability’.

4.13 Critiques of the French Approach
As stated earlier, the key features of the French approach are the tribunal possessing exclusive power, at least initially, to determine challenges to its jurisdiction, subject to minimal or no curial review. If the tribunal has not yet been seized of the dispute, then courts have limited power to review jurisdiction. If the arbitrators have accepted their mandate, courts are restricted from ruling on a challenge to an arbitration agreement, until an award is issued. When reviewing an arbitration agreement, the court generally adopts a prima facie review to ensure the autonomy of the arbitral tribunal.

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111 New Decree, art 1448.
112 Jones, above n 90, 61.
114 See Table 3.1: Variations in Application of Compétence-Compétence, Chapter 3, 87.
115 The meaning of being ‘seized of the dispute’ is defined in the New Decree, art 1456. In this provision a tribunal is considered as completely constituted when the arbitrators’ accept their mandate. ‘As of that date, the tribunal is seized of the dispute.’ Pursuant to art 1448 of the New Decree, the court may only intervene if the tribunal has not been constituted and the agreement is manifestly void or inapplicable.
This restriction is enshrined in Article 1448 of the New Decree which applies to both domestic and international arbitrations. ¹¹⁶

The first time the principle of compétence-compétence was applied by a French court was in 1949.¹¹⁷ French case law concerning international commercial arbitration is distinguished by its consistency. This is because arbitration disputes are centralised in the Paris Court of Appeal with a specialised chamber.¹¹⁸ Consequently, the court’s judgments are authoritative in France. The importance of French judgments is also attributed to the ICC, which is the most selected institution for arbitration.¹¹⁹ The cases from both the Court of Appeal and the French Supreme Court - Cour de Cassation - demonstrate the support for arbitration by the French judiciary.¹²⁰

One potential risk presented by the approach of French courts is that it may compel parties to submit to arbitration against their will. However, this must be balanced against the dilatory tactics used by parties to stall proceedings. Essentially, the French position is most likely to hold parties to their bargains and facilitate arbitration. Another criticism is that in more complex circumstances such as when there is a dispute relating to a group of companies and the name of a non-signatory party is not included in the main contract or the agreement to arbitrate, conducting a prima facie review may not be sufficient to determine the question of jurisdiction. Nor may it assist to identify the parties to the arbitration agreement.¹²¹ This is a practical limitation of the prima facie review approach. Therefore, a ‘one-size-fits-all’ approach to review may result in unfair outcomes.

Samuel argues that the French approach of prima facie review of arbitration agreements has a flaw, as it may result in three different proceedings. He contends that a prima facie review lends itself to substantial debate without necessarily resolving the matter. Deference to the arbitrator’s compétence-compétence may result in three separate proceedings: (1) the initial proceeding which could be in a court of the seat during the

¹¹⁶ New Decree, art 1448.
¹¹⁸ See New Decree, arts 1523, 1525.
¹²¹ Brekoulakis, above n 63.
stage of formation of the arbitral tribunal; (2) a proceeding before the arbitral tribunal and (3) a proceeding at the appellate court of the seat. Notwithstanding, such an outcome is usually not more time-consuming than legal proceedings in a court where an appeal is available. Both speed and costs are dependent upon the assiduousness of the arbitrators and the capacity of the courts to hear the matter promptly.122

4.14 Summary
French courts have provided parties with an assurance that the arbitral award will be enforced. The courts have supported arbitration through their judgments, and the New Decree which ensures that France remains the most progressive in its approach. Further, the establishment of a specialised chamber in the Court of Appeal leads to consistency. These factors have made France a popular seat for arbitrations. The positive effect enables arbitrators to determine their own jurisdiction, unless the agreement is manifestly void or inapplicable. The negative effect takes this one step further. It restricts the courts from determining the existence or applicability of an arbitration agreement prior to the issue of an award by the tribunal determining its jurisdiction. Both the positive effect and the negative effect provide benefits; however, there appears to be more criticism of the negative effect.

It should be noted, however, that the prima facie review approach has its limitations. For example, it is not satisfactory in complex disputes where it is not manifestly evident that the parties agreed to arbitration or who the parties are. In such cases a more comprehensive review may be warranted. Thus, the overuse of the prima facie review approach may result in subsequent proceedings, thereby escalating costs and delay.

Accordingly, the legislation should confer discretion on the courts to enable judges to decide which approach is the most suitable in the particular circumstances. A ‘one-size-fits-all’ approach may result in some parties losing their legitimate right to judicial review. Although France is considered the most progressive jurisdiction with respect to compétence-compétence, in the interests of justice, there must be some discretion given to the national courts.

122 Poudret and Besson, above n 71, [470].
Unless the arbitration agreement is manifestly void, tribunals have exclusive jurisdiction once they has been constituted. The courts are expressly forbidden from reviewing an arbitration agreement until the tribunal has ruled on the question of jurisdiction. The disadvantage of granting tribunals exclusive jurisdiction is that it may squander legal resources, since the parties may have to wait until an arbitral tribunal issues its final award. Only then may a party mount a challenge before national courts. From this perspective, the *prima facie review* provides scope for misapplication, as it allows national courts to refer the question to a tribunal following a brief inquiry into the validity of the agreement. This holds true especially in disputes concerning a complex matrix of facts, such as non-signatory parties. In spite of the shortcomings, the approach adopted by the French courts to *compétence-compétence* remains the most arbitration-friendly and conducive to holding parties to their agreements.

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123 *New Decree*, art 1465.
124 *New Decree*, art 1448. provides that: ‘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 inapplicable’.
Chapter Five

THE ENGLISH APPROACH TO COMPÉTENCE-COMPÉTENCE

5.1 Introduction
The differences between the civil and common law traditions were discussed in Chapter 1. Chapter 4 shed light on the French approach to *compétence-compétence*. Chapter 5 turns to the English approach. The objective is to provide a contrast to the French approach to *compétence-compétence*. Customarily, the English common law tradition was premised on case law and the doctrine of precedent; in recent history, however, English courts have increasingly relied on legislation when resolving arbitration disputes. As we shall see in this chapter, the *Arbitration Act 1996* (UK) is the cornerstone of the English approach.¹ The Act came into effect on 31 January 1997. One of its principal aims was to consolidate English law into one statute and create a coherent legal framework.² ‘The primary purpose of the Act, as recited in its preamble, was to restate and improve the law relating to arbitration pursuant to an arbitration agreement.’³ However, the Act did not result in the adoption of the French approach to *compétence-compétence*.

This chapter is structured as follows. It begins with a historical perspective, and then considers the subtleties of *compétence-compétence* in the English context. The key features of the Act are discussed. Moreover, recent case law is highlighted to draw attention to some recent developments. Again, as in earlier chapters, the focus of the discussion will be on the degree of judicial intervention in arbitral proceedings. Whilst the English jurisdiction is not unfavourable to upholding arbitration agreements, the legal framework allows greater scope for judicial intervention. *Compétence-compétence* does not have the same force in the U.K. as it does in France. This carries a number of important implications which are explored further in this chapter.

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² *The Act*. Its predecessor *Arbitration Act 1979* (UK) came under increasing criticism for having been rushed through under pressure from the international community.
³ *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, (Lord Nicholls).
5.2 A Historical Perspective of the Law in England regarding Compétence-Compétence

Historically, English courts sought to apply their own domestic practices and establish a regime of arbitration which would protect traditional presumptions, procedural and substantive rules.⁴ Foreign judicial decisions and general rules of international arbitration were not considered important. Generally, English arbitrators deemed principles of international arbitration law as academic, theoretical or too abstract.⁵ The view was that by agreeing to arbitrate in the England, foreign parties had consented to the application of local rules and customs.

As far as the enforcement of arbitration agreements was concerned, English courts only provided half-hearted support for the principle of separability and retained firm constraints on compétence-compétence. Until 1996, control regarding the jurisdiction of the arbitral tribunal was almost exclusively in the hands of the courts. The approach which dominated until that time was that the courts possessed the authority to determine if a valid arbitration agreement existed and they could intervene before or after the award was made.⁶ As noted in the Departmental Advisory Committee Report, it was ‘generally thought that arbitrators had no power to do more than express a view as to whether they had jurisdiction or not.’⁷

Moreover, case law from English courts indicates that any questions regarding the validity, scope or existence of an arbitration agreement remained for the courts to address rather than the arbitral tribunal.⁸ An example of the interventionist approach is the case of *S.A. Coppee Lavalin v Ken Ren Fertilisers*.⁹ The House of Lords held that an English court had jurisdiction to order security for costs notwithstanding the lack of connection the parties had with England.¹⁰ With respect to *Lavalin*, Lord Saville stated that it was perceived as ‘confirming the widely held suspicion that the English courts were only too ready to interfere in the arbitral process and to impose their own dicta on

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⁶ Ibid.
⁹ *S.A. Coppee Lavalin v Ken Ren Fertilisers* [1994] 2 All ER 449. (‘Lavalin’).
¹⁰ Ibid.
the parties, notwithstanding the agreement of the parties to arbitrate rather than litigate.\footnote{11}

\section*{5.3 The English Approach to Arbitral Jurisdiction}

The general scheme of the Act enshrines the international tendency for non-intervention and for matters of substantive jurisdiction to be determined or ruled upon in the first instance by the tribunal.\footnote{12} Similar to the French, the English legislation does not provide a definition of arbitration although Section 1 states ‘the object of arbitration is to attain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense’.\footnote{13}

Since the enactment of the \textit{Arbitration Act 1996} (UK), courts have intervened to a greater extent than originally expected.\footnote{14} Notwithstanding the power of the courts, arbitrators have the authority to continue proceedings and make an award whilst the jurisdictional challenge is pending before the court.\footnote{15} The underlying rationale is to discourage parties from using court challenges as a delaying tactic and to allow arbitrators whose jurisdiction is challenged to proceed with the arbitration if the tribunal believes the challenge is groundless.\footnote{16}

This has led to criticism regarding unnecessary intervention by the courts.\footnote{17} Although not adopting the \textit{UNCITRAL Model Law on International Commercial Arbitration}, the \textit{Act} follows it in large part, notably with respect to the nature of the grounds for

\footnotesize{\begin{itemize}
  \item \footnote{12} \textit{The Act}, ss 1, 30, 32. \textit{Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping} [2002] 2 LR 1 where Thomas J held that ‘without the permission of the parties or the tribunal, ordinarily the courts should decline in the first instance to intervene in cases of dispute as to arbitrator’s substantive jurisdiction is convincing. See also Arts 5 and 8.2 of the \textit{Model Law}. See also, David Joseph, \textit{Jurisdiction and Arbitration Agreements and Their Enforcement} (Sweet & Maxwell, 1\textsuperscript{st} ed, 2005), 294.
  \item \footnote{13} \textit{The Act} s 1(a).
  \item \footnote{14} See John Lurie, ‘Court Intervention in Arbitration: Support or Interference’ (2010) 76(3) \textit{Arbitration} 447, 447.
  \item \footnote{16} DAC Report, above n 7, 8.
  \item \footnote{17} See Anthony Crivellaro, ‘All’s Well that Ends Well: London Remains a Suitable Venue for International Arbitration - But Only Thanks to the House of Lords’ (2005) 22(4) \textit{International Construction Law Review} 480.
\end{itemize}}
challenge. The DAC Report sheds light on the key principles which subsequently emerged in the Act. The Report stated:

The ideal system of arbitration law in the view of the Committee is one which gives the parties and their arbitrators a legal underpinning for the conduct of disputes which combines the maximum flexibility and freedom of choice in matters of procedure with a sufficiently clear and comprehensive set of remedies which will permit the coercive, supportive and corrective powers of the court to be invoked when, but only when, the purely consensual relationships have broken down.

As shown earlier in Table 3.1 in Chapter 3, the English approach is to confer concurrent power on tribunals and courts to determine challenges to the arbitration agreements. Awards are subject to curial review using a full review method rather than a prima facie one. Such review may lead to reviewing the award on the merits which is not generally the role of the courts. A corollary of full review is usually an increase in cost for the parties and delay in time.

5.4 Jurisdictional Objections: Powers of Tribunals and Powers of Courts
As in earlier chapters, Chapter 5 makes a distinction between two alternative procedures for dealing with jurisdictional objections. One is to have recourse to courts. As shall be seen in the discussion under subheading 5.5, there are a number of avenues to contest the jurisdiction of the tribunal. The other alternative is to ask the arbitral tribunal itself to determine its jurisdiction. This is discussed under 5.6. When a court orders a matter to be heard before the court notwithstanding a valid arbitration agreement, it negates the principle of compétence-compétence as adopted in section 30 of the Act. Section 30 is discussed under 5.6.

5.5 Challenging jurisdiction of arbitral tribunals via courts

5.5.1 Setting the scene
Although the Act expressly provides for compétence-compétence, it also provides opportunities for the courts to review the jurisdiction of arbitral tribunal. Thus, jurisdictional challenges may be brought under sections 32, 67 and 72. Section 67

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20 Chapter 3, Table 3.1, 89.
21 The Act’s applicability is not limited to England. See The Act 1996 pt 1, s 2. Jean François Poudret and Sébastien Besson, Comparative Law of International Arbitration (Sweet and Maxwell, 2nd ed, 2007) [464]. Section 1(c) of the Arbitration Act also confers courts with residual jurisdiction although it fails to outline how this jurisdiction should be exercised. See JT Mackley & Co Ltd v Gosport Marina Ltd [2002] EWHC 1315 (TCC).
provides that a party to an arbitral proceeding may apply to the court challenging an award of the arbitral tribunal as to its substantive jurisdiction. The provision allows a party to seek a court order declaring an award made by the tribunal to be void, in whole or in part, because the tribunal lacked substantive jurisdiction.\textsuperscript{22} The court may set aside, vary, or confirm the tribunal’s award once an application under section 67 is made.

Section 67 of the Act is the key provision to an award on jurisdictional grounds. However, there are strict time limits to such challenge. Evidence indicates that parties often accept a fully reasoned decision of the tribunal on jurisdiction in order to avoid the costs of re-litigating the same matter before courts.\textsuperscript{23}

However, an important distinction is made between jurisdictional objections raised by a non-participant, on one hand, and a participant in arbitration, on the other. Section 72(1) states that a person alleged to be a party but who takes no part in the proceedings may challenge the substantive jurisdiction of the tribunal by seeking an injunction or declaration in court. He or she has the same right as a party to the arbitral proceeding to challenge an award under section 67 on the ground of a lack of substantive jurisdiction in relation to him or her.\textsuperscript{24}

Section 32 must be read in conjunction with sections 67 and 72 of the Act. Its value lies in avoiding delayed proceedings. Section 32 allows the court to make a preliminary ruling on the question of substantive jurisdiction. The provision applies where the jurisdictional dispute has gone to arbitration, and makes it possible for the arbitrators to consent to refer the jurisdictional question to the court for a preliminary ruling.\textsuperscript{25}

\textbf{5.5.2 Section 67 of the Arbitration Act: Challenging an Award}

As stated, an application may be made pursuant to section 67 of the Act for an order setting aside an award on the grounds that it was made without jurisdiction. Section 67(2) provides that the arbitral tribunal may continue the arbitral proceedings and make

\textsuperscript{22} The Act s 67(2).
\textsuperscript{23} The parties cannot apply directly to the courts except for situations described in ss.32 and 72. The DAC Report art 138 states that these provisions serve to prevent delaying tactics.
\textsuperscript{24} The Act s 72(2).
\textsuperscript{25} The Act s 32.
an award whilst an application to the court under section 67 is pending in relation to its jurisdiction.

5.5.3 The Emerging Jurisprudence on Section 67
It is important to note that a significant body of case law concerning section 67 has developed. The case law indicates that the courts will undertake a full rehearing into the matter rather than a mere review of the tribunal’s ruling. This was what occurred for example in Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan.26

5.5.4 The Dallah Case
The Court of Appeal in Dallah held that an order granting leave to enforce a French arbitration award was correctly set aside by the High Court. The Court of Appeal found that in accordance with section 103(2)(b) of the Act, the government was not a party to the arbitration agreement.27 The High Court and the Court of Appeal concurred that an application pursuant to section 103(2)(b) meant a rehearing of the facts in dispute was required.28

In the case, the Government of Pakistan (Government) had established a pilgrimage trust (Trust) for the purpose of serving its citizens who performed pilgrimage in Mecca. Initially, Dallah executed a Memorandum of Understanding with the Government for the construction of accommodation. The Trust formed an agreement with Dallah to build accommodation near Mecca for Pakistani pilgrims. The agreement provided for arbitration by the ICC in Paris; however, no choice of law was specified. Subsequent to the dissolution of the Pakistani Government in 1996, the Trust also was dissolved.

26 Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] EWCA Civ 46 (3 November 2010). (‘Dallah’). Pursuant to Article V.1 of the New York Convention which is given effect by section 103 of the Arbitration Act 1996 (UK), if such a challenge is found to exist by the court, it may amount to a ground for refusing to enforce the award. See Matthew Weiniger, Supreme Court rejects Dallah appeal and refuses enforcement of French ICC Award (11 November 2010) International Law Office <http://www.internationallawoffice.com>.

27 Section 103(2)(b) stipulates that:
(1) recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
(2) Recognition or enforcement of the award may be refused in the person against whom it is invoked proves –
(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made’. 28

Dallah consequently sought arbitration by the ICC against the Government. Although the Government did not submit itself to the jurisdiction of the tribunal, the tribunal relying on competence-compétence, ruled that the Government was a party to the agreement. Accordingly, the tribunal ruled that it had jurisdiction to determine the claim.29

The dispute was determined in favour of Dallah. Pakistan resisted enforcement in the courts of the United Kingdom on the grounds that the arbitration agreement was invalid under the laws of France, where the award was made. The Government argued that it was not a party to the agreement and, therefore, it was not bound by the arbitration agreement. Given that there was no express choice of law provided for by the parties in their agreement, the law of France was applied to the agreement. In particular, the question of whether the Government was a party to the agreement had to be determined in accordance with French law.

On appeal by Dallah, the Supreme Court of the United Kingdom reopened jurisdictional matters relating to both facts and issues prior to issuing its judgment. As a result, the Court re-examined the issue of competing interests between the roles of arbitral tribunals and national courts in ruling on jurisdiction. In particular, the court considered two key questions: the effect of the competence-compétence principle and the application of arbitration agreements to non-signatories pursuant to French law. Although Lord Collins of the Supreme Court acknowledged the worldwide pattern to restrict review of determinations by tribunals and emphasised the pro-enforcement policy of the New York Convention, neither of these played a central role in this case.30

The Supreme Court dismissed the appeal by Dallah. The first reason was that although the tribunal had jurisdiction, its ruling was subject to review at the stage of setting aside or enforcement of the award. 31 Whether the award has its seat in England or elsewhere is immaterial for this purpose. In reaching its decision, the Supreme Court undertook a comparative analysis of how competence-compétence is used in different jurisdictions.

31 Moi and Collier, above n 29.
It is interesting to note that at paragraph 30 of the judgment the Court reaffirmed the award being subject to judicial review and held that ‘the tribunal’s own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal has any legitimate authority in relation to the Government at all.’

Secondly, the U.K. Supreme Court accepted the submission made by the Government pursuant to section 103(2)(b) of the Act. Under this section the court must decide if the party objecting to the arbitration gave consent to arbitration. The decision clarified the degree to which a court may utilise the discretion conferred on it in section 103 to re-examine questions of fact and law in order to ascertain whether a valid arbitration agreement exists between the parties.

The court found that there was no common intention between the parties to bind the Government. The Supreme Court concluded its judgment by affirming the decisions of the two courts below it where the matter had been heard and no jurisdiction was held to exist by the tribunal. Accordingly, the award was not enforceable. Dallah also reaffirmed that there is no duty for a party to contest or appeal an award in the courts of the seat (in this case France), prior to challenging enforcement in another jurisdiction. It appears that the Supreme Court undertook a full review on the question of jurisdiction.

As seen in Dallah, although England is deemed to be a pro-arbitration jurisdiction, its law leaves the door slightly more open to judicial review than France. Whilst this may accentuate the tension between the English legal community’s pro-arbitration attitude and the Act, the judgment assigns jurisdiction to the English courts rather than international arbitral tribunals. A tribunal’s determination concerning issues such as the validity and the constitution of the tribunal are subject to rehearing on their merits. A party may contest an award at both the preliminary and enforcement stages.

5.5.5 Republic of Serbia v Imagesat International and the Significance of the Azov decision

In Republic of Serbia v Imagesat International, the English High Court considered the application of s 67. The court heard a challenge to the substantive jurisdiction of an

33 Moi and Collier, above n 29.
34 Born and Lindsay, above n 28.
ICC tribunal. The tribunal ruled, *inter alia*, that it had the jurisdiction to address whether Serbia had conferred on the ICC tribunal jurisdiction to rule if it was a party to the arbitration agreement.

In reaching its decision, the High Court relied on *Azov Shipping Co v Baltic Shipping Co.* The *Azov* case is a leading authority on s 67. In the case, Justice Rix stated that s 67 provided the challenger with a means to ‘present his case and challenge the opposing party’s case on the question of jurisdiction with the full panoply of oral evidence and cross-examination so that, in effect, the challenge becomes a complete rehearing of all that already occurred before the arbitrator’. Justice Longmore opined that the applicants who had their jurisdictional challenge defeated by the tribunal were ‘effectively now having a second bite at the same cherry’.

In *Republik of Serbia*, the Court found that in hearing a challenge pursuant to section 67, ‘it is for the court to determine whether the arbitrator had jurisdiction and whether he was correct in deciding that he did.’ Following the approach in *Azov*, the Court also opined that the decision of the arbitrator regarding jurisdiction is only provisional.

The significance of *Azov* lies in its expression of the English principle that a jurisdictional challenge will be heard *de novo* and in full by the courts, even if (in effect) that decides the case on the merits. This is in clear contrast to approaches adopted by other countries such as France. It is in contradiction with the general principle that a court must not review the merits of a decision reached by the arbitral tribunal.

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36 Ibid.
37 *Azov Shipping Co v Baltic Shipping Co* [1999] 1 LR 68. (‘*Azov’*). *Azov*’s decision established that where the *seat* of the arbitration is the United Kingdom, the court will examine the issue of jurisdiction brought under sections 32 or 67 of *The Act* as a full review
38 *Azov* [1999] 1 LR 68.
39 Ibid.
40 *The Act* ss 32 and 67.
41 *De Novo* is a matter heard over again from the beginning.
5.5.6 *Habas Sinai*

Another recent case where section 67 received consideration is the *Habas Sinai* decision. The High Court had no reservations conducting a full review.\(^{44}\) The English High Court in *Norscot Rig Management* also allowed a rehearing of jurisdiction, but the challenge was dismissed.\(^{45}\)

This is in clear conflict with the notion that courts should avoid deciding jurisdictional issues on their merits. Some scholars have asserted that this emphasises a divergence between the pro-arbitration and pro-enforcement attitude of the English legal community and the wide discretion of the High Court’s jurisdiction to hear challenges under section 67.\(^{46}\) In such circumstances, due deference is not provided to the arbitral award.\(^{47}\)

Although the challenges pursuant to section 67 in the cases of *Azov, Serbia, Habas Sinai* and *Norscot* were not successful, the ability to require, as of right, a full rehearing tends to negate the foundation of international commercial arbitration.\(^{48}\) The approach taken by the courts in these cases appears to be in conflict with the concept of limited judicial review.\(^{49}\) The cases discussed above illustrate that courts do not consistently provide the necessary priority to tribunals on the question of their jurisdiction.\(^{50}\)

5.5.7 *Section 72 of the Arbitration Act: Jurisdictional Challenges by a Non-Participant to the Arbitral Proceeding:*

Section 72 allows a non-participant to a proceeding to contest the jurisdiction of the arbitral tribunal. An action under section 72 is not subject to a preliminary contest before the tribunal and its rationale is to safeguard people who refute that the tribunal has any authority over them, thereby avoiding participation in the arbitration.\(^{51}\) In some disputes before the courts, a *prima facie review* may be sufficient to ascertain the

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\(^{44}\) *Habas Sinai ve Tibbi Gazlar Ithisal Endustri AS v Cometal SAL* [2010] EWHC 29 (Comm).

\(^{45}\) *Norscot Rig Management PVT Ltd v Essar Oilfields Services Ltd* [2010] EWHC 195 (Comm).

\(^{46}\) The Act s 67.

\(^{47}\) Born and Lindsay, above n 28.

\(^{48}\) Ibid. The position regarding costs for unsuccessful challenges of jurisdiction in court is that the losing party pays costs.

\(^{49}\) Born and Lindsay, above n 28.

\(^{50}\) In particular in *The Act* ss 7 and 30.

\(^{51}\) Poudret and Besson, above n 21, [485].
questions before the court. Conducting a full review of the arbitration agreement would amount to a waste of public and private resources for the court. 52

5.5.8 The Significance of Section 32 of the Arbitration Act

A section 32 application is not considered unless:

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied—

   (i) that the determination of the question is likely to produce substantial savings in costs,

   (ii) that the application was made without delay, and

   (iii) that there is good reason why the matter should be decided by the court.

The safeguards found in section 32 are designed to prevent parties from using this provision to stall the arbitral proceedings. 53

5.5.9 Stay of Proceedings While an Application Under Section 32 is Made

Section 31(5) provides that ‘[t]he tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32’. 54

Given that the party objecting to arbitration would not be against a stay of the arbitral process in order to have judicial review of jurisdiction, the party in support of arbitration would effectively determine whether to request a preliminary ruling from the tribunal regarding jurisdiction.

There are concomitant risks to proceeding with arbitration in the presence of a jurisdictional challenge. One risk is that if the pro-arbitration party loses, it will usually suffer the wasted costs of the tribunal proceeding in such circumstances. Further, there will be a subsequent duplication of proceedings in court causing delays and more expense. Section 32 would offer the benefit of permitting a pro-arbitration party who is concerned about the risk of wasted costs, to give consent to the party refusing arbitration and have the matter addressed beforehand by judicial intervention. 55

52 See Law Debenture Trust Corp Pty Ltd v Elektrim Finance BV [2005] EWHC 1412 (Ch). (‘Law Debenture’).
53 The Act s 31(5) is in contrast to the Model Law.
54 The Act s 31(5).
5.5.10 Critiques of Section 32

Section 32 has been criticised for permitting the tribunal to request that the court address the question of jurisdiction at the outset of the arbitration, which has been viewed as inefficient. Instead, it has been recommended that the tribunal render a preliminary award on jurisdiction and only if required, refer the matter for judicial review.56

This criticism should be balanced against its aims to create a high threshold to be satisfied prior to judicial intervention. In particular, if there is failure to effect mutual agreement between the disputing parties, the tribunal must have legitimate reservations concerning the validity of the arbitration agreement before referring the matter to judicial review.57

The condition in section 32(2) that the court must be satisfied that the determination of the question is likely to produce substantial savings in costs and the application is made without delay, impose strict conditions which are clearly designed to avoid dilatory tactics.58 An additional safeguard is found in section 32(4) which provides that the tribunal may continue the arbitral proceedings and issue an award whilst an application to court is pending.59

Thus, arbitrators who are challenged by parties have the discretion to continue with the arbitral proceedings. This provision ensures that dilatory tactics employed by a party challenging the validity of the arbitration agreement fail to stall the arbitral proceedings. Although section 32(4) does not fully accommodate the negative effect of compétence-compétence, it nevertheless provides some deference to it by conferring discretion on the tribunal to initiate or continue with its proceedings.

Further, sections 32(5) and (6) of the Act limit further appeals once the court has delivered a judgment. This section stipulates that an appeal from the court’s decision is

56 Emmanuel Gaillard, John Savage (eds), Fouchard Gaillard Goldman on International Commercial Arbitration (Kluwer, 1999) [682].
59 Poudret and Besson, above n 21, [485].
subject to leave which is only granted if the case concerns a question of law of general significance or is deemed as ‘special grounds’ by the Court of Appeal.  

The court must also have substantial grounds for intervening in the arbitral process. For example, section 72 permits a person who is a non-participant in an arbitration but who is alleged to be a party to arbitral proceedings, to challenge the validity or scope of the arbitration agreement.

5.6 Power of the Tribunal to Rule on its Jurisdiction
The principle of compétence-compétence is addressed in section 30 of the Act. Subsection 30(1) is one of the most fundamental provisions. It permits the arbitral tribunal, subject to the parties agreeing otherwise, to rule on its own substantive jurisdiction in three circumstances:

(a) whether there is a valid arbitration agreement,  
(b) whether the tribunal is properly constituted, and  
(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

Subsection 30(1) is supplemented by subsection 30(2) which permits rulings regarding the three circumstances above to be challenged by processes of appeal within the arbitral rules, as well as by judicial review.

Article 1448 of the New Decree is the French equivalent of section 30 of the Act. The French provision is more succinct and does not set out in detail the circumstances in which the jurisdiction of the arbitral tribunal may be challenged. Compared to Article 1448, section 30 provides more possibilities for challenge, despite the safeguards in the Act to prevent dilatory tactics.

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60 Ibid.  
61 The Act s 30(1) commences with ‘unless otherwise agreed by the parties’. Therefore, it is not a mandatory provision.  
62 See Downing v Al Tameer Establishment [2002] EWCA 721 where a party denied the existence of the arbitration agreement and this denial was accepted by the court. The court held that this would bring the arbitration to an end. (‘Downing’).  
63 The Act s 30(1). For matters outside the arbitration agreement, see M/S Alghanim Industries Inc v Skandia International Insurance Corporation [2001] 2 All ER 30. (‘Alghanim’).  
64 The Act s 30(2).  
65 New Decree, art 1448. The Act s 30.
Thus, the fact that section 30 is subject to the parties’ agreement stands in stark contrast to Article 1448 of the New Decree.\(^{66}\) Pursuant to the French New Decree, compétence-compétence is a mandatory provision.\(^{67}\) The powers of the French arbitral tribunals cannot be excluded by agreement of the parties.

5.6.1 **Advantages of Allowing the Arbitral Tribunal to Rule on its Jurisdiction**

Although not making compétence-compétence a mandatory provision, the English legislators acknowledged the advantages of the principle. The benefit of allowing the arbitral tribunal to rule on matters of its own jurisdiction was highlighted in the DAC Report where it was observed that the application of compétence-compétence would discourage parties from delaying ‘valid arbitration proceedings indefinitely by making spurious challenges to its jurisdiction.’\(^{68}\)

An advantage of permitting the tribunal to rule on its own jurisdiction arises in relation to knowledge of foreign laws. International arbitration frequently requires the application of a governing law other than English law. The tribunal is likely to be more familiar with the foreign governing law than the courts. This is because when appointing arbitrators, knowledge of the relevant law is usually an important criterion. Finally, if the seat is abroad but the proceedings are brought in the English courts, the courts have a greater incentive to stay the litigation. This is primarily because the arbitrators are better equipped and more qualified to address the application of foreign laws.\(^{69}\)

5.6.2 **Objections to Jurisdiction to be Raised at the Outset of Proceedings**

Section 31 of the Act allows an objection that the arbitral tribunal lacks substantive jurisdiction but it must be raised at the outset of the proceedings by a party.\(^{70}\) Section 31(4) further stipulates:

Where an objection is duly taken to the tribunal’s substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—

(a) rule on the matter in an award as to jurisdiction, or

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\(^{66}\) New Decree, art 1448.

\(^{67}\) Ibid.

\(^{68}\) Ibid.

\(^{69}\) Joseph, above n 12, 295.

\(^{70}\) The Act s 31. In Athletic Union of Constantinople v. National Basketball Association [2002] EWCA Civ 830 (28 May 2002) the court held that early preparatory matters did not amount to ‘a step in the arbitral proceedings to contest the merits of any matter.’ The court further stated that the first step was the service of a defence on the merits.
5.7 The Negative Effect

UK courts have oscillated in their approach to the *negative effect*. Some courts have refuted the *negative effect* whilst others have supported it. 71 It has been suggested, however, that in difficult cases, the court is inclined to rule on the issue of jurisdiction, prior to the tribunal. This may be considered a cautious approach where the dispute is too complex to ascertain existence or validity by conducting a *prima facie review*. The English position sits somewhere in centre of the spectrum – with the French position being the most extreme in its provision of exclusive jurisdiction to the arbitral tribunal – and the U.S. being at the opposite end, providing the least support for *compétence-compétence*.

In this context, it is useful to highlight the interplay between the *negative effect* and section 9 of *the Act*. Subsection 9(1) of *the Act* states that a party to an arbitration agreement against whom legal proceedings are brought, may apply to the court in which the proceedings have been brought to stay the judicial proceedings. Section 9(4) further provides that ‘on an application under this section the court shall grant a judicial stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed’. 72

Section 9(4) of *the Act* mirrors the language of Article II (3) of the *New York Convention* and to an extent, the language in Article 8(1) of the *Model Law*. 73 The preferable approach to the interpretation of the section was enunciated by the House of Lords in the pro-arbitration decision of *Premium Nafta Products Ltd v Fili Shipping Co Ltd*74 where it was held that:

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71 *The Act*. ‘Res Judicata’ means the rule that if a dispute is judged by a court of competent jurisdiction, the judgment of the court is final and conclusive as to the rights and duties of the parties involved. Res judicata constitutes an absolute bar to a subsequent suit for the same cause of action.

72 *The Act* s 30 provides the positive effect of competence-competence of the tribunal. Also s 31(4) allows arbitrators the right to issue a separate decision on jurisdiction or to decide the question in the award on the merits.


74 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40. (‘*Premium Nafta*’). This case previously came before the English Commercial Court under the name of *Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20. (‘*Fiona Trust*’). It subsequently changed name to *Premium Nafta* when it came before the House of Lords.
to determine on the evidence before the court that [an arbitration agreement] does exist in which case (if the disputes fall within the terms of that agreement) a stay must be granted, in the light of the mandatory ‘shall’ in section 9(4). It is this mandatory provision which is the statutory enactment of the relevant article of the New York Convention, to which the United Kingdom is a party.  

The judgment placed significance on the responsibilities of the United Kingdom as a signatory to the New York Convention thereby highlighting the importance of the United Kingdom as a jurisdiction favourable to arbitration and giving priority for tribunals to determine their jurisdiction. The House of Lords noted:

If in a case where an arbitrator does have jurisdiction to decide a particular dispute, he is to be restrained from so doing and no stay of court proceedings is to be granted, there is likely to be a potential breach of the United Kingdom’s international obligations in relation to commercial arbitrations under the New York Convention ... as enshrined in the 1996 Act.

Moreover concerning the stay of court proceedings, the House of Lords in Premium Nafta held that ‘it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute’. Most importantly perhaps, the decision in Premium Nafta asserted the doctrine of separability and the principle of compétence-compétence. A contrary approach, however, was adopted by the court in the earlier decision of Birse Ltd v St David.

5.7.1 Birse Ltd v St. David: Negating the Jurisdiction of the Tribunal

In Birse, the parties were in dispute over an outstanding sum which was allegedly owed by St David to Birse on a building contract. As Birse sought recovery of the sum in court, St David applied for a stay of court proceedings pursuant to section 9 of the Act. In his decision, Lloyd J commented on the power of the tribunal under section 30 of the Act. His Honour emphasized that section 30 was not a mandatory provision and stated that:

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75 Premium Nafta [2007] UKHL 40, 37.
76 The term ‘United Kingdom’ is defined as the ‘United Kingdom of Great Britain and Northern Ireland’ in the status document for ratification of the New York Convention.
77 Premium Nafta Products Ltd. v Fili Shipping Co. Ltd [2007] UKHL 40 (Hoffman LJ).
78 Ibid. The Act.
79 Premium Nafta [2007] UKHL 40. Similar to the Model Law, sections 30(1) and 30(2) of the Arbitration Act 1996 (UK) permit the arbitrators to determine questions on jurisdiction either in a preliminary award or in the final award.
80 Birse Construction Ltd v St David Ltd [1999] EWHC 253. (‘Birse’).
81 Ibid.
82 The Act s 9.
83 The Act s 30 provides that unless otherwise agreed by the parties, the tribunal may rule on its own substantive jurisdiction including whether there is a valid arbitration agreement.
The existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal. ... A court would first have to be satisfied that there is an arbitration agreement before acting under section 9 (and that a dispute about such a matter falls outside section 9). ... In other cases it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement.  

The divergence of the courts towards arbitral jurisdiction is highlighted in the court’s judgment in *Ahmad Al Naimi v Islamic Press Agency* where it held that:

> it is not mandatory and the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal.  

Another case which illustrates undue intervention by English courts is *FT Mackley & Co Ltd v Gosport Marina*. The court prevented the tribunal from ruling on its jurisdiction. In so doing, the court relied on section 1(c) of *the Act*. Section 1(c) is the equivalent of Article 5 of the *Model Law*. The section provides that ‘in matters governed by this Part the court should not intervene except as provided by this Part.’ The term ‘should’ was argued to be a weaker limitation on court intervention than the word ‘shall’ in the *Model Law* and the court in *Mackley* was willing to take a broad approach to its powers of review. 

The reasoning in *Birse* and *Mackley* suggests that an arbitration agreement which is prima facie valid is insufficient to provide tribunals with exclusive jurisdiction to decide the validity of an arbitration agreement. According to these decisions, the court must review arbitration agreements, ascertaining their validity and applicability. In doing so, the arbitral proceedings are delayed, if not prevented, which is contrary to *compétence-compétence* and to the purpose of *the Act*.  

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84 *Birse* [1999] EWHC 253 [4].
86 *FT Mackley & Co Ltd v Gosport Marina* [2002] BLR 367. (‘Mackley’).
87 *The Act* s 1(c).
88 *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17 (11 April 1980) (‘Model Law’).
89 *The Act*. 
In a subsequent case, *Law Debenture Trust Corp Plc v Elektrim Finance BV*, an application was made to stay the court proceedings and permit the tribunal to determine the dispute.\(^{90}\) The court refused a stay and held that ‘[t]here is no support for any suggestion that the court should inevitably allow the arbitral tribunal to decide the jurisdiction question and stay the court proceedings in the meanwhile’.\(^{91}\) By interpreting the tribunal’s authority to have first priority to rule on jurisdiction as non-compulsory, it may be argued that the United Kingdom courts’ construction of the *negative effect* restricts its efficacy.

### 5.7.2 The XL Insurance Case: A Renewed Recognition of the Arbitral Tribunal

The approach in *Birse* and *Mackley* has been displaced in recent times in favour of an approach which recognises the importance of international arbitration law and practice. English judges are now willing to recognise that local rules are not always applicable. “They appear increasingly aware of their role as transnational decision-makers in arbitrations between nationals of different states.”\(^{92}\) There is now an attempt to harmonise English arbitration practice with that of other jurisdictions.

The judiciary’s new inclusive approach to international and comparative law extends to arbitral awards not traditionally considered to be a source of law in England. Indeed, citation of arbitral awards was actively opposed. They were believed to lack authority. Fear was expressed that reliance on arbitral awards would lead to unfairness and the creation of autonomous systems of ‘pseudolaw’ through departures from State law.\(^{93}\)

Thus, in contrast to *Birse*, the court in *XL Insurance Ltd v Owens Corning*\(^{94}\) took a pro-arbitration approach. Unlike *Birse* and *Mackley*, the court took a narrow interpretation of its review powers. The issues for the court included: (1) whether there was an arbitration agreement in existence between the parties; (2) which law governed the validity of the alleged arbitration agreement; (3) which tribunal should decide its validity and (4) how the court’s discretion ought to be determined.\(^{95}\) *XL Insurance* successfully obtained an anti-suit injunction to restrain Owens from proceeding with litigation and sought to enforce an agreement to arbitrate whose validity was contested

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\(^{90}\) *Law Debenture* [2005] EWHC 1412 (Ch). See also *Azov* [1999] 1 LR 68 which favours the approach that the court should determine matters concerning the existence or the terms of the arbitration agreement. Otherwise there may be two hearings: one before the tribunal and one before the court on a challenge.

\(^{91}\) *Law Debenture BV* [2005] EWHC 1412 (Ch) [34].


\(^{93}\) Ibid 68.

\(^{94}\) *XL Insurance Ltd v Owens Corning* [2000] LR 2 QB 500. (‘*XL Insurance*’).

\(^{95}\) Ibid.
by Owens Corning.96 Toulson J found that the agreement to arbitrate was prima facie valid and, thereby, deferred the final decision regarding the validity of the arbitration agreement to the tribunal stating that:

under the arbitration clause and the provisions of the Act, it will be for the arbitral tribunal to rule on the validity of the arbitration agreement, if Owens Corning challenges its jurisdiction on that ground, unless the matter is referred to the Court for determination under s.32. I am satisfied that in the meantime, justice requires that an injunction should be granted restraining Owens Corning from continuing its litigation against XL in Delaware.97

His Honour found that as a matter of substance rather than form, it was unequivocal that the parties had formed a contract which included an arbitration agreement with the arbitral seat in London and governed by the laws of the United Kingdom.98 He opined that:

[...] as a matter of good case management, and in compliance with the overriding objective, which of course all business in this court is conducted pursuant to, namely that the parties should save expense and should have the case dealt with in ways that are proportionate given the amount of money involved, expeditiously and fairly the arbitrator’s decision as to the existence of the contract should come first.99

5.7.3 Fiona Trust: The Return to an Arbitration-Friendly Culture?
The decision in Fiona Trust & Holding Corporation v Yuri Privalov is a landmark case.100 The judgment played a crucial role in clarifying the position of the United Kingdom on enforcement of arbitration agreements and the doctrine of separability. Until this decision, these notions had remained nebulous. The dispute arose from a number of charter party contracts entered into between a Russian group of shipowners (owners) and a number of charter companies (the charterers). The owners claimed that the charter parties were executed by way of bribery.101 The owners commenced litigation in the Commercial Court in London on the grounds of fraud. The contracts included a key law and litigation clause which permitted the parties to resolve any dispute arising from the contract by arbitration.

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96 Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’ Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.
Relying on this clause the charter parties commenced proceedings for arbitration. In turn, the owners applied to the court pursuant to section 72 to restrain the arbitration on the grounds that the arbitration clauses including the charter party contracts had been rescinded for bribery.\footnote{102 The Act s 72.} The charterers responded with a cross application requesting a stay of judicial proceedings in accordance with section 9 of the Act. At first instance, Morison J in the Commercial Court declined to stay judicial proceedings under section 9 and issued an injunction to restrain the arbitration proceedings pending the court trial.\footnote{103 The Act s 9. Fiona Trust [2006] EWHC 2583. (Morison J).} His honour stated that the arbitrator lacked jurisdiction because the arbitration clause was not separable from the charter party contracts.\footnote{104 Fiona Trust [2006] EWHC 2583 (Morison J)}

The charterers successfully appealed the decision of the Commercial court. The first issue considered by the Court of Appeal was whether the arbitration clause was sufficiently broad to address claims that bribery had induced the charter parties. Longmore LJ held in the affirmative on this question. His Lordship stated that:

> If businessmen go to the trouble of agreeing that their disputes be heard by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about whether any particular cause of action comes within the meaning of the particular phrase that they have chosen in their arbitration clause. If any business man did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so... It seems to us that any jurisdiction or arbitration clause should be liberally construed.\footnote{105 Fiona Trust [2007] EWCA Civ 20 (24 January 2007). [17]-[18] (Longmore LJ).}

This decision was hailed as a success for cementing an arbitration-friendly environment in the United Kingdom and reaffirming the doctrine of separability. In relation to this doctrine, the court held that:

> As we have sought to explain, once the separability of the arbitration agreement is accepted, there cannot be any question but that there is a valid arbitration agreement... If there is a contest about whether an arbitration agreement had come into existence at all, the court would have discretion as to whether to determine that issue itself but that will not be the case where there is an overall contract which is said for some reason to be invalid e.g. for illegality, misrepresentation or bribery and the arbitration agreement is merely part of that overall contract.\footnote{106 Fiona Trust [2007] EWCA Civ 20 (24 January 2007). [38].}

The decision in Fiona has shown that in assessing an application under section 9, the court may only rule on the question of validity of the arbitration agreement itself in cases where there is a challenge regarding whether an arbitration agreement ever existed
or any other question of validity affecting the arbitration agreement is particularly raised. The Court of Appeal in *Fiona* has therefore provided a narrow interpretation to sections 9 and 72 of *the Act*, rendering it a decision supportive of *compétence-compétence*.\(^{108}\)

### 5.8 Summary

The principle of *compétence-compétence* has gained more traction in English courts in the last decade. However, it seems to be a case of ‘one step forward, two steps back’ at times with divergent decisions taken by the courts. Although *compétence-compétence* appears to have become more established in the English arbitration jurisprudence – with judgments such as *Fiona Trust* – there is substantial scope for further entrenchment of this principle. Unlike in France, the case law in the United Kingdom demonstrates an oscillation between a narrow and wide interpretation. This has prevented the development of a unified and consistent body of law. Moreover, there are numerous opportunities in *the Act* for a party to raise a challenge to the jurisdiction of the tribunal such as section 67.

It is accepted that the courts must balance two crucial yet competing interests: (a) to exercise a supervisory role to ensure that tribunals do not usurp the rights of the parties and; (b) to support the arbitration agreement and ensure that parties honour their agreement to arbitrate. Parties can request courts in various circumstances to vary, or set aside, arbitral awards in whole or in part. The above analysis has drawn attention to the jurisdictional challenges that can be brought under *the Act*. Particular emphasis was placed on the ability of non-participants to challenge the substantive jurisdiction of arbitral tribunals.

Chapter 5 has traced the evolution of the English approach. The *Arbitration Act 1996* was a watershed. The Act was intended to bring the laws of arbitration in the United Kingdom into alignment with other pro-arbitration jurisdictions. However, as has been shown in this chapter, *the Act* was only partially successful in achieving this objective. As Lord Steyn stated ‘arbitrators are entitled, and indeed required, to consider whether

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\(^{107}\) The preceding case law including *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701.

they will assume jurisdiction. But that decision does not alter the legal rights of the parties and the courts have the last word.\footnote{John Steyn, ‘England’s Response to the UNCITRAL Model Law of Arbitration’ (1994) 10 \textit{Arbitration International} 1, 1.}
Chapter Six

THE U.S. APPROACH TO COMPÉTENCE-COMPÉTENCE

6.1 Introduction
The previous chapter dealt with the English approach to the jurisdiction of the arbitral tribunal. This chapter analyses the U.S. approach to compétence-compétence. Case law on arbitration in the United States has evolved substantially since the enactment of the Federal Arbitration Act in 1925.1 However, despite significant developments in case law, the principle of compétence-compétence is not consistently applied by the courts. The case law is ambivalent and does not assist to establish a pattern in the approach taken to the jurisdiction of the arbitral tribunal. This chapter sheds light on current uncertainties in the law and provides meaningful guidance on the application of compétence-compétence in the U.S.

In addition, where appropriate, this chapter will make comparisons to the French and English arbitral approach. This is designed to promote a greater understanding of how the three legal orders deal with this complex issue. Compétence-compétence operates differently in all three jurisdictions, being most circumscribed in the U.S. One of the most striking differences between the U.S. and the other two countries is the lack of guidance provided in the legislation.

6.2 The Federal Arbitration Act (1925)
The Federal Arbitration Act came into force in 1925 and applies to international and national commercial arbitration in the United States. The FAA also prevails over inconsistent state legislation.2 Before the passage of the FAA, American courts tended to view arbitration with skepticism.3 Congress enacted the FAA to ensure the validity and enforcement of arbitration agreements in any ‘maritime transaction or contract evidencing a transaction involving commerce.’4 In doing so, Congress sought to ‘place

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1 Federal Arbitration Act, 9 USC (1925). (‘FAA’).
4 FAA § 2.
The policy supporting arbitration underlying the FAA has been justified as serving two purposes: (1) safeguarding freedom of contract and (2) creating an efficient alternative dispute resolution system. The House of Congress’ Report explicitly indicates the aims of the FAA as:

The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the federal courts.

Thus, Congress recognized the costliness and delays of litigation, and thought it necessary to regulate arbitration. The pro-arbitration policy was reinforced further by the ratification of the New York Convention in 1970. At the outset, it is important to note there are two types of challenges regarding the validity of arbitration pursuant to section 2 of the FAA. Firstly, there are challenges which contest the particular validity of the arbitration agreement. Secondly, there are challenges which go to the main contract between the parties. The court should only address those challenges which fall under the first category as the doctrine of separability means the challenge to the main contract does not render the arbitration agreement automatically void. The courts have at times accepted jurisdiction concerning disputes which fall within the second category.

The principle of compétence-compétence is not expressly provided for in the FAA. The lack of provision in the FAA for such a crucial principle highlights the outdated nature of the legislation. It follows that contracting parties need to agree to confer
jurisdictional issues on the tribunal. Thus, parties may make *compétence-compétence* available by contractual agreement. Section 3 of the *FAA* requires courts to stay judicial proceedings where matters are referable to arbitration. This provision states that jurisdictional issues concerning arbitration - whether a valid arbitration agreement exists and whether a dispute falls under an arbitration agreement - are conferred on Federal District courts to determine. Hence, where a party claims that a dispute is not arbitrable and files court action in federal or state court, the federal district court may stay arbitral proceedings until it addresses the arbitrability issue.

The Supreme Court, on the other hand, has developed its own approach to *compétence-compétence* and has interpreted the *FAA* in accordance with contemporary developments in international arbitration. The U.S. being a party to the *New York Convention* has assisted the Supreme Court in adopting a pro-arbitration stance. However, despite these recent judicial interpretations, the *FAA* is long overdue for a complete review and major overhaul. For example, there is no distinction made between national and international arbitrations. Other scholars contend that the *FAA* has fallen behind with the substantial progress in the field of international arbitration since the 1970’s. The *FAA* lacks many provisions such as *separability* and *compétence-compétence*, found in modern arbitration statutes of France and the United Kingdom.

6.3 The U.S. Approach to Arbitrability
As stated, the principle of *compétence-compétence* is neither expressly referred to in U.S. case law nor the *FAA*. The term ‘arbitrability’ is often used in lieu. Generally, courts refer to the term ‘arbitrability’ to encompass jurisdictional matters concerning both the scope of the arbitration agreement and matters which public policy permits arbitrators to consider. If there are questions related to the arbitration agreement which

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12 This is a rule which emanated from the case of *First Options v Kaplan* 514 US 938 (1995). (‘First Options’).
13 The Supreme Court is the highest court with federal jurisdiction in the United States. For recognition of arbitrators’ jurisdiction see *Shaw Group Inc. v Triplefine International Corporation*, 322 F 3d, 115 (2nd Cir, 2003).
14 *New York Convention*. The *New York Convention* is incorporated into the *FAA* 9 § 207
16 *FAA* § 1.
are not clearly delegated to the arbitrators to determine, the courts have jurisdiction to
determine such questions.\(^\text{19}\) Thus, any challenge concerning arbitrability requires a
court hearing pursuant to the FAA.\(^\text{20}\)

By nature, the questions which arise in this context are preliminary or threshold
questions. The U.S. Supreme Court generally refers to arbitrability questions as
‘gateway’ issues.\(^\text{21}\) In this chapter, the term arbitrability will be used to encompass
jurisdictional issues. Arbitrability goes to the heart of compétence-compétence in that if
a dispute is not capable of being resolved by arbitration, the tribunal will not have the
authority to rule on the matter. If an arbitral tribunal were to decide a dispute which was
beyond its scope, then the award issued by the tribunal may be rendered void on the
grounds of the tribunal exceeding its powers.\(^\text{22}\)

Historically, there was judicial hostility toward arbitration which restricted arbitral
authority to hear disputes involving a public interest, such as competition law. Such
disputes were considered to be non-arbitrable and beyond the powers of arbitral
tribunals. Gradually, some areas in the United States, such as competition law and
patents have become capable of being arbitrated. Other areas such as taxation however,
remain more nebulous.\(^\text{23}\)

6.4 The United States Approach: An Overview and Comparison with the
French and UK Approaches

According to Table 3.1 in Chapter 3, the United States approach falls within the second
category. Under this category, courts and tribunals have concurrent powers to determine
challenges to arbitration agreements. Tribunal decisions are subject to subsequent curial
review.\(^\text{24}\) This is similar to the approach taken by courts of the United Kingdom. The
U.K. approach to arbitration was explored in Chapter 5. However, unlike the English
Arbitration Act, the FAA does not have any provision for judicial determination of legal
issues.\(^\text{25}\) A unique feature of the United States policy is that it adopts an ‘either/or’

\(^{19}\) Such questions pertain to what are referred to as ‘gateway’ issues. For instance whether the parties
have a valid arbitration agreement, or whether they are bound by an arbitration agreement. See

\(^{20}\) FAA §§ 2, 3.


\(^{22}\) See Arbitration Act 1996 (UK), ss 67(1) and 68(2)(b).

\(^{23}\) William W Park, Procedural Evolution in Business Arbitration: Three Studies in Change (Oxford,
2006) 23.

\(^{24}\) Chapter 3, Table 3.1, 89.

\(^{25}\) FAA.
approach. The question according to this notion is framed as ‘who decides the jurisdiction of the tribunal – the tribunal or the court?’

Both the United States and United Kingdom stand in contrast to the French approach – the fourth category under Table 3.1. French law grants exclusive power to arbitral tribunals to decide challenges to arbitration agreements. As was shown in Chapter 4, the decisions of tribunals are subject to minimal or no curial review under French law. In this chapter, it is shown that although the U.S. Supreme Court has been more inclined to favour arbitration of international commercial contracts, the general approach to review of the tribunal’s jurisdiction, has been relatively interventionist and presumptive. In fact, as Park states it may seem perplexing that courts are willing to intervene in a process which is designed to be private.

6.5 Standard of Review
The divergence between France, U.K. and U.S. is not limited to the differing approaches to compétence-compétence but extends to the applicable standards of review adopted by the national courts. As seen in Chapters 4 and 5, France employs a prima facie review of arbitration agreements, whereas English courts are more open to utilising a full review. Some case law in the U.S. has introduced the principle that where the parties have consented - by clear and unmistakable evidence - the tribunal has authority to rule on issues of jurisdiction and any curial review should be prima facie at most. Breyer J of the Supreme Court stated that:

The court’s standard for reviewing the arbitrator’s decision about that [arbitrability] matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.

In the U.S, however, the courts tend to conduct a full review of the arbitration agreement when it is brought before the courts, especially when prior to the constitution of the tribunal. Such a tendency presents the risk of higher costs and delays for parties

27 The term ‘presumptive’ means that unless there is a clear and unmistakable agreement that the arbitrator shall decide all issues pertaining to jurisdiction (arbitrability), the court shall presume jurisdiction. This is the rule emanating from First Options 514 US 938 (1995).
30 Ibid.
including further backlogs and costs for the public court system. Full review of arbitral jurisdiction disputes are generally preferred to prima facie reviews, although a principal draftsman of the FAA, Julius Cohen, noted that:

At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine the merits of such a claim. Such examination is, however, made summarily, so that there is a minimum of delay and expense.32

Although the FAA remains silent on the standard of review to be employed by courts, the view of Cohen supports prima facie review. This standard, however, is not applied consistently by the judiciary in the U.S.

6.6 The Development of Arbitration Case Law in the U.S.

6.6.1 The Formative Years: Wilko v Swan

The earlier view of American courts regarding arbitration is best exemplified in the Supreme Court’s decision of Wilko v Swan.33 The facts pertained to a plaintiff who purchased securities from a brokerage firm and sought to seek damages under the Securities Act.34 Only two weeks after the Plaintiff’s purchase he sold the securities at financial loss. The grounds for the plaintiff’s action were allegations the brokerage firm had misrepresented crucial information in its sale of the securities. The defendant brokerage firm sought to stay curial proceedings on the grounds of section 3 of the FAA.35 The defendant argued that an arbitration agreement existed between the parties. The District Court denied a stay of judicial proceedings. It reasoned that the agreement to arbitrate was in breach of public policy as it denied the plaintiff the right of judicial recourse provided for by the Securities Act.36

The Second Circuit Court of Appeals subsequently reversed the judgment of the District Court and found the Securities Act did not prohibit arbitration where it had been contractually agreed upon by the parties. On further appeal, the issue before the

34 Securities Act, 15 USC (1933).
35 FAA § 3 states: ‘If any suit or proceedings be brought in any of the courts of the U.S. upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration on such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.’
36 Securities Act 15 USC (1933).
Supreme Court was whether an agreement to arbitrate a future dispute is a ‘condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of the Securities Act.’\textsuperscript{37} The Supreme Court reversed the decision of the Second Circuit. In doing so, it stated the desire of Congress regarding the sale of securities is better conducted by rendering the arbitration agreement void. Effectively, the Supreme Court in \textit{Wilko} held the FAA subservient to the Securities Act.\textsuperscript{38} This judgment prompted major debate among legal practitioners and scholars and was generally perceived as a setback.\textsuperscript{39}

By holding the arbitration agreement void, the Supreme Court undermined the principle of party autonomy.\textsuperscript{40} Although \textit{Wilko} concerned a domestic arbitration agreement, it was considered to have ramifications for international arbitrations as both national and international arbitration agreements are governed by the FAA.\textsuperscript{41} The opportunity to clarify the approach of the Supreme Court arose fourteen years later in the decision of \textit{Prima Paint Corporation v Flood & Conklin Manufacturing Company}.\textsuperscript{42}

\subsection*{6.6.2 Establishing the Cornerstones of Arbitral Jurisdiction: Prima Paint}

\textit{Prima} was the first federal judgment where \textit{separability} was expressly recognised thereby enabling the court to expand the scope of the FAA.\textsuperscript{43} The defendant F & C sold its paint business to the plaintiff Prima Paint. The parties also entered a consulting contract where the defendant was to provide consulting and other services to the plaintiff. In return, the plaintiff agreed to pay the defendant a percentage of receipts from its sales during the stipulated period. The consulting contract included an arbitration clause. Shortly after the sale, the defendant declared bankruptcy. The plaintiff therefore, refused to make payments as per consulting contract on the grounds that it had been fraudulently induced to enter it. Subsequently, the defendant commenced arbitration proceedings. The plaintiff commenced court action to have their consulting contract rescinded and sought a stay of arbitral proceedings. The plaintiff

\begin{itemize}
  \item \textsuperscript{37} \textit{Wilko} US 427, 430 (1953).
  \item \textsuperscript{38} Ibid 427. \textit{FAA. Securities Act} 15 USC (1933).
  \item \textsuperscript{39} Martinez-Fraga, above n 7, 15. Further, the court in \textit{Wilko} added ‘manifest disregard of the law’ as grounds for setting aside an award.
  \item \textsuperscript{40} The principle of party autonomy provides that parties are free to strike a bargain as they wish, provided it is not unlawful.
  \item \textsuperscript{41} The Supreme Court attempted to undo the damage arising from \textit{Wilko} in the decision of \textit{Bremen v Zapata Off Shore Company}. 407 US 1 (1972).
  \item \textsuperscript{42} \textit{Prima Paint} 388 US 395 (1967).
  \item \textsuperscript{43} Ibid.
\end{itemize}
claimed that it believed the defendant was solvent at the time of making the contract and had the capacity to perform under it. 44

When the appeal came before the Supreme Court, the legal issue was whether the federal courts or the tribunal should address a claim of fraud in the inducement under a contract governed by the FAA. The Court held that the contract pertained to interstate commerce and therefore came within the ambit of the FAA. As for a stay pursuant to section 3 of the FAA, the court found that it may not consider claims of fraud in the inducement of the contract generally, only matters which relate to the making and performance of the arbitration agreement. 45 The Court in Prima also referred to giving effect to the intent of Congress which is for parties to have it free of delay and hurdles caused by the judiciary. 46

The decision in Prima was reinforced in Moses H Cone Memorial Hospital v Mercury Construction Corporation. 47 In Moses the Supreme Court declared that a federal court is authorised to issue a stay of court proceedings to have issues arbitrated since the FAA rules on matters of arbitrability apply in state and federal courts. 48 The court held that ‘any doubts concerning the scope of arbitrable issues should be resolved in favour of arbitration.’ 49

6.6.3 The Winds of Change: Southland v Keating
A year after the judgment of Moses, the Supreme Court seized the opportunity to further expand the scope of the FAA. 50 The significance of the decision in Southland Corp v Keating was in that it changed the view that the FAA was a federal procedural statute and held that it was a federal substantive law statute applicable in state courts. 51 The plaintiff, Keating, commenced class action on behalf of hundreds of franchisees of 7 Eleven stores in California. A number of claims, including fraud and breach of contract, were made by Keating against the defendant franchisor. Southland took court action to

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44 Ibid 396.
46 Ibid 404.
47 Moses H Cone Memorial Hospital v Mercury Construction Corporation 460 US 1 (1983). (‘Moses’).
48 Ibid 3.
49 Ibid 24-25.
50 Ibid 1. FAA.
compel Keating to arbitration.\textsuperscript{52} The Supreme Court of California permitted arbitration of all claims except the ones addressed by the \textit{California Franchise Investment Law}.\textsuperscript{53} The U.S. Supreme Court held that the California Supreme Court was incorrect in ruling that an arbitration clause in a franchise agreement was unenforceable as this was inconsistent with section 2 of the \textit{FAA}\.\textsuperscript{54} It also held that the California Supreme Court had thereby nullified a valid agreement to arbitrate. This was not found to be in keeping with the pro-arbitration policy of the \textit{FAA}. In its judgment the Supreme Court opined that ‘contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate.’\textsuperscript{55}

Principles emanating from decisions such as \textit{Southland} have ramifications for international commercial arbitrations, as both domestic and international arbitrations are governed by the same statute.\textsuperscript{56} Only one year following \textit{Southland} another major case made its mark on the arbitration landscape. In \textit{Mitsubishi Motors Corp v Soler Chrysler Corp} the court ruled on the powers of courts and arbitral tribunals with respect to jurisdiction.\textsuperscript{57}

\textbf{6.6.4 Strengthening the Cornerstone: Mitsubishi Motors Corp v Soler Chrysler Corp}

\textit{Mitsubishi} is significant as it created far-reaching ramifications for international arbitration in the U.S. In \textit{Mitsubishi}, the Supreme Court emphasised its confidence in the effectiveness of international commercial arbitration as a tool of dispute resolution in addition to addressing competition law disputes.\textsuperscript{58} The plaintiff Mitsubishi, an automobile manufacturer, brought court proceedings against Soler pursuant to the \textit{FAA} and the \textit{New York Convention}.\textsuperscript{59} The plaintiff sought a court order for arbitration of particular disputes relating to a sales contract executed between the parties. The defendant Soler, a Puerto Rican automobile dealership company, contested the order to compel arbitration. One of the grounds for doing so was that, some disputes were allegedly with respect to competition law – known as antitrust law- and fell under the

\begin{itemize}
  \item \textsuperscript{52} Ibid.
  \item \textsuperscript{53} \textit{CAL Corporations Code} §§3100 – 31516 (1970).
  \item \textsuperscript{54} \textit{Southland} 465 US 1, 10 (1984).
  \item \textsuperscript{55} Ibid 5.
  \item \textsuperscript{56} \textit{FAA}.
  \item \textsuperscript{57} \textit{Mitsubishi Motors Corp v Soler Chrysler Corp} 473 US 614 (1985), (‘\textit{Mitsubishi}’).
  \item \textsuperscript{58} \textit{Mitsubishi} 473 US 614 (1985).
  \item \textsuperscript{59} Ibid. Soler Chrysler Plymouth (‘Soler’).
\end{itemize}
ambit of the *Sherman Act*.\textsuperscript{60} Another ground was that, purportedly, an international arbitrator cannot be trusted to correctly apply antitrust laws.

The arbitration agreement provided for arbitration in Japan in accordance with the rules of the Japan Commercial Arbitration Association. The District Court ruled that the dispute, including the antitrust law claims, ought to be arbitrated, due to the international aspect of the contract.\textsuperscript{61} The Court of the First Circuit, however, found that the arbitration agreement covered all matters arising under different legislation, except antitrust claims.\textsuperscript{62}

In reaching its decision, the Court relied upon the doctrine conceived in *American Safety Equipment Corp v J.P. McGuire & Co*.\textsuperscript{63} According to this doctrine, national arbitration of antitrust claims were precluded. When the judgment was appealed, the issue before the Supreme Court was, where the arbitration agreement stems from an international contract can a U.S. court enforce such agreement addressing antitrust claims by arbitration? The Court held that pursuant to the New York Convention the arbitration clause must be enforced and antitrust claims under the *Sherman Act* were arbitrable pursuant to the *FAA*.\textsuperscript{64} It qualified this by also stating that if the arbitrator failed to respect U.S. antitrust laws, a U.S. Court could refuse to enforce the arbitration award.\textsuperscript{65}

The decision in *Mitsubishi* has come under criticism for being ambiguous as to whether courts should enforce arbitration agreements as standard procedure or only when the court is certain that arbitrators will comply with mandatory laws.\textsuperscript{66} The decision does, however, support the pro-arbitration federal policy and upholds the choice of forum provisions between parties to an international arbitration agreement.

\textsuperscript{60} *Sherman Act* 15 USC §§ 1-7 (1890). The antitrust laws are mandatory laws, that is, they cannot be contracted out of by parties.

\textsuperscript{61} The District Court for the District of Puerto Rico. In doing so, the District Court relied upon *Scherk v Alberto-Culver*, 417 US 506 (1974).

\textsuperscript{62} *Mitsubishi* 723 F 2d, 155, 169 (1\textsuperscript{st} Cir, 1983).

\textsuperscript{63} *American Safety Equipment Corp v J.P. McGuire & Co*, 391 F 2d 821, (2\textsuperscript{nd} Cir, 1968).


\textsuperscript{65} *Mitsubishi* 473 US 614, 637 (1985).

6.6.5 More Key Cases: AT & T and First Options

The shortcomings in the FAA have been partly compensated for by the U.S. Supreme Court, firstly in AT&T Technologies Inc v Communications Workers of America, and subsequently in First Options of Chicago Inc v Kaplan. These two cases have been relied upon by national courts. AT & T involved a dispute regarding the scope of an arbitration clause. In particular, the dispute related to a collective bargaining agreement and dismissal of staff. The union for the employees claimed that the dismissal of staff was arbitrable in accordance with the collective bargaining agreement.

The Supreme Court held that it is the task of the court to interpret the agreement and to determine whether the parties intended to arbitrate disputes regarding dismissals predicated on a ‘lack of work’ decision by the employer. If the court rules that the agreement provides for arbitration of the dispute, then it is for the arbitrator to determine the merits of the parties’ substantive construction of the agreement. The Court concluded that courts should interpret arbitration agreements widely and resolve doubts in favour of the arbitral tribunal. This case has created inconsistency for lower courts as to what is arbitrable. The question of arbitrability in AT & T was whether a collective bargaining agreement created a duty for the parties to arbitrate the particular grievance. The vagueness as to what constitutes arbitrability has led lower courts to develop their own interpretations.

The definition of arbitrability was revisited in First Options where the Court stated that arbitrability was defined as whether the parties agreed to arbitrate the merits of the dispute. First Options further established that contracting parties can authorise arbitrators to decide questions of contractual inarbitrability. This means that parties may confer competence-competence authority upon arbitrators, and hence remove contractual inarbitrability questions from the courts’ jurisdiction. In First Options, the Kaplans were in charge of MK Investments – MKI – a firm which lost heavily in the

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69 Ibid 651.
70 Ibid 656.
71 Ibid 649.
72 PaineWEBBER 87 F 3d 589, 596 (1st Cir, 1996).
75 Ibid 244.
stock market crash of 1987. First Options of Chicago Inc was a company which cleared stocks on the Philadelphia Stock exchange for MKI. The Kaplans, MKI and First Options entered a “workout” agreement whereby MKI, but not the Kaplans, signed the workout agreement incorporating an arbitration clause.\(^\text{76}\)

First Options liquidated some MKI assets following the loss of considerable amounts by MKI. When MKI failed to pay the debts demanded, First Options resorted to arbitration against the Kaplans and MKI. The Kaplans argued that their dispute with First Options was not arbitrable. They insisted that they were not party to the arbitration agreement, and hence the arbitrator lacked both jurisdiction to rule on the merits and the arbitrability of its dispute.

The arbitral tribunal ruled in the case that it had jurisdiction to hear the merits, and decided the matter in favour of First Options. It also found that the arbitration agreement, though only signed on behalf of MKI, bound the Kaplans personally.\(^\text{77}\)

First Options was successful in having the award confirmed by a district court, however, the Third Circuit reversed the judgment. Subsequently, the matter came before the U.S. Supreme Court. The main contention of the Kaplan’s argument was that they had not signed the arbitration agreement and were therefore not subject to the jurisdiction of the arbitrator. The Court was asked to consider the extent to which judges could review a decision of arbitrators concerning jurisdiction. In what may be regarded as an anti-arbitration judgment, the Supreme Court held that the district court and not the tribunal must determine arbitrability matters.\(^\text{78}\)

The Court reasoned that the arbitrability question did not belong to the tribunal since the parties had not ‘clearly and unmistakably’ submitted the question to the tribunal.\(^\text{79}\) It also found that where the parties did not agree to submit the arbitrability question, the courts should decide independently. In the case of First Options, however, the court did not find a ‘clear and unmistakable’ submission of arbitrability issues conferred on the tribunal, primarily because the Kaplans had not signed the agreement.\(^\text{80}\) Another reason

\(^{76}\) *First Options* 514 US 938 (1995).

\(^{77}\) Ibid 946.

\(^{78}\) Ibid 938-941.

\(^{79}\) Ibid 944.

\(^{80}\) Ibid 945.
for this holding was due to the fact that the arbitration agreement failed to specify whether the tribunal had authority to rule on jurisdictional matters. According to First Options, whether the tribunal has jurisdiction to rule on its own jurisdiction is therefore subject to construction of the parties’ agreement. The Court indicated this where it stated that:

Who has the primary power to decide arbitrability turns upon what the parties agreed on that matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court’s standard for reviewing the arbitrator’s decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate.

The rule derived from this case is that if the dispute arises at the outset of the arbitration then questions such as the existence of the arbitration agreement and its validity are presumptively for the courts to determine. It follows that courts should not assume parties consented to have arbitrability issues arbitrated, unless there exists clear and unmistakable evidence to support it. This approach stands in contrast to the French approach where the inverse is true. French courts will only intervene if the tribunal has not been constituted and there is a manifestly inapplicable arbitration agreement. The English approach on the other hand, permits more challenges to jurisdiction than available under French law, however, the English arbitration law explicitly provides for the procedure and substance of such challenges.

It is argued that the judgment in First Options has established a presumption against tribunals determining arbitrability. This is due to the Supreme Court finding that courts should not assume parties assented to have arbitrability questions arbitrated unless there is ‘clear and unmistakable’ evidence to support it. The effects that flow from this decision are explored below.

6.6.6 Implications of First Options

Courts have applied the dicta from First Options in a conflicting manner. Some courts have applied it in a wider sense thereby satisfying the parties’ ‘clear and unmistakable’ agreement to have arbitrability addressed by the tribunal. Others have provided it with a

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81 Ibid 946.
82 Ibid 943.
83 Ibid 938-941.
narrow interpretation. This has created inconsistency in the lower courts application of arbitrability. What emerges from *First Options* is that a distinction must be made between two types of agreements: (1) arbitration agreements where jurisdiction issues are not submitted to the tribunal; and (2) those where the parties also submit the issue of jurisdiction to the tribunal. In the first type of arbitration agreements, the decision of the tribunal is subject to full review by the court, whereas in the second type of agreement the court should only set aside the tribunal’s ruling in exceptional circumstances. On the facts of the case, it was clear that the Kaplans had not agreed to have the arbitrability question decided by the tribunal. The parties had not ‘clearly and unmistakably’ submitted the jurisdictional question to the tribunal, therefore it was an ordinary arbitration agreement. The court held that:

> given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration . . . courts might hesitate to interpret silence or ambiguity on the “who should decide arbitrability” point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.87

In its decision the Court failed to make express reference to the *compétence-compétence* doctrine, although essentially recognizing its effect. This is confirmed by Carbonneau who states that:

> The Court in *Kaplan* had the chance to integrate the *compétence-compétence* doctrine into the U.S. law of arbitration. It does so indirectly by holding that arbitrators can rule upon the validity and scope of arbitration agreements, if the arbitration agreement authorises them to rule on these matters. For all intents and purposes, the *Kaplan* holding amounts to an adoption of the *compétence-compétence* doctrine on an ad-hoc contractual basis.88

It is precisely the ad-hoc contractual basis in which *compétence-compétence* is determined by U.S. courts that contributes to the lack of consistency. The judgment in *First Options* means that if a dispute arises at the outset of the arbitration, the courts determine the preliminary issues of existence and validity. This stands in stark contrast to the French approach where the court defers review of jurisdiction unless the manifestly void or inapplicable exception applies to the arbitration agreement. According to the dicta in *First Options*, parties are permitted to give arbitrators the authority to determine jurisdictional issues, but the court will look for evidence of this in clear and unmistakable terms. Further, validity of the arbitration agreement is an

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86 See *Smith Barney Shearson v Sacharow*, 92 2d 39 (NY, 1997). See also *General Motors Corp v Pamela Equities Corp*, 146 F 3d 242 (*5*th Cir, 1998).


88 Carbonneau, above n 74, 262, 263.
aspect U.S. courts may examine at any phase of the arbitral procedure before an arbitral tribunal is allowed to exercise concurrent jurisdiction.

The arbitrability principle established in this decision creates a high standard which lends itself to a presumption that if the court finds that the arbitration agreement does not cover all the claims made by the parties, the arbitration agreement may only be partially enforceable. This will generally be the case unless, there is unequivocal evidence the parties agreed to arbitrate all jurisdictional issues. Although the presumption is a rebuttable one, such rebuttal will rarely be clear and unmistakable, thus the fallback position will be review by the courts. Moreover, by the ruling that the court should determine the existence and validity of the arbitration agreement as a full review – de novo - it may be inferred that during the early stage of the arbitral process, the court may determine existence and validity questions prior to referring the matter to the tribunal.

This is likely to undermine the principle of party autonomy as well as compétence-compétence. The rule in First Options therefore grants too much discretion for courts to determine the jurisdiction of the tribunal. Unsurprisingly, the standard of full review has received much criticism due to its onerous nature and that it may lead lower U.S. courts to presume that the arbitration agreement is invalid. It is feared that such an interventionist and presumptive approach by the courts could lead to the attrition of arbitration agreements.

The case law generated from Prima Paint and First Options comprises a significant platform in the doctrinal framework of arbitration in the United States. Prima Paint and First Options address questions concerning arbitrability whereas Buckeye Check Cashing Inc v Cardegna primarily addresses the doctrine of separability. In addition further reinforcement was provided on the arbitrability issue in the determination of arbitrability.

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Howsam. This case provided a pro-arbitration approach in connection with procedural issues in arbitration.

6.6.7 Procedural Arbitrability: Howsam

In Howsam v Dean Witter Reynolds Inc. the U.S. Supreme Court held that the interpretation of a National Association of Security Dealers Code (NASD) regulation stipulating a six year time limitation for an arbitration was a matter presumptively for the tribunal to decide, rather than the court.94 Owing to this rule, issues concerning procedural arbitrability, such as whether conditions precedent to arbitration were satisfied, are subject to a less interventionist approach in the U.S.95 Due to the ruling in Howsam, arbitrability issues arising at the outset of the dispute relating to procedural questions such as time limits on a claim are presumptively the preserve of arbitrators.96 Once an award on jurisdiction or a final award is issued, the U.S. courts will only conduct a prima facie review of procedural arbitrability issues whereas French courts may conduct a full review of same.97 This does not however alter the U.S position on the substantive issues concerning jurisdiction.

Both First Options and Howsam relate to an analysis of section 3 of the FAA, which concerns a stay of proceedings where the issue is referable to arbitration. Despite such legislative provisions, the case law suggests that the courts have not always been inclined to refer matters to arbitration, nor to provide first priority to the tribunal on the question of its own jurisdiction. The next case is evidence of this argument.

6.6.8 The Standard of Review of Arbitral Awards: China Minmetals

Although First Options and Howsam concerned domestic arbitrations, they have implications for international arbitrations in the United States and the principle of compétence-competence in general.98 An example where domestic arbitration judgments were applied to an international arbitration dispute is China Minmetals

96 Howsam 537 US, 79-84 (2002). In Howsam the U.S. Supreme Court held that the interpretation of a National Association of Security Dealers Code (NASD) regulation stipulating a six year time limitation for an arbitration was a matter presumptively for the tribunal rather than the court.
97 Barcelo, above n 90, 134.
Materials Import and Export Co. Ltd. v Chi Mei Corp.\textsuperscript{99} China Minmetals is a corporation under Chinese law and Chi Mei is incorporated pursuant to the laws of the U.S.\textsuperscript{100} The dispute arose from a business transaction between the parties. The arbitration was conducted under CIETAC rules and the tribunal found in favour of Minmetals.\textsuperscript{101} The arbitrators found that Chi Mei was unable to prove the alleged forgeries. During the arbitration and subsequent litigation, Chi Mei maintained that it did not agree to sell any goods to Minmetals and the contracts relied on by Chi Mei were forged.

Following the arbitral award, Minmetals filed court proceedings in the U.S. for enforcement. The District Court upheld the award. On appeal, the majority of the Court of Appeal for the Third Circuit found that the District Court, acting pursuant to the \textit{FAA}, should have autonomously ruled upon the validity of the arbitration agreement, at a minimum in cases where the arbitration agreement is alleged to be \textit{void ab initio} and where there is no waiver precluding such a defence.\textsuperscript{102} The allegation by Chi Mei that it never agreed to sell anything is similar to the claim made by the Kaplans in \textit{First Options}.\textsuperscript{103} The Court of Appeal therefore relied heavily on the dicta in \textit{First Options} for its reasoning.\textsuperscript{104} In \textit{Minmetals}, the Court found that challenges to existence, validity or enforceability fall within the ambit of curial determination.\textsuperscript{105} It reasoned by stating that ‘a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it.’\textsuperscript{106} The Court held that:

\begin{quote}
The liberal federal policy favouring arbitration agreements is at bottom a policy guaranteeing the enforcement of private contractual arrangements and that because arbitration is a matter of contract, no arbitration may be compelled in the absence of an agreement to arbitrate.
\end{quote}

\textsuperscript{99} \textit{China Minmetals Materials Import and Export Co v Chi Mei Corp}, 334 F 3d 274 (3d Cir, 2003). (‘\textit{China Minmetals’}). This case related to the enforcement of a Chinese award in New Jersey, U.S.A. At paragraph 52 of the decision by the Court of Appeal, Third Circuit, it was stated that: ‘We recognise that \textit{First Options} is a domestic arbitration case, but the international nature of the present litigation does not affect the application of \textit{First Options} principles’.

\textsuperscript{100} \textit{China Minmetals Materials Import and Export Co} (‘\textit{Minmetals’}). Chi Mei Corp (‘\textit{Chi Mei’}).

\textsuperscript{101} CIETAC – China International Economic and Trade Arbitration Commission.

\textsuperscript{102} David D Caron and Rebecca J Wright, ‘Justice Alito and Arbitration: His Opinion on \textit{China Minmetals}’ (2006) 20(1-2) \textit{News and Notes from the Institute for Transnational Arbitration} 1, 2.

\textsuperscript{103} \textit{First Options} 514 US 938 (1995).

\textsuperscript{104} Ibid.

\textsuperscript{105} \textit{China Minmetals} 334 F 3d 274, 287 (3d Cir, 2003).

\textsuperscript{106} Ibid 288.
If the District Court had conducted a *prima facie review* of the arbitration agreement and this did not suffice to ascertain the validity of it, then it should have conducted a *full review*. Evidence indicates that the District Court did neither and only heard oral arguments without any evidentiary hearing. In this instance, the District Court should have decided the arbitrability question of whether Chi Mei had consented to arbitration. This is also in alignment with the *New York Convention* which permits refusal to enforce awards where the parties did not reach a valid agreement to arbitrate.

Under the circumstances, *China Minmetals* was a case where had the District Court conducted a *prima facie review* of the validity of the arbitration agreement, the dispute may have been resolved expeditiously without wasting further public and private resources. Pursuant to Article 1448 of the *New Decree*, French courts would have reviewed the jurisdictional challenge in this case, since it was at the enforcement stage of the award. English courts would also have authority to review the substantive jurisdiction under section 67 of the *Arbitration Act*. Similar to the decision in *China Minmetals*, the Supreme Court had the opportunity to determine the same question - whether the court or the tribunal should decide if the contract was *void ab initio* - in *Buckeye Check Cashing Inc v Cardegna*.

### 6.6.9 The Trilogy of Prima Paint, First Options and Buckeye

Another opportunity for the court to supplement the development of the principles it had established in *Prima Paint* and *First Options* arrived in the decision of *Buckeye Check Cashing Inc v Cardegna*. In particular, four main questions were answered in the decision of *Buckeye*. First, whether an arbitration clause is separable from the main contract? Secondly, whether a challenge to the main contract incorporating an arbitration agreement should be determined by the tribunal or the court? Third, whether a federal substantive law is established by the *FAA*? Finally, whether a federal substantive law is relevant to state and federal courts? The most relevant is the first question as it is most closely linked to jurisdiction.

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107 Ibid 278.
109 *New Decree* art 1448.
110 *Arbitration Act 1996* (UK) s 67(2).
112 Ibid.
113 Ibid.
114 Martinez Fraga, above n 7, 130.
The dispute arose from a decision concerning an arbitration clause in a standard-form consumer lending contract. The plaintiff filed a class action against Buckeye contending that the interest rates charged were in breach of Florida consumer laws. Buckeye applied for a court order to compel arbitration as per contract. The trial court held that a court, not an arbitrator, should rule on the particular question of whether the contract is illegal and void ab initio. The District Court of Appeals reversed the trial court judgment on the ground that the respondents argued the entire contract – as opposed to the arbitration agreement in particular- was void and therefore the arbitration agreement was enforceable. The Appeal Court accordingly determined that the tribunal should adjudicate on the question of the contract’s validity.115

The Florida Supreme Court, once again reversed the District Court of Appeal’s decision on the predication that enforcement of an arbitral agreement in a contract contested as unlawful could breathe life into a contract that not only violates state law, but also is criminal in nature.116 The Supreme Court reversed the Florida Supreme Court ruling on the issues of whether a court or an arbitrator ought to decide the question and that a contract which includes an arbitration agreement is void for illegality. Scalia J for the majority, opined that the principle of separability established in Prima Paint was applicable in state and federal judicial actions subject to the FAA and in accordance with the Court’s decision in Southland.117

The Supreme Court in Buckeye also found that given the challenge did not specifically contest the arbitration clause, curial intervention was uncalled for pursuant to the FAA. Accordingly, the challenges brought before the Court should be addressed by the arbitrator.118 Effectively, the Court held that the FAA prevents state courts from interpreting state contract laws in a manner which would reallocate jurisdiction from arbitral tribunals to courts. The Court acknowledged in Buckeye that Congress enacted the FAA ‘to overcome judicial resistance to arbitration’ and to codify a ‘national policy favouring arbitration.’119 This was a pro-arbitration judgment by the Supreme Court which reinforces the policy of the FAA for upholding agreements to arbitrate and

115 Ibid 141.
119 Ibid 443.
particularly the doctrine of *separability*.\(^{120}\) The issue of arbitrability and in particular, who has priority for ruling on contract validity arose again in *Preston v Ferrer*.\(^{121}\)

### 6.6.10 The Decision in Preston v Ferrer in Light of Buckeye

The rule from *Buckeye* was subsequently applied in the Supreme Court decision in *Preston v Ferrer* where the Court found that an arbitrator and not a judge must first determine the validity of a contract alleged to be invalid in its totality.\(^{122}\) The dispute arose in California from a fee disagreement between a lawyer and his client - a former Florida judge pursuing a second career as an actor. According to State law, talent agents must obtain a license from the State to operate their business.\(^{123}\) Ferrer argued that the contract with his lawyer Preston was void pursuant to California legislation, primarily because Preston did not have the necessary license and therefore the invalidity of the contract absolved him from the duty to pay the lawyer’s fees. Ferrer successfully obtained an injunction from a California trial court, staying arbitration pending a ruling by the California Labor Commissioner. Ferrer’s application to stay the arbitral proceeding was denied by the Commissioner. Upon application by Preston to compel arbitration, the California Court of Appeal sustained the injunction and held that arbitration may proceed only if the Commissioner determined lack of jurisdiction to adjudicate the dispute.\(^{124}\)

The question presented to the U.S. Supreme Court was whether the arbitrator or the Labor Commissioner had primary power to decide if the statutory definition of “talent agent” applied to Preston? The Supreme Court addressed the issue in favour of the arbitrator's authority to rule.\(^{125}\) The majority in *Preston* held that when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws which confer primary jurisdiction in another forum, whether judicial or administrative.\(^{126}\) The Court relied on a number of cases in its reasoning, including *Prima Paint, Southland*

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\(^{120}\) For a more recent decision regarding separability in an employment contract dispute see *Rent-A-Center West Inc v Antonio Jackson*, 130 US 1133 (2010). (‘Rent-A-Center’).


\(^{122}\) Ibid.

\(^{123}\) Ibid.

\(^{124}\) Ibid 444.

\(^{125}\) Ibid 446.
and *Buckeye*.\textsuperscript{127} This was another pro-arbitration decision, however, the lack of guidance in the federal legislation regarding many aspects of international arbitration has left the Supreme Court to extrapolate law.\textsuperscript{128} Further, lower courts have at times misunderstood the rules developed by the Supreme Court thereby applying them inconsistently.\textsuperscript{129} This has led to divergence in the degree of judicial intervention by courts.

### 6.7 Judicial Intervention in the U.S.

Arbitration in the U.S. proceeds against the backdrop of judicial intervention. International arbitration in the U.S. is conducted under the ambit of the *New York Convention*, however, as stated earlier, the degree of intervention in the U.S. exceeds that in the U.K. and France.\textsuperscript{130} The lack of contemporary arbitration laws in the U.S. provides more discretion for courts to decide jurisdiction on an ad-hoc basis. Lower intervention in the U.K. and France is primarily attributed to both these countries operating under modern arbitration laws which provide explicit guidance on procedural and substantive aspects of arbitration. Consequently, there is less propensity for lower courts to apply the laws incorrectly in these two jurisdictions.

Whilst judicial review may be essential in some circumstances, excessive interference enables parties to stall the arbitral process and provide them with a path to dishonour their agreement to arbitrate. This has serious implications for the cost and efficiency of the arbitral process and is particularly problematic in the context of international arbitration where the parties usually require both certainty and predictability with respect to the enforcement of their arbitration agreements. Excessive intervention, thus, undermines the goals that motivate commercial parties to opt into arbitration. Not only does it risk the squandering of public resources of the judiciary but, also the waste of private resources of the parties.

#### 6.7.1 Challenging Arbitral Jurisdiction in the U.S.

American arbitration law has primarily provided parties with entitlement to challenge the tribunal’s jurisdiction at any time, either prior to or following the award. U.S. courts


\textsuperscript{128} See Hulbert, above n 26, 564.

\textsuperscript{129} See *Painewebber* 87 F 3d 589, 596 (1st Cir, 1996) where the court applied *AT&T Technologies Inc v Communications Workers of America* 475 US 643 (1986).

\textsuperscript{130} *New York Convention*. 
have liberty to review arbitrability questions and have them addressed by a jury.\textsuperscript{131} Judicial rulings on such challenges are generally made by a party litigating pursuant to sections 3 or 4 of the \textit{FAA}.\textsuperscript{132} The advantage of this approach is that the party who did not consent to arbitrate will not be compelled to have the tribunal rule on the issue first; therefore saving costs and time. The saving in cost and time, however, are only realised if the court finds that the tribunal lacks jurisdiction to rule on the matter. Once the court refers the dispute to the tribunal, the likelihood of the resulting award being set aside by the court is also reduced.

In contrast, with the exception of manifestly null or inapplicable agreements, French law prohibits judicial review of jurisdictional challenges until the award has been rendered.\textsuperscript{133} The advantages of this approach are three-fold: firstly, it promotes potentially more considered reviews by the judiciary as they have the arbitrator’s reasoned decision on jurisdictional issues. Secondly, a party is less likely to increase costs by concurrently challenging jurisdiction in courts whilst the matter is pending before a tribunal. Thirdly, the matter may be settled during arbitration, precluding the requirement for judicial scrutiny.\textsuperscript{134}

In the United States, unless the parties to a contract have ‘clearly and unmistakably’ agreed to arbitrate disputes concerning the arbitrability of a dispute, courts will rule on such jurisdictional issues without deferring to an arbitral tribunal.\textsuperscript{135} Moreover, particular intermediate appellate courts have stated that parties are capable of demonstrating a ‘clear and unmistakable’ agreement to arbitrate questions of arbitrability by agreement to arbitrate all disputes.\textsuperscript{136} Hence, where one party to arbitration challenges the arbitrability of the dispute, courts will rule on the matter, unless the parties had clearly evinced their intention for the tribunal to rule on the issue.

\textsuperscript{131} \textit{China Minmetals} F 3d 274 (3d Cir, 2003). (‘Minmetals’).
\textsuperscript{132} \textit{FAA} §§ 2, 3.
\textsuperscript{133} \textit{New Decree}, art 1448 provides that: ‘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.’
\textsuperscript{134} Park, above n 28, ‘The Arbitrator’s Jurisdiction’ 42, 43.
\textsuperscript{135} The standard of ‘clear and unmistakable’ agreement to arbitrate disputes emanates from \textit{First Options} 514 US 938, 944 (1995).
Recent case law also supports the view that courts examine the language of the arbitration agreement to find that a ‘clear and unmistakable’ agreement to arbitrate exists.\textsuperscript{137}

Pursuant to section 201 of the \textit{FAA}, the question of who decides the jurisdiction of the tribunal is essentially subject to the construction of Article II(3) of the \textit{New York Convention}, which is subsumed in the \textit{FAA}.\textsuperscript{138} Although it is argued that the language of Article II(3) invites a \textit{prima facie review} of arbitration agreements, in practice, the United States courts have not always taken such an approach.\textsuperscript{139}

From a comparative perspective, the approach of the United States judiciary may be said to be underpinned by the contractual intention of the parties. Further, there is an emphasis on the language of the arbitration agreement to determine the source of power of the arbitrators to determine their own jurisdiction. In contrast, the approach adopted by the French courts is premised on the status of the arbitrator, possessing an authority conferred by law to make determinations binding at law.\textsuperscript{140}

Although the objectives may be the similar, the two approaches are divergent. Pursuant to French law, judicial intervention is restricted until the tribunal has ruled on its jurisdiction although subsequent judicial review of that decision is permissible.\textsuperscript{141} By contrast, according to the United States approach, courts have discretion to examine arbitral jurisdiction at any stage during the proceedings. However, a ruling that the parties had conferred the arbitral tribunal with power to rule on their own jurisdiction may bar any judicial intervention with the decision of the tribunal.\textsuperscript{142}

\textsuperscript{137} \textit{John Momot v Dennis Mastro} (9th Cir, No 10-15276, 22 June 2011) slip op 8483, 8485. See also \textit{Rent-A-Center West Inc v Antonio Jackson}, 130 US 1133 (2010).

\textsuperscript{138} The \textit{New York Convention} is incorporated into the \textit{Federal Arbitration Act} by virtue of § 207 which states: ‘Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.’


\textsuperscript{141} See \textit{Code de Procedure Civile 1996} [Code of Civil Procedure] (France) art 1458. (‘\textit{CPC}’). 

\textsuperscript{142} Virginie Colaiuta, above n 140, 154.
If judicial intervention with respect to arbitral jurisdiction became less available during the early stages of the arbitral procedure, yet more available at the post-award stage, this would bring U.S. courts closer to the U.K. and French courts’ approach to international arbitration. Such practice would reduce opportunities for recalcitrant parties to stall the proceedings yet simultaneously provide a safety net against any breaches of jurisdiction or due process by a tribunal.

6.8 Summary
The judgments of the Supreme Court in First Options and Buckeye reinforce the current U.S. approach to arbitral jurisdiction, which limits to some extent courts’ authority to interfere with contracts containing arbitration clauses. Although there is an absence of express reference to the principle of compétence-compétence in the judgments and the FAA, effectively, there is recognition of it in the approach adopted by the Supreme Court in particular. The Supreme Court’s ruling in cases such as Buckeye reaffirms the FAA’s limited framework for judicial review of parties’ decisions to resort to arbitration. The U.S. Federal Arbitration Act does not distinguish among employment, civil rights, consumer, business and international arbitrations. Accordingly, the decision of the Supreme Court in cases such as Southland and Preston may potentially affect all future decisions which pertain to the FAA.

The approach of the United States concerning review of the tribunal’s jurisdiction by courts today, may be characterised as oscillating between full review, prima facie and - as seen in the District Court’s decision in China Minmetals - no review. Courts in the U.S. are more likely to intervene if jurisdiction is challenged during the early stages of the arbitral process. This is in contrast to the approach found under Article 1448 of the New Decree which permits full review at the stage of enforcement of the award. On the other hand, United Kingdom courts tend to intervene frequently if the jurisdictional challenge is based on a complex set of facts. Therefore the U.K. approach may be viewed as cautious. In the U.S., where a party contests the existence of an agreement to arbitrate rather than the enforceability of a pre-existing contract, courts are likely to find they have jurisdiction to decide the issue.

145 Graffi, above n 91, 744.
146 New Decree art 1448.
147 See Will-Drill Resources Inc v Samson Resources, 352 F 3d 211 (5th Cir, 2003).
Generally, the key cases considered in this chapter have gradually increased the scope of the tribunals’ jurisdiction, albeit lower courts have applied the dicta from Supreme Court judgments inconsistently.\textsuperscript{148} Although there is a restriction on the power of national courts to review questions pertaining to the existence or validity of arbitration agreements, there needs to be ‘clear and unmistakable’ evidence that the parties intended to arbitrate all arbitrability questions.\textsuperscript{149} This rule from \textit{First Options} created considerable controversy and confusion in application by lower courts. In contrast, cases such as \textit{Preston v Ferrer}, where the question before the court centred on the arbitrability question, the court ruled that this was for the tribunal to decide.\textsuperscript{150} Due to this divergence, it is one step forward, two steps back for U.S. courts with respect to arbitrability. In the result, U.S arbitration laws do not bear significant resemblance to those of France or the U.K. When compared with the U.K. practice, the approach of U.S. courts appears to be less closely aligned to the French approach, which provides the highest deference for priority of tribunals to rule on jurisdiction.

If U.S. legislation were to be overhauled it should curtail curial intervention at the early stages of the arbitral process to a narrow set of circumstances such as manifestly inapplicable arbitration agreements. In addition, the amended laws should leave open the possibility for a full judicial review where necessary, once an award has been issued. This would present a step in the right direction to modernise U.S. arbitration law by reducing opportunities for dilatory tactics used by parties to stall the arbitral process, whilst concurrently providing a safeguard for due process and the rights of parties.

The fact that the \textit{FAA} lacks a mandatory provision similar to Article 1448 of the \textit{New Decree}, enables U.S. courts to use more discretion in the approach they adopt with respect to examination of the arbitration agreement. This may be a double edged sword

\textsuperscript{148} See Painewebber 87 F 3d 589, 596 (1\textsuperscript{st} Cir, 1996) where the court applied \textit{AT&T Technologies Inc v Communications Workers of America} 475 US 643 (1986).

\textsuperscript{149} The standard of ‘clear and unmistakable’ agreement to arbitrate disputes emanates from \textit{First Options} 514 US 938, 944 (1995). Two bills were introduced in the U.S. Congress but were not passed. \textit{Arbitration Fairness Act} H.R.3010, s.1782 (110th Congress, 1\textsuperscript{st} Session) (12 July 2007); \textit{Fair Arbitration Act} s.1135 (110\textsuperscript{th} Congress, 1\textsuperscript{st} Session) (17 April 2007). These bills were anti-arbitration in their approach and would have seriously negated the principle of \textit{compétence-compétence} had they been successfully passed. It is argued by some scholars that these bills were a response to the negative effect of \textit{compétence-compétence}. See Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’ Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.

\textsuperscript{150} \textit{Preston v Ferrer} 552 US 346 (2008).
in that, discretion may be used to intervene too readily if not applied with caution. Conversely, such discretion permits courts to intervene where it finds a genuine doubt concerning arbitrability. There is more flexibility in the FAA in this regard.

It has been suggested, however, that U.S. laws are long overdue for an overhaul in arbitration legislation to align them more closely with current developments in international arbitration laws including providing a greater priority for the tribunals to determine their own jurisdiction. Highly technical interpretations of arbitration provisions ought to be avoided in favour of a broad interpretation of arbitration agreements. The Supreme Court has begun the journey to expand the substantive law of the FAA but this effort may be expedited with major amendments to the legislation.

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Chapter Seven

STRIKING A BALANCE: ASSISTING THE ARBITRAL PROCEDURE WITHOUT UNDUE JUDICIAL INTERVENTION

7.1 Introduction
The role of the legal order is to strike a balance between effectively assisting the arbitral procedure and providing intervention where parties’ interests are at stake. The aim is to balance legality with finality. This consists of providing priority to the parties’ agreement, whilst ensuring there is access to courts if one of the parties presents a genuine challenge to the jurisdiction of the tribunal. The arbitration laws of the three jurisdictions examined, attempt to strike such balance. They all succeed to varying degrees.

Since the rise of international commercial arbitration as an effective tool for alternative dispute resolution, there have been concomitant tensions between the jurisdiction of national courts to intervene and the autonomy of arbitral tribunals to determine their own jurisdiction. To prohibit judicial review of the tribunal’s ruling on jurisdictional questions would be tantamount to refusing one of the fundamental entitlements found in any democratic legal system – the right to have judicial review. Conversely, to dispose entirely of the courts’ power to intervene in the arbitral process could potentially result in a miscarriage of justice. What is suggested is that tribunals be conferred with a chronological priority to determine their jurisdiction, wherever this is legally possible. This priority does not equate to an absolute ouster of the court’s jurisdiction to review the ruling of a tribunal.

The courts in all three countries provide some recognition to the tribunal to determine its own jurisdiction. In analysing the level of recognition provided, this thesis focuses on three key criteria. These can be categorised as: the timing of review; the grounds for review and the standard of review. Further examination reveals substantial divergence among national laws and courts in their approach to compétence-competence, particularly the stage at which the court intervenes and the extent of intervention.

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1 See Australian Communist Party v Commonwealth, (1951) 83 CLR 1, 262 (Fullagar J). See also Marbury v Madison, 5 US (1 CRANCH) 137 (1803).
This chapter is divided into two parts. The first summarises the findings of the thesis followed by a more detailed summary and recommendations for each jurisdiction. This is followed by general recommendations for reform for the United Kingdom and United States. It is suggested that the U.S. and the U.K. adopt key features of the French approach and make the necessary modifications to suit their own legal, economic and social conditions. Although the French approach is not perfect, it delivers best practice in balancing the competing interests of maintaining a legal order whilst providing sufficient deference to the principle of compétence-compétence.

7.2 Key Findings

Chapter 1 set out the thesis question, key definitions and the historical development of arbitration. Despite the global financial crisis, international arbitration is experiencing significant growth evidenced by increasing case loads of leading international arbitral institutions in the last decade. Chapter 2 examined the legal framework within which arbitration operates including the Model Law and the New York Convention. The chapter also explored the various grounds for challenging arbitration agreements and awards. Key principles such as separability and compétence-compétence were introduced.

Chapter 3 undertook an in-depth examination into separability and compétence-compétence. The findings indicate variations in the national courts’ approach to arbitral jurisdiction. It is not only different legislation, but also the interpretation and practices provided by the courts which affect the outcome and overall approach. Separability was analysed in the context of the three countries under focus in this thesis. Prima facie and full review were discussed, and the three countries examined revealed a different approach to these.

Chapters 4 to 6 examined the first criterion of the thesis question: the extent to which each country recognises international conventions. Although each jurisdiction has embraced international arbitration law to varying degrees, the interpretation and practice is subject to national practices. For example, although the U.S. was one of the

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2 See Doug Jones, ‘International Dispute Resolution in the Global Financial Crisis’ (2009) 28 The Arbitrator and Mediator 35, 37. For example the LCIA has seen an 81% growth in case load.

early signatories to the *New York Convention*, this is not a guarantee that its courts consistently uphold international arbitration agreements.\(^4\)

The legal systems examined indicate that the authority to decide jurisdiction varies among the national courts of all three countries. The case law of each country revealed the degree to which national courts provide for the independence of arbitral tribunals, thus answering the second criteria for the thesis question. Their respective national laws interpretations differ. There were no express provisions in the national or international laws or conventions regarding the handling of a jurisdictional challenge regarding the tribunal.

The preferable option appears to be discretion for courts to decide on a case-by-case basis, in accordance with national policies and laws.\(^5\) There should, however, be a clear pro-arbitration policy and practices conducive to upholding arbitration agreements. Finally, each country was assessed on their overall record for enforcing agreements. This was the final thesis question.

Chapter 4 provided the broad context followed by an in-depth examination of the French approach to arbitral jurisdiction. France has the most liberal approach to *compétence-compétence*. The French legislation has express provisions for the circumstances under which a court may intervene.\(^6\) In particular, the courts of France only review jurisdictional challenges once an award is issued, unless the tribunal has not been constituted and the agreement is manifestly void or inapplicable.\(^7\)

The approach to arbitral jurisdiction in the U.K. was addressed in Chapter 5. The *Arbitration Act* of the U.K. permits a party to seek judicial review whilst arbitral proceedings are on foot.\(^8\) Compared with the French approach, the U.K. *Arbitration Act* leaves more doors open for judicial review.\(^9\) Although *compétence-compétence* is established, there is still scope for further entrenchment of the principle. Unlike in

\(^4\) *New York Convention*.
\(^5\) For example the *New York Convention* does not provide any explicit provision with respect to the timing or degree of intervention a court of a signatory country should follow.
\(^7\) See New Decree art 1448.
\(^8\) *Arbitration Act 1996* (UK) s 32(4). An arbitral tribunal may continue with its proceedings whilst the court is reviewing jurisdiction, unless parties agree otherwise.
\(^9\) Ibid ss 31, 32, 67.
France, the case law in the United Kingdom oscillates between a narrow and broad interpretation of *compétence-compétence*. This has prevented the development of a unified and consistent body of law. The chapter drew attention to a range of jurisdictional challenges under the *Arbitration Act*. Particular emphasis was placed on the ability of non-participants to challenge the substantive jurisdiction of arbitral tribunals.

The question of jurisdiction referred to as ‘arbitrability’ in the U.S. was addressed in Chapter 6. The approach of the U.S. stands at the other end of the spectrum from France. This chapter showed that the U.S. extends intervention by providing that a court may, in advance of arbitration and by the application of a party, determine questions concerning existence, validity and scope of the arbitration agreement. The absence of a contemporary statute with clear provisions on arbitrability has been a major contributing factor for the lack of consistency in U.S. courts. The Supreme Court has looked behind the *FAA* to find implied support for its decisions. The dicta of the Supreme Court, however, have at times been misinterpreted by lower courts causing further confusion and inconsistency.

The key findings indicate that if exercised with restraint, the authority of courts to intervene provides an effective system of checks and balances to ensure the rights of parties and the public are not negated. Conversely, if national courts intervene unnecessarily, this may result in undermining arbitration as an effective tool for the resolution of international commercial disputes. In striking a balance, the overarching factors must be agreement of the parties and avoidance of unnecessary delay or costs. The discretion of the courts to intervene requires flexibility, particularly where the interests of the parties or the interests of public policy are at stake. Lord Mustill has said ‘it is only a court with coercive powers that could rescue an arbitration in danger of foundering.’

### 7.2.1 Findings on Prima Facie Examination

Chapters 4 through to 6 looked at whether a *prima facie review* or a *full review* was favoured. This was the third criterion of the thesis question. The limitation of a *prima facie* examination is that it may not be definitive. Some disputes are complex. An

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12 *Coppee Lavalin SA NV v Ken-Ren Chemicals and Fertilisers Ltd* [1995] 1 AC 38 at 64.
example is provided by a dispute concerning a group of companies where the identity of a non-signatory party does not appear in the contract. A similar difficulty may arise where there has been an assignment of an agreement to arbitrate. This is particularly so if the identity of the assignee and original counterparty of the assignor are not in the same agreement. A *prima facie review* may also be insufficient if an agreement to arbitrate is ambiguous.\(^{13}\)

A key question is that of consent. It is argued that it is not possible for courts to determine the question of validity in all cases by employing *prima facie review*. The evidence suggests that, in some cases, a *full review* may be warranted.\(^{14}\) The cases examined in Chapter 4 suggest that only in very few circumstances would an arbitration agreement be manifestly void or manifestly inapplicable in accordance with the French *New Decree*.\(^{15}\) To ascertain this, however, may require more than a *prima facie review*. Hence, some discretion must be given to the courts to depart from a *prima facie review* where necessary. French courts usually permit a *full review* once an award has been issued and a review of the arbitration agreement is necessary.

Although there are broad international provisions, such as Article II(3) of the *New York Convention* and Article 8(1) of the *Model Law*, the standards applied by courts from different jurisdictions concerning *compétence-compétence* vary substantially.

### 7.2.2 International Arbitration Law: The Model Law and New York Convention

The *Model Law* and the *New York Convention* provide a paradigm for national arbitration legislation. National laws may incorporate the *Model Law* including any modifications as they see fit. A *prima facie review* was, however, definitively rejected by the drafters of the *Model Law*.\(^{16}\) It is argued that the rationale underpinning Article 8(1) of the *Model Law* is that the court ought to conduct a *full review* prior to referring the parties to arbitration.\(^{17}\)

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\(^{13}\) Stavros Brekoulakis, ‘The Negative Effect of Compétence-Compétence: The Verdict has to be Negative’ Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.


\(^{15}\) *New Decree* art 1448.


\(^{17}\) Ibid.
The drafters of the *Model Law* perhaps favoured a *full review* to reduce the possibility of appeal in future. In addition, Article 8(1) parallels the language used in Article II(3) of the *New York Convention*, which requires courts to refuse referring the parties to arbitration if the agreement is ‘null and void, inoperative or incapable of being performed.’ The *New York Convention* does not, however, indicate whether this calls for a *full review* or a *prima facie* one, leaving this to the discretion of the member states. The *New York Convention* is equally nebulous on the question of *compétence*.

The *New York Convention* is equally nebulous on the question of *compétence*. The *Model Law* permits a complete examination of the arbitration agreement as per Article 8(1), therefore, any dispute which requires more than a *prima facie review* may receive closer scrutiny.

Simultaneously, the *Model Law* provides substantial discretion to the arbitral tribunal to rule on its own jurisdiction pursuant to Article 16. This Article also provides the tribunal with liberty to continue its proceedings, even if there is an objection by one of the parties to the tribunal’s jurisdiction. This represents one of the cornerstones of the *Model Law*. The disadvantage of the *Model Law* is that it provides little confidence to a tribunal to render enforceable awards, providing an opportunity for parties to abuse the system. The risk of squandering public and private resources is made possible by Article 16, which permits the party objecting to the tribunal’s jurisdiction to seek judicial review whilst the tribunal continues with the arbitral proceedings. The *New York Convention* and the *Model Law* provide flexibility for national courts to adopt their own approach. However, there is no uniformity in the approach to arbitral jurisdiction of national courts among the countries which have adopted these conventions.

### 7.2.3 Key Findings and Recommendations on the French Approach

Chapter 4 explored the French approach to arbitral jurisdiction. The *New Decree* amends the arbitration provisions of the *Code of Civil Procedure*. Although it maintains the distinction between domestic and international arbitration, the *New Decree* sets out the basic principles and procedural framework for an international arbitration with its *seat* in France. It reforms and codifies many developments in case law since 1981, making French arbitration law more user-friendly. The French approach...
to the negative effect, particularly Article 1448 of the New Decree, affords an express priority to the tribunal, unlike the other jurisdictions analysed in this thesis.

By prohibiting judicial review of jurisdictional questions until an award is issued, Article 1448 discourages parties from engaging in dilatory tactics. The only exception is where the tribunal is yet to be constituted and the agreement is manifestly void or manifestly not applicable. Such an approach is likely to produce fair outcomes and should serve as a framework for other jurisdictions.

Use of the New Decree by courts reduces the misuse of resources for the parties and courts alike, striking a better balance between assisting the tribunal and intervening in manifest cases of invalidity. The French approach is the most supportive of compétence-compétence, in both the positive effect and the negative effect. The French approach is not perfect. There are times where the French courts ought to investigate an agreement further, especially where it is not possible to tell if an agreement is manifestly void or inapplicable without a more thorough inquiry. This is relevant in more complex cases, such as assignment of arbitration agreements and group of companies disputes.

Cases such as Distribution Chardonnet and La Charteuse indicate that the French are ready to grant unparalleled priority to tribunals over courts. Article 1448 has played a major role in enabling French courts to adopt such a radical approach to the negative effect. This approach, however, presents its own perils in that, the parties’ rights to have the matter heard by a national court may be lost. This risk is somewhat mitigated by the right to have the ruling by the tribunal, reviewed by the court once an award is issued. Thus, it is up to the parties to act swiftly in bringing the dispute before court prior to the constitution of the tribunal. To conduct a full review as standard procedure would be an inefficient use of public and private resources. The French approach throws a safety net

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22 Jones, above n 2, 63.
for parties by providing priority rather than absolute exclusivity to the arbitral tribunal.  

7.2.4 Findings and Recommendations on the United Kingdom Approach

Chapter 5 reviewed the approach of the U.K. The decisions of the courts there are inconsistent and unreliable, notwithstanding the well drafted Arbitration Act. Decisions such as Azov and Al-Naimi have been accused of being anti-arbitration. Subsequent judgments such as Fiona Trust have to a degree, mitigated the damaging effects of previous anti-arbitration decisions in the United Kingdom.

Although the Arbitration Act aims to provide more deference to the arbitral tribunal by the adoption of a modified position of the Model Law, it is not as effective as may appear. This is because some judges construe the Arbitration Act as offering the choice of having the question of jurisdiction determined initially by a tribunal or a court. U.K. courts are less supportive of tribunals than the French. The courts in the United Kingdom have developed an inconsistent case law, thereby undermining compétence-compétence. Although there have been reviews of the Arbitration Act since its enactment, there have not been any recommendations for amendment.

7.2.4.1 Method of Review by United Kingdom Courts

The French approach has much to commend it and it would be desirable to apply some elements of it in the U.K. The courts of the United Kingdom may, for instance, adopt a prima facie review as the default procedure unless the circumstances warrant full review. A provision in the legislation encouraging the prima facie approach is recommended. The term ‘manifestly void or manifestly inapplicable’ in the New Decree is the French legislators’ answer. There should, however, always be some discretion for courts to employ a full review where circumstances warrant it. Such an amendment would ensure a more uniform approach to compétence-compétence, rendering the United Kingdom even more competitive as a seat for international arbitrations.

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25 New Decree art 1527.
29 Arbitration Act 1996 (UK).
31 New Decree art 1448.
32 Where for example the factual matrix is more complex and a full review is necessary to discover the identity of the parties to the arbitration agreement. E.g. group of companies agreement.
7.2.4.2  Recommendations for Reform of the U.K. Approach

The U.K. would benefit from reducing the possibilities for judicial review. Similar to the French *New Decree*, parties should be barred from challenging jurisdiction once the tribunal has been constituted, only permitting judicial proceedings once an award is issued. This would ensure that parties who have a genuine interest in arbitral jurisdiction, act swiftly in bringing their claim before the court. A provision added to the *Arbitration Act* similar to Article 1448 of the *New Decree* should be considered, as it would provide express priority to the arbitral tribunal. The existing *Arbitration Act* allows for courts to review the jurisdiction question whilst the matter is before the arbitral tribunal. This may undermine the tribunal’s authority to rule upon its own jurisdiction, as it negates the priority tribunals should be afforded – at least initially.

Further, if a *prima facie review* indicates the existence of a valid agreement, the court must not review the arbitral tribunal’s jurisdiction until the tribunal itself has made a determination as to its jurisdiction. This would give credence to the *negative effect*, which would require an amendment to section 32(4). This provision of the *Arbitration Act* permits tribunals to make a determination on jurisdiction whilst the matter is also pending before a national court. Section 32(4) may be altered so that concurrent review is not permitted. It should bar courts from addressing jurisdictional issues unless the arbitration agreement is clearly void or inapplicable. Such an amendment should reduce the number of appeals made purely as a dilatory tactic. Moreover, such provisions for restraint to be exercised by the courts may be expected to leave less room for divergence in the courts’ approach to arbitral jurisdiction.

Parties should be at liberty to apply for a *full review* by the courts once the award is issued. It is not suggested anywhere in this thesis that courts lose their power to review the award for purported lack of substantive jurisdiction. Permitting the court to conduct a review is fundamental to ensure due process and public policy is complied with and the tribunal does not exceed its powers. It is argued that a chronological priority be afforded to the tribunal to rule on jurisdiction. This is far from an absolute

33  *New Decree* art 1448.
34  Ibid.
36  Ibid.
37  Pursuant to the current legislation the court may confirm, vary or set aside the award. *Arbitration Act UK* (1996) s 67(3).
power. Rather, it is an exclusive power, for a limited time, on the basis that the arbitration agreement between the parties is valid.

7.2.5 Key Findings and Recommendations for the United States Approach
The standard of judicial review adopted by the United States national courts has been heavily criticised for the ruling in First Options, which granted too much discretion to courts. Since First Options, however, the U.S. Supreme Court has adopted a less interventionist approach in an endeavour to become a more arbitration-friendly jurisdiction. The most significant reform mechanism must come from amendments to the FAA, which ought to have explicit provisions for arbitrability. Any amendment to the FAA must also take into account recent case law. If arbitration is to be efficient, the parameters of the ‘arbitrability’ dicta from court judgments require specification in the FAA. Due to the antiquated nature of the FAA, the Supreme Court has been compelled to develop principles by looking at the intent of the FAA. In doing so, it has effectively rewritten some of it. In order to have a more consistent approach to compétence-compétence, an overhaul of the FAA is critical to align U.S. arbitration law with current trends in other pro-arbitration jurisdictions. In particular, the FAA is in greater need of an overhaul than the English Arbitration Act as it dates back to 1925.

Although there has been an increasing recognition of arbitral autonomy and compétence-compétence in the national courts of the United States, it is plagued by inconsistency. The recommendation to overcome such divergence is to designate a particular division within specific courts with judges who have relevant expertise in international commercial arbitration law.

7.2.5.1 Method of Review and Recommendations for Reform in the U.S.
Based upon the case law examined in Chapter 6, the U.S. courts demonstrate the most variation between a narrow and broad interpretation of compétence-compétence. With respect to the method of review, the approach adopted by the United States is furthest from the French, favouring a full review whilst arbitral proceedings continue. This stems from the principle in First Options that if the dispute arises at the outset of the

40 United States Arbitration Act, 9 USC (1925); Arbitration Act 1996, (UK).
arbitration, questions such as the existence and validity of the agreement are for the courts to determine. The precise definition of what is meant by ‘the outset of the arbitration’ is not entirely clear and is in need of clarification, preferably by amendment to the FAA. This is in stark contrast to the French approach where if the challenge is brought before the court once the tribunal is constituted, the court must refuse review.

In reforming the FAA, the French New Decree should be used as a model for U.S. legislative amendments. The effect of this would be a more uniform approach to compétence-compétence and render it more attractive as a seat. As a minimum, provisions similar to article 1448 of the New Decree should be inserted into the FAA. Article 1448 forbids the court from reviewing the arbitration agreement whilst it is before a tribunal. The only exception to this is if the tribunal has not been constituted and the agreement to arbitrate is manifestly void or inapplicable. Pursuant to article 1519 a review to have the award set aside may be conducted de novo which provides the court with opportunity for a full verification of the award. There are, however, strict grounds for seeking an order to set aside an award under article 1520. From the perspective of parties, their counsel and respective arbitrators, this would have the significant benefit that the U.S. and France would be more uniform in their approach to compétence-compétence. When the benefits and risks are weighed against one another, the French approach appears to present the least risk to the interest of the parties and the most balanced approach to giving effect to the arbitral procedure.

7.3 General Recommendations for Reform for the U.K and U.S.
To provide the optimum level of deference to tribunals, courts must refuse to review jurisdiction until after an award has been made. The only circumstance where intervention should occur before an award, is where the tribunal is yet to be constituted and a prima facie review of the arbitration agreement reveals a manifestly void or manifestly inapplicable agreement. Concurrent review by courts and tribunals practised by the U.K. and U.S. courts falls short of the French standard. Therefore, it does not provide sufficiently for the negative effect. National laws should be amended defining

42 United States Arbitration Act, 9 USC (1925)
43 New Decree art 1448.
44 United States Arbitration Act, 9 USC § 2 (1925).
45 New Decree art 1448.
46 Ibid art 1519. Articles 1519 and 1520 apply to awards made in France.
47 Ibid art 1520.
the stage and the extent to which courts should intervene. Some jurisdictions have already made provisions in their laws, such as Section 32 of the *Arbitration Act 1996* (UK). This section permits an application to court for a preliminary point of jurisdiction, whereas the French courts would refuse to hear the matter once an arbitration is on foot and the agreement to arbitrate is prima facie valid. Therefore, Section 32 leaves the door to judicial review open wider than the French approach.

Appointment of a support judge as practised in the French legal system is worth further consideration so as to narrow the gap between the arbitrations and trial processes. For example, a support judge may assist in the appointment of an arbitrator. Utilising support judges would lead to more consistent judicial decisions, as familiarity and expertise would be a key criteria in appointment. A support judge may also produce efficiencies in more complex matters such as non-signatory contracts. In such complicated contractual disputes, the court must conduct a more thorough examination of the contract in order to reach a determination.

The key features that the U.K and U.S could incorporate are shown in Table 7.1 on the following page:

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49 The utility of a support judge was discussed in Chapter 4 in the French jurisdictional analysis. *International Arbitration Act 1974* (Cth) was amended on 5 July 2010. One of the new practices is an arbitration list in the Supreme Court of Victoria where arbitration disputes are heard by a single judge who is also an experienced arbitrator. This has produced pro arbitration judgments already. This follows the juge d’appui of the French and Swiss courts.
50 *New Decree* art 1452.
### Table 7.1: Key Recommendations for Amendments on Jurisdictional Challenges

<table>
<thead>
<tr>
<th>Stage of Proceedings</th>
<th>Key Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before constitution of tribunal</td>
<td>• The removal of court intervention unless the arbitral tribunal has not yet been constituted and;</td>
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<tr>
<td></td>
<td>• the arbitration agreement is manifestly void or manifestly inapplicable.</td>
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<td></td>
<td>• Any uncertainty should be interpreted in favour of arbitration.</td>
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<tr>
<td></td>
<td>• There should be a general presumption that the court will conduct a prima facie review of the agreement at this stage.</td>
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<tr>
<td></td>
<td>However, this presumption may be rebutted where the case warrants a full review.</td>
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<tr>
<td>During the arbitral proceedings</td>
<td>• There should not be any concurrent judicial review at this stage.</td>
</tr>
<tr>
<td></td>
<td>• There should not be a stay of arbitral proceedings pending a determination by the court.</td>
</tr>
<tr>
<td></td>
<td>• Participation by the parties in the arbitral proceedings is not taken as acceptance of the jurisdiction of a tribunal, neither does it negate</td>
</tr>
<tr>
<td></td>
<td>any of the parties legal rights for review at the post-award stage.</td>
</tr>
<tr>
<td>Following the arbitral proceedings</td>
<td>• Once an award has been issued and brought before national courts to be set aside or enforced, a full review of the arbitration agreement may</td>
</tr>
<tr>
<td></td>
<td>be required. This should be subject to necessity and treated on a case by case basis.</td>
</tr>
<tr>
<td></td>
<td>• Courts should have discretion to conduct either a prima facie or full review to set aside or enforce an award.</td>
</tr>
</tbody>
</table>

The first stage of proceedings in the above Table provides a time period which begins once a party has been notified of commencement of arbitral proceedings, until the constitution of the tribunal. If a party harbours a genuine concern regarding the existence, validity or legality of an arbitration agreement, it is required to act promptly in bringing a challenge before a national court. Such amendments should facilitate party autonomy, yet provide due process where necessary. The key provisions in Table 7.1 ensure that both the positive and the negative effect are accorded sufficient deference, whilst providing a safety net for protection of parties’ interests.

### 7.4 Conclusion

This thesis has argued that the United States needs to provide a higher degree of consistency in judicial support of arbitration. The United Kingdom has some inconsistencies but is closer to the approach adopted by the French. A notable difference between the U.S. and the U.K. is that the U.K. has a relatively modern statute which provides more guidance on issues of procedural and substantive law.
In answer to the thesis question, it is submitted that the French approach is best practice among the three jurisdictions examined. The thesis has recommended reforms of the legislative frameworks and practices to achieve a better balance between arbitral autonomy and due process by courts. It concluded that the French approach offers a framework which strikes a better balance between the competing demands on the legal order to safeguard arbitration from dilatory tactics on one hand and to permit genuine disputes concerning the tribunal’s jurisdiction to be determined by courts on the other.

The need to balance the competing demands is echoed by Professor Reisman who has stated ‘too much national judicial review will transfer real decision-making power from the arbitration tribunal, selected by the parties in order to be non-national and neutral, to a national court whose party neutrality may be considered less’.\textsuperscript{51} This must, however, be balanced against the possible abuse of power by arbitral tribunals. Fouchard, Gaillard and Goldman have succinctly summarised the concern as:

Even today the compétence-compétence principle is all too often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators’ jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award.\textsuperscript{52}

The principle of \textit{compétence-compétence} is a crucial factor in arbitration. Notwithstanding this broad recognition, practices are far from unanimous concerning questions such as the stage at which a court may intervene in the arbitral procedure.\textsuperscript{53} This thesis examined case law drawn from three countries, highlighting the inconsistent application of \textit{compétence-compétence}. These disparities have substantial ramifications for private and public resources and the utility of arbitration as a preferred method of resolving international commercial disputes.

Although the French legal system has a civil law tradition, whilst the U.K. and the U.S. common law jurisprudence, this is no barrier to its acceptance. The French approach is by no means perfect. The proposed solution is to amend national arbitration laws to

\textsuperscript{52} Emmanuel Gaillard, John Savage (eds), \textit{Fouchard Gaillard Goldman on International Commercial Arbitration} (Kluwer, 1999) [658,659].
\textsuperscript{53} Jones, above n 2, 63.
unequivocally reinforce *compétence-compétence* - both the *positive* and *negative effect* - by providing chronological priority to the tribunal concerning its own jurisdiction.
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**G Lectures**


**H Translation of Terms**

*Bundesgerichtshof* German Federal Supreme Court

*Compétence sur la Compétence* French term for compétence- compétence

*Cour de Cassation* French Supreme Court.

*Kompetenz-Kompetenz* German term for compétence- compétence

*l-autonomie de la clause compromissoire* French term for separability