REGULATING ARBITRAL JURISDICTION: A PRIVATE INTERNATIONAL LAW PROPOSAL

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This thesis is submitted for the degree of Doctor of Philosophy

June 2020

DECLARATION

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

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Cambridge, June 2020

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ABSTRACT

This PhD thesis focuses on the regulation of jurisdictional issues in relation to the arbitral resolution of international commercial disputes. It provides an account based on a contemporary analysis of these issues utilising the tools of private international law. The analysis is divided in two parts: a theoretical and a practical one.

The theoretical part is informed by the triangle of: (a) the particular characteristics of international commercial disputes in a globalised economy; (b) the role of party autonomy as a shifting paradigm of jurisdiction in cross-border disputes; and (c) the resulting relationship between arbitration and litigation as dispute resolution methods in the global commercial arena. The thesis proposes a model based on a horizontal relationship of equality between court litigation and arbitration in cases involving an arbitration agreement, albeit a disputed one. This model depicts the relationship of the two dispute resolution methods as two streams. Parties in international commercial transactions—and resulting disputes—can choose in which stream their dispute will enter. These streams are parallel and equal streams, not exclusive, allowing, therefore, for movement between them, creating jurisdictional intersections in all phases of a dispute.

Focusing on the arbitration stream, and based on this theoretical model, the thesis proceeds by examining these jurisdictional intersections in the context of the law and practice of arbitration in England and Wales. This practical exercise serves a twofold purpose: (a) to consider the extent in which the current statutory and case-law framework can accommodate the proposed model; and (b) to provide a restatement of the law and practice in England and Wales in the form of rules of arbitral jurisdiction. In fulfilling both purposes, the analysis focuses on issues pertaining to the initial threshold, standard, and content of proof, the prerequisites for moving from the arbitration to the litigation stream, and various methods employed in each stream for ensuring that the choice of the parties is enforced.

The thesis, in its theoretical framework and restatement of the law and practice, proposes a novel, horizontal architecture of arbitral jurisdiction based on a contemporary conception of private international law in a globalised world.

Faidon Varesis

To my Family and to Meliti

ACKNOWLEDGEMENTS

This is both the easiest and the most difficult part of the thesis to write. It is the easiest as words of appreciation are easily transcribed when I have been lucky to have many amazing friends, colleagues, and mentors, who were generous with their help, support, and patience. It is, however, the most difficult as the overall word limit would not be enough to express this very same gratitude. I shall certainly try to do so.

This thesis could not have been completed and my time in Cambridge would not have been so enriching without the constant guidance, encouragement, help, and support of my research supervisor, Professor Richard G Fentiman QC. He has been a critical academic friend, a mentor, and a source of inspiration throughout this journey. I am also indebted to the invaluable support and comments of Professor Haris Pamboukis from the National and Kapodistrian University of Athens. Being my mentor from the first years of my undergraduate studies, he has always been there to listen to my every question, idea, or theory, to guide, and to support me in every step.

I am also grateful for the generous support of St John's College, Cambridge having been elected a JC Hall Scholar and a Member of the Foundation of the College. The college Fellows, administration, the Lady Margaret Boat Club, and the porters are people who supported, assisted, and were there for me every day for the past three years. My gratitude also goes to the Faculty of Law and the Squire Law Library; members of the faculty and staff were always ready to help every time something was needed. My appreciation also goes to the Faculty of Law at the Catholic University of Milan and to Professor Pietro Franzina for the hospitality and assistance during my research visit in their premises.

I would also like to express my sincere thanks to all colleagues in the UK, Greece, and elsewhere around the world, who were present and assisted in different aspects of this endeavour. I am especially grateful to Professor Antonios Karampatzos for his support and friendship, Professor Stavros Brekoulakis for our insightful discussions, Professor Christine Gray for the support and collaboration at St John's College, The Honourable Charles N Brower for the opportunity to get exposure in interesting investment arbitration cases, Hendrik Puschmann for his friendship and his—always masterfully given—advice, Dr Vasiliki Marazopoulou for her comments on early ideas of this thesis and her support in seeing this project through, and, finally, Dr Giorgos Nikolaidis for the insightful conversations on various topics. I am also grateful to Lord David Hacking, Kenneth Rokison QC, Sir Christopher Clarke, Ian Gaunt, and Ibrahim Alturki for the

excellent collaboration we had in coaching the Cambridge Willem C Vis Moot teams and the insightful discussions on arbitration and litigation matters.

I could not, however, but single out three friends and colleagues. First, Dr Michalis Papageorgiou for our parallel and joint journey as comrades. His always cheerfully and powerfully administered comments and the conversations we had on every aspect of our theses—and beyond them on every aspect of life—were always reason for reflection and provided me with renewed energy to complete this project and plan many more for the future. Second, Evgenia Stavropoulou was always ready to discuss and question the fundamental reasoning of my proposal and arguments. Much of the finished thesis is the result of our disagreement on several aspects of my original ideas. Finally, Dr Fabio Saguato has been there from the first day I submitted the proposal, had the interview, got accepted, and finished this PhD thesis always encouraging me. His support and encouragement went beyond academic matters, especially in Italy helping me communicate and order in the many restaurants and places we visited together.

This thesis would not be achieved without the constant support and patience of my friends; even at times when I would force them read parts of my research instead of their magazine of choice. In alphabetical order to avoid the terrible act of ranking: Clara, Giota, Ioulia, Lito, Mariliza, and Polina, I am profoundly and deeply thankful for all the support and resilience you have shown through the ups and downs of this endeavour.

My journey—both physical and academic—to Cambridge, let alone this thesis, would not be even a thought without my family. There is no scale to measure the support, unconditional love, and encouragement that my family has given me. My parents, Eleni and Vangelis, and my twin brother, Orestis, have been the pillars of my life and without them I would not be able to write these words now—this thesis is for you, thank you.

Finally, my deepest gratitude and admiration goes to Meliti. my better half, a constant source of support, understanding, inspiration, compassion, laughter, and selfless love. Travelling back and forth to Cambridge and always being there to listen to my—often completely unfounded—fears and concerns or my—completely strange to anyone else—bursts of joy when finding a rather obscure article or case supporting my arguments, she is the reason I was able to complete this task. She is amazing and this thesis, as everything else, is for her.

Cambridge, June 2020

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LIST OF ABBREVIATIONS AND ACRONYMS

Arb.	Arbitration
Arbitration Act 1996	Arbitration Act 1996 (c.23) of 17 June 1996 '[a]n Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes'
cf	*confer* (compare)
CJEU	Court of Justice of the European Union
CJJA 1992	Civil Jurisdiction and Judgments Act 1982 (c.27)
CO	Code of Obligations
Com.	Commercial
CPR	Civil Procedure Rules
CUP	Cambridge University Press
Ed/Eds	Editor/Editors
Edn	Edition
e.g.	*exemplum gratia* (for example)
EC	European Commission
EU	European Union
et seq	*et sequens* (what follows)
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
GDP	Gross Domestic Product
GmbH	Gesellschaft mit beschränkter Haftung (German Limited Liability Company)
i.e.	*id est* (that is)
ibid	*ibidem* (in the same place)

ICC	China International Economic and Trade Arbitration Commission
ICC	International Chamber of Commerce
ICC Rules	International Chamber of Commerce Rules of Arbitration
J	Justice
LCIA	London Court of International Arbitration
LJ	Lord/Lady Justice
Ltd.	Limited
New York Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award
No.	Number
OUP	Oxford University Press
para./paras.	paragraph/paragraphs
S.A.	Société Anonyme
SCC	Stockholm Chamber of Commerce
Senior Courts Act 1981	Senior Courts Act 1981 (c.54) of 28 July 1981 '[a]n Act to consolidate with amendments the Supreme Court of Judicature (Consolidation) Act 1925 and other enactments relating to the Supreme Court of England and Wales and the administration of justice therein; to repeal certain obsolete or unnecessary enactments so relating; to amend Part VIII of the Mental Health Act 1959, the Courts-Martial (Appeals) Act 1968, the Arbitration Act 1979 and the law relating to county courts; and for connected purposes'
UK	United Kingdom of Great Britain and Northern Ireland
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006
UNIDROIT	International Institute for the Unification of Private Law

USA	United States of America
USD	United States Dollar(s)
v	*versus* (against)
vol.	Volume
Y.B.	Yearbook

1 INTRODUCTORY MATTERS

1.1 Arbitral Jurisdiction in Private International Law and Arbitration

1.1.1 Jurisdiction as Adjudicatory Competence in Cross-border Disputes

'Jurisdiction' derives directly from the latin '*juridictio*': from '*juris*', genitive of '*jus*' which means law and '*dictio*', which translates as the '*act of saying*'; jurisdiction, thus, etymologically means the act of saying what the law is. Though etymologically clear, '[j]urisdiction is an expression which is used in a variety of senses and takes the colour from its context'.[1] In a similar manner to its linguistic pluralism, jurisdiction as a technical term is pluralistically conceived. As Park appositely describes: '[j]urisdiction remains a notoriously slippery term. Different statutes employ different terms, and divergent intellectual pigeon-holes to organize grounds for jurisdictional challenge'.[2]

First, it is used in a prescriptive or a normative manner to refer to the power of States—that is their executive and legislative branches—to legislate and prescribe rules of law in the territory of that State. Second, it refers to the power of enforcement of law by a State. Finally, it refers to the power existing logically between the previous two powers; that is, the power of courts or any other adjudicatory body—either governmental or not—to

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1 *Anisminic Ltd v Foreign Compensation Commission* [1967] 2 All ER 986, 994 per Diplock LJ. See also Stéphane Beaulac, *The Power of Language in the Making of International Law: the word sovereignty in Bodin and Vattel and the myth of Westphalia* (Brill 2004); Stéphane Beaulac, 'The Lotus Case in Context – Sovereignty, Westphalia, Vattel and Positivism' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 41.

2 William Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction' in Albert Jan van den Berg (ed) *International Arbitration 2006: Back to Basics?* (Kluwer Law International 2007) 66.

decide on matters taken before them based on the law.[3] This is usually termed adjudicative jurisdiction and forms the basis of the analysis undertaken in the following Chapters.

In the context of cross-border commercial disputes, which are the focus of this thesis, the term adjudicatory jurisdiction refers to international adjudicatory jurisdiction. There is no specific term in English to denote separately this element of internationality. The term international adjudicatory jurisdiction is used, however, to refer not only to the power of an adjudicative body to decide on matters before it, but also to the outer limits of this body's adjudicative powers and the allocation of adjudicatory competence *vis-à-vis* the potentially conflicting or competing competence of other bodies.[4] International jurisdiction necessarily involves an element of consideration of the jurisdiction of other bodies and, as analysed below, the notion of sovereignty. While the extent and weight of these considerations varies depending on the legal tradition, it acts as a limit and delineation mechanism for co-existing sovereigns.

Before considering the connection between jurisdiction and sovereignty, adjudicatory jurisdiction—both domestic and international—can be analysed in temporal terms: (a) the analysis undertaken by any adjudicatory body itself at the interlocutory stage of the proceedings, that is the stage of examining the prerequisites of its own jurisdiction; (b) the analysis and limits of the power any other adjudicatory—supervising or not—body undertaking—for any reason—an inquiry into the basis, prerequisites, and scope of another body's jurisdiction at the interlocutory stage; and (c) the analysis of the adjudicatory competence of another *forum* as part of the recognition and/or enforcement proceedings of a decision or judgment of that *forum*. While the term jurisdiction is usually used to denote all three aspects, the analysis in this thesis focuses primarily on the interlocutory stage of proceedings and considers the regulation of arbitral jurisdiction

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3 For the distinction in prescriptive, enforcement, and adjudicative jurisdiction see Michael Akehurst, 'Jurisdiction in International Law', (1972) 46 British Yearbook of International Law 145. See also Stéphane Beaulac, 'The Lotus Case in Context – Sovereignty, Westphalia, Vattel and Positivism' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 41; Alex Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction' in Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019) 332.

4 Ralf Michaels, 'Jurisdiction' in Jurgen Basedow and others (eds), *Encyclopedia of Private International Law* (Elgar 2017).

both from the perspective of a given arbitral tribunal itself, and from the perspective of a court engaged with parallel proceedings at the interlocutory stage.

These distinctions lead to the analysis of what has been termed as jurisdictional issues and disputes in an arbitral setting. The term does not only suggest issues arising out of or in connection with the basis and the outer limits of the tribunal's power to decide on matters brought before it. It is also suggesting: (a) more broadly, any interlocutory issue at the stage before or during the commencement of arbitral proceedings; and (b) any issue arising before any other adjudicatory body—of arbitral or most likely State origin—that deals with proceedings connected with or related to the proceedings before the arbitral tribunal. These jurisdictional issues include questions of existence and scope of the arbitral authority as well as questions of who is going to decide on these issues and to what effect.[5]

Jurisdiction is traditionally analysed and considered intrinsically linked with the concept of sovereignty.[6] This refers to the power to adjudicate, the limits to this power, and the need to regulate the co-existence of powers between different bodies as an 'aspect of or a consequence of sovereignty'.[7] As analysed below in Chapter 3, jurisdiction is directly linked with the conception, or paradigm, of private international law and with the unilateral or multilateral—or global—character of the approach adopted. In other words, jurisdiction has been conceived as a direct extension of sovereignty and cross-border jurisdiction revolves around the question of the co-existence of sovereigns and the

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5 These are issues usually termed in the US jurisprudence as arbitrability or gateway issues. See, for example, George Bermann, 'The Role of National Courts at the Threshold of Arbitration' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator Liber Amicorum Pierre A Karrer* (Kluwer International 2017); George Bermann and Alan Scott Rau, 'Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau' (2015) 43 Pepperdine Law Review 469; Cesare Cavallini, 'On Arbitral Jurisdiction. How to Deal with the Complementarity between Arbitral Tribunals and the Courts?' (2018) 18 Global Jurist; Park 2007 (n 2) 66.

6 Stéphane Beaulac, 'The Lotus Case in Context – Sovereignty, Westphalia, Vattel and Positivism' in Stephen Allen and others (eds), *The Oxford handbook of Jurisdiction in International Law* (OUP 2019) 42; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 456; Derek Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources' [1983] 53 British Year Book of International Law 1.

7 Frederick Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (1984) 186 Hague Recueil 9, 20.

regulation of the authority attached to each of these sovereigns.[8] While, however, traditional perceptions of jurisdiction are focused on either the vertical—between States and parties—or the horizontal—between States themselves—relationship[9] keeping intact the notion of State sovereignty, the analysis below will show that, in a transnational globalised world, these territorial and other objective connecting factors are becoming less and less important as the monopoly of States in sovereignty is diluted by the rise of individuals in the international arena.

The analysis in Chapter 3, addressing contemporary theories of private international law and global governance, shows that we are moving from a conception of adjudicatory jurisdiction 'as an expression of public international law jurisdictional constraints in the context of private law disputes'[10] to a multifaceted and multifocal system of global justice, where the adjudicatory power might lie—at least partially—outside the State's sphere of influence.

As analysed below, this shifting in the context of the global economy has repercussions on the conception and basis of jurisdiction. This suggests a shift in the conception of territorial sovereignty and objective factors as basis of jurisdiction. Party autonomy is not anymore only a mere choice between *fora* otherwise objectively linked with the territory of a given State, but rather represents a connecting factor between one or more parties and the dispute on the one hand and the chosen adjudicatory body on the other.

This contemporary view of private international law and adjudicatory jurisdiction is reflected in the approach adopted. This is not a thesis concerning the heads or gateways of arbitral jurisdiction, or merely a descriptive analysis of the issues arising out of the familiar concepts of competence-competence and separability. It is, rather, an analysis of the regulation of arbitral jurisdiction, denoting an analysis of jurisdictional issues, both from the perspective of arbitral tribunals—a type of jurisdictional self-regulation—and from the perspective of other *fora*, particularly the supervising or competing State courts—a form of hetero-regulation.

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8 Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 British Yearbook of International Law 229.

9 Ralf Michaels, 'Two Paradigms of Jurisdiction' (2006) 27 *Michigan Journal of International Law* 1003.

10 Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 British Yearbook of International Law 188.

1.1.2 Jurisdiction, Arbitration, and Party Autonomy

This is not a thesis focused generally on the law on jurisdiction.[11] It is rather focused on arbitral jurisdiction as a form of adjudicatory competence in cross-border commercial disputes.

Arbitral jurisdiction is better defined functionally as serving a dual purpose. First, it prescribes the outer limit of a tribunal's adjudicatory power. As such, it necessarily raises questions on the basis, nature, and effect of this body's power to adjudicate disputes brought before it. Second, it regulates the relationship with other *fora*—particularly State courts—as to the resolution of jurisdictional issues. This cross-border, international element of the disputes in focus here elevates the jurisdictional enquiry from a domestic and purely unilateral exercise of a given adjudicatory body to an exercise involving to a large extent a comparative element and notions of respect and comity for the sovereignty of other *fora*, State or private ones.

A ritual incantation among scholars and jurists of international commercial arbitration is that 'arbitration is a creature of contract'. When Justice Brennan from the Supreme Court of the United States used this expression for the first time in *United Steelworkers of America v American Manufacturing Co.*[12] he was making a point as to the voluntary assent to an arbitration agreement remarking in passing that:

> *[t]o be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute.*

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11 See generally Stephen Allen and others (eds), *The Oxford Handbook of Jurisdiction in International Law* (OUP 2019); James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012).

12 *United Steelworkers of America v American Manufacturing Co*., 363 U.S. 564 (1960) 570.

Merkin and Flannery and Redfern and Hunter refer to party autonomy as a positive force[13] and a guiding principle[14] in international commercial arbitration. Andrews[15] even expressly refers to 'the parties' consensual autonomy ("freedom of contract") [as] a leading feature of the [Arbitration] Act [1996]'. The practice of English Courts attests to this; an arbitration agreement—usually in the form of an arbitration clause included in a contract—is much like any other term of the host contract, introducing substantive obligations for the parties.[16] On the contrary, in other jurisdictions, arbitration agreements are considered a form of procedural contracts.

A thesis adding another verse in this incantation of the contractual underpinning of arbitration would be a banality. It is, indeed, trite to say that arbitration is an expression of the parties' autonomy and that the courts are merely enforcing these agreements or giving effect to their procedural constituent elements. As the analysis in Chapter 3 will show this mutually exclusive dichotomy of contractual and procedural elements focuses on notions of substantive justice, while ignoring the operation of such clauses at a regulatory level as part of a global system of justice in cross border commerce. Jurisdictional issues in general, and more acutely in arbitration, reveal the tension between traditional models of State sovereignty and the role of party autonomy. The analysis of, and proposal for, arbitral jurisdiction in this thesis is positioned precisely at the forefront of this tension.

1.2 Recurring Themes

In proceeding with the analysis, leading to a proposal for a re-designed system of arbitral

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13 Robert Merkin and Louis Flannery, *Arbitration Act 1996* (6th edn, Informa law from Routledge 2019) 217.

14 Nigel Blackaby and others, *Redfern & Hunter on International Commercial Arbitration* (6th edn, OUP 2015) 355.

15 Neil Andrews, *Andrews on Civil Processes: Court Proceedings, Arbitration & Mediation* (2nd edn, Intersentia 2019) para. 31.22.

16 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889; *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87. See also Mukarrum Ahmed, *The nature and enforcement of choice of court agreements: a comparative study* (Hart Publishing 2017) 22; David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edn, Sweet & Maxwell 2015); Adrian Briggs, 'The Nature or Natures of agreements on Choice of Court and Choice of law' (2016) ASIL Webinar.

jurisdiction, the following Chapters are informed by a quartet of recurring themes: (i) both as a result of the nature of the inquiry and as a pragmatic result of the cross-border nature of the disputes, jurisdictional issues inherently entail the risk of parallel proceedings before different *fora*; (ii) the theoretical basis of the proposed solution is based on doctrines of party autonomy in private international law and the analysis draws parallels with the methods and tools utilised in this area of law; (iii) the regulation of arbitral jurisdiction in the proposed analysis is positioned within the context of economic globalisation and a globalised legal system; and (iv) the focus of the analysis and the restatement proposal is England and Wales.

1.2.1 Arbitral Jurisdiction and Parallel Proceedings in International Commercial Disputes

The first of the recurring themes in this thesis also prescribes the context of the analysis and proposal.[17] This is a thesis positioned in an international setting, where cross-border transactions take place and international commercial parties are aiming to minimise the transaction and litigation risks inherently associated with their cross-border trade.[18]

Jurisdictional issues in cross-border disputes are fertile ground for parallel proceedings. This is all the more so in connection with jurisdiction based on exclusive jurisdiction or arbitration clauses. While the commencement of parallel proceedings, as such, is not unconscionable,[19] two problematic instances arise: (i) firstly, tactical—often called in the English context torpedo actions[20]—proceedings aiming to frustrate the jurisdiction of a *forum* based on a *prima facie* existent and valid arbitration agreement; and (ii) secondly, parties often after the dispute has arisen take different approaches as to the existence, validity, and scope of these agreements. Such differences can be raised before the same *forum* or—more often—before different *fora*. These legitimate, yet parallel, proceedings cause practical difficulties for defending a case in multiple fronts, but also test the various

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17 This aspect and contextual background of the regulation of arbitral jurisdiction as part of cross-border trade is analysed in Chapter 2.

18 Richard Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) 42 *et seq*.

19 *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425; *SNI Aérospatiale v Lee Kui Jak* [1987] AC 871. See also Fentiman 2015 (n 18), para. 7.36 ('[i]n a sense, all litigation is tactical, or at least instrumental, insofar as parties invariably litigate not for its own sake, but to achieve a favourable outcome out of court').

20 *Erich Gasser GmbH v Misat srl, Case C–116/0*2 [2003] ECR I–14693.

theoretical frameworks that have been used in the context of cross-border litigation.

Arbitral jurisdiction is inherently and intrinsically connected with parallel proceedings. Arbitration addresses the risks associated with international commercial disputes by providing a neutral *forum* to the parties.[21] Nevertheless, it is not free from similar problems found in the cross-border dispute resolution arena. First, dispute resolution agreements are usually the ones agreed during the late—midnight—hours,[22] thus fertilising the ground for different approaches as to their validity. Second, the same questions of the existence, validity, and scope of an arbitral tribunal's jurisdiction are raised both before the tribunal itself—possessing the so-called competence-competence—and before State courts where a party wishing to resist arbitration has commenced substantive or jurisdictional proceedings. Finally, the contractual underpinning of arbitration, which is perceived as pure, enhances the importance of jurisdictional issues related to the existence and validity of the consent to arbitrate.

The following analysis takes place exactly in the context and in the factual matrix of parallel proceedings utilising known concepts, such as competence-competence, but also challenging notions used in literature without due regard of the position of arbitration as part of a global system of justice.

1.2.2 Private International Law Analysis of Arbitral Jurisdiction: Comparison, Parallels, and Transposition

The second recurring theme in the analysis of this thesis is the pervasive private international law treatment of arbitral jurisdiction. Traditionally, in England, the analysis is kept at a level of analogous treatment of arbitration and exclusive jurisdiction

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21 This neutrality is the primary characteristic for which parties choose arbitration. See Horst Eidenmueller, 'Competition between state Courts and Private Tribunals' (2020) 3 Oxford Legal Studies Research Paper; Queen Mary University of London; White & Case, '2018 International Arbitration Survey: The Evolution Of International Arbitration' (2018), <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 16 September 2019.

22 See Dafina Atanasova, 'Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?' (2019) 10 Journal of International Dispute Settlement 396; Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 156; Stefan Kröll, '"Pathological" arbitration agreements before German Courts – short notes on the occurrence of a recent decision by the Higher Regional Court Hamm' (2006) 6 Internationales Handelsrecht 255.

agreements,[23] drawing parallels, and showing the similarities or differences between the two types of *forum* selection clauses. Both agreements are conceptualised as substantive ones, creating rights and obligations for the concluding parties.[24]

As extrapolated below, both types of *forum* selection clauses are traditionally considered to include positive and negative obligations. These obligations are in English law enforced by the courts, either on the basis of their inherent power or on the basis of statutory regulation, by granting a stay of the proceedings, essentially refusing to exercise the power they otherwise possess.[25] As put forward by Briggs:

> *[i]n general it is correct to say that subject to important exceptions, to be elucidated below, if the parties have made an agreement for the jurisdiction of a particular court, and no material challenge is made to the validity or the sub- stance of that agreement, practically all mature legal systems will now accept and will exercise jurisdiction in accordance with, or at least consistently with, the agreement which the parties have made.*[26]

On the contrary, in most civil law jurisdictions both agreements are considered procedural contracts which have positive and negative effects, which either establish or take away jurisdiction for the tribunal or the court reflecting an internationalist approach.[27]

While this thesis does not disregard the reality in English law, it places arbitration agreements in the context of a private international law analysis of the role and nature of party autonomy in cross-border international commercial disputes. In addition, it argues that both agreements are of dual nature, which corresponds to a shifting paradigm of jurisdiction in private international law.[28] In doing so, the relationship of arbitration and

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23 See, for example, *AES v Ust-Kamenogorsk* (n 16).

24 Albert Dicey, John Morris and Lawrence Collins, *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 613; Louise Merrett, 'The Enforcement of Jurisdiction Agreements Within The Brussels Regime' (2008) 55 International and Comparative Law Quarterly 315; Ahmed 2017 (n 16) 22; Joseph 2015 (n 16).

25 See below in Chapter 3. See also Briggs 2016 (n 16); Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edn, Informa Law from Routledge 2015); Alex Mills, *Party Autonomy in Private International Law* (CUP 2018); Fentiman 2015 (n 18).

26 Adrian Briggs, 'Choice of forum and submission to jurisdiction' in Jurgen Basedow and others (eds), *Encyclopedia of Private International Law* (Elgar 2017) 305.

27 See below in Chapter 3.

28 ibid.

private international law is dynamic. On the one hand, the theoretical analysis of jurisdiction and party autonomy as established in private international law scholarship is transposed into the realm of arbitral jurisdiction and serves as the basis for the proposal put forward in this thesis. On the other hand, the private nature of arbitration serves as evidence and pragmatic encapsulation of the theories based on a transnational and globalised paradigm of jurisdiction.

The approach favouring a dual, procedural, and substantive, nature of arbitration agreements is a reflection of the shifting paradigm in private international law jurisdiction. This is, in turn, based on the role of party autonomy in private international law as a separate jurisdictional link in a transnational globalised world. Although there is, indeed, a difference between an exclusive jurisdiction agreement, i.e. agreeing that a particular State court will have exclusive jurisdiction, and an arbitration agreement, i.e. agreeing that no State court or *forum* will be able to adjudicate a particular dispute, the underlying rationale to both types of agreements is that parties are free to decide on how to resolve disputes that have arisen or will arise between them. The principle of party autonomy lies at the heart of the issues analysed in this thesis. It can be used to understand the origins and the rationale of the various mechanisms to regulate jurisdictional conflicts and parallel proceedings.

In addition, the concept of competence-competence as established in the arbitration context has found its way into private international law regimes. The most interesting conceptualisations of this, useful for the analysis to follow, are the Brussels I Regulation Recast[29] and the 2005 Hague Choice of Court Agreements Convention.[30] First, under Article 31(2) of the Recast Regulation, provided that 'an agreement as referred to in Article 25 [that] confers exclusive jurisdiction' exists, the chosen *forum* is the only one to decide the substance of the case. This clearly establishes a positive competence-

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[29] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/1 (Brussels I Recast). This replaced Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ 212/1 (Brussels I Regulation).

[30] Convention on Choice of Court Agreements, concluded 30 June 2005, <http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98> accessed 28 March 2020. See also Louise Ellen Teitz. 'The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration' (2005) 53 American Journal of Comparative Law 543.

competence for the putatively chosen court. On the negative aspect of the doctrine, although there is no reported ECJ case on the matter and the proviso is triggered only if an agreement exists, the predominant view is that *prima facie* evidence of such existence is enough.[31] Second, and on the contrary, Article 6 of the 2005 Hague Convention provides that the non-designated court may decide on the validity of the agreement.[32]

Arbitration and private international law are in a dynamic relationship. All the more so in the field of jurisdiction and cross-border adjudicative power on the basis of an exercise of party autonomy, the origins and operation of jurisdiction and arbitration agreements are for the most part identical. This commonality suggests in principle and in practice that: (i) parallels can easily be drawn between the two dispute resolution methods; (ii) doctrinal and prescriptive analyses can be transposed from the one to the other; and (iii) a uniform analysis and theory for the basis of jurisdiction and party autonomy can be put forward.

1.2.3 Economic Globalisation, Global Law, and Arbitral Jurisdiction

As alluded to already, this thesis is based on the premise of jurisdiction as an expression of a transnational paradigm in private international law. As such, it is positioning the analysis of arbitral jurisdiction within the evolving field of global law and governance with a particular focus on international commerce as analysed in Chapter 2.

The effects of globalisation are permeating every area of political, social, and economic structures and are changing not only these systems, but also the law and our understanding of the law. As Ziccardi Capaldo observes '[t]he international legal order is no longer that of the Westphalian era, as a result of the deep transformation of the traditional model of

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31 Trevor Hartley, *Choice-of-Court Agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (OUP 2013) 312-313; Andrew Dickinson, Eva Lein and Andrew James, *The Brussels I Regulation Recast* (OUP 2015) 340; Fentiman 2015 (n 18), para. 2.203; Andrew Dickinson, 'Surveying the Proposed Brussels I bis Regulation' (2010) 12 Yearbook of Private International Law 247, 290; Justin Cook, 'Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements (Analysis)' (2013) 4 Aberdeen student law review 76; Alexander Layton, 'Comments by Alexander Layton QC on the proposed recast of the Brussels I Regulation' (European Parliament, Directorate-General for Internal Policies, Legal Affairs, 2011).

32 Trevor Hartley, *Civil Jurisdiction and Judgments in Europe: the Brussels I regulation, the Lugano Convention, and the Hague Choice of Court Convention* (OUP 2017) 140-141.

the international community and its constitutive structure'.[33] Indeed, as Pamboukis observes '[t]he Westphalian model has been, if not totally eroded, certainly surpassed. State law (and International State Law) is not any more the exclusive form of regulation'.[34] Other forms of regulation have been developed in a variety of domains. Regulation has become fragmented and multifaceted. But also, the postmodern pluralistic model is dominated by a transnational polyarchy.

Fragmentation, multiplicity of sources and forces, as well as the emergence of different actors and the shifting to different models of power and regimes are features of globalisation which affect the composition and operation of the new legal order.[35] In this order, traditional notions of sovereignty and jurisdiction are not able to fully encapsulate the needs of private and State actors in a complex legal framework. Global law is depicted as a communal spider web 'made up of filaments (whose properties are resistance, flexibility, and elasticity), arranged in concentric circles linked by threads, evoking the symbolism of weaving'.[36] This web-like system provides elasticity, flexibility, and connects the fragmented legal orders into a legal system of its own. This is not to suggest necessarily the unification and harmonisation of laws into a global uniform harmonised regime. To the contrary, global law recognises the polyarchy of sources and actors, connects them, but also utilises their differences.

Arbitration, as a form of non-State, private dispute resolution is a prime example of a field operating in this transnational global legal order and has ramifications on the commercial indexes of States. With the risk of oversimplification, and with the caveat of further analysis in Chapter 4, arbitration laws around the globe have been increasingly

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33 Giuliana Ziccardi Capaldo, 'What Is Global Law?' <https://blog.oup.com/2015/08/what-is-global-law-jurisprudence> accessed 28 March 2020.

34 Charalampos Pamboukis, 'The Future of Global Law: Introductory considerations' (Speech at the International Symposium on 'The Future of Global Law', Athens, 24 May 2019).

35 Robert Wai, 'Transnational lift-off and juridical touchdown: the regulatory function of private international law in an era of globalization' (2001) 40 Columbia Journal of Transnational Law 209.

36 ibid. See also Giuliana Ziccardi Capaldo, 'Managing Complexity within the Unit of the Circular Web of the Global Law System: Representing a 'Communal Spider Web'' (2011) 1 The global Community-Yearbook of International Law and Jurisprudence <https://ssrn.com/abstract=3126780> accessed 28 March 2020.

presenting a higher degree of similarity.[37] This similarity in form and principles does not mean that the laws of different jurisdictions are the same; regulatory fragmentation and competition exists and persists.[38] It is rather evidence of an amalgamation of principles and doctrines accepted in their core form globally. This is evident from the conclusion, acceptance, and worldwide success of the New York Convention. In addition to this core similarity, jurisdictions have retained some differences in regulating arbitration related matters. This regulatory diversity is part of the elasticity presented in the global law landscape. Arbitral jurisdiction is an area where core principles are in place, but diversity also exists. It is an area that requires regulation that balances the commandments of party autonomy and State interests.

While the question of whether arbitration is an international or transnational system of dispute resolution existing above and beyond national legal orders or whether it is a product of such national legal orders is a debated topic,[39] the globalised and transnational legal framework is always a part of the equation. As analysed below, several theories have been proposed for the justification of the nature of arbitration as well as for the role of party autonomy in arbitration and private international law.[40] This thesis does not aim

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37 Richard Garnett, 'International arbitration law: progress towards harmonisation' (2002) 3 Melbourne Journal International Law 400; Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' (2001) Foundations and Perspectives of International Trade Law 3.

38 Catherine Rogers, 'Is International Arbitration in a Race to the Top?' Kluwer Arbitration Blog 15 March 2018, <http://arbitrationblog.kluwerarbitration.com/2018/03/15/is-international-arbitration-in-a-race-to-the-top/> accessed 28 March 2020.

39 Jan Paulsson, 'Arbitration in three dimensions' (2011) 60 International & Comparative Law Quarterly 291; Emmanuel Gaillard, *Aspects Philosophiques du Droit de l'Arbitrage International* (Martinus Nijhoff Publishers 2008) 58-60; Emmanuel Gaillard, 'The representations of international arbitration' (2010) 1 Journal of International Dispute Settlement 271; Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996). See also Thomas Schultz, 'The concept of law in transnational arbitral legal orders and some of its consequences' (2011) 2 Journal of International Dispute Settlement 59.

40 Emmanuel Gaillard, *Legal Theory of International Arbitration* (Brill Nijhoff 2010) 35; See also Ralf Michaels, 'Roles and Role Perceptions in International Commercial Arbitration' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance–Contending Theories and Evidence* (OUP 2014) 52; Jan Paulsson, 'Arbitration in three dimensions' (2011) 60 International &

to adopt one particular theory on the nature of arbitration. The progress made, however, toward the doctrinal and theoretical understanding of the historical and normative foundations as well as the *modus operandi* of party autonomy in private international law can be transposed into arbitration.

1.2.4 Jurisdictional Focus: Arbitral Jurisdiction in England and Wales

The final recurring theme informs also the territorial focus of this thesis. Although the theoretical analysis in Chapters 2–4 is not specifically linked to a particular jurisdiction, England and Wales is used in Chapters 5 and 6 as a case study to formulate the theoretical proposal into pragmatic rules within one of the major arbitral hubs.[41] As such, it is focused: (i) on the role and effects of party autonomy and of the proposed model of horizontal choice in the context of the English legal system; and (ii) on the restatement of the approach in England and Wales as a paradigm of materialising the proposed model. Within this framework, the research question addressed in this thesis aims at investigating issues arising out of the regulation of arbitral jurisdiction in England, identifying the current position of the law and the approach of the judiciary, and proposing a model based on modern theories for jurisdiction in private international law.

As the analysis below will show, the role of national courts in the context of regulation of arbitral jurisdiction is both supporting and supervisory on the one hand and reviewing on the other. In the context of the English legal system, this dual function of the courts in relation to arbitration plays a vital role in the regulation of arbitral jurisdiction. Interlocutory jurisdictional issues are an expression of the supervisory, supportive, or reviewing role of English courts in relation to arbitration.[42]

Having this contextual framework, and the overarching principle of minimum court interference, as guidelines, the English legal system and courts have adopted an approach

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Comparative Law Quarterly 291, 292 (‘pluralistic’ thesis, under which ‘arbitration may be given effect by more than one legal order, none of them inevitably essential’); Horatia Muir Watt, '“Party Autonomy” in international contracts: from the makings of a myth to the requirements of global governance' (2010) 6 European Review of Contract Law 250, 254. (‘international commercial arbitration has now established itself as a largely auto-poetic, parallel, world of private justice, supposedly secreted by a self-regulating transnational merchant community’).

41 In the 2018 Queen Mary Report (n 21), London was the most popular amongst respondents as a choice for arbitral seat with 64%.

42 Andrews 2019 (n 15), para. 31.30

which has been characterised as pragmatic and in favour of enforcing parties' agreement. Instances where questions and issues of arbitral jurisdiction arise before English courts include: (i) applications to stay litigation proceedings in England in favour of an existing arbitration agreement covering the dispute in question (Section 9 of the Arbitration Act 1996); (ii) applications for a declaration as to the existence, validity, and scope of the arbitration agreement (Sections 32 and 72 of the Arbitration Act 1996); (iii) applications for enforcing the arbitration agreement by way of a damages award[43] or an anti-suit injunction (Section 37 of the Senior Courts Act 1981);[44] (iv) applications for granting anti-arbitration injunctions (Section 37 of the Senior Courts Act 1981); and (v) challenge proceedings for awards rendered in England and enforcement proceedings for domestic or foreign awards (Sections 66-69 and 101 *et seq* of the Arbitration Act 1996). In addition or as predecessors to many of these statutorily established powers of the English courts, in common law there is always the residual discretion of an English court which has jurisdiction of its own to decide how and whether it will exercise this jurisdiction in order to deliver justice in the particular case.

These various instances coupled with the legislative framework of the Arbitration Act 1996 and the commercial pragmatism of English judges, create a system that is workable and provides pragmatic results. While this is certainly true to an extent, and despite the existence of the system in the Arbitration Act 1996, the multiplicity of sources and the often different treatment of issues by courts enhance the uncertainty existing to the regulation of arbitral jurisdiction and the relationship of arbitral tribunals and courts on this matter. In addition, the current approach in statute and jurisprudence is not based on a coherent theoretical framework for the basis, nature, and effects of the jurisdiction of arbitral tribunals. This is not to suggest, complete lack of a theoretical basis. The Arbitration Act 1996 as well as the common law rules have been developed on the basis of long-standing principles and theoretical bases.

A particular example of the importance of arbitral jurisdiction, as well as of the need for

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43 *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010; *Union Discount Co v Zoller* [2002] 1 WLR 1517; Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) 308; Stuart Dutson, 'Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies if It Continues' (2000) 16 Arbitration International 89.

44 *Donohue v Armco Inc* (n 19); *AES v Ust-Kamenogorsk* (n 16).

a restatement of the approach currently in place, is given by the latest decision in the *Sabbagh v Khoury* saga by the Court of Appeal.[45] The court was invited to decide on two specific aspects in the relationship between litigation in England and foreign arbitration proceedings.

First, it shed some light on the relationship between Section 9 Arbitration Act 1996 and anti-arbitration injunctions. Section 9 Arbitration Act 1996 provides for a mandatory stay of litigation proceedings where the court is satisfied that a dispute falls within a valid arbitration agreement. In such cases, an anti-arbitration injunction for claims, which—had a stay been requested in the appropriate proceedings—would fall within the arbitration agreement, is not within the court's power and the court should, in any case, refuse to exercise such a power. On the particular facts of the case, Richards LJ held that one of the litigation claims was within the scope of the arbitration agreement and, hence, he rejected the request for an injunction.

Second, Richards LJ found that the general requirement that England must be the natural *forum* is not required when the court is granting an anti-arbitration injunction. His rationale is based on the following assumptions. The requirement of England being the natural *forum* is dictated by the requirements of comity and respect of the sovereignty of foreign States. Anti-suit injunctions operate *in personam*; they constitute, however, an indirect interference with the sovereignty of other States. Richards LJ held that there is no such interference with foreign arbitrations. The only interference in these cases was with the principle of enforcing arbitration agreements in accordance with the New York Convention and the Arbitration Act 1996.

Both aspects raise in essence fundamental questions of the relationship between courts and tribunals in a cross-border commercial dispute. The latter aspect, however, touches upon a more fundamental issue. The approach of Richards LJ, reflecting the orthodox English approach, is that there is no issue concerning comity because a tribunal is a creature of contract not one born out of sovereignty. The analysis in the following Chapters, and the new approach proposed in this thesis, aims at challenging such assumptions in conceptualising the basis and framework for the regulation of arbitral jurisdiction in the context of international cross-border disputes by introducing the modern theoretical analysis on party autonomy in private international law into the

[45] [2019] EWCA Civ 1219.

discussion on arbitral jurisdiction.

1.3 The Enquiry

1.3.1 Research Question

As already mentioned, this thesis is focusing on the regulation of arbitral jurisdiction in the light of a contemporary private international law analysis in the context of international commercial disputes. The research question addressed is the role that party autonomy has as a transnational paradigm of jurisdiction on the determination of jurisdictional issues in arbitration. The question is answered both in a theoretical manner, based on contemporary theories of private international law, and in a practical and pragmatic manner with a particular focus on the law and practice—and in a restatement of these two—in England and Wales.

Arbitral jurisdiction lies at the heart of arbitration as a dispute-resolution system. It permeates the commencement, actual procedure, and post-award stages of arbitral proceedings. As analysed in Chapter 2, every international commercial dispute necessarily poses the question of where and under which principles will this dispute be decided. This question is a jurisdictional one and it is present in both international commercial litigation and international commercial arbitration. Furthermore, the nature of these transactions enhances the role of party autonomy in determining which *forum*—and which law—will have adjudicatory competence on the dispute. This is not to suggest that in case parties have not exercised their autonomy, there would or should be a legal vacuum by nullifying the private international law rules of national jurisdictions. The premise analysed in this thesis is twofold: firstly, exactly due to the differences in national legal systems and the lack of international harmonisation in many areas of law, parties to cross-border commercial transactions very often include dispute resolution provisions in their agreements; and secondly, that the regulation of arbitral jurisdiction should be based on the effects of the parties' exercise of their freedom to choose one or no *forum* for the resolution of their disputes. This is, then, a thesis analysing the nature and role of party autonomy in establishing and evaluating arbitral jurisdiction in a transnational cross-border environment.

The thesis is informed by the following considerations, which support the argument in favour of a solution promoting *forum* synergy/complementarity in the determination of the jurisdictional disputes, each of which is extrapolated in the following Chapters:

First, it is based on a coherent analysis of the nature of arbitral jurisdiction as an expression of private international law party autonomy. The aim of the thesis is to consider the analysis already undertaken in the context of private international law and cross-border jurisdictional disputes in a globalised legal system and transpose the findings in the analysis of arbitral jurisdiction.

Second, and in the context of this analysis, the proposal adopted in this thesis for the regulation of arbitral jurisdiction, both in a theoretical[46] and in a practical level within and in amendment of the current regime,[47] is based on the idea of a shifting paradigm of jurisdiction. This is not a paradigm shift exclusively or myopically focused on adjudicative jurisdiction; it is, rather, a broader shift from traditional concepts of jurisdiction and sovereignty based on the Westphalian model. The Westphalian model is not dead, but it is also not anymore apposite to provide theoretically sound and pragmatically workable solutions in the context of a global legal system. As Pamboukis aptly argues:

> *[t]he rise of individual as international actor affirms […] that every human is potentially a legal order in the sense that could be a source of regulation. It is, thus, without surprise in the field of Private International Law that we observe the domination of the principle of autonomy of will in international regulation. As a consequence, we observe the rise of private legal regimes. The individualism has, if not defeated, importantly limited the force of States sovereignty.* [48]

Third, as a result of this shifting paradigm, States and individuals are in a relationship of equality and, therefore, the role of individual parties and their choices as well as the role of systemic players in the global arbitration market becomes important in regulating issues of arbitral jurisdiction. This has consequences for the legal treatment of exclusive jurisdiction and arbitration agreements as not merely expressions of choice between pre-existing jurisdictions; they are, rather, standalone connecting factors and expressions of the parties' sovereignty in the context of global law.

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46 See below in Chapter 4.

47 See below in Chapters 5 and 6.

48 Pamboukis (n 34). See also Sam Muller and others, *The Law of the Future and the Future of Law: Volume II* (Torkel Opsahl Academic EPublisher 2012) 4.

Finally, this theoretical shift has pragmatic and practical consequences in the manner that arbitral jurisdiction is regulated both at the level of positively enforcing arbitration agreements and at the level of staying proceedings before other *fora*. As such, this thesis is based on formulating a coherent proposal for the regulation of arbitral jurisdiction on both levels.

Based on these pillars, the objective of the research is again tripartite: (i) to formulate a theoretical framework for the regulation of issues arising out of or in connection with arbitral jurisdiction; (ii) to apply this framework within the current statutory regime of the Arbitration Act 1996; and (iii) to formulate a practical proposal for the modernisation of the Arbitration Act 1996 creating a restatement of the rules included therein. This is a coherent proposal on complementarity and *forum* synergy in the allocation of authority on the basis of the finding on party autonomy as a way of respecting the parties' and non-parties' autonomy. In doing so it considers approaches in foreign jurisdictions as well as proposals formulated by scholars on the analysis of competence-competence and separability.

The overarching objective is to support an argument, both on a theoretical and a practical level, promoting synergy in the allocation and delineation of authority between courts and tribunals on the basis of considering the value that party autonomy has as a basis, limit, and measuring rod of the parties' consent.

1.3.2 Contribution to Knowledge

The treatment of jurisdictional issues in arbitration is one of the gordian knots of this field of law. National approaches differ and a plethora of theories have been developed in arbitration legal doctrine. The analysis and proposal of this thesis is not merely a reiteration of the subject or one additional theory for regulating arbitral proceedings.

It is an analysis of and a proposal for regulating arbitral jurisdiction in the context of contemporary private international law. It is a proposal based on the nature, effects, and mechanics of party autonomy in private international law and establishment of adjudicatory jurisdiction. It is a proposal conceiving private international law as part of global justice, as a seamless web of rules, institutions, and users regulating adjudicatory authority for transnational and international commercial disputes. In doing so, this thesis supports and at the same time extends the contemporary conception of party autonomy in private international law as a part of a system of global justice. Considering the development and the effects of a choice to arbitrate, the arguments on the nature and the

importance of State sovereignty as the conceptual basis of private international law (in a domestic or international perception) is ill-equipped in describing, justifying, and regulating the expansion of economic globalisation and of private dispute resolution in such a global market. The proposal for a horizontal model of arbitral jurisdiction is adequately equipped in performing these functions.

In this context, the analysis in the following Chapters contributes to the development of contemporary private international law by using arbitral jurisdiction as a 'case study' for the role of party autonomy in a system of global justice. In addition, and starting from the opposite direction, it is applying such theories in the regulation of arbitral jurisdiction. Finally, avoiding being a theoretical discourse on the nature and law of arbitral jurisdiction, this thesis focuses on the establishment of a theoretically sound and pragmatically feasible proposal for the regulation of arbitral jurisdiction in England and Wales.

1.3.3 Scope

Reflecting the realities in practice, this is a thesis covering arbitral jurisdiction from a practical point of view, aiming to regulate the possibility and reality of parallel proceedings at the jurisdictional stage of an arbitration. The analysis covers both tactical ('torpedo') and legitimate parallel court proceedings where the issue of the tribunal's jurisdiction arises. These jurisdictional issues include a variety of inquiries, court and tribunal ordered remedies and tools aiming at the regulation of jurisdiction between these two *fora* and the enforcement of the parties' choices. Furthermore, it considers issues at the post-award phase of an arbitration; limited, however, to the extent that these are related to the determination of the arbitral jurisdiction.

In terms of territorial scope, as already stated, the second part of this thesis focuses on the statutory and jurisprudential regime of England and Wales as a case study for the application of the theoretical argument.

By contrast, this thesis does not deal with any of the following aspects of parallel proceedings in cross-border litigation and arbitration: (a) a full-fledged comparative analysis of the regulation in other jurisdictions; (b) potential issues arising out of related proceedings, except where such reference is necessary to analyse jurisdictional issues; (c) parallel proceedings between courts of different States or between arbitral tribunals; (d) issues pertaining to the parallel adjudication of substantial (merits) issues between courts and tribunals to the extent that such analysis is not useful to draw parallels and consider

issues falling within the scope of this thesis; (e) cross-border litigation questions *per se*; and (f) issues arising out of Investor-State disputes.

In addition, the scope of this thesis is limited to cases of disputed jurisdiction. That is to say, the analysis and proposed model herein, are not concerned with the default allocation of power in the context of international commercial disputes or with challenging per se the current state of affairs. This area remains a topic covered by traditional rules of law encapsulated in conflict of law regimes. The analysis and proposal operate in the field of expression—or more accurately contested expression—of party autonomy towards one or other direction. In other words, it applies in cases where there is at least an argument—albeit debatable or contested—that an agreement to arbitrate exists, is valid, and covers the dispute in question.

Furthermore, this thesis does not deal with the question of establishing a right or an obligation for non-signatory or third parties to participate in the arbitral proceedings. Several theories have been proposed on the basis of identifying and construing the consent of non-signatory parties or extending the consent of the signatories to the arbitration agreement to non-signatories.[49] Other theories focus on justifications of efficiency or economy of the process in bringing all disputes—and parties connected with these disputes—together in the same arbitral proceedings. These are theories utilising the doctrines of apparent authority, alter ego, group of companies, or piercing of the corporate veil. Such theories are, however, not easily squared with the focus on party autonomy and factual consent as the basis of the arbitral resolution of disputes. This is an area analysed extensively elsewhere[50] and an item for future work in relation to the proposed model of this thesis.

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[49] See generally Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (OUP 2010); William Park, 'Non-signatories and international contracts: an arbitrator's dilemma' in Doak Bishop and Belinda Macmahon (eds), *Multiple party actions in international arbitration* (2009); Otto Sandrock, 'Extending the scope of arbitration agreements to non-signatories' in Marc Blessing (ed) *Arbitration Agreement: its Multifold Critical Aspects* (ASA 1994).

[50] Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610. Brekoulakis observes that under the traditional doctrines ‘arbitration tribunals and national courts have compelled non-signatories to arbitrate because of fundamental considerations of equity, not consent for arbitration’ and proposes a rather different approach focusing on the concept of ‘dispute’ and the existence of a close relationship in law and/or in fact between signatory and non-signatory parties.

Finally, despite the focus on a systemic conception of global justice and the role of arbitration therein, this is not a thesis commenting in general on the existence or operation of an arbitral legal order or on the law-making powers of such an order. The analysis and proposal are constrained by the development of a theoretical framework and pragmatic rules for regulating arbitral jurisdiction. To the extent required in analysing and establishing this framework, it considers issues touching upon global governance, the relationship between private and public international law and the role of private regulators in a global system of justice. It is by no means, however, an extensive, thorough, and authoritative analysis of such issues.

1.3.4 Structure

This thesis is an analysis of, and a proposal for regulating, arbitral jurisdiction in the context of contemporary private international law. It aims at providing a coherent framework for regulating arbitral jurisdiction in a manner which corresponds to the multilateral and systemic nature of contemporary private international law. On the basis of this framework, the thesis moves to analyse and propose on a practical level how arbitral jurisdiction can be regulated in England and Wales. This objective and overarching theme coupled with the considerations mentioned above, affect the structure of this thesis.

As such, Chapter 2 is thus providing the context within which the analysis and the thesis is based. More specifically, the issues this thesis is concerned with are ones arising in the context of a commercial cross-border setting where the transaction, litigation, enforcement risks for the parties are particularly high and incentives exist for enhanced private regulation. Not only are the risks higher in international commercial transactions and disputes, but also the role of party autonomy is enhanced. In addition, the nature of the disputes arising more often in the context of international commercial transactions is interlocutory, dealing with the *forum* and law applicable to the substantive parts of the disputes. These factors combined together, create a fertile ground for jurisdictional disputes. Adding arbitration in the equation, issues of arbitral jurisdiction should be dealt with considering the risks, role of party autonomy, and overall particularities of international commercial disputes.

Chapters 3 and 4 provide the core theoretical framework of this thesis' analysis as well as the proposal for a horizontal argument in the relationship of courts and tribunals in regulating arbitral jurisdiction and in the relationship of State litigation and arbitration as

dispute resolution processes. This theoretical framework and proposal are based on contemporary theories of private international law, on the conception of private international law as secondary rules allocating the authority between States, on the conception of party autonomy not as a mere connecting factor recognised, allowed for, or bestowed by States, but rather as an expression of a changing landscape in the adjudication of transnational and cross-border disputes. The analysis here is limited to a top-level approach of these paradigms for the purposes of explaining the role of party autonomy through the respective lenses and providing the basis for the analysis of arbitral jurisdiction in Chapter 4. The theoretical analysis of the distinction between private and public international law and the nature and effects of jurisdiction and arbitration agreements in private international law has been extensively analysed elsewhere.[51]

In this context, arbitration as a dispute resolution mechanism and the adjudicatory power of a given tribunal is an expression of this nature of party autonomy and cannot be considered as invariably being subject to or a bestowal of State sovereignty. This is not due to the adoption of an international paradigm, but rather due to a different conception of the allocative power in this global system of justice.

Private international law jurisdiction, as well as arbitral jurisdiction, is not merely a product of the will of sovereign States. Jurisdiction is affected by private forces in this globalised environment. As such, the nature and importance of State sovereignty is corroded in private international law. This area is defined and affected by an amalgamation of State and private powers co-existing in a horizontal, dynamic, collaborative or competing relationship with each other. Adjudicatory bodies of each of these beacons of power are equally in a horizontal, systemic relationship between them and party autonomy is the basis for establishing the power of each of these bodies and for delineating their relationship.

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[51] See generally Mills 2018 (n 25); Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (CUP 2009); Ahmed 2017 (n 16); Michaels 2006 (n 9); Giesela Ruehl, 'Party Autonomy in the Private International Law of Contracts' in Gottschalk et al (eds), Conflict of Laws in a Globalized World (CUP 2007); Horatia Muir Watt, '"Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance' (2010) 6 European Review of Contract Law 250. These are works frequently relied upon in Chapters 3 and 4 to provide the basis of the proposed approach. As analysed below in Chapter 3, they form the basis for the analysis of this thesis on arbitration.

Based on this theoretical model for the basis, operation, and features of arbitral jurisdiction, this thesis moves forward in Chapters 5 and 6 and considers how this theoretical model can be pragmatically and practically transposed into the law and practice of England and Wales. They are both proceeding on the basis of analysing first the various instances of jurisdictional intersections between courts and arbitral tribunals traditionally forming part of the vertical relationship between the two of them. Then, on the basis of this analysis, the thesis proceeds to a restatement of the approach in each of the jurisdictional intersections, codifying the elements of the English law and practice that are compatible with this horizontal model and proposing rules in the form statutory provisions with comments.

2 International Commercial Disputes and Arbitral Jurisdiction in an Era of Globalisation

This Chapter focuses on the context within which any regulatory exercise takes place. As delineated above, this thesis analyses questions of arbitral jurisdiction in a cross-border commercial setting. Cross-border trade is not a recent phenomenon; rather, it has existed for centuries. It is, however, a dynamic phenomenon, the characteristics of which are shaped by technological and societal developments. This Chapter posits the question of effective regulation of arbitral jurisdiction—and of international commercial disputes in general—within the current and future directions of cross-border trade. As such, it focuses on the meaning, characteristics, and effects on international cross-border disputes and jurisdiction of globalised relationships. This analysis is important as it positions the following Chapters in the broader context of the needs and features of the global commercial community. In addition, it shows the importance of cross-border trade, dispute resolution, and arbitral jurisdiction in addressing the needs of a globalised commercial world.

This serves to show that the relationship between international commerce, dispute resolution, and globalisation is dynamic and multilateral. The nature of this relationship is not merely one of academic or theoretical interest. It has, rather, normative consequences on how one perceives the role of States and individuals in, among others, the design of dispute resolution systems in cross-border trade. Regulation of arbitral jurisdiction is positioned in this thesis at the centre of this dynamic relationship. This is to suggest that it is examined as a mechanism shaped by the features and serving the needs of a global community. This Chapter considers the historical, descriptive, and normative features of globalised commercial trade and international commercial disputes setting the foundation and context for the analysis of the role of party autonomy within this context in Chapter 3 and the analysis of and proposal for regulating arbitral jurisdiction in Chapter 4.

2.1 Globalisation and the Rise of Private Actors in International Commerce

Globalisation is a word and a concept adored by some and loathed by others. Its meaning and precise definition is elusive. Despite the polysemy of the term, it is empirically conceived as a phenomenon.[52] As Held and McGrew observe, '[g]lobalization has an undeniably material aspect in so far as it is possible to identify, for instance, flows of trade, capital and people across the globe' and 'it suggests a growing magnitude or intensity of global flows such that States and societies become increasingly enmeshed in worldwide systems and networks of interaction'.[53] Another contribution is provided by Stiglitz who observes:

> *[t]he idea of globalization is very simple. The decrease of communication costs, transportation costs, and artificial barriers to goods and factors of production has led to a closer integration of the economies of the world. Globalization implies mobility not only of goods and services but also of capital and knowledge – and to a lesser extent of people. Globalization entails not only the integration of markets, but also the emergence of a global civil society.*[54]

This globalised environment also leads to and is characterised by a proliferation of international commerce. This is not only a result of the reduction of transaction costs of various kinds with the development of technology and transportation, but also of the very integration of markets and cultures in international transactions. Cross-border transactions have risen exponentially in numbers, amounts, and complexity.

This proliferation has not only economic and societal consequences; it also has consequences on the legal arena. First, it leads to increased need for regulation of cross-

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52 Pamboukis (n 34); Neil Walker, *Intimations of Global Law* (CUP 2015) 10-11 (referring to a cacophony of global talk providing an excellent snapshot of the sheer variety of contemporary uses of global law synonymous to a variety of terms as world law, universal law, common law, jus gentium or earth jurisprudence).

53 David Held and Anthony McGrew, *The Global Transformations Reader: an Introduction to the Globalization Debate* (2nd edn, Polity 2003) 3.

54 Joseph Stiglitz, *Globalization and its Discontents* (Norton 2002) 51.

border transactions,[55] a need traditionally addressed by two sets of rules: (a) rules of private international law regarding the aspects of jurisdiction, applicable law, and enforcement of judgments; and (b) rules of substantive law. Second, rules of such kind can no longer be a result of, and have a focus on, territorial limits of States. Globalisation has led to a proliferation of harmonisation on both the private international law level,[56] and the substantive law level.[57] Harmonisation of rules is achievable to an extent, but it is also susceptible to sub-optimal results as a consequence of the divergent approaches which States adopt in the process of harmonising a particular area. Regulating cross-border transactions in a post-modern era can no longer be adequately done by focusing on notions and concepts of pure State sovereignty and agreements between these States.[58] This is all the more so in the field of international commercial arbitration, a pure product of the needs of the global commercial community. The focus of analysing cross-border and arbitral jurisdiction should be adapted to this post-modern era; along with it, the vertical relationship between arbitration and State litigation should also be adapted. Chapters 3 and 4, establishing a horizontal choice model for regulating arbitral jurisdiction, are positioned in this context of a globalised economy and the proliferation of commercial disputes.

Globalisation has also led to a change of focus as to the role of individuals in the public (and) international arena. Individuals have risen from being objects of international law to increasingly having a more active role as subjects of international law.[59] In addition, not only has the individual risen as an international actor, but also private regulation has increasingly become the norm, especially in areas such as cross-border commercial transactions.[60] It is, thus, not surprising that private international law is dominated by

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55 Campbell McLachlan, 'Lis pendens in international litigation (Volume 336)' in The Hague Academy of International Law (ed) Collected Courses of the Hague Academy of International Law (Brill 2009) 212.

56 See, for example, European Union Regulations or the work of the Hague Conference.

57 See, for example, the UN Convention on International Sale of Goods or the UNIDROIT Principles on International Commercial Contracts.

58 Mills 2009 (n 51), 87 *et seq*. focusing on the reconsideration of the notion of sovereignty.

59 International human rights or international criminal law are the typical examples of this transformation. The same is the case, however, with the increasingly important role of individuals in the context of regional organisations, such as the European Union and its rules of Competition Law.

60 See, for example, the role of Incoterms created by the International Chamber of Commerce (ICC).

party autonomy, the principle of autonomy of individual will in international regulation. As a consequence of this domination, private legal regimes are growing in the international global arena.[61]

This individualism has, if not defeated, importantly limited the normative force of State sovereignty and has blurred the line between the private and public spheres in the global arena. Globalisation allows—and indeed pushes—for the horizontalization of previously vertical relationships and is defined by the interdependence and competition of various actors in the international legal arena. The focus is increasingly on the converging or competing interests between actors in this arena without extensive reference to the origin of their power.

2.2 State Interests in Private Commercial Disputes

This emergence of private regulation is not to suggest that State actors are no longer important or do not have interests in the resolution of commercial disputes. States might not be directly involved in these disputes themselves, but they are involved in their resolution. This is both through their judicial systems, either adjudicating themselves or supervising resolution by arbitration, and because the financial and societal consequences of dispute resolution in favour or against a commercial party has an impact upon the State's economy. States have interests in relation to these consequences. This is not far from this thesis' analysis. Private international law is, as analysed in Chapter 3, not only concerned with issues of substantive justice and fairness between the parties, but also with broader public issues of global justice.[62]

The point of departure is to extrapolate on the meaning of State interests in relation to international commercial disputes. These refer to the reasons and considerations which affect the approach of a particular jurisdiction towards international commercial disputes. More specifically, in the context of regulating arbitral jurisdiction it refers to the underpinnings and reasons behind the approach a particular State adopts in relation to the prerequisites and standards for intervening in the private resolution of disputes. These interests are not meant to refer to individual cases, but rather to policy rationales in designing the private international law and arbitration legal regimes.

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61 Sam Muller and others, *The Law of the Future and the Future of Law: Volume II* (Torkel Opsahl Academic EPublisher 2012) 4.

62 McLachlan 2009 (n 55) 258.

First, mirroring the financial interests of the commercial parties, States also have financial interests linked with the resolution of international commercial disputes. These are primarily indirect, in the sense that they are a result of the financial enterprise of the commercial parties involved in the dispute. Commercial parties are often companies which are contributing to the national economy of the States in which they are operating. This is not only a result of their contribution at the Gross Domestic Product (GDP) of these States but also of their resources to conduct research and develop new products and the ability to offer more and varied job opportunities and greater job stability. In fact, according to an EFIGE policy report, based on a survey conducted on companies from Europe, it is clear that the larger the companies, the more impact they have on the national economy of their host States. Reversing that finding, economically more successful countries have a greater share of large firms.[63] On the contrary, businesses that do not perform well or that are subject to large losses—as a result of one or more claims raised against them—have a negative impact on the national economy.

Financial interests are also connected with the dispute resolution system and the legal regime applicable in a given State. As shown below, 70% of the London Commercial Court's business relates to international cases. Both the dispute resolution system, through court litigation, arbitration or other forms of Alternative Dispute Resolution (ADR), and the legal rules applicable are an important consideration to attract foreign companies and create trade connections with other countries. Furthermore, the acceptance and promotion of international arbitration as a form of resolving disputes creates positive financial outcomes for the States through the increased trade transactions with foreign companies.[64]

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63 Loris Rubini, Klaus Desmet, Facundo Piguillem and Aránzazu Crespo, *Breaking down the barriers to firm growth in Europe: the fourth EFIGE policy report* (BRUEGEL Blueprint Series Volume XVIII, BRUEGEL 2012) 4.

64 This is also evident in the list of signatories at the New York Convention 1958. All the major trading nations are signatories. In addition, in all these nations the Chambers of Commerce have created arbitral institutions to enable and facilitate the resolution of commercial disputes through arbitration. The mere link between commercial organisations and arbitration is evidencing of the increased financial implications of arbitration both to commercial parties and states. See also Jason Fry, 'Arbitration and Promotion of Economic Growth and Investment' (2011) 13 Eur JL Reform 388, 391; Daniel Berkowitz, Johannes Moenius, and Katharina Pistor, 'Legal Institutions and International Trade Flows' (2004) 26 Mich J Int'l L 163.

Second, States have interests related to their judicial institutions. These are interests in regulating the number of cases that end up in the public court system, the docket congestion, and the equivalent waste of public resources as a result of this congestion. It, thus, appears that States have interests in reducing the number of cases that reach their courts. The primary method for doing that is the promotion of ADR methods, including arbitration.[65] This has been the choice of the legislator in England and Wales through various acts, including the reformed Civil Procedure Rules[66] and the Arbitration Act 1996.[67]

At the same time, there is growing concern about the development of the law in countries where the law is developed in courts. The concern is usually put forward as follows. Unless State courts have a sufficient number and varied selection of cases to decide on the merits, the common law cannot develop. Arbitration takes these cases away from the courts and the review procedure established by the Arbitration Act 1996 is only limited to procedural irregularities, public policy violations, and mistakes on points of law. This latter instance is available, however, under Section 69 of the Arbitration Act 1996, only where the applicable law is English, and the seat of arbitration is in England. That, according to the critics, serves to transform 'the common law from a living instrument into […] "an ossuary"'.[68] The same critics, however, acknowledge that 'the key point is the balance between respect for party choice and the wider State and public interest in

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65 See Neil Andrews, *The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England* (Springer 2018).

66 See CPR Rule 1.4 (2)(e) 'Active case management includes – […] (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'.

67 See Arbitration Act 1996, Section 1(a) 'the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense'.

68 Lord Thomas, 'Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration' (2016) The Third Annual Bailii Lecture Freshfields, London 2016. See also Harris Bor, 'Comments on Lord Chief Justice Thomas' 2016 Bailii Lecture which promotes a greater role for the courts in international arbitration', 11 April 2016, Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2016/04/11/comments-on-lord-chief-justice-thomas-2016-bailii-lecture-which-promotes-a-greater-role-for-the-courts-in-international-arbitration/> accessed 29 March 2020 ('Arbitration is retreating into its lair, dragging with it into the darkness the very cases that should be used to develop the common law as it applies to modern commerce'.

ensuring the law is developed and keeps pace with change'[69] or that an increase in the scope of court jurisdiction and a decrease of the scope of arbitration '[s]ets the clock back almost 40 years'.[70] This ongoing discussion reveals an underlying conflict between party choice and State interests that resembles the conflict between legitimacy and efficiency. In a similar manner, however, the nature, extent, and effects of the parties' choice or lack thereof is the important element to consider in this regard as well and in the context of the wider interests of the States. Solutions proposed on the basis of establishing a greater interaction between courts and tribunals are towards the right direction but do not complete the exercise. It is not only relevant to focus on quantitative aspects of greater and more rigorous interaction between courts and tribunals but determine the nature of their relationship on the basis of the basic interests that arbitration serves within a State, both for the commercial parties and for the State itself.

Finally, international commercial transactions and disputes raise issues of sovereignty regulation and balance of the interests of comity towards other jurisdictions.[71] Although comity is a notion with an elusive meaning, it represents the need to respect and regulate the relationship between States, their judicial systems and institutions, and the interests they might have in relation to the resolution of an international commercial dispute. This need has led to the development of rules of private international law on jurisdiction and enforcement of foreign judgments as well as of rules on arbitral jurisdiction and enforcement of arbitral awards. The establishment of jurisdictional links or certain standards for the fulfilment of these links is central to the quest to regulate arbitral jurisdiction in a manner that fulfils the interests of everyone involved.

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69 Lord Thomas, 'Commercial Dispute Resolution: Courts And Arbitration', 6 April 2017, <https://www.judiciary.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf> accessed 29 March 2020, para. 29.

70 Bernard Rix, 'Confidentiality in International Arbitration: Virtue or Vice?' Jones Day Professorship in Commercial Law Lecture, SMU, Singapore, 12 March 2015.

71 For the English Law approach on comity see Dicey, Morris, and Collins 2012 (n 24), para. 1-008. See also McLachlan 2009 (n 55) 259. See also Joel R Paul, 'Comity in international law' (1991) 32 Harv Int'l LJ 1; Thomas Schultz and Niccolò Ridi, 'Comity and international courts and tribunals' (2017) 50 Cornell Int'l LJ 577.

2.3 Characteristics and Particularities of International Commercial Transactions and Disputes

Cross-border transactions and multistate disputes are the raw material of this thesis. Such disputes are characteristic of a globalised economy as analysed above, but they also entail enhanced risks for the parties and alter the nature of the parties' interests and choices. This section considers three characteristics in such disputes, resulting from the subjective or objective internationality, which are important as background considerations for the analysis of jurisdictional issues in the arbitral resolution: (a) the enhanced role of party autonomy and private regulation; (b) the interlocutory or jurisdictional nature of the majority of the disputes generated; and (c) the increased financial risks as a result of the high value of these transactions.

2.3.1 Enhanced Role of Party Autonomy

Party autonomy and private regulation not only of the substantive terms of transactions between the parties but also of the *forum* and the applicable law is a defining characteristic of cross-border disputes.[72] This is a result of the very nature of the commercial actors involved. The majority of parties are commercial, sophisticated entities—often of complex and multistate structure—which enter into equally complex transactions. Furthermore, it is often that these commercial parties are repeat players in their respective industry.[73] This is to suggest that, first they are necessarily involved in many transactions and disputes of the same or similar kind, and second, either individually or collectively, they adopt and create standard practices, clauses, and rules.

This enhanced role of party autonomy and individual choice is a result of the additional

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[72] Mukarrum Ahmed, 'The Validity of Choice of Court Agreements in International Commercial Contracts under the Hague Choice of Court Convention and the Brussels Ia Regulation' in Michael Furmston (ed.), *The Future of the Law of Contract* (Informa Law from Routledge 2020); Gilles Cuniberti, 'The international market for contracts: the most attractive contract laws' (2013) 34 Nw J Int'l L & Bus 455 with empirical evidence on the choice of specific contract laws; Campbell McLachlan, 'International Litigation and the Reworking of the Conflict of Laws'(2004)' 120 LQR 580.

[73] Marc Galanter, 'Why the" haves" come out ahead: Speculations on the limits of legal change' (1974) 9 Law & society review 95 (introducing the term). See also Carrie Menkel-Meadow, 'Do the Haves Come Out Ahead in Alternative Judicial Systems: Repeat Players in ADR' (1999) 15 Ohio St J on Disp Resol 19.

concerns and risks associated, among others, with the *forum* and the applicable laws for resolving any possible disputes.[74] This is not to suggest that, absent specific regulation by the parties, these issues will remain unregulated. National and supra-national rules on conflict of laws and jurisdiction provide essentially default rules reflecting the balance of interests that a given State or international organisation has struck.[75] In the context of the disputes and the transactions this thesis is concerned with, these default rules are often displaced by the exercise of the parties' autonomy. The principal reason for this enhanced presence of individual regulation and drift-away from the default rules is the need for certainty for the parties. In commercial transactions of this kind, an uncertain result as to the litigation risk and outcome of the dispute might often be less desirable than a certain, but less favourable result for the parties.[76]

This is the reason that party autonomy is central in international commercial disputes as a vehicle for the parties to express their interests and as a regulator of the risks involved in international commercial transactions. Parties, counsel, and the dispute resolution system as a whole try to control these risks, minimise any possible adverse outcomes and ensure an effective resolution process. International commercial contracts include provisions with a high degree of detail and sophistication both in their substantive part—regulating, for example, the price, delivery, and financial structure—and in their boilerplate part—containing general provisions, among others, related to dispute resolution and applicable law. This is to suggest that these regular and sophisticated players in their respective industries, are hesitant to leave such matters regulated by default rules considering the increased risks and the interests they have in such transactions and disputes.

Finally, the corollary of the enhanced role of party autonomy is the increase in private regulation primarily in two ways: (a) a high degree of contract and contractual terms

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74 Dicey, Morris, and Collins 2012 (n 24), para. 1-003. Fentiman 2015 (n 18), para. 1.21.

75 See, for example, the approach in the Article 7 Brussels I Recast, Article 3 Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)) and Article 14 Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)), as well as the rules of the 2005 Hague Choice of Court Agreements Convention and other conflict of laws instruments.

76 Jennifer Robbennolt, 'Litigation and Settlement' in Eyal Zamir and Doron Teichman (eds), *Oxford Handbook on Behavioral Economics and the Law* (OUP 2014) 623.

standardisation is observed in international transactions;[77] and (b) there is an increased role of private institutions either of academic and regulatory nature, such as the UNIDROIT,[78] or of procedurally administrative nature, such as the plethora of arbitral institutions around the globe. Both aspects are interconnected and result in a flexible web-like set of rules that can be incorporated into commercial contracts by the parties during the conclusion of their commercial deals. Through these standardised or model terms, the role of such private regulators is increasingly becoming of paramount importance for regulating arbitral jurisdiction.

While party autonomy is represented as a principle throughout the operation of international commercial rules and transactions, it also has a normative and regulatory role in private international law and cross border jurisdiction. This is the focus of Chapter 3 of this thesis, while its role as a foundational principle for the regulation of arbitral jurisdiction is analysed in Chapter 4. The context within which this principle operates and produces its effects is important in order to provide the framework of the proposed argument in regulating arbitral jurisdiction both from an arbitration and from a State court point of view in Chapters 5 and 6.

2.3.2 Interlocutory Nature of the Disputes

International commercial disputes are also characterised by the interlocutory or jurisdictional nature of the majority of the questions involved. This is to suggest that (a) there are often complex and intertwined jurisdictional issues to be resolved; and (b) there is a tendency of these disputes to settle at a stage prior to the hearing or the decision on the merits.[79] This stage involves questions that are different both in relation to the logically and chronologically pre-drafting phase of an international commercial contract and to the subsequent phase of a trial on the merits. While during the pre- and post-

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77 See for example the Incoterms by the ICC or various model contracts by regional or sectoral organisations such as FOSFA. See also Mark Patterson, 'Standardization of standard-form contracts: competition and contract implications' (2010) 52 Wm & Mary L Rev 327; Oren Sussman, 'Economic growth with standardized contracts' (1999) 43 European Economic Review 1797 (for an economics perspective).

78 International Institute for the Unification of Private Law – UNIDROIT (<https://www.unidroit.org/>).

79 Fentiman 2015 (n 18), para. 1.19; Peter Grajzl and Katarina Zajc, 'Litigation and the timing of settlement: evidence from commercial disputes' (2017) 44 European Journal of Law and Economics 287.

drafting phase, the focus of the parties and other agents involved is on the substantial provisions of the contract, the focus here is on questions of jurisdiction, venue, applicable law, and parallel proceedings. This is all the more so when arbitration is added to the equation. Arbitral jurisdiction and its regulation from the courts' and tribunal's perspective is a prime example of these type of issues.[80]

This interest shift is explained by the following two considerations. First, the objective of the parties is rarely to get an enforceable judgment on the merits. Their objective is to use the processes and proceedings at this front stage and gain the upper hand in the dispute resolution process so as they can settle on favourable to them terms.[81] Second, international commercial disputes are fertile ground for tactical considerations by the parties as a result of the dynamics involved.[82] The venue and law applicable will often determine, at least in terms of probabilities, the final outcome the case. Only when the dispute resolution process is known and the venue has been identified are the parties able to engage into calculations of the chances of success and measure these chances against the cost of pursuing the trial on the merits and the judgment.[83] Even in cases where the parties have agreed—or at least have attempted to agree—on a jurisdiction or arbitration clause, there is still room for tactical considerations to increase the probabilistic outcome of the case.

Litigation, arbitration, and, in broader terms, a dispute is a financial investment for the parties.[84] There are indeed, as the next Section analyses, increased financial risks for the parties. For this reason, parties are trying to calculate the probabilities of winning the case or, in any case, achieving the most favourable outcome to them. Economic models of litigation and settlement show that litigants engage in expected value calculations when making decisions.[85] These calculations are affected by a number of factors ranging from

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80 Peter Aeberli, 'Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map' (2005) 21 Arbitration International 253.

81 Fentiman 2015 (n 18), para. 120; Robbennolt 2014 (n 76) 623.

82 ibid.

83 Gary Fournier and Thomas W Zuehlke, 'Litigation and settlement: An empirical approach' (1989) The Review of Economics and Statistics 189; Jonathan Molot, 'The Feasibility of Litigation Markets' (2014) 89 Ind LJ 171.

84 Matteo Arena and Brandon Julio, 'Litigation risk, cash holdings, and corporate investment' (2011) Marquette University and London Business School Working Paper.

85 Robbennolt 2014 (n 76).

their position as claimants or defendants[86] to the costs associated with each stage of the dispute and the outcomes of each stage. Disputes always carry a high degree of risk and the outcome, as well as the tendency of either side to settle, is affected by these risks and uncertainties. While litigation or arbitration outcomes are uncertain, a settlement provides a certain outcome. This also explains the tendency both for settlement and for either party to increase their negotiating position. The higher the chances for a good overall outcome, the better the negotiating position of the party. As shown by Kahneman and Tversky in their research on behavioural economics and prospect theory, in low-probability outcome situations people tend to be risk-seeking toward low-probability gains and risk-averse toward low-probability losses. The reverse is happening in high-probability outcomes.[87] Transposing this into the dispute resolution strategy realm, if the one side increases its chances of success, it is more likely to be risk averse and seek a settlement on better terms.[88] This consideration drives the rationale of parties in international commercial disputes and reduces the number of cases that are actually decided on the merits. From the English Commercial Court surveys in 2018/19, the settlement rate of all cases (not only arbitration related was 63%.[89]

The role of tactical choices at the jurisdictional stage of a commercial disputes often results not only into vast costs spent on the determination of jurisdictional issues but also in parallel proceedings before different jurisdictions. Cross-border dispute settlement is prone to parallel proceedings.[90] Although this is curtailed to a considerable extent by the involvement of jurisdiction or arbitration clauses, the different approaches taken in relation to the role and effects of such clauses lead to parallel proceedings.

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86 See Jonathan Molot, 'The Feasibility of Litigation Markets' (2014) 89 Ind LJ 171.

87 Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision Under Risk' (1979) 47 Econometrica 263.

88 Robbennolt 2014 (n 76). See also Jeffrey Rachlinski, 'Gains, losses, and the psychology of litigation' (1996) 70 S Cal L Rev 113; Chris Guthrie, 'Prospect theory, risk preference, and the law' (2002) 97 Nw UL Rev 1115.

89 Judicial Office, 'The Commercial Court Report 2018-2019' 10 <https://www.judiciary.uk/wp-content/uploads/2020/02/6.6318_Commercial-Courts-Annual-Report_WEB1.pdf> accessed 29 March 2020.

90 Fentiman 2015 (n 18), para. 1.17.

2.3.3 Increased Financial Risks

Finally, the cross-border nature of international commercial transactions almost always corresponds to an increased value in comparison to domestic transactions and disputes. This is not only to suggest that the amounts in dispute are higher, but also that the costs for litigation or arbitration are respectively higher.

As shown by the English Commercial Court Report in 2017-2018, international cases account for 70% of the Court's business. The figure remains roughly the same for 2018-2019.[91] These statistics indicate that the Commercial Court remains predominantly an international court. No specific statistics are kept concerning the amounts involved in claims. It is clear, however, that the vast majority of cases brought in the Commercial Court concern claims for sums well in excess of £10 million. The largest noted was a claim for $3 billion and there were over a dozen claims worth over £100 million.[92] According to the same report, many arbitration claims concern awards made for extremely substantial sums, sometimes into the billions of pounds. In addition, the aggregate value of all pending disputes before the ICC Court of Arbitration at the end of 2018 was $203 billion, with an average value of $131 million and a median value of $10 million.[93]

The mere existence of a dispute is a financial investment for the parties involved as well

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91 Judicial Office, 'The Commercial Court Report 2018-2019' 10 <https://www.judiciary.uk/wp-content/uploads/2020/02/6.6318_Commercial-Courts-Annual-Report_WEB1.pdf> accessed 29 March 2020.

92 See also Paul Beaumont and others, Cross-Border Litigation in Europe (Hart Publishing 2017) 6 mentioning the Eva Lein and others, Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts, 2015 ('BIICL Report'). According to the BIICL Report:

> *'[i]t is difficult to make precise statements about the value of commercial claims brought to the English courts and the extent to which they involve foreign parties, as data is not routinely collected. However, the Rolls Building courts were able to provide some indicative data.[…] The most comprehensive available data on foreign litigants comes from the Admiralty and Commercial Courts. This suggested that since 2010, around 80% of all Commercial Court cases each year have involved at least one foreign party … In almost 50% of all cases, all parties are foreign'.*

93 'ICC Arbitration Figures Reveal New Record for Awards In 2018' (*ICC - International Chamber of Commerce*, 2019) <https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/> accessed 31 March 2020.

as a potential liability question for their directors.[94] As such, they have the same twofold incentive analysed in the previous Section. To settle the dispute instead of proceeding to the merits and to gain the higher ground as early as possible. In addition, the legal costs and fees generated for the resolution of such disputes creates an incentive to the involved parties to draft their contracts as efficiently as possible. This is all the more so taking into account that most commercial parties are repeat players in the industry with sophisticated structures and legal departments.

2.4 Arbitration, Merchants, and International Commercial Disputes

International commercial disputes create a multitude of interests and risks for disputing parties and States alike. The objective of the rules and legal regime on the resolution of international commercial risk is to regulate these interests and minimise the risks for the parties. Arbitration has been developed as a dispute resolution method addressing primarily the risks and interests of merchants, of commercial parties. Not only does it provide a neutral *forum* for the resolution of the disputes, but also allows the parties to craft and tailor the process to their needs while ensuring the maximum enforceability of the awards. Neutrality, flexibility, and enforceability are three of the basic principles upon which arbitration is based. They enhance legal certainty, promote the satisfaction of interests, and minimise the risks. Arbitration in general is a method to regulate risks and fulfil interests of the commercial parties engaging in trade with other parties from abroad. As it will be shown, below, however the very nature of international commercial disputes and the diverging interests of the parties create issues which require regulation. The presence of these issues is stronger at the jurisdictional stage. This section considers in turn the position of arbitration as a dispute resolution method for merchants in general and in England and Wales in particular, and the issues of arbitral jurisdiction arising in the context of international commercial disputes through various scenarios.

2.4.1 Arbitration as a Dispute Resolution Method for Merchants

It is undoubtable that arbitration is a dispute resolution method developed by merchants and addressed to merchants. Already in ancient Greece, arbitration was favoured for a

94 Fentiman 2015 (n 18), para. 1.20.

variety of reasons.[95] England represents the development of arbitration as a response to the needs of commercial communities. In Medieval England, the guilds' unions—such as the Company of Clothworkers or the Gild of St. John of Beverley of the Hans House—provided for mandatory arbitration of disputes among members even if the merchants were dealing with one another at trade fairs.[96] Due to the international character of those fairs and the presence of foreign merchants, the concept of international dispute resolution via arbitration was born. The same approach was adopted in France, Germany, and the Swiss cantons during the same time period. Despite the time difference, the reasons in favour of arbitration remain the same for merchants today;[97] Merchants—now referred to as commercial parties—historically prefer arbitration for the same reasons: neutrality, speed, expertise, and flexibility in relation to the remedies available by the courts.[98]

Despite being favoured by merchants, there are many instances where the approach of courts towards arbitration has been hostile.[99] In England, the origins of this misconception can be found in the *dicta* of Lord Campbell in two cases. In *Scott v Avery,* before adopting a favourable approach to arbitration, he said that English judges 'had great jealousy of arbitration' as a result of the competition they had with them.[100] In addition, he held in *Russell v Pellegrini*, decided in the same year as *Scott v Avery* that:

> *[s]omehow the Courts of law had, in former times, acquired a horror of arbitration; and it was even doubted if a clause for a general reference of*

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95 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 26. For a general overview of arbitration in Ancient Greece see Nicholas Hammond, 'Arbitration in Ancient Greece' (1985) 1 Arbitration International 188.

96 William Blackstone, III *Commentaries on the Laws of England* 33 (1768), quoted in Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. Pa. L. Rev. 132, 136 (1934-1935).

97 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647; [2012] 1 WLR 920, at [194]. Stavros Brekoulakis, 'The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration' (2019) 39 Oxford Journal of Legal Studies 124, 131.

98 Courts tended to focus on legal points of the conflict between the parties, many times without giving due regard to the commercial rationale and reasons for this conflict.

99 Earl Wolaver, 'The historical background of commercial arbitration' (1934) 83 University of Pennsylvania Law Review and American Law Register 132.

100 *Scott v Avery* [1843–1860] All E.R. Rep. 1 HL [853]. See also Andrew Tweeddale and Keren Tweeddale, 'Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees' (2011) 77 Arbitration 423-427.

> *prospective disputes was legal. I never could imagine for what reason parties should not be permitted to bind themselves to settle their disputes in any manner on which they agreed.*

As Brekoulakis argues, however, Lord Campbell's conception of the up-until-then hostile attitude of the courts against arbitration was misplaced because 'it has been observed that Campbell's readings of Wellington and Kill were based on defective printed reports'.[101] Born has also characterised this conception as an overstatement.[102] As mentioned above, arbitration has been developed in England as a dispute resolution system of and for merchants.[103] This is not to suggest, however, that this development was independent from and against the development of the common law. On the contrary it has developed in parallel with the common law as part of the judiciary system.[104]

Commercial courts in England had—and still have—a firm position in favour of party autonomy. As a result, they will enforce agreements reached between the parties, such as exclusive jurisdiction agreements and arbitration agreements. In addition, as Brekoulakis points out '[e]nglish courts' typical pragmatism meant that they viewed arbitration as a potentially useful dispute resolution method that could alleviate the burden of their own heavy caseload'.[105] This does not mean, however, that they would accept that parties could oust their jurisdiction by way of an arbitration agreement. This was not even the case in *Scott v Avery*. All Law Lords of the House of Lords involved in the case, including Lord Campbell, made it clear that under common law a private agreement in the form of an arbitration agreement could not oust the inherent jurisdiction of the English courts. Essentially, the court denied the negative aspect and obligation of the arbitration agreement. The court held, however, that the parties could essentially agree that there was

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101 Stavros Brekoulakis, 'The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration' (2019) 39 Oxford Journal of Legal Studies 124, 141. See also Derek Roebuck, 'The Myth of Judicial Jealousy' (1994) 10 Arbitration International 395.

102 Born 2014 (n 95) 38. See also Henry Horwitz and James Oldham, 'John Locke, Lord Mansfield, and arbitration during the eighteenth century' (1993) 36 The Historical Journal 137.

103 Michael Mustill, 'Arbitration: History and Background' (1989) 6 *JOIA* 43, 43-44.

104 Stavros Brekoulakis, 'The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration' (2019) 39 Oxford Journal of Legal Studies 124, 149.

105 ibid, 142.

no breach of contract—which would justify an action under the common law—unless the parties went to arbitration and the arbitral tribunal has rendered a decision.[106] As analysed below in Chapters 3 and 5, this notion of not ousting the jurisdiction of courts is sidelined as a result of Section 9 of the Arbitration Act 1996.[107]

State legislators, courts, and arbitral institutions work to protect, if not endorse, the arbitral process in commercial matters. As analysed in Chapter 4, these actors are often in competition among each other.[108] The recent 2018 White & Case–Queen Mary Survey revealed that '97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%)'.[109] The target group of the respondents for this report was arbitration related practitioners, lawyers, inhouse counsels and academics.[110] It is, therefore, not surprising that the responses were overwhelmingly in favour of arbitration. It is not, however, wrong to accept that arbitration is favoured by commercial parties and occupies a significant share of the total number of international commercial disputes. Considering the available data, according to the 2018 Commercial Court Report, 'a significant proportion of the claims issued (roughly 25%) relate to matters arising out of arbitration'.[111] In addition to

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106 Lord Campbell characteristically noted in Scott v Avery [853]:

> *[w]hat pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract ... I can see not the slightest ill consequence that can flow from such an agreement, and I see great advantage that may arise from it. Public policy, therefore, seems to me to require that effect should be given to the contract.*

107 See below in pp. 56 and 169.

108 See below in Chapter 4. See also Rogers 2018 (n 38).

109 2018 Queen Mary Report (n 21), para. 1.3.2.

110 ibid 41 ('[t]he respondent group consisted of private practitioners (47%), full-time arbitrators (10%), in-house counsel (10%), "arbitrator and counsel in approximately equal proportion" (12%), and others (21%)').

111 Judicial Office, 'Commercial Court Report 2017-2018' ('[t]his reflects London's importance as a centre for international arbitration. The applications include challenges to awards, whether on the grounds of jurisdiction (s. 67), appeal on a point of law (s. 69) or irregularity (s. 68)'). See also Judicial Office, 'Lord Chief Justice Report 2018' p. 17 <https://www.judiciary.uk/wp-

that percentage, there are more applications primarily 'for injunctions arising from arbitrations, and for enforcement of arbitration awards'.[112] There are also many other types of applications, including applications to the court for the appointment of an arbitrator. In England, courts and arbitral tribunals are in a pragmatic relationship which can be characterised both as strict and formal and as flexible. As Lord Thomas has said, 'there is a real exchange of practice between courts and arbitration, as they learn from each other. Procedure is improved and the relationship between the different forms of dispute resolution strengthened'.[113]

2.4.2 Arbitral Jurisdiction in the Context of International Commercial Disputes

Cross-border disputes are primarily of an interlocutory nature; this is no different in a case where an arbitration agreement exists in the parties' contract. Much like in the case of exclusive jurisdiction agreements commercial parties often take different positions after the dispute has arisen at the stage of determining the tribunal's jurisdiction. The parties might adopt divergent positions as to the existence, validity, and scope of the arbitration agreement.

Having as a point of departure the statutory and jurisprudential treatment in England and Wales, this thesis is concerned with the regulation of arbitral jurisdiction in such circumstances. The divergent interests of the parties at this stage, as well the State interests in favour or against arbitration, raise questions as to the correct approach and criterion to be adopted in regulating arbitral jurisdiction.

Chapter 4 is considering the regulation of arbitral jurisdiction in general as a theoretical model in providing a coherent model for defining and delineating the relationship between courts and tribunals. Despite the historical references to the contrary, the approach of courts in England is neither hostile nor restricted. It is, however, lacking the

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content/uploads/2018/11/lcj-report-2018.pdf>, accessed 29 March 2020 ('[t]he Commercial Court maintains its international reputation as a destination of choice for international litigants. About a third of its work arises out of arbitrations, reflecting London's importance as a centre for international dispute resolution').

112 Judicial Office, 'Commercial Court Report 2017-2018'.

113 Lord Thomas, 'Commercial Dispute Resolution: Courts And Arbitration', 6 April 2017, <https://www.judiciary.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf> accessed 29 March 2020, para. 29.

necessary clarity to provide the legal certainty parties require. Chapters 5 and 6 consider this approach and how within the current system or through a restatement of this system the picture can be one of higher definition and coherency.[114] Both the legislator and courts do not view arbitration as something alien and dangerous that requires containment, but, rather, as something that exists for the interests of companies and merchants operating in the UK that requires regulation and should be supported.[115]

This thesis does not offer an argument in favour of arbitration as an independent legal order, a system of law and dispute resolution constituting a floating norm independent of any legal State.[116] At the same time, however, it is not considering arbitration as a simple dispute-resolution method existing as a bestowal of State sovereignty and, thus, as sub-ordinate to State court litigation. As it will be shown below in Chapter 3, arbitration is based both on the manifestation of consent of the parties at the transnational or private international law regulatory level. State regulation is not constitutive of the jurisdictional effects of such an agreement, but rather recognising the power of the parties' autonomy to regulate adjudicatory authority. This is all the more so in the context of international commercial disputes where party autonomy has already and enhanced role in the jurisdictional context.

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114 See, for example, the analysis below in Chapter 5 on the regulation of arbitral jurisdiction, the standard of proof for applications of stay, and the declaratory power of courts. This is all the more so, considering the effect of the withdrawal of the UK from the European Union—i.e. Brexit—and the emergence of commercial courts in various other EU Member states, adjudicating cases in English. There are those, however, who argue that there will be no detrimental effect on arbitration in England or that Brexit will have a rather beneficial effect. See in this regard: Neil Andrews, 'London Arbitration and Streamlined Courts Post-"Brexit"' (2016) 21 Zeitschrift für Zivilprozess 3; Adrian Briggs, 'Secession from the European Union and private international law: The cloud with a silver lining' (2017) 24 COMBAR Lecture, January 2017 <https://www.blackstonechambers.com/documents/311/Secession_from_the_European_Union_and_private_international_law.pdf > accessed 1 April 2020 arguing that Brexit will have a beneficial effect on London as an arbitral centre. ('[…] the relationship between judicial jurisdiction and arbitration will be freed from the hamstringing complications of the [Brussels] Regulation and from the taint – to put it no higher – that the Regulation is less respectful of the rights and duties of those who promised to arbitrate than English law would naturally be').

115 Elizabeth Gloster, 'Symbiosis or Sadomasochism? The relationship between the courts and arbitration' (2018) 34 Arbitration International 321, 323.

116 See Jan Paulsson, 'Arbitration in three dimensions' (2011) 60 International & Comparative Law Quarterly 291; Emmanuel Gaillard, *Legal theory of international arbitration* (Brill Nijhoff 2010).

3 Party Autonomy in Cross-Border Disputes and Arbitration

The analysis in Chapter 2 showed that, in the context of international cross-border disputes, party autonomy and private regulation of substantive relationships plays an important role. This is all the more so in relation to the arbitral resolution of disputes where much analysis has been devoted to the contractual or procedural underpinning of arbitration. As delineated in Chapter 1, this is not a thesis following the traditional maxim of 'arbitration is a creature of contract'. It is, rather, focusing more narrowly on arbitral jurisdiction and on the nature and role of party autonomy in cross-border jurisdiction. In this context, Chapter 3 considers the anatomy of party autonomy in private international law and arbitration forming the theoretical and doctrinal basis for the analysis in Chapter 4 of arbitral jurisdiction and the proposed horizontal choice model.

The very foundation of arbitration is indeed based on consent; it is an expression of party autonomy.[117] Traditionally perceived, this expression of party autonomy to choose, not only the *forum* and the applicable law to their relationship, but also the very nature of the adjudicative institution is a bestowal of the State's sovereignty. In this conception, arbitration is a creature of contract to the extent that this creature is not caged by sovereign States. Only if national courts are prepared to recognize and enforce an agreement to arbitrate, under applicable national and international law, can the parties' will be

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[117] See definitions of arbitration in Nigel Blackaby and others, *Redfern & Hunter on International Commercial Arbitration* (6th edn, OUP 2015) ('two or more parties, faced with a dispute that they cannot resolve for themselves, agreeing that one or more private individuals will resolve it for them by arbitration; and if this arbitration runs its full course…it will not be resolved by a negotiated settlement or by mediation or by some other form of compromise, but by a decision which is binding on the parties') and Jean-François Poudret and Sébastien Besson, *Comparative law of international arbitration* (Sweet & Maxwell 2007), para. 3 ('a contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in place of state courts by rendering a decision having effects analogous to those of a judgment').

effective.

In this context, the question arises as to the value that one attributes to an arbitration agreement as a foundation of the parties' obligations and the tribunal's powers. A recurring theme in answering this question is the tug of war between substantive and international conceptions of the role of party autonomy in adjudicatory and arbitral jurisdiction. This thesis is therefore re-positioning the inquiry of arbitral jurisdiction on the nature of the constituting element of the tribunal's power to adjudicate rather than focusing on the legitimacy and efficiency debate.[118] Even within this balancing act, party autonomy is primordial, and the crucial element of analysis is the examination of its operation.

This Chapter will examine the role of party autonomy as considered in the context of contemporary private (and public) international law. The analysis proceeds from examining the traditional conception—or paradigms—of jurisdiction in private international law and how the operation of individuals and private actors in the globalised economy is not adequately explained by these paradigms. Works by other scholars of private international law are used in this context to provide the theoretical foundations of the analysis of this thesis on the arbitral resolution of disputes and arbitral jurisdiction.[119]

While this is a contemporary, post-modern,[120] approach in private international law and is based on a holistic examination of the role and operation of rules of private international law in a globalised world, this thesis agrees with their premise on the role of party autonomy in private international law as a new paradigm of jurisdiction. In considering

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118 George Bermann, *Arbitration and Private International Law* (Collected Courses of the Hague Academy of International Law, Brill 2016); George Bermann, 'The Role of National Courts at the Threshold of Arbitration' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator Liber Amicorum Pierre A Karrer* (Kluwer International 2017); George Bermann and Alan Scott Rau, 'Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau' (2015) 43 Pepperdine Law Review 469; Thomas Carbonneau, 'At the Crossroads of Legitimacy and Arbitral Autonomy' (2006) Bepress Legal Series 1139.

119 See generally Mills 2018 (n 25); Mills 2009 (n 51); Ahmed 2017 (n 16); Michaels 2006 (n 9); Giesela Ruehl, 'Party Autonomy in the Private International Law of Contracts', in Gottschalk et al (eds), Conflict of Laws in a Globalized World (CUP 2007); Horatia Muir Watt, '"Party Autonomy" in international contracts: from the makings of a myth to the requirements of global governance' (2010) 6 European Review of Contract Law 250.

120 Pamboukis (n 34).

the role of party autonomy as part of this contemporary private international law, this thesis proceeds to consider the nature and operation of party autonomy in arbitration through similar lenses. Such contemporary approaches to the role of private international law rules not only correspond to the reality of globalised economy and the power of private actors in a multinational level, but they also normatively capture the multifaceted role of this area of law. This is all the more so, in an era and an area where, as Chapter 2 analysed, the notion of State borders becomes increasingly less important for international trade. This Chapter concludes in considering the role of party autonomy in arbitration. These conclusions serve as a basis for the analysis of the role of this principle in arbitral jurisdiction in Chapter 4 and the proposal of a horizontal model.

3.1 Traditional Paradigms of Private International Law and Party Autonomy

The point of departure and most fundamental element of the analysis of the different conceptions—or more aptly described as paradigms using the terminology adopted by Michaels[121]—of jurisdiction in private international law is the nature of the rules in this field of law and their telos.

Private international law has, among others, a regulatory telos in relation to the distribution of power to legislate and adjudicate a given dispute. This regulatory and distributive feature of private international law is to suggest that its rules are of a higher secondary nature. [122] Being of regulatory nature, rules of private international law are not

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121 Michaels 2006 (n 9) 1022:

> *[a] legal paradigm is, thus, a thought pattern, an epistemic back- ground for analysis, the way participants of a legal system discuss matters of jurisdiction. A paradigm does not define specific rules or institutions--different views on almost any issue are possible within one paradigm. Instead, a paradigm defines what questions are relevant for analysis and what kinds of factors can be relevant. Since paradigms are often unstated, they must be induced from the actual practice of participants in the analysis.*

122 See Mills 2018 (n 25) 5:

> *[t]his is at least in part because private international law functions at two discrete levels. First, it is concerned with the exercise of regulatory authority by one or more states, raising the question of whether that exercise of power is legitimate under international law. Second, it is concerned with the relationship between national courts and two or more disputing private parties, including of course the regulation by the court of the private law relationship between those parties.*

duty imposing but rather power conferring. In the system of HLA Hart,[123] such types of rules are considered secondary rules and not primary ones. Primary rules are conduct-regulating and require individuals to do or abstain from certain actions. Under secondary rules, 'human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations'.[124]

This regulatory nature of private international law rules is closely linked with the notion of sovereignty. With the risk of oversimplification, modern international law, including private international law, is built around the notion of the sovereignty of States. This so-called Westphalian conception of the international arena is based on the equality of sovereign States. This is to suggest primarily three things: (a) first, that the pragmatic differences in territorial or financial magnitude do not matter for the relationships between States; (b) second, each State opts to limit itself with rules of international law on the basis of a pre-existing rule—one could say a *Grundnorm*—that States are the only ones that can curtail their sovereignty; and (c) finally, that individuals or companies are not recognised as actors in this arena and as subjects of the rules. Private parties are subject to a sovereign State and do not in themselves have access to the transnational community. As already referred above and as it is elsewhere analysed[125] this absolutistic distinction is no longer entertained or supported in public (and private) international law.[126]

In regulating authority between States, rules of private international law, both in general

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123 HLA Hart, *The Concept of Law*, (2nd edn, OUP 1994) 79–81.

124 ibid, 81. See also Ahmed 2017 (n 16) 18; Mills 2009 (n 51), 19 where he uses the example of:

> *[a] dispute over ownership of property, where the law of England would give title to one party and the law of France would give title to the other. The decision of the law of England to give title to the first party is a primary legal norm. The decision whether it is the law of England or the law of France which should determine title is a secondary legal norm. It is concerned with the scope of authority of the law, not the outcome in the specific case. The same distinction operates in the context of jurisdiction. The determination of whether an English court will hear the dispute does not dictate the outcome of the dispute according to primary legal norms; it concerns only whether the state will exercise judicial authority.*

125 As delineated above in Chapter 1, this thesis is not considering in detail this distinction and only uses the existing scholarship in support of the argument put forward on arbitral jurisdiction.

126 Alfred Aman Jr, 'The Globalizing state: A Future-Oriented Perspective on the Public\Private Distinction, Federalism, and Democracy' (1998) 31 Vand J Transnat'l l 769.

and specifically in relation to jurisdiction, are generally conceived in two ways, expressing two different paradigms: one substantive and one international(ist). As Michaels argues in presenting the differences between the US and EU approaches in jurisdiction, these paradigms are not necessarily corresponding to different theories or conceptions. [127] They are rather, the thread binding the approaches in different jurisdictions via different theories or conceptions.

Private international law can be conceived as a purely national, domestic, and unilateral field of law. This is placing the emphasis on the 'private' or domestic element and is the result of the positivist methodology[128] dominating the conception of international law. Applying this positivist methodology to the behaviour of States, theorists of the 18th and 19th centuries argued that international law was a new set of rules, separate from the natural law and based on the voluntary limitation of each State's sovereignty. A positivist approach conceived a strict distinction between internal and external aspects of State sovereignty. Anything having to do with individuals was part of private national law and not as part of the relationship between sovereign States. This is to suggest that private international law is conceived as purely national having nothing to do with the international arena of sovereigns. The introduction of comity[129] as respect to the foreign sovereigns is not a limitation on the inherent powers of sovereigns but rather only a discretional element. Rules of private international law are not considered as multilateral regulative ones but rather as unilateral, serving only the interests of individuals within the territory of a given State.

As Mills aptly explains, this is the approach historically adopted in English law as a result of the theories of Story, Westlake, and, importantly, Dicey. Under this paradigm, and the English common law approach as analysed below, jurisdiction and arbitration agreements are merely contractual agreements between the parties that do not confer or oust the jurisdiction of courts which is established on the basis of the power of the sovereign State. Party autonomy, is thus, having no relation to the allocative or regulatory function of

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127 Michaels 2006 (n 9) 1022.

128 Mills 2009 (n 51) 38.

129 ibid 47, recording that Huber conceived this as one of the logical legal consequences of the territorial sovereignty. His proposition was that each state 'will so act by way of comity' to recognise 'rights acquired within the limits of a government', so long as the state's own power, law or citizens are not prejudiced by this recognition.

private international law, but rather is instituting substantive obligations which are then enforced by courts at their discretion. This background explains not only the enforcement of arbitration and jurisdiction agreements by anti-suit injunctions but also the awards on damages and the discretion of courts—at least in jurisdiction agreements—to disregard the choice of the parties on the basis of substantive justice between the parties. This approach is criticised by Ahmed as giving 'rise to a clash of sovereign legal orders and also the possibility of "regime collision" by interfering with the jurisdiction and judgments apparatus of foreign courts'.[130] Conceptualising party autonomy as a purely substantive exercise is indeed liable to create a relationship of competition between different sovereigns and does not fully grasp or explain the operation of party autonomy at a regulatory level of private international law.

The second paradigm is an international one. This paradigm is placing emphasis on the international rather than the private features of private international law and is favoured by internationalists who conceive private international law as nothing more than rules of public international law. In this context, jurisdiction is based on objective connecting factors, derived from territorial or personal connections.[131] These factors are justifying the exercise of power, including adjudicative power, from a sovereign State over an individual. This paradigm is considering and respecting other State sovereigns as the connecting factors operate in a delineating manner. These factors are an expression of the regulative nature of private international law. Party autonomy as the ability to choose the *forum* or the law applicable to a dispute either has no place at all within this international paradigm—a position rarely or never presented nowadays—or is always subordinate to State interests and rules. Party autonomy is, thus, operating as a connecting factor granted or bestowed by a State subject to limitations.

These two paradigms focus on different aspects of the nature and operation of private international law. They are both, however, commencing from the premise that

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130 Ahmed 2017 (n 16) 23; On regime collision see Andreas Fischer-Lescano and Gunther Teubner, 'Regime-collisions: the vain search for legal unity in the fragmentation of global law' (2003) 25 Mich J Int'l L 999.

131 Matthias Lehmann, 'Liberating the individual from battles between states: justifying party autonomy in conflict of laws' (2008) 41 Vand J Transnat'l L 381, 419-21; Mills 2009 (n 51), 303 ('[i]n the history of public and private international law, this has primarily involved a contest between two fundamentally distinct ideas of global ordering—the personal division of the world into different peoples, and the territorial division of the world into geographical regions).

sovereignty is a State prerogative which either allows internally limitless regulation of private disputes without due regard to the element of internationality or limits the operation of States to the relationships between them and subordinates any operation of individuals in this relationship. Both conceptions are equally inadequate to provide in and of themselves a convincing justification and conceptual basis for the needs of the commercial community in a globalised world where, as seen in Chapter 2, individuals are rising and claiming a role in the international legal arena. Traditional conceptions of State sovereignty and individual freedom cannot be reconciled in a transnational environment where States and private actors alike operate in pragmatically equal terms.

An example of this pragmatic power of private actors is the role and power of social media platforms, such as Facebook. The global reach of these platforms, the creation of communities, and the imposition of certain standards within these communities[132] are some of their distinctive characteristics. These characteristics not only allow the companies behind the platforms to arrange their corporate structures and presence to take advantage of favourable legal regimes, for example tax ones, but also provide them with law-making and enforcement powers which test traditional notions of State sovereignty.[133]

This thesis is arguing that the development of international commercial transactions, disputes generated therefrom and their resolution via arbitration in a globalised world, prove that the role of party autonomy is more than a simple contractual agreement or a (quasi-)connecting factor bestowed by the sovereign States. This leads to the examination of party autonomy as a new paradigm of jurisdiction.

3.2 Party Autonomy as a New Paradigm of Jurisdiction

3.2.1 Creature of Contract or Creature of Party Autonomy?

The starting point is usually no more than the ‘arbitration is a creature of contract’ maxim.

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132 'Community Standards | Facebook' (Facebook.com) <https://www.facebook.com/communitystandards/introduction> accessed 3 April 2020. The discussion has been focused on censorship and authenticity of news, but the private regulatory power such platforms have can be equated with law-making. See Marjorie Heins, 'The brave new world of social media censorship' (2013) 127 Harv L Rev F 325.

133 Nabiha Syed, 'Real talk about fake news: Towards a better theory for platform governance' (2017) 127 Yale LJF 337.

As clarified in Chapter 1, this thesis is also based on the concept of party autonomy but does not stay completely faithful to this maxim. On the contrary, the point of departure in this thesis is to clarify what is the notion of party autonomy and, then, to analyse how the conceptually higher and prior concept of transnational or private international law party autonomy rather than the contractual party autonomy operates in the regulation of arbitral jurisdiction. This Section aims at disentangling the two concepts and identifying the characteristics of transnational party autonomy that are influential for the proposal advocated in this thesis.

As analysed below, the traditional conception in common law systems is that choice of *forum* agreements—including as a general term both exclusive jurisdiction and arbitration agreements—, as well as choice of law agreements are nothing more than contractual terms; as such, they should be accepted and enforced due to the wide—and virtually uncontested—acceptance of the principle of party autonomy in contractual matters. Although in the case of arbitration agreements granting a stay is mandatory for the court,[134] the basic premise remains the same for the traditional approach; *forum* selection agreements should be enforced because they are contractual terms and private actors have the right to decide on their own matters subject only to limitations. This is to suggest that the parties' availability to agree on such *forum* selection clauses rests on the same premises and the same rationale that their freedom is sufficient to 'determine the terms and conditions of their contract'.[135] This echoes the argument presented by Lehmann that the general principle of freedom of contract allows the parties to choose the applicable legal system—and equally the dispute resolution system—to their contract 'which precedes national law'.[136]

This freedom of the parties is not to suggest, however, that the parties have an unconditional and unqualified right to agree on anything they want. This limited availability and constraints from the private international law system bespeaks the differences between contractual party autonomy and private international law one. As

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134 Arbitration Act 1996, Section 9(4).

135 Peter Nygh, 'The reasonable expectations of the parties as a guide to the choice of law in contract and in tort' (1995) 251 Recueil des cours 269, 297; Peter Nygh, *Autonomy in International Contracts* (Clarendon Press 1999) 8; Mills 2018 (n 25).

136 Mattias Lehmann, 'Liberating the Individual from Battles Between states: Justifying Party Autonomy in Conflict of Laws' (2008) 41 Vanderbilt Journal of Transnational Law 381, 390.

Briggs argues '[t]he autonomy of contracting parties is not boundless. The frameworks of private international law […] are established by higher authority than, and are not subordinated to, the private agreement of the parties'.[137] Furthermore, as Mills argues exactly on this point, '[t]he parties' freedom of contract is determined by a system of national law. To say that their choice of law is part of that freedom of contract is to ignore the particular function of private international law as a prior set of "secondary rules"'.[138]

As Mills analyses in his treatise on the matter, private international law autonomy presents conceptual, normative, and functional differences to contractual party autonomy. First, the former operates at a level higher than the contractual autonomy. This is a direct result of its functional objective. Private international law autonomy is linked to the existence, limits, and regulation of authority between different jurisdictions or actors. Contractual autonomy operates at a level within a given legal system, albeit this might be a transnational legal system. Second, while parties are limited in their contractual choices by the mandatory rules and public policy of the chosen system of default rules, private international law autonomy is limited by different mandatory rules and public policy considerations which have to do with the primary and higher availability—or lack thereof—of the parties to choose a system of law or a system for the resolution of their disputes. These latter considerations stem directly from the inherent cross-border enterprise and function of private international law and arbitration. Finally, while contractual autonomy addresses and revolves around the individual interests of parties themselves,[139] private international law autonomy might be justified on individualistic or public grounds and address both the State and non-State actors alike. This is evident not only from the constraints and limitations imposed at the stage of establishing jurisdiction but also at the stage of enforcing foreign judgments. This is all the more evident in the context of arbitration where the principles on recognition and enforcement both of arbitration agreements and arbitration awards are established by the New York Convention and are heavily influenced by public and public international law considerations.

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137 Briggs 2008 (n 43) 13.

138 Mills 2018 (n 25) 21.

139 It is only indirectly that it involves wider societal considerations. If the non-derogable, mandatory, or public policy rules of a given system are occupying the majority share of the contract law rules, this has a wider impact on the society through the impact it has to each individual of the contracting parties in each specific case.

These differences do not mean that the two concepts are alien to each other or mutually exclusive. Historically, and normatively, party autonomy in private international law and arbitration has concrete influences from the development of contractual party autonomy.[140] Indeed, as analysed in the following Section, the continuous emergence of non-state actors both in commercial transactions and in international—private and public—law is the common basis for the historical development and the continuous normative acceptance of both aspects of party autonomy. It is also the driving force for the transformation of the normative paradigm for the regulatory source of private international law and arbitration. While this is not a thesis on the sources of regulatory power in arbitration, the focus shifting from traditional conceptions of State sovereignty to the powers of individuals and the role of non-State actors it affects both the interests of States in regulating the relationship between courts and tribunals and, as a result of these interests, the relationship between the parties.

3.2.2 Fitting Party Autonomy to the Traditional Paradigms or Changing the Paradigm?

Considering the origins of *forum* selection agreements and their functions at the level of private international law, Mills provides a detailed analysis that contributes to a previously not thoroughly explored area.[141] Depending on the angle from which one views party autonomy, the justification might be different. Mills identifies 'two general types of arguments, one private and unilateral […], and the other public and systemic'.[142] What differs in these two arguments is the point of departure and the lenses through which party autonomy is justified. First, party autonomy—both aspects of it—can be justified as an expression of the parties' inherent individual freedom—a version of their innate human right to arrange their personal lives—[143]or as having positive consequences to the parties themselves, something which the States have to recognise.[144] Second, party autonomy in private international law can be justified from a public and State sovereignty

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140 Mills 2018 (n 25) 66 *et seq*.

141 Jurgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation of International Relations* (Brill 2013) 164 ('[p]arty autonomy is generally considered as a universally accepted bedrock principle of the international law of contractual obligations despite the fact that its theoretical foundations continue to remain elusive.').

142 Mills 2018 (n 25) 67.

143 ibid 71; Peter Nygh (n 136)

144 Mills 2018 (n 25) 71 naming this version as a form of 'consequentialist libertarianism'.

perspective as having beneficial outcomes for the States themselves. As seen in Chapter 2, States have benefits from allowing parties to exercise their freedom and provide for dispute resolution clauses and more specifically arbitration clauses.

In this context, jurisdiction and arbitration agreements can be seen as part of the inherent and unconditional freedom of parties to arrange their own affairs not only at a contractual and domestic level but also at the higher regulatory level private international law. Following a consequentialist approach—either from the private perspective or from a public one—the acceptance of private international law party autonomy in effect leads to the recognition of a jurisdictional link only on the basis of the parties' agreement because this is beneficial for the parties and for the States.

Despite this analysis of the normative foundations, the traditional paradigms of jurisdiction fall short in coherently capturing the operation of party autonomy on both a substantive and a regulatory level. This is because, as analysed earlier in this Chapter, both paradigms are based on the absolute prevalence of State sovereignty, focusing however on different aspects of it; one in the internal and one in the external. The developments of technology and communication and the expansion of global commerce have assisted in the pragmatic rise of the individual in the international arena. On the one hand, this pragmatic rise cannot be adequately explained with State sovereignty being the only player in the 'jurisdiction market'. On the other hand, the normative foundation of party autonomy as a relevant power in this market, cannot be simply justified in the innate contractual freedom of the parties. Basedow's justification on the basis of such a freedom needs to be expanded (a) to private international law party autonomy, with regulatory consequences and (b) to cover non-individual actors, that is corporations.

Regardless of the source, however, the need to move the discussion on cross-border jurisdiction forward is described by Michaels as follows: '[i]f this traditional image of sovereignty is inadequate under conditions of globalization, as is frequently claimed, then both paradigms are inadequate as well, and both sides must come together to create a new, third paradigm of jurisdiction'.[145] As Ahmed argues 'the existing concept of State sovereignty and the methodological nationalism that defines, in general, the dualism of the *internationalist* paradigm and the *substantive law* paradigm fails to adequately

[145] Michaels 2006 (n 9) 1069.

account for the "sovereignty of the individual" within a *transnationalist* paradigm'.[146]

This new paradigm of jurisdiction is a synthesis of the two traditional ones in the context of the globalised and increasingly complex world. This transnational paradigm is able to provide a basis for the proper and conceptually stable understanding of party autonomy in cross-border jurisdiction. First, the individual is at the centre of this paradigm.[147] As analysed above, it has been argued that private international law party autonomy is justified on the basis of the 'sovereignty of the individual' to arrange its own affairs. Even if such sweeping statement on the sovereignty of individual is not accepted, what is clear is that in a globalised and increasingly pluralistic legal order, the source of adjudicatory power is no longer conceived narrowly on State sovereignty. To the contrary, one has to move to a multifaceted and multifocal approach where this power can pragmatically and normatively derive from multiple sources regardless of their status as States or private actors. This is leading to a reconceptualisation of both the nature and role of sovereignty and the nature and role of the individual in cross-border jurisdiction. The transnational paradigm accommodates such conception with the sovereignty of States as it is based on a notion of equal relationship between States and non-State, private actors. This is a relationship of equality, not one of subordination.[148]

This shifting transnational paradigm of jurisdiction, a multifocal approach to the sources of adjudicatory competence, and the conception of equality between private actors and State sovereigns is the driving force for the argument proposed in Chapter 4 for the regulation of arbitral jurisdiction for international cross-border commercial disputes.

3.3 Arbitration Agreements as an Expression of Party Autonomy in International Commercial Arbitration

Primarily as a result of the different paradigms[149] as well as—or consequently—the

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146 Ahmed 2017 (n 16) 27; Ronald Brand, 'Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice' in Johan Erauw, Vesna Tomjenovic and Paul Volken, *Liber Memoralis Petar Sarcevic-Universalism, Tradition and the Individual* (Sellier 2006) 35.

147 Mattias Lehmann (n 137) 415.

148 Ahmed 2017 (n 16) 29.

149 Ralf Michaels, 'Party Autonomy in Private International Law--A New Paradigm without a Solid Foundation?' (126th Conference of the Private International Law Association of Japan, 2 June 2013)

different justifications of party autonomy in private international law, different approaches exist as to the legal nature and effects of jurisdiction and arbitration agreements. While not uncontested or applicable to every single aspect, arbitration and exclusive jurisdiction agreements are treated similarly in the jurisprudence and academic analysis alike. The different paradigms are concentrated in two different, diametrical opposite poles: (a) the common law, substantive, contractual approach; and (b) the continental, civilian oriented, procedural approach. A combined approach should, however, be favoured as corresponding better to the normative and pragmatic realities of cross-border commerce (c).

3.3.1 Common Law – Contractual Paradigm

The orthodox conception in common law traditions adopts a substantive or contractual paradigm. *Forum* selection agreements, both arbitration and exclusive jurisdiction ones, are considered to give rise to enforceable rights and obligations for both sides in the form of contractual obligations.[150] In the context of civil jurisdiction, a jurisdiction agreement does not confer or oust court jurisdiction; rather, it is merely an agreement between the parties involved under which they undertake to submit their disputes to the chosen *forum* and to avoid taking these dispute before any other *forum*, State or arbitral one.[151]

The courts are tasked only with giving effect to the parties' agreement, which they will ordinarily do so.[152] Encapsulating this focus, Briggs succinctly observes:

> *[w]hatever else the law may say, we made a contract and I may hold you, one way or another, to the performance of its obligations' remains a proper*

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2 <www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf> accessed 12 November 2019; Michaels 2006 (n 9) 1022–27.

150 *AES v Ust-Kamenogorsk* (n 16); Briggs 2008 (n 43) ch 3; Zheng Sophia Tang, *Jurisdiction and Arbitration Agreements in International Commercial Law* (Routledge 2014) ch 1, 3; Chee Ho Tham, 'Damages for breach of English jurisdiction clauses: more than meets the eye' (2004) 2004 Lloyd's Maritime and Commercial Law Quarterly 46, 50–56; Joseph 2015 (n 16), para. 4.02.

151 Briggs 2008 108.

152 *The El Amria* [1981] 2 Lloyd's Rep 119; *Donohue v Armco Inc (n 19)*; Fentiman 2015 (n 18), para. 2.224 and 16.42; Briggs 2015 (n 25) 452 ('[a] stay of proceedings brought in breach of a jurisdiction agreement for a foreign court will be ordered unless the circumstances are exceptional'); Briggs 2008 (n 43) 13; Mills 2018 (n 25) 66; Giesela Ruehl, 'Party Autonomy in the Private International Law of Contracts', in Gottschalk et al (eds), *Conflict of Laws in a Globalized World* (CUP 2007.

> *justification for action, even where that contract purported to determine the jurisdiction of courts or the recognition of judgments.*

What is clear in the common law tradition is the focus on the contractual obligations of *forum* selection agreements. English courts will enforce it by way of a stay their own proceedings,[153] granting anti-suit injunctions,[154] or awarding damages against the breach of that agreement.[155] Despite acknowledging the—at least potential—procedural or *erga omnes* effect,[156] the orthodox view in common law has focused almost exclusively on the contractual rights and obligations arising from these agreements.

While not expressly accepting it, common law recognises the dual nature of arbitration and exclusive jurisdiction agreements. This is most evident in the following aspects of the common law rules on jurisdiction and enforcement of judgments.

First, the power to grant an anti-suit injunction is statutorily reflected in section 37 of the Senior Courts Act 1981 but remains part of the inherent and residual power of English courts to provide justice. As such it is based on an unconscionable conduct of the defendant. This is even in cases where the ground is based on a substantive right arising out of an exclusive jurisdiction or an arbitration agreement. As Fentiman argues:

> *[a]lthough the existence of a substantive right under such provisions is a necessary condition for such relief, it is not a sufficient condition. The existence of a right is a prelude to consideration of whether the respondent's conduct is unconscionable, which is conceptually the same enquiry as in any case where an anti-suit injunction is sought. An anti-suit injunction in such cases is not merely an injunction which enforces a contractual right. It is one which enforces a contractual right in circumstances where the breach of that*

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153 *Donohue v Armco Inc* [2001] UKHL 64; [2002] 1 All ER 749.

154 *AES v Ust-Kamenogorsk* (n 16).

155 *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG (The Alexandros T)* [2014] EWCA Civ 1010.

156 This is what Briggs calls relative effect of such agreements. See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008), para. 13.02 ('[t]here is a clear distinction in legal function between the effect an agreement has on the chosen court, by way of prorogating or derogating from, jurisdiction—what one may regard as its "*erga omnes* or *in rem* effect"—and its effect as a privately enforceable set of rights and obligations.').

right is unjust within the terms of Section 37.[157]

Second, under Section 32 of the Civil Jurisdiction and Judgments Act, a foreign judgment reached in violation of an exclusive jurisdiction or arbitration agreement will not be recognised and/or enforced in England. This is not a result of a contractual breach that is sanctioned by such preclusion before English courts. It is rather a secondary rule in the Hart classification,[158] which regulates the enforcement of judgments in line with the conceptions of party autonomy at this higher level of private international law.

Finally, the historical approach that *forum* selection and arbitration agreements cannot oust the jurisdiction of English courts and operate only at a contractual level[159] is side-lined by the introduction of the mandatory stay under section 9 of the Arbitration Act 1996. As analysed extensively in Chapter 5, the stay of proceedings is mandatory for the court if the arbitration agreement is found valid. Contrary to this, in the context of an exclusive jurisdiction agreement, the agreement in favour of a court overseas does not oust the jurisdiction of the English court but forms the basis for a procedural application of discretionary stay[160] without granting a right to obtain such a stay.[161] The agreement simply provides the cause of action and informs the availability of remedies.

Considering, therefore, the obligations in the context of an arbitration agreement, the parties: (i) grant private individuals (the arbitrators) with the positive mandate to adjudicate their present or future defined disputes and (ii) waive their right to have the same disputes resolved by any other *forum*.

3.3.1.1 Negative obligation: a form of negative forum selection clause

Focusing first on the negative aspect of the obligation, the point of departure is that this takes the form of an obligation 'not to do something'; in particular, each party undertakes the express—or 'silent concomitant' in the words of Lord Mance in AES[162]—obligation not to submit any dispute covered by the scope of the agreement to a *forum* other than the

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157 Fentiman 2015 (n 18), para 16.18.

158 See above in Chapter 1.

159 See above in Chapter 2.

160 Although with high hurdles for the party resisting such agreement. See Fentiman 2015 (n 18), para. 2.230.

161 Adrian Briggs, *Civil Jurisdiction and Judgments* (6th edn, Informa Law from Routledge 2015) 432.

162 *AES v Ust-Kamenogorsk* (n 16) at [1] per Lord Mance.

prescribed arbitral tribunal.[163] The prohibition includes any other *forum*, that is both State courts[164] and other tribunals.[165] This is to suggest that an arbitration agreement is functionally equivalent to an exclusive *forum* selection agreement.[166] Although not without exceptions, this is certainly the rule. If the parties have agreed upon such clause, then each of them should abide by the obligations stemming from this clause without objecting to the use of enforcement remedies, such as anti-suit injunctions.[167]

When breached, this negative obligation is remedied by a series of remedies depending on the jurisdiction. In England and Wales, as analysed extensively below, these are: (i) a stay of the improperly brought proceedings on the basis of the arbitration proceedings;[168] (ii) an equitable restraining injunction against the unconscionable conduct of the recalcitrant party;[169] and (iii) a remedy for damages resulting from such breach.[170] From the very nature of the arbitral jurisdiction as based on the parties' consent, these remedies are neither automatic nor can be declared by the courts in their own motion. The claiming party has the burden to object to the jurisdiction of the *forum* it considers improper and not to take any step in these proceedings as now established in Section 73 of the

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163 *Joint Stock Asset Management Co Ingosstrakh-Investments v BNP Paribas SA* [2012] EWCA Civ 644; Emannuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999), para. 661.

164 *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2013] 1 WLR 102. See also Andrews 2019 (n 15), para. 32.41 ('[this case] demonstrates that an arbitration clause will take precedence, even though there is a co-existing jurisdiction clause').

165 For example, a tribunal seated in a different country, having a different composition or operating under different procedural law or rules.

166 See in this regard *Anzen Limited and others (Appellants) v Hermes One Limited (Respondent) (British Virgin Islands)* [2016] UKPC 1 at [31] and [35]. The Privy Council had to interpret an arbitration agreement providing that 'any Party may submit the dispute to binding arbitration'. After considering various options in this constriction exercise, the Privy Council held that this provision should be interpreted as follows: 'Any party is allowed to start litigation, but another party can force a stay of those court proceedings by either "making an unequivocal request to that effect" or applying to the court for a stay'.

167 Pierre Fouchard, 'Anti-Suit Injunctions in International Arbitration: What Remedies?' in Emmanuel Gaillard, *Anti-suit Injunctions in International Arbitration: IAI Seminar, Paris, November 21, 2003* (Juris Publ. 2005).

168 See below in p. 125.

169 See below in p. 156.

170 See below in p. 181.

Arbitration Act 1996.[171]

3.3.1.2 Positive obligation

While the negative aspect of the arbitration agreement has received extensive treatment in case law and scholarly analysis, the other side of the coin, that is the positive aspect, has only been scarcely touched upon.[172] Often it is merely said that the agreement 'confers' or 'grants' jurisdiction to the tribunal focusing on prescriptive effects.[173] When conceived as an obligation that a party undertakes against each other, the content and importance of this aspect become equally important to the negative one.

In fact, this positive obligation of the arbitration agreement epitomises the parties' choice to 'submit to arbitration'[174] their differences, and can be described in terms of content as including three distinct obligations: (i) to submit any and all claims to arbitration; (ii) to participate in the arbitration proceedings in good faith; and (iii) to abide by the contents of the tribunal's decision. This is to suggest that the obligation is more than an agreement to confer a private body with the power to adjudicate the disputes covered by the agreement. This is certainly the primary feature of the positive effect and obligation, also

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171 Section 73 provides that:

> *[i]f a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—*
> *(a)that the tribunal lacks substantive jurisdiction,*
> *(b)that the proceedings have been improperly conducted,*
> *(c)that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or*
> *(d)that there has been any other irregularity affecting the tribunal or the proceedings,*
> *he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.*

172 Usually it is merely referred to as an obligation or aspect of the agreement without further analysis. Contrary to others, Born does discuss features of this obligation in his treatise. See Born 2014 (n 95) 1257 *et seq*. ('the positive obligation to participate in the resolution of disputes by arbitration also necessarily includes more general duties to participate in good faith and cooperatively in the arbitral process. This follows both from the nature of the arbitral process and from the general rule of *pacta sunt servanda.*').

173 Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (Juris Publishing 2014) 292.

174 In the wording of Article II(1) of the New York Convention.

recognised by Article II(1) of the New York Convention, but not the end of the inquiry.

Positive obligations undertaken also include, as provided in Section 40 of the Arbitration Act 1996, the obligation of the parties to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings'.[175] By their mere agreement to arbitrate parties are deemed to have impliedly inserted a term in this agreement prescribing them to cooperate in accordance with the applicable rules and law during the proceedings. This was clarified in *Bremer Vulkan Schiffbau und Maschinenfabrik v S. India Shipping Corp.* by the House of Lords, where Lord Diplock found that:

> *[…] the obligation is, in my view, mutual: it obliges each party to cooperate with the other in taking appropriate steps to keep the procedure in the arbitration moving, whether he happens to be the claimant or the respondent in the particular dispute.*[176]

This is the general duty of cooperation and good faith in the course of the arbitral process that Born describes. As he further extrapolates,

> *[t]he duty of good faith cooperation in the arbitral process has been held to include participating in the constitution of the arbitral tribunal, paying the arbitrators' fees and any required advances, cooperating with the arbitrators in relation to procedural matters, not obstructing or delaying the arbitral process, obeying confidentiality obligations relating to the arbitration, complying with disclosure requests, orders and awards, appointing arbitrators and establishing the procedural Rules for the arbitration. […] As with most other aspects of the arbitral process, these obligations to participate in the arbitral process are the subject of party autonomy and can be altered or elaborated by contract.*[177]

Finally, the parties undertake the obligation to abide by the decision of the arbitrators, regardless of the outcome. The losing party undertakes an obligation to comply with the award rendered against it. The enforcement of this particular obligation is achieved through the rules of recognition and enforcement embodied in the national arbitration

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175 Arbitration Act 1996, Section 40(1).

176 *Bremer Vulkan Schiffbau und Maschinenfabrik v S. India Shipping Corp* [1981] AC 909, 983.

177 Born 2014 (n 95) 1262.

laws[178] and the New York Convention.

Unfortunately, such treatment is non-existent even at the highest levels in English jurisprudence. For example, Lord Mance in *AES v Ust-Kamenogorsk* held that '[a]n agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever *forum* is prescribed'.[179] He did not extrapolate on the context of such obligation because, under the facts of the case, he need not do it; this is, however, the most analytical treatment of English Courts on the nature and content of this positive obligation. While English case law and scholars are hesitant in recognising remedies for the breach of a positive agreement to arbitrate, Chapters 5 and 6 consider how the equitable remedy of specific performance in contract law can be utilised in remedying such a breach from the perspective of both a State court and an arbitral tribunal.[180]

3.3.2 Civil Law approach – Procedural Contracts

By contrast to the common law contractual approach, in civilian continental law traditions, both jurisdiction agreements and arbitration agreements are considered 'procedural contracts'.[181] While they refer to 'contracts'—albeit procedural ones—in most cases there is no requirement for a contractual agreement in the strict legal sense of a binding exchange of compromises.[182] What is required is a unilateral, yet parallel,

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178 Under the regime of the Arbitration Act 1996, an award can be enforced by rendering the award an English judgment under Section 66 or by a common law action on the award. See Andrews 2019 (n 15), para. 43.01 *et seq*.; Merkin and Flannery 2019 (n 13) 625 *et seq*.

179 *AES v Ust-Kamenogorsk* (n 16), at [1] per Lord Mance.

180 See below in Chapters 5 and 6.

181 Alexander Belohlavek, *Rome Convention-Rome I Regulation*, vol 1 (Juris Publishing, Inc. 2011) 363–66; Felix Sparka, 'Classification of Choice of Forum Clauses and their Separability from the Main Contract' *Jurisdiction and Arbitration Clauses in Maritime Transport Documents* (Springer 2010) 81. See also Look Chan Ho, 'Anti-suit injunctions in cross-border insolvency: a restatement' (2003) 52 International & Comparative Law Quarterly 697, 707–09; Andreas Lowenfeld, *Conflict of Laws: Federal, state and International Perspectives* (2nd edn, Matthew Bender, 1998) 308; CJS Knight, 'The Damage of Damages: Agreements on Jurisdiction and Choice of Law' [2008] *Journal of Private International Law* 501, 506–07. See also for an analysis in the US, David Marcus, 'The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts' (2007) 82 Tul L Rev 973.

182 Ahmed 2017 (n 16) 80.

manifestation of consent from both sides to prorogate or confer jurisdiction to a certain *forum*.[183] In that sense, the focus is primarily on the prorogation and negation effects of the agreement, rather than its contractual nature or the rights and obligations of the parties thereunder. Such contractual features are merely a by-product of the procedural aspects.

Under this approach, any existing obligations undertaken by the parties against each other cannot be dissociated from the effects that the agreement produces under the private international or arbitration law of the country in which it is enforced. In other words, there is no distinction between effects *in personam* and effects *in rem*.[184] This approach is also favoured under the multilateral and horizontal context of the Brussels I Recast Regulation. This creates a hierarchy of jurisdictional bases—or gateways in the common law tradition—and the designated court is conferred jurisdiction, which is obliged to exercise whilst all other courts are required to stay and eventually decline jurisdiction.[185]

The CJEU has clarified that these are agreements of a procedural nature and should not be analysed as if they were producing private rights and obligations for the parties.[186] Not only is it not necessary to analyse a jurisdiction agreement as producing private rights, but also it is not necessary to have a contractual agreement as such. Rather, they operate as a mere factual expression by one or both parties that they will accept the jurisdiction of a court not otherwise in possession of such jurisdiction and that 'a court which would otherwise have had jurisdiction will not be seized with a claim to which this agreement refers'.[187] What is required is adequate manifestation of factual consent for either, or both, of the parties in order for the ground to be fulfilled.[188]

Conceptualising such agreements as procedural contracts has three important ramifications on their treatment in law. First, their availability in the first place is a question for the *lex fori* as the source of the procedural framework. Despite this being

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183 This is the treatment also in the context of the Brussels I Regulation, Article 25. See Fentiman 2015 (n 18), para. 2.33; Briggs 2015 (n 25) 49.

184 Ahmed 2017 (n 16) 23.

185 See Articles 25 and 31(2) of the Brussels I Recast Regulation.

186 *Benincasa v Dentalkit Srl, Case C–269/95* [1997] ECR I–3767; *Refcomp SpA v AXA Corporate Solutions Assurance SA, Case C-543/10*, EU:C:2013:62; [2013] 1 Lloyd's Rep 449 at paras 21, 39-40.

187 Ahmed 2017 (n 16) 79.

188 Briggs 2015 (n 25) 169.

predominant approach in Germany, according to the case law,[189] the choice of court agreement is perceived as a substantive agreement for the purposes of the law applicable to it.[190] Second, the utility of such agreements is confined to its effects on prorogation or derogation of certain courts. This is to suggest that the agreement in the form of parallel manifestation of factual consent may add or remove certain courts from the list of competent courts which are available to both or one of the parties. In other words, 'under the 'procedural contract' conception, the contractual and procedural effects of the jurisdiction agreement are fully convergent, mutually inclusive in effect and reconcilable'.[191]

3.3.3 Dual nature and Effects of Arbitration Agreements

In the international arbitration jurisprudence, while there is no concrete and unequivocal appraisal of the contractual approach and the terminology used is mostly divergent, the consensus seems to lie, at least partially, with the common law approach. This is suggested not only by the bright marquis of 'arbitration as a creature of contract' or the focus on the positive and negative obligations of an arbitration agreement but also, and more topically for the questions addressed by this thesis, by the comparison of arbitration agreements with any other contractual term.[192] This comparison has led to the criticism, especially by US academics, that the pro-arbitration treatment advocated before and by courts, as well as by other academics, has turned arbitration agreements into 'super contracts', claiming a status higher than other contract terms.[193]

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189 Ahmed 2017 (n 16) 54-55. The prevailing view in Germany among German commentators is to interpret jurisdiction agreements as not entailing any substantive rights and obligations with only a minority considering such agreements as entailing legal rights and obligations.

190 See Jonas Steinle and Evan Vasiliades, 'The Enforcement of Jurisdiction Agreements under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy' (2010) 6 Journal of Private International Law 565, 576;

191 Ahmed 2017 (n 16) 23.

192 *AES v Ust Kamenogorsk* (n 16); *Aggeliki Charis* (n 16); Stavros Brekoulakis, 'Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories' (2017) 8 Journal of International Dispute Settlement 610; Dicey, Morris, and Collins 2012 (n 24) Chapter 16.

193 Richard Frankel, 'The arbitration clause as super contract' (2013) 91 Wash UL Rev 531; Hiro Aragaki, 'Does Rigorously Enforcing Arbitration Agreements Promote Autonomy' (2015) 91 Ind LJ 1143; Steven Burton, 'The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate' (2006) J Disp Resol 469.

The comparison with 'any other contractual term', however, does not provide the whole picture. An arbitration agreement is not a term like any other in the contract; it has distinct features, origins, and effects. As such, the correct comparison would be with exclusive jurisdiction agreements. In this manner, the approach in common law traditions, as explained above, does provide the correct starting point with due regard to the procedural ramifications of these agreements.[194]

This is not, however, uncontested. Ahmed argues that, while arbitration agreements do present similarities with exclusive jurisdiction agreements—especially from a pragmatic perspective—, they operate at different levels especially with respect to their enforcement.[195] His argument focuses on the difference between the agreement of the parties under an arbitration agreement that the tribunal shall determine their rights and, therefore, the award would take the character of 'accord and satisfaction by substituted agreement'[196] whereas in the context of litigation proceedings 'the substitution of the original rights of the parties under the contract does not occur as a result of any private agreement but by operation of law pursuant to the "doctrine of merger"'.[197] Finally, Ahmed considers the procedural flexibility of the parties in international arbitration in comparison with the lack of such private flexibility in litigation proceedings—indeed one of the arguments usually used in favour of arbitration. For Ahmed, these differences, coupled with the basis of the recognition and enforcement of awards and arbitration agreements on the New York Convention constitute distinguishing features that render the transposition of the contractual nature of arbitration agreements into the realm of exclusive jurisdiction agreements false.

There are, however, several points against this criticism. First, arbitration agreements are not of purely contractual nature. As shown above, the same private international law party autonomy justifications apply for both types of agreements. This is not to suggest that the considerations are the same throughout the spectrum of the questions. The procedural implications and effects of arbitration agreements are, however, similar to the ones of jurisdiction agreements. This is all the more so in traditions where arbitration and

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194 Hiro Aragaki, 'Arbitration: Creature of Contract, Pillar of Procedure' (2016) 8 Yearbook on Arbitration and Mediation 2.

195 Ahmed 2017 (n 16) 44.

196 ibid; *Doleman and Sons v Ossett Corporation* [1912] 3 KB 257 (CA) per Moulton LJ.

197 Ahmed 2017 (n 16) 44.

jurisdiction agreements are considered procedural contracts, with the same limitations and qualifications applying to both of them. The different treatment of an application for a discretionary stay of proceedings under English common law for exclusive jurisdiction agreements and an equivalent application for a mandatory stay under the Arbitration Act 1996, does not alter the effect that such clauses have. While the finer nuances of this difference and the effect it has on regulating arbitral jurisdiction will be analysed in Chapter 4, the discretionary or mandatory effect of staying litigation proceedings in favour of a different *forum*—State or arbitral one—is more similar than distinguishing. Second, the effects of such agreements on the regulation of the final outcome of the cross-border litigation or arbitral proceedings present the same questions for the parties involved despite the different legal basis and mechanism for enforcing a court judgment and an arbitral award.

Finally, Ahmed's objection stems from the consideration of private international law as a purely multilateral exercise. As a result of the difference between primary and secondary rules, the 'simultaneous conception of jurisdiction agreements as private law contracts and as procedural bases for asserting jurisdiction may also to an extent be divergent, mutually exclusive in effect and even a contradiction in terms'.[198] This criticism, however, conflates the difference between the agreement of the parties and the effects this agreement might have on a level other than the contractual one. The recognition of these effects is a secondary rule, the origin and justification of which depends on the approach one takes on the normative foundations of party autonomy.

Exclusive jurisdiction and arbitration agreements are not only a product of the parties' autonomy to arrange their affairs at a contractual level, but they also constitute an embodiment of private international law autonomy. As analysed elsewhere in this thesis,[199] the common origins of both jurisdiction and arbitration agreements as expressions of private international law autonomy can be used as the conceptual basis for their similar treatment in law regulating jurisdictional questions. More importantly, however, despite their differences—also in the effects they have in court proceedings—the analysis of their origins and normative foundations shows that the analogy with any other contractual term is conceptually and functionally misplaced.

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198 ibid, 21.

199 See above in p. 8.

As analysed above, however, the paradigm shift from the subjective internationalist divide to a transnational paradigm of individual sovereignty, where States and private actors are in a relationship of equality, further supports the comparison between jurisdiction and arbitration agreements. Indeed, both are founded on the notion of private international law autonomy; not on contractual autonomy.

Traditional contractual or procedural conceptions of arbitration agreements fall short in working out the mechanics, function, and effects of these agreements. Characterising arbitration as a dispute resolution method of substantive or procedural nature is outside the scope of this thesis. The identification, however, of the dual character of arbitration agreements is important in considering both the machinery and the justifications for the regulation of arbitral jurisdiction by courts and tribunals.

Much like exclusive jurisdiction agreements, arbitration agreements are of a chimeric nature: they have both procedural and contractual aspects and corresponding effects. This co-habitation of effects is present regardless of the focus one chooses to adopt. It is at the same time the reason States have ratified the New York Convention, courts are enforcing arbitration agreements, and parties are generally allowed to conclude them. This is to suggest that the focus should not be at characterising arbitration agreements as substantive or procedural contracts, but rather at recognising their chimeric nature and their link to a transnational paradigm of private international law. The widespread acceptance and practice of arbitration is leading the shifting of the paradigm from traditional internationalist or substantive approaches to a transnational paradigm.

3.4 Arbitration, Party Autonomy, and International Commercial Dispute Settlement

This paradigm shift as a synthesis of the traditional paradigms of jurisdiction in private international law has ramifications also to the field of private dispute resolution. Concepts of individual sovereignty and equality of State and non-state actors in a global and transnational legal system have been facilitated by, and have themselves supported, arbitration.[200]

More specifically, in the context of arbitral jurisdiction, the acceptance and widespread

[200] Mills 2018 (n 25), 265.

enforcement of arbitration agreements is beyond contention;[201] not least because it is prescribed in one of the most successful international law treaties.[202] This acceptance is in itself a result of and can be explained by the paradigm shift from notions of State sovereignty to a transnational conception.

This is not to suggest that this new paradigm should be adopted in relation to arbitration only because empirical data suggests that the users are opting for arbitration. As analysed in Chapter 2 and above in the previous Sections of this Chapter, at least in England, arbitration was developed and accepted as a dispute resolution mechanism parallel to State litigation. This also coincides with the wider acceptance of party autonomy in private international law. This Section considers the role of arbitration within this new third paradigm of transnational jurisdiction in private international law and provides the basis for the theoretical formulation of the argument on regulating arbitral jurisdiction analysed in Chapter 4.

Under traditional paradigms of jurisdiction in private international law, the widespread acceptance of party autonomy was simply justified either—from an individualistic perspective—as a result and extension of the freedom of the parties to arrange their own affairs without reference to the role of States, or—from a party or State sovereigntist perspective—as producing benefits for the parties or States.[203] In the latter case, the multi-layered regulatory competition between judicial institutions and arbitral tribunals, not only produces more options for the parties, but it also enhances the quality and efficiency of justice, providing at the same time the States with judicial de-congestion benefits.[204]

Focusing, however, on the role of individuals as equals to States in terms of their effect on jurisdictional allocation, the transnational paradigm proves useful in conceptualising the position of arbitration in the context of international—or more precisely globalised, transnational—commercial dispute resolution settlement. As analysed above, the power

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201 See above in Chapters 1 and 2.

202 The New York Convention has been ratified by 161 jurisdictions around the globe.

203 Mills 2018 (n 25) 264.

204 Thomas Stipanowich, 'ADR and the "Vanishing Trial": the growth and impact of "Alternative Dispute Resolution"' (2004) 1 Journal of Empirical Legal Studies 843; Louise Phipps Senft and Cynthia A Savage, 'ADR in the courts: progress, problems, and possibilities' (2003) 108 Penn St L Rev 327. See also to the contrary Owen Fiss, 'Against settlement' (1984) 93 The Yale Law Journal 1073; Robert Condlin, 'ADR: Disputing With a Modern Face, or Bargaining for the Bargaining Impaired?' (2020) Cardozo Journal of Conflict Resolution.

of parties to decide on their own jurisdictional terms is not subject to State sovereignty but derives in itself from their individual sovereignty. This, in turn, is based on a relationship of equality between States and private parties in determining jurisdictional matters. As arbitration agreements and arbitration is based on the same notions of private international law party autonomy under the transnational paradigm arbitration agreements stand independent from State sovereignty and derive their justification from the individual sovereignty of the parties.

This is not to suggest that arbitration agreements—much like jurisdiction agreements—are floating norms which exist completely independent from one or more legal systems. As Ahmed has observed 'in order to achieve meaning and enforceability, the contract will require linking to one State order'.[205] This is not a submissive linking to a given legal order. As Michaels explains, 'neither is the State subordinate to the parties, nor *vice versa* are the parties subordinate to the State. Or: each is both at the same time, dominant and subordinate'.[206] If this is the balanced future paradigm of private international law and party autonomy, arbitration provides an example where the concurrent detachment from a given legal order and linking on equal terms to such an order is more easily observed and accepted at a normative level.

In international arbitration scholarship, Gaillard has proposed that an arbitration legal order exists as a transnational system of justice.[207] While the arguments against such proposition rest on that it promotes a system of international justice that is 'floating in the transnational firmament', the gist of the argument is that arbitration derives its justification not from one but, rather, from multiple legal orders, as well as from the international legal order through the recognition under the New York Convention. This approach is not necessarily at odds with the conception of arbitration as an expression of a multifocal system of jurisdiction giving emphasis on the parties' choices in a context of a transnational paradigm. Both conceptions refer to the justification or the parties' power

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205 Mukarrum Ahmed, *The Nature and Enforcement of Choice of Court Agreements: a Comparative Study* (Studies in Private International Law, Hart Publishing 2017) 29

206 Ralf Michaels, 'Party Autonomy in Private International Law--A New Paradigm without a Solid Foundation?' (126th Conference of the Private International Law Association of Japan, 2 June 2013) 9 <www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf> accessed 12 November 2019

207 See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Brill Nijhoff 2010). See also Jan Paulsson, 'Arbitration in three dimensions' (2011) 60 International & Comparative Law Quarterly 291 explaining the approaches developed within the arbitration community.

to adopt arbitration. The difference is that Gaillard's theory refers to the legal source of the arbitrators' power being anchored to more than one legal order, not however recognising the effect of the parties' choice itself. It is still an analysis of two different levels. Multiple State legal orders are fuelling the arbitral legal order.

A transposition, however, of the transnational paradigm in private international law and court jurisdiction to arbitration is not aimed at diminishing the role of the seat or the State in general in determining arbitral jurisdiction. The legal regime and approach of the seat is important as it provides support and links arbitration to a particular legal order at the interlocutory stage of accepting jurisdiction. Regulation of arbitral jurisdiction takes place mostly in State courts. Considering the position of arbitration in the regulatory level of private international law and the role of arbitration agreements within this system, allows the formulation of a legal regime which recognises the co-equality of parties and States.

In this context, this thesis does not advocate that arbitration agreements should be enforced as the result of a floating norm, independently of the legal regime of the seat of arbitration. Rather it provides for a theoretical argument for regulating jurisdictional issues based on the conception, justification, and the role of party autonomy in private international law and arbitration for international commercial disputes.

The effect of the justifications of party autonomy, and of the shifting paradigm in private international law, is the development of party autonomy as an independent jurisdictional link not only between different *fora* but also between different systems of dispute resolution. On the basis of this argument, Chapter 4 analyses the question of arbitral jurisdiction and formulates a proposal based on a horizontal rather than a vertical relationship. This horizontal relationship is a direct result of the multifocal approach in the role and nature of party autonomy in private international law and the dilution of traditional notions of State sovereignty as the only player in the game. As analysed in this Chapter, contemporary theories of private international law based on a systemic and global conception of the legal arena with multiple actors being involved more accurately display the powers—often diametrically opposite—that inform the adjudicatory competence of State, intra-State, and arbitral bodies.

4 ALLOCATING AUTHORITY IN JURISDICTIONAL CONFLICTS

4.1 Classical Conceptions and the Need for a Re-designed Approach

The single constant point of reference for any discussion on the question of allocation of authority between courts and tribunals is the return to the fundamental principles of competence-competence[208] and separability.[209] Elusive yet technical, these concepts are in one way or another in the very heart of the regulation of the jurisdictional conflicts. The relevant analysis, however, in relation to these principles, their relationship, and their utility in deciphering the puzzle of arbitral jurisdiction before arbitral tribunals and State courts has not been crystal clear. This Section analyses these two principles and their basis in the English arbitration legal regime to set the foundation for the proposed approach and re-formulation of the rules on regulating arbitral jurisdiction.

4.1.1 Competence-Competence

One of the most fundamental principles of adjudication, both litigation and arbitration, is expressed with the repetition of the word 'competence'.[210] A given adjudicatory body has—and should have—the jurisdiction to determine its own jurisdiction. As Park has

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208 *Competance-Competance* (in French) or *Kompetenz-Kompetenz* (in German). Although the German version of the name has been popular in case law and literature, it is connected with certain conceptions of the notion in relation to the enforceability. See on this Stavros Brekoulakis, 'The negative effect of competence-competence: the verdict has to be negative' (2009) Austrian Arbitration Yearbook 237. This thesis uses the English version in a neutral way in order to describe the idea that a tribunal, much like any other adjudicatory body, should have the power (competence) to decide over its own competence.

209 Also known as principle of severability. The terms are used interchangeably in case law and literature.

210 Philippe Fouchard and others, *Fouchard, Gaillard, Goldman on international commercial arbitration* (Kluwer Law International 1999) 650 ('[t]he fact that arbitrators have jurisdiction to determine their own jurisdiction—known as the 'competence-competence' principle—is among the most important, and contentious, rules of international arbitration').

described, 'this much-vexed principle possesses a chameleon-like quality that changes colo[u]r according to the national and institutional background of its application'.[211] This colour-shifting quality is not only referring to the contents of what 'competence-competence' means, but also to the effect that this principle has in the regulation of arbitral jurisdiction.

The classifications, typology, or categorisations of the concept, include in relation to arbitral jurisdiction three distinct, yet interconnected, issues: (a) an issue of identity—i.e. who can decide on arbitral jurisdiction; (b) an issue of timing—i.e. when can or should the arbitrators or the courts decide on arbitral jurisdiction; and (c) an issue of finality and reviewability of the tribunal's or court's decision on the arbitral jurisdiction.

Of tripartite nature and content, competence-competence is rooted both—and not more as some authors argue—on pragmatic necessities and legal foundations of arbitration as a dispute resolution method. One cannot say, however, that competence-competence is necessarily based on parties' consent; indeed, it precedes and exists independently of such consent.[212] The basic pragmatic need served by the most primitive form of competence-competence—that is the positive aspect that arbitrators *can* rule on their own jurisdiction—is to avoid impeding the arbitral inquiry due to mere the filing of an action before a court. This form of competence-competence is almost universally accepted in jurisdictions that have allowed parties to conclude arbitration agreements and resolve their disputes in arbitration.[213]

This is not, however, an exclusive right of arbitrators. The extent of that right as well as of its 'longevity' differs from jurisdiction to jurisdiction. As it will be elaborated further below, some legal systems extend this right of arbitrators until the post-award stage, whereas others allow for interlocutory challenges either to a jurisdictional decision or to the very process of the tribunal determining its own jurisdiction. This is to suggest that:

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211 Park 2007 (n 2) 11.

212 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 at [25].

213 This is also in accordance with the spirit of the New York Convention. Although there is no express language to the effect of providing arbitrators with the right to rule on their own jurisdiction, it does allude to the existence of this right through the obligation to recognise arbitration agreements (Article II(3)) and the grounds to refuse enforcement in cases where the tribunal has considered jurisdictional objections and has found—wrongly in the opinion of the party resisting the enforcement (Article V(1)(a) and (c)). See also Born 2014 (n 95) 1053-1054.

(a) where the right of arbitrators is not exclusive, a question of regulating this concurrent jurisdiction arises; and (b) the different approaches observed around the globe address in the same or different manner the questions of timing and finality. This Chapter examines the current position in England and in other jurisdictions, illuminating both the various commonalities and differences arising as well as the need for a lucid, coherent, and structured approach based in the context of international commercial disputes.

Considering the three different but intertwined issues, doctrine has identified two types of competence-competence: one positive the other negative. The former suggests the empowerment of arbitrators to rule on their jurisdiction and the latter their power to do so first—that is, prior to any State court, which must wait until the post-award stage to review this issue. This distinction, however, is often leading to misguided conceptions.

First, the positive and negative aspects of competence-competence are addressed to different directions with different meanings. While the positive is addressed to tribunals, the negative is addressed to State courts, essentially denying their involvement only temporarily and not entirely. Second, while negative competence-competence is a rule of temporal priority in favour of the tribunal in having the first approach to the inquiry into its own jurisdiction, the use of the word 'negative' has led to the misconception that courts are completely banned from examining arbitral jurisdiction. In other words, negative competence-competence has an even more elusive and contextual meaning depending on the approach that legislators, courts, and scholars take on the matter of regulating arbitral jurisdiction. Finally, positive and negative competence-competence is often mixed with the questions of the depth of the court's inquiry into arbitral jurisdiction at the interlocutory stage and the standard of review of an arbitral jurisdictional decision in the context of setting aside or enforcement proceedings. This is not to suggest that the concepts are dissociated with each other or that they are not linked. The three issues raised in the context of a competence-competence inquiry are inexorably linked with questions of depth and standard of the court's inquiry.

Although clear when considered in isolation from one another, the options available in considering and regulating arbitral jurisdiction have not been treated as a coherent system to address the three issues raised above. Indeed, the approach and typology adopted focuses on the issue of finality and temporal priority[214] rather than the basis of the parties'

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214 Park 2007 (n 2) 11.

choice or lack thereof to arbitrate their disputes. Statute and case law interpretation are in need of a coherent interpretation and reform aimed at clarifying and codifying the specific approach adopted in the jurisdiction.[215] This is all the more so in the context of international commercial transactions where rules need to reflect the parties' choices and aid in minimising the risks and costs associated with parallel proceedings. The concept of competence-competence is reconsidered in Chapter 6 in analysing the regulation of arbitral jurisdiction from the tribunal's point of view.

4.1.2 Separability

The second of the fundamental principles in the context of regulating arbitral jurisdiction is introduced with the term separability.[216] Much like competence-competence it has been used to describe a multiplicity of notions, not all of which are reflected in the original conception and practical needs of the principle. This multiplicity of notions has frequently caused confusion both regarding its content and regarding its relationship with the principle of competence-competence and role in the regulation of arbitral jurisdiction.

The point of departure and basic premise of the principle is to create a barrier to challenging the validity of the arbitration agreement in case there is a question of contractual termination, or a conclusion that the host contract containing this agreement is void or unenforceable. As the name of the principle suggests, the arbitration agreement is separable or severable from the host contract. The wording used to define the principle

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215 Most recently Popplewell LJ in *Enka* held in analysing the importance of the seat and the curial court's powers that 'the court of the seat always remains the primary arbiter of the substantive jurisdiction of the tribunal and will examine that jurisdiction not only in a challenge to the tribunal's ruling on its own substantive jurisdiction, but if necessary in advance of it'. See *Enka v Chubb* [2020] EWCA Civ 574 at [53] per Popplewell LJ.

216 Almost virtually accepted in legislation and case law around the globe, both civil and common law jurisdictions. See *Fiona Trust and Holding Corporation v Privalov* (also known as *Premium Nafta Products Ltd v Fili Shipping Co Ltd*) [2007] UKHL 40; [2007] 4 All ER 951; Born 2014 (n 95) 395. See also Pierre Mayer, *L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence* (Brill 1990); Alan Scott Rau, 'Everything you really need to know about" separability" in seventeen simple propositions' (2003) 14 American Review of International Arbitration 121; Adam Samuel, 'Separability of Arbitration Clauses-Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice' (2000) 9 Arbitration and Dispute Resolution Law Journal 36; Peter Gross, 'Separability Comes of Age in England: Harbour v Kansa and Clause 3 of the Draft Bill' (1995) 11 Arbitration International 85.

shows that the arbitration agreement is not completely separated or severed from the host contract but, rather, that it can be separated or severed from it.[217] This suggests that the autonomy of the arbitration agreement is not absolute, but it is functionally limited to achieve the pragmatic need of allowing the tribunal to rule that the host contract is null and void on its merits without frustrating its own jurisdiction. In other words, the doctrine of separability is a legal fiction which has only limited application—where it is necessary to save the agreement that disputes shall be referred to arbitration where the dispute puts into question the validity or continuing validity of the substantive agreement. It does not require or permit the arbitration agreement to be treated altogether as a separate contract.[218]

Separability and competence-competence are both fictions—one legal, the other pragmatic—contributing towards the smooth operation of arbitral proceedings.[219] As Redfern and Hunter argue:

> *[t]here are essentially two elements to this [jurisdictional] rule: first, that an arbitral tribunal can rule on its own jurisdiction; and secondly that, for this purpose, the arbitration clause is separate and independent from the terms of the contract containing the transactions between the parties.*[220]

In the same vein, and considering the relationship between the doctrines of separability, the latter is functionally operating as the necessary prerequisite for the performance of the jurisdictional role of the tribunal. The arbitrators' decision on their jurisdiction pursuant to their arbitral competence-competence is not frustrated in case they decide that the host contract was null or void or that it has been terminated; the arbitration agreement is not retroactively terminated or nullified as well. In other words, while the basic premise of competence-competence is that arbitrators can rule on their own jurisdiction

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217 See Oxford English Dictionary, "-able, suffix" (OUP); the suffix -able is used in 'forming adjectives to denote the capacity for or capability of being subjected to or (in some compounds) performing the action denoted or implied by the first element of the compound'.

218 See the recent judgment of the Court of Appeal in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6 dealing with the question of the law applicable to the arbitration agreement.

219219 Park 2007 (n 2) 11; Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 334.

220 Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell 2004) 254.

considering any vitiating factors of the agreement itself, separability dissociates the validity of the agreement from the validity of the host contract.

In England, unlike the position in the United States of America and in a similar manner to other jurisdictions,[221] the role of separability on issues of arbitral jurisdiction ends there. Section 7 of the Arbitration Act 1996 provides that:

> *[u]nless 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.*

Considering Section 7 of the Arbitration Act 1996, Lord Hoffmann's speech in *Fiona Trust v Privalov* not only did confirm the operation of the principle as legal fiction safeguarding the arbitration agreement from invalidities of the main contract,[222] but also provided a rule on construction of arbitration agreements. Lord Hoffmann found that 'businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way'.[223] This approach has been interpreted as favouring an 'one-stop shop' approach where 'the courts will strive to avoid a result which places some disputes arising out of a single commercial relationship before an arbitral tribunal, leaving others to be determined by the court'.[224]

These two aspects of Lord Hoffmann's approach suggest a clearer approach on regulating arbitral jurisdiction that has been flagged in the literature but, unfortunately, has not

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221 See below in p. 83 for the particularities of the US approach where the principle of separability is used to determine the allocation of authority between courts and tribunals. In a similar approach to Section 7 Arbitration Act 1996 see UNCITRAL Model Law, Article 16(1); Stephen Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publications 1987) 1-60.

222 *Fiona Trust v Privalov* (n 216). See, however, the analysis of Lord Hoffmann at [17] and [18] on issues touching on the arbitration agreement. Commenting on these paragraphs Andrews 2019 (n 15), para. 30.40 argues that the examples provided by Lord Hoffmann of forgery or total absence of authority to act as agent that would also invalidate the arbitration agreement are considered double barrelled shot gun situation which operate simultaneously on both the arbitration agreement and the host contract.

223 *Fiona Trust v Privalov* (n 216), at [10].

224 Merkin and Flannery 2019 (n 13), para 9.7.

gained ground before the courts. The precise contours of this approach will be analysed in Chapter 5 along with the improvements proposed for the jurisdictional allocation stage before State courts, but two propositions can be made already at this stage: (a) a jurisdictional attack before courts[225] has to be directed—at least as a double-barrel shotgun—against the arbitration agreement itself;[226] and (b) there is a difference between challenges going to the existence of the arbitration agreement on the one hand and challenges to the validity or challenges relating to the scope of the agreement on the other. *Fiona Trust* provides authority that the latter should be for the tribunal itself to decide.[227]

As discussed above, the nature of the arbitration agreement and the functions it serves are distinctive, including both substantive and procedural aspects. As Born argues, the 'arbitration clause is concerned with the "separate" function of resolving disputes about the parties' commercial relations, rather than contractually regulating the substantive terms of the parties' commercial bargain'.[228] While this is clearly the distinguishing feature of arbitration agreements that leads to their potential separation from the host contract, it is not absolute. The procedural and substantive aspects of arbitration—as well as exclusive jurisdiction—agreements are intertwined and as shown above the effects of the parties' choice to arbitrate their disputes are both substantive and procedural. Alluded to in the approach of some courts at a first instance level,[229] by allowing the parties to contract out of the default competence-competence regime of the Arbitration Act 1996, the parties' choice transforms a default jurisdictional question into one of substance. While this is akin to the approach the US courts follow with the so-called delegation clauses,[230] the role of the separability doctrine seems to be greater than a legal fiction

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225 On the basis of Section 9 or even Section 72 of the Arbitration Act 1996. The decision in *Fiona Trust v Privalov* (n 216) was one on the basis of Section 72 but the same rationale should apply under an argument of the litigation claimant facing an application of stay in the context of Section 9.

226 *Fiona Trust v Privalov* (n 216), at [17] and [18]; Merkin and Flannery 2019 (n 13), para 9.7; Born 2014 (n 95) 471.

227 *Microsoft Mobile Oy Ltd v Sony Europe Ltd* [2017] 2 Lloyd's Rep 119 at [45] and [54] per Marcus Smith J.

228 Born 2014 (n 95) 396.

229 *LG Caltex Gas Co v China Nat'l Petroleum Co* [2001] EWCA Civ 788; *Vee Networks Ltd v Econet Wireless Int'l Ltd* [2005] 1 Lloyd's Rep. 192, 198 (QB); *Astro Valiente Compania Naviera v Pakistan Ministry of Food & Agric.* [1982] 1 All ER 823 (Comm).

230 See below in p. 83 and especially *Rent-A-Ctr, W., Inc. v Jackson*, 130 S.Ct. 2772.

allowing the survival of the arbitration agreement in relation to the main contract.

4.2 Regulation of Arbitral Jurisdiction in a Comparative Context

Before analysing the proposed approach on the basis of the concept of party autonomy in private international law and arbitration, it is important to consider briefly what the approaches in other jurisdictions are to illuminate the policy rationales and underpinnings in these jurisdictions in comparison to the approach in England and Wales. These are, then, useful in formulating the proposed approach at the end of this Chapter.

4.2.1 New French Code of Civil Procedure—A rule of Temporal Priority

Starting from the most striking example of a rule in favour of temporal priority for the tribunal, the French legal system keeps jurisdictional intersections to the minimum degree and considers them primarily at the post-award stage. The French approach is based on the premise that arbitration is a floating norm in the transnational firmament unconnected with any municipal system of law that anchors to a particular legal order only at the stage of enforcement of the award.[231] In Gaillard's words 'the transnational vision recognizes an arbitral legal order that is founded on national legal systems, while at the same time transcending any individual national legal order'.[232] The effect of this conception at the interlocutory jurisdictional stage is to favour a rule of temporal priority in favour of the tribunal. According to Article 1448 of the New French Code of Civil Procedure:

> *[w]hen a dispute subject to an arbitration agreement is brought before a court, such court* ***shall decline*** *jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is* ***manifestly void or manifestly not applicable****. A court may not decline jurisdiction on its own motion.* (emphasis added)

This statutory provision is considered both domestically in France and internationally as the epitome of negative competence-competence. As explained below, the more

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231 Emmanuel Gaillard, *Aspects Philosophiques du Droit de L'arbitrage International* (vol 1, Martinus Nijhoff Publishers 2008); Emmanuel Gaillard, 'International Arbitration as a Transnational System of Justice' in Albert Jan van den Berg, *International Arbitration: The Next Fifty Years* (ICCA Congress Series No 16, Kluwer Law International 2011) 66.

232 Emmanuel Gaillard, 'Transcending National Legal Orders for International Arbitration', in Albert Jan van den Berg, *International Arbitration: The Coming of a New Age* (ICCA Congress Series No 17, Kluwer Law International 2013) 373.

appropriate term would be temporal competence-competence as it establishes a rule of priority in favour of the arbitral tribunal to have the first crack at determining its own jurisdiction.

This statutory provision establishes a two-fold rule and sets a high threshold. First, if an arbitral tribunal has already been established, a State court dealing with a dispute falling within the scope of the arbitration agreement 'shall decline' jurisdiction without any further examination. Second, if no tribunal has been established yet—for example, in a situation where there is a claim before State courts and the litigation defendant wants only to resist the litigation proceedings without commencing a counterclaim before the competent arbitral tribunal—the review of the court is extremely limited. The threshold is that the arbitration agreement must be 'manifestly' void or inapplicable.[233] Originally developed by case law, this two-fold rule is now firmly established in the statutory law.[234]

While the aim of providing the tribunal with the power to decide on its own jurisdiction, unfettered by any other adjudicatory body, is certainly towards the liberal side of arbitration regimes, the scope of applying the rule presents certain problems in a cross-border setting.

The application of the 'manifestly void' rule only in cases where no arbitration is on foot, is likely to lead to odd results in cases where a manifestly null or void agreement exists and the tribunal has already been constituted. French courts will have to decline jurisdiction, even on their own motion without delving into a *prima facie* examination of the arbitration agreement. While the establishment of the priority rule in favour of the arbitral tribunal on the basis of a *prima facie* approach is indeed to be praised as liberal and in favour of the parties' putative choice to arbitrate their disputes, the rule that the court must 'decline jurisdiction' with the mere objection from one party that arbitration is the chosen dispute resolution method goes too far and might result into the encroachment of the other side's rights. Indeed, it leads to a reverse situation of this that the rule on arbitral competence-competence—as defined below and as expressed in most cases with the term positive competence-competence—aims to avoid. Even if the agreement is in reality non-existent or invalid, court proceedings are doomed to fail on the basis of the mere constitution of the arbitral tribunal.

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233 In the original French text: '[m]anifestement nulle'.

234 Civ. 1ère, 16.10.2001, Quarto Children's Books Ltd v Société Editions du Seuil et Société Editions Phidal Inc., Rev. arb. 2002.919, n. Cohen.

Two further issues are raised. First, it is not immediately clear to a non-French lawyer what the manifest standard entails. Manifest linguistically means 'having evident signs of something'; '[c]learly revealed to the eye, mind, or judgement; open to view or comprehension'.[235] This common meaning suggests that the impediment on the validity or the applicability of the arbitration agreement has to be extremely evident.[236] Attempting to shed some light on the contours of this standard's application, the ICCA National Report from France provides:

> *[t]he manifest nullity and inapplicability of the arbitration agreement should be interpreted restrictively. If an arbitration agreement is valid or if its nullity has not been invoked, the question whether it applies to the dispute concerned or only to certain parts of it is not for the courts to decide.*[237]

This restrictive interpretation, however, is not to suggest anything on the content of the threshold; it merely excludes questions of scope if the agreement is valid or its nullity has not been invoked. This leads to the second issue, the one of scope of the arbitration agreement. Under the formulation of the French approach, questions of scope remain for the tribunal alone and the courts are not concerned with them at all. This is the case regardless of whether nullity or voidness is invoked in the proceedings. Indeed, the court has to decline jurisdiction 'on its own motion'. As it will be analysed below, however, questions of scope, especially personal one, are rarely so clearly distinct from issues of validity and consent that the same standard should apply.

As these considerations suggest, such an absolute rule in favour of the tribunal can be tactically used to stall, delay, and even torpedo litigation proceedings with the mere assertion that an arbitration agreement is present. It would render arbitration agreements as super contracts entitled to a degree of respect unknown to other contracts or even jurisdiction agreements. The *prima facie* approach enshrined in in the second limb of Article 1448 and advocated in this thesis under Sections 9(1) and 9(4) of the Arbitration

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235 Oxford English Dictionary, *"manifest, adj. and adv."* (OUP).

236 Société Prodim v Berthé ès qual., ICCA Com., 13.06.2006, Rev. arb. 2006.864; Com., 02.06.2004, Société Industry et autres v Société Alstom Power Turbomachines and Com., 14.01.2004, Prodim v Logidis, Rev. arb. 2004.591, n. Ancel.

237 Yves Derains and Laurence Kiffer, 'National Report for France (2013 through 2018)' in Lise Bosman (ed), *ICCA International Handbook on Commercial Arbitration* (Supplement No. 99, Kluwer Law International 2018) 30.

Act 1996 is striking the right balance between efficiency of the presumably chosen dispute resolution method and the rights of both parties, without stripping State courts of the ability to review the arbitrators' decision at the post-award stage.

4.2.2 United States of America – Separability as a Delineating Mechanism

Crossing the Atlantic, and seemingly on the other side of the spectrum, the US approach is difficult to put in a single category. The national arbitration regime, the Federal Arbitration Act (FAA), is elusive in its content, but seems to establish a rule that issues of jurisdiction are, by default, a question to be addressed by the courts rather than tribunals. This is enshrined in Sections 3 and 4 of the FAA permitting an order for staying their own proceedings and/or compelling the recalcitrant party to participate in the arbitral proceedings only if the court is satisfied that the issue is referable to arbitration and any issues of the making of the agreement are not present.[238] This way, the US approach seems to allow for a limited arbitral competence including a rule in favour of courts if there is a claim before them either in a separate action or as a motion. If an objection is raised, the courts usually will issue a final binding decision on the whether the claim is subject to a valid arbitration agreement before referring the parties to arbitration.

In addition, US Courts and doctrine have used separability in a broader manner. Separability is a delineating tool for the so-called gateway or arbitrability issues. These are the jurisdictional issues analysed in this thesis—namely, issues of existence, validity and scope of the arbitration agreement. For a US court, an issue pertaining to the arbitration agreement, that is a gateway or arbitrability issue, is to be resolved, by default and at the outset, finally by State courts. On the contrary, an objection on an issue pertaining to the merits of the case is to be dealt with by the tribunal. The premise of this approach is simple. If the tribunal's jurisdiction is not challenged, then it is the only competent body to decide and State courts should stay their proceedings. As Bermann

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238 Section 3 FAA (on judicial stay of proceedings) provides that:

> *[…] the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action […].*

Section 4 FAA (on orders compelling arbitration) provides that:

> *[…] upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*

says: 'a US Court will entertain a threshold challenge to arbitral jurisdiction to the extent that the challenge implicates the reality of the parties' consent'. This is to suggest that only where the challenge goes to the arbitration agreement itself will the courts decide bindingly on the issue.

The presumption in US case law is that the parties have not agreed to confer on the tribunal the power to decide jurisdictional issues. This stems from the conception that issues dealing with the core question of the parties' consent to confer adjudicatory powers to the tribunal can only be decided by a State court. There are, in this conception, two equally good claims: one arguing in favour of the arbitration agreement's existence and validity and one arguing against it. This battle of claims, in the rationale of the US courts, can be resolved only by a State court and not by the arbitrators.[239]

Until this point, the position in the US resembles the remarks of Lord Hoffmann in *Fiona Trust* on the separability presumption.[240] The distinctive feature of the approach in the US, however, is the option that is given to the parties to agree on a so-called delegation clause. The Supreme Court of the United States established in *First Options* that it is for the courts to decide questions of arbitrability, unless the parties have decided to 'delegate threshold arbitrability questions to the arbitrator'; this is so, however, only if 'the parties' agreement does so by "clear and unmistakable" evidence'.[241] The effect of such a

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239 The court held that claims that both the underlying contract and the arbitration agreement are invalid or illegal were for initial resolution by the arbitrators. See *Prima Paint Corp. v Flood & Conklin Mfg Co* 388 US 395 where at 403-404 the majority of the court relied on Section 4 of the FAA which limits the court review to only issues relating to the making and performance of the agreement to arbitrate; See also *Buckeye Check Cashing, Inc. v Cardegna* 546 U.S. 440 ('because respondents challenge the [underlying] Agreement, and not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract," and "should therefore be considered by an arbitrator, not a court' and 'a challenge to the validity of the contract as a whole and not specifically to the arbitration clause, must go to the arbitrator').

240 See above in p. 75. See also *Fiona Trust v Privalov* (n 216), at [17] and [18].

241 *First Options of Chicago, Inc. v Kaplan* (1995) 514 U.S. 938, 944. Although the question before the court concerned the standard of review of the arbitrator's decision on arbitrability issues, the Court established a broader rule of allocation of authority at the interlocutory stage which translates into a rule of standard of review at the post award stage. While this rule is closely linked with the operation of the separability doctrine, it is to be clearly distinguished from it. As Graves and Davydan argue '[w]hile consistently applying a presumption in favour of "arbitrability" in deciding whether a

delegation clause is two-fold: (a) the courts should stay their proceedings without examining the jurisdictional issues; and (b) the courts will conduct only a deferential review at the post-award stage; not a *de novo* one. Considering the nature of such choice of the parties, US courts and doctrine have not considered it to be nothing more than an option, a jurisdictional availability, provided by the FAA. It seems, however, that by exercising their autonomy, the parties are transforming jurisdictional issues into ones of the substance.

This ability of the parties in the US raises two issues: (a) who will decide questions on the existence, validity, and scope of the delegation clause; and (b) what constitutes clear and unmistakable language.

Answering both questions involves considering briefly the jurisprudence of the US Supreme Court on the issues. In *Rent-A-Center*[242] the US Supreme Court provided an answer in relation to the first issue towards the direction of the courts alongside a delphic statement as to the content or scope of the First Options requirement. The US Supreme Court held that if there is a challenge specifically to the existence or validity of an agreement to arbitrate jurisdictional disputes, i.e. the delegation clause, this can be reviewed by the courts.[243] This is to suggest an operation of the separability doctrine within the arbitration agreement with the delegation clause being considered as a separate sub-agreement within the arbitration agreement. As a result, a challenge generally to the validity and existence of the arbitration agreement, will not be for the courts, but for the arbitrators. In addition, the court held that the 'subject of the *First Options* "clear and unmistakable" requirement […] pertains to the parties' manifestation of intent, not the agreement's validity generally'.[244] With this delphic statement, the US Supreme Court is essentially creating a rule on the standard of review of the delegation clause removing the availability of a challenge on validity grounds. Only by challenging the parties' manifestation of consent as expressed in the wording of the parties' arbitration agreement

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dispute is subject to arbitration, the Court explained in *First Options Inc v Kaplan* the requirement of a contrary presumption in respect to who should decide this question'; Jack Graves and Yelena Davydan, 'Competence-Competence and Separability-American Style' in Stefan Kröll and others (eds), *International Arbitration and International Commercial Law: Synergy, Convergence, and Evolution: Liber Amicorum Eric Bergsten* (Kluwer Law International 2011).

242 *Rent-A-Ctr, W., Inc. v Jackson*.

243 See Born 2014 (n 95) 1162.

244 *Rent-A-Ctr, W., Inc. v Jackson*.

will be enough.

In a more recent decision, *Henry Schein Inc. v Archer & White Sales Inc*[245] Justice Kavanaugh—in his first judgment at the US Supreme Court—confirmed the *First Options* approach writing on behalf of a unanimous court. The US Supreme Court was presented, among others, with two important questions in relation to the *First Options* and *Rent-a-Center* formulations: (a) whether the approach of several lower courts to adopt the so-called 'wholly groundless' exception to the First Options presumption is valid; and (b) whether the incorporation of institutional rules by reference to an arbitration agreement constituted a 'clear and unmistakable' delegation of the arbitrability question to the tribunal where these rules included a specific reference as to the power of the tribunal.

Justice Kavanaugh took the opportunity and rejected the 'wholly groundless' exception holding that:

> *[this exception] would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is wholly groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow'.*[246]

On the contrary, the US Supreme Court—despite the *per curiam* brief of Professor Bermann on the issue[247]—did not seize the opportunity to address the latter of the two issues and merely repeated the language of *First Options*. The approach consistent with international arbitration principles as well as with the contractual nature of the institutional rules' incorporation seems to be that such a clear and unmistakable language has to appear in the relevant rules. This is to suggest that it is not enough for the rules to simply refer to the competence-competence of the tribunal. A positive delegation of the jurisdictional issues to the exclusive competence of the tribunal should be required. For example, Article 23(1) of the 2014 LCIA Rules provides that: '[t]he Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the

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245 561 U.S. 63.

246 ibid.

247 George Bermann, *Brief Of Amicus Curiae by Professor George A. Bermann In Support Of Respondent* in *Henry Schein Inc. v Archer & White Sales Inc Docket No 17-1272* (October 3, 2018).

Arbitration Agreement'. This reference can be construed as an agreement to arbitrate jurisdictional disputes to the standard of clear and unmistakable language. As the lower US courts have held, the *First Options* analysis does not require a clear and unmistakable language as to the exclusive jurisdiction of the tribunal to rule on arbitrability issues or a waiver of judicial review. It merely requires an agreement in the form of manifestation of consent and to the standard of clear and unmistakable language that the tribunal should resolve questions of arbitrability. In other words, the lack of a default rule of arbitral competence requires a contractual delegation clause on arbitral competence which has a two-fold effect: (a) it transforms the arbitral competence-competence into one of temporal competence-competence with the courts staying their proceedings; and (b) gives finality to the tribunals decision subject only to a deferential standard of review like issues pertaining to the merits of the case. These effects include important conceptions and elements in regard to the autonomy of the parties to allocate jurisdictional determination on arbitral tribunals.

In summary, the US approach: (a) firstly, seems to use in essence the correct delineating mechanism—that is the parties' autonomy, the requirement of a clear and unmistakable language to give the tribunal even the power to decide on their own jurisdiction establishes a high threshold and is arguably not consistent with the presumption of arbitration as an one stop shop as envisioned by Lord Hoffmann in *Fiona Trust*; (b) secondly, it emphasises and focuses on the importance of the rules and model clauses provided by arbitral institutions. This type of soft law harmonisation with standardise bits of 'clear and unmistakable language' shows the importance of clear expression of party autonomy which has to be respected; (c) finally, it correlates the judicial stance adopted at the 'threshold' jurisdictional issues with the standard of review of the award.

4.2.3 Germany—Abandoning a rule of contractual competence-competence

When the US Supreme Court accepted in *First Options* the availability of a delegation clause reversing the presumption that arbitrability questions should be dealt with by the courts, Germany abandoned the court established availability of an agreement on jurisdiction (*Kompetenz-Kompetenz-Klausel*). Being the original source of the competence-competence doctrine,[248] Germany allowed the 'parties to an arbitration

[248] As mentioned above, this thesis uses the English version of the term to propose a universal approach

agreement […] to stipulate that it should be for the arbitrators to make a binding decision on the existence, the validity and scope of an arbitration agreement'.[249] With the adoption of the UNCITRAL Model Law, Germany accepted a version of arbitral competence-competence providing arbitrators with the power to decide on their own jurisdiction, but also introduced some amendments creating a *sui generis* regime. This regime seems to have the effect of no longer allowing *kompetenz-kompetenz* clauses in the form of delegation clauses for final determination of jurisdictional issues by arbitral tribunals.[250]

Under Section 1032 of the German Code of Civil Procedure:

> *(1) Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible provided the defendant has raised the corresponding objection prior to the hearing on the merits of the case commencing, unless the court determines the arbitration agreement to be null and void, invalid, or impossible to implement.*
>
> *(2) Until the arbitral tribunal has been formed, a petition may be filed with*

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not affected by the historical development of the notion in Germany. As explained briefly in this Section, the German version of the doctrine was originally considered as an agreement to arbitrate jurisdictional issues, that is quite similar to the delegation clause envisioned in the USA. See in this regard Julian Lew, Loukas Mistelis, and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 339-9; Gerold Zeiler and Katarina Hruskovicova, 'Principle of kompetenz kompetenz according to the UNCITRAL Model Law on international commercial arbitration' in UNCITRAL and International Association for Arbitration eds), *The UNCITRAL Model Law on International Commercial Arbitration: 25 years* (Maklu 2010) 109; Park 2007 (n 2) 93; Born 2014 (n 95) 1121-1122.

249 Judgment of 26 May 1988, 1988 NJW-RR 1526, 1527 (German Bundesgerichtshof). See also Judgment of 5 May 1977, 1977 NJW 1397, 1400 (German Bundesgerichtshof); Judgment of 3 March 1955, 1955 BB 552 (German Bundesgerichtshof); Peter Schlosser, 'Arbitral Tribunals or state Courts: Who Must Defer to Whom?' in Pierre Karrer, *Arbitral Tribunals or state Courts: Who Must Defer to Whom?* (ASA 2001).

250 Klaus Peter Berger and Catherine Kessedjian, *The new German arbitration law in international* perspective (Kluwer Law International 2000). See, however, to the contrary, Judgment of 24 June 1999, XXIX Y.B. Comm. Arb. 687, 688 (Schleswig-Holsteinisches Oberlandesgericht) (2004) where the first instance court held that there is no reason to doubt the validity of the Kompetenz-Kompetenz clause agreed on by the parties after their dispute arose.

the courts to have it determine the admissibility or inadmissibility of arbitration proceedings.

(3) Where proceedings are pending in the sense as defined by subsection (1) or (2), arbitration proceedings may be initiated or continued notwithstanding that fact, and an arbitration award may be handed down.

The jurisdictionally important element of the timing of the court's involvement—that is, before or after the constitution of the tribunal—present in France is only relevant in Germany as to the declaratory proceedings under Section 1032(2). Until the arbitral tribunal is established, any party may bring an action before the courts on the admissibility (or inadmissibility) of the arbitration procedure. The consequence of accepting such an application is the inadmissibility of the arbitration procedure, which is binding on the arbitral tribunal. Once, however, the arbitral tribunal is established, the parties can no longer apply to the courts for a decision on the admissibility of the arbitration procedure.

Contrary to Section 9 Arbitration Act 1996, the courts in Germany are to mandatorily dismiss—instead of granting a stay of proceedings—the claim as inadmissible on the basis of defendant's timely objection. The exception to this is if the court 'determines the arbitration agreement to be null and void, invalid, or impossible to implement'. The standard here is one of full and binding determination by the State court.

4.3 Theoretical Models of Regulating Arbitral Jurisdiction

Complementing the comparative analysis of the previous section, several scholars have attempted to provide theoretical models and approaches in relation to various aspects of regulating arbitral jurisdiction. Either in the form of figurative constructions or in the form of radical proposals aiming to change the current system of default rules in favour of State litigation in international commercial transactions, these models are helpful in creating the background for, and in being contrasted with, the proposed horizontal model at the end of this Chapter.

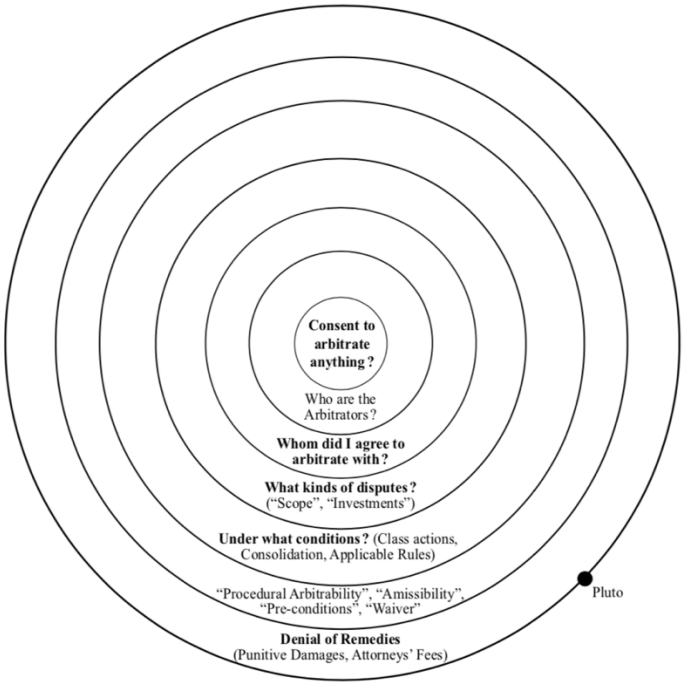
4.3.1 Rau's Solar System

The first of the alternative approaches considered is Alan Scott Rau's proposal to consider the issue of allocation of authority between courts and tribunals as co-centric circles. In

this solar type of conception, expressed in a schematic way in the figure below,[251] judicial determination is the centre and arbitral determination lies at the outer circles. Rau's principal argument is summarised in challenging the US approach of arbitrability and non-arbitrability issues[252] on the basis that this approach is attempting to 'dichotomize a continuum'. Rau argues that:

> *[i]t may instead be preferable to look at the critical notions of "consent" and "jurisdiction"—and thus the extent of judicial control—not at all in a binary fashion* ***but rather as a matter of degree****: if so, then it might be useful to visualize these notions in terms of a series of concentric circles, radiating outward.*[253] (emphasis added)

Rau's Solar System of Consent



In the first circle, the one closer to the centre, one can find the fundamental, core issues

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251 Alan Scott Rau, 'Arbitral jurisdiction and the dimensions of 'consent'' (2008) 24 Arbitration International 199.

252 See George Bermann and Alan Scott Rau, 'Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau' (2015) 43 Pepperdine Law Review 469; Alan Scott Rau, 'Everything you really need to know about "separability" in seventeen simple propositions' (2003) 14 American Review of International Arbitration 121.s

253 Alan Scott Rau, *The Allocation of Power Between Arbitral Tribunals and State Courts* (Brill 2018) 182.

of consent to arbitrate. As Rau puts the question: 'did the parties agree to arbitrate anything at all, at any time?'[254] This, for example, includes questions of the agreement's existence. Rau identifies at least three situations in cases where: (a) there is lack of manifestation of mutual assent; (b) there is a challenge necessarily calling into question the existence of any agreement whatever; and (c) there is a defect limited to the arbitration clause itself. For these issues, Rau is accepting the approach of the US courts that only the courts are able to decide these issues on the basis that it would be circular for a tribunal to be granted this power.[255] This is, in turn, suggesting a higher standard of proof—threshold—for the core fundamental issue of whether an agreement to arbitrate even exists.

In the circles further outside, Rau includes questions of personal subject-matter scope of the agreement, procedural and admissibility requirements, as well as remedial issues. For these issues, the answer on whether the issue is for the courts or for the arbitral tribunal to decide depends on balancing different aspects. These aspects pertain primarily to how strong is the evidence of 'consent' or 'submission' and how closely connected to the question of 'consent' are the ultimate 'merits'.[256] As he further analyses:

> *[a]nd as we move from the core to the periphery, absolutism with respect to 'consent' may well be tempered, and insistence on a strict requirement of 'consent' become progressively less appropriate - or more properly perhaps, deference to arbitral determinations respecting 'consent' become progressively more appropriate. So 'the line', in any particular case,* ***is but a function of where on the continuum we are; and then, as the presumption in favour of a judicial determination becomes weaker****.*[257] (emphasis added)

Rau's construction is based on the same premise as the US model of 'two equally good claims'; hence, he agrees that questions of arbitrability 'should be for the courts to decide'. While the need to establish that the parties indeed opted to resort to arbitration is of paramount importance, there is no reason to argue that the tribunal cannot even decide the issue of whether and if an agreement ever existed. In addition, although Rau is

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254 ibid.

255 ibid 206.

256 Alan Scott Rau, 'Arbitral jurisdiction and the dimensions of 'consent'' (2008) 24 Arbitration International 199, 203

257 ibid.

opposed to approaches that dichotomise a continuum, his analysis is itself fallible towards the same direction it purports to criticise. This is not only through the existence of a dichotomy—indeed, one of a different kind—in his analysis, but also through the erroneous basis that it would be circular for a tribunal to decide issues of core consent. The response is multi-fold. Firstly, the same happens with courts at least in the context of exclusive jurisdiction agreements or the existence of a jurisdictional link that establishes exclusive jurisdiction—e.g. the existence of a right *in rem*. A court which is seized on the basis of an exclusive jurisdiction agreement is not preforming a strange or alien exercise ruling on that agreement's non-existence. Secondly, the allocation depends on the weight that one attributes to the consent of the parties. Thirdly, and in relation to the notion of consent, a challenge to the agreement's existence cannot be safely and squarely be distinguished from the challenge to the underlying contract. Finally, this approach denies from the tribunal any form of arbitral competence to decide on its own jurisdiction, both positive and negative in the traditional meaning of competence-competence. As analysed below, the competence-competence principle is one which is necessarily not based entirely upon the parties' consent and indeed must precede and exist independently of such consent.[258]

Rau's figurative solar system approach is informative, however, for two aspects which are also utilised in the proposed analysis: (a) that the various questions we ask must be distinguished; and (b) that the focus on issues of consent.

Firstly, virtually any challenge can be framed as an 'arbitrability' question. There are, however, differences between a challenge alleging that the arbitration agreement is non-existent, a claim that there is a factor affecting its validity, and a claim that the scope of the existent and valid arbitration agreement does not cover the dispute or the remedy requested. While there is no dichotomy between issues going to the existence of the agreement and other, peripheral issues, the idea that one should distinguish the challenges on a practical level in addressing whether courts or tribunals should be there to decide on them is a useful one. This is partly reflected currently in English courts approach when considering whether a Section 9 Arbitration Act 1996 stay should be granted where the issues raised as a jurisdictional challenge are inexorably connected with issues on the merits.[259]

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258 See below in Chapter 6.

259 See below in p. 141.

Secondly, equally useful is the focus on consent as delineator for the inquiry at hand. As Rau puts forward: 'to require—and then to privilege—the presence of "consent" and exercises of "agreement", is to treat contractual autonomy as "the factual, legal, and ideological core of international arbitration" […]'.[260] The basis of the regulation of arbitral jurisdiction lies in the existence, value, and manifestation of the parties' autonomy to use the primary choice allowed by States to choose arbitration as a dispute resolution method and as a legal system.

The proposal advocated in this thesis utilises Rau's figurative conception of the jurisdictional intersections and Paulsson's pragmatic approach, analysed in the following Section, without however considering the issue as a presumption. It is a proposal for revisiting the English approach on jurisdictional issues on the basis of a horizontal delineation of competences as intersections resembling a spider web rather than co-centric circles.

4.3.2 Paulsson's Presumptive Allocation of Authority

Jan Paulsson, analysing the concept of separability as a basis for the judicial deference to arbitration, considering the issue of allocation of authority, and has proposed the adoption of 'an overarching presumption intended to solve most problems associated with the who and when issues'.[261] Before reaching this presumption, Paulsson is considering the various types of private challenges launched against arbitration in general and an arbitration agreement specifically. The most familiar scenarios for Paulsson are that a party resisting arbitration can argue that:

> *(i) it never consented to give the supposed arbitrator any authority whatsoever;*
>
> *or that although it did agree to arbitration:*
>
> *(ii) the law forbids arbitration of the particular claim raised;*
>
> *(iii) the claim falls outside the scope of agreement to arbitrate; or*
>
> *(iv) the claim should be dismissed without substantive examination because liability is in any event barred by some legal or contractual impediment.*[262]

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260 Rau 2008 (n 254) 257.

261 Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 52.

262 ibid 51.

Immediately, it is evident, as Paulsson himself agrees, that the last one is not a jurisdictional objection, but, rather, one pertaining to the merits of the case. Out of the remaining ones, the first is identical to the issues of core consent identified by Rau, the third is one of the peripheral issues pertaining to the subject matter scope of the agreement, and the second one pertains to the subjective arbitrability of the case. Although this last issue of subjective arbitrability is a distinct one, it plays a significant role in considering the State interests involved and the rationale behind the approach adopted in regulating arbitral jurisdiction. As analysed elsewhere in this thesis,[263] under the traditional approaches, when States allow for resolution of disputes through arbitration, they are expressing their interests and sovereignty in two directions: (a) they are providing interested parties with a choice to select a legal system different than State litigation for the resolution of their disputes. This availability can be characterised as primary because it allows the parties to enter in a different system of resolution; and (b) they are limiting this primary availability as to the subject matters that they consider in abstract as non-arbitrable. To the extent that States have made such limitation, they have expressed their sovereignty to allow this system of dispute resolution to operate without undue interference for issues considered arbitrable.

Turning now to Paulsson's presumption, its succinct formulation and detailed content merits quotation in full:

> *[p]rovided that the proponent of arbitration makes* ***a prima facie case*** *(with the evidence being construed in its favour) to the effect that the objecting or defaulting party is bound to arbitration with respect to the subject matter at issue, courts* ***shall presume that the agreement to arbitrate intends that an arbitral tribunal*** *constituted in accordance therewith* ***should be first to decide*** *any controversy as to what parties are bound by the agreement, and as to its validity, as well as what claims and defences are covered by it.* ***This presumption is reinforced in the context of international transactions or relationships.*** *Although judicial review may be plenary with respect to the validity of the arbitration agreement, arbitrators' determinations as to the scope and timeliness of arbitrable claims should be presumed to be final (subject as always to judicial authority to determine whether the effect of*

[263] Both above in p. 28 and below in p. 118.

enforcing an award would be contrary to public policy).[264] (emphasis added)

A presumption is, by definition, 'a conclusion made as to the existence or nonexistence of a fact that must be drawn from other evidence that is admitted and proven to be true'.[265] Explaining this presumption, Paulsson argues that:

> *[i]t seeks to achieve aims that are similar to those of the French concept of 'negative effective' […], except with greater nuance: (i) it is a rebuttable presumption, notably subject to contrary stipulations, and (ii) courts would presumptively be barred from holding that matters of scope and timeliness make the arbitration agreement "manifestly inapplicable".*

Breaking down this presumption to consider its advantages and drawbacks in the context of the proposed argument, it entails three distinct, but interrelated, aspects, which as Sir Bernard Rix observes,[266] illuminate both principle and policy considerations: (a) courts should presume that the parties to an arbitration agreement indeed want the tribunal to decide jurisdictional issues; (b) the arbitral decisions as to the scope and timeliness of arbitration claims should be considered as final; and (c) the degree of judicial review as to the validity of the agreement should be plenary—that is, full and independent from any arbitral decision. In addition to these aspects, the language used in the presumption makes clear that '[it] is reinforced in the context of international transactions or relationships'. It is, in this vein, aligned with the contextual analysis which this thesis advocates.[267] The need for pragmatic, yet principled, solutions on the allocation of authority might indeed be served by the existence of a presumption. This allows both the parties and the tribunal or court to overcome the presumption on the basis of all the facts involved. It is, thus, encapsulating an element of pragmatism and flexibility in its application.

Paulsson's conception is different from Rau's solar system in addressing the validity of the agreement rather than core consent to arbitrate anything at all. As the writer himself states: 'once it is established that the objecting party signed the arbitration agreement, issues as to whether that party is bound to arbitrate the claims raised should presumptively

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264 Paulsson 2013 (n 262) 81.

265 Jeffrey Lehman and Shirelle Phelps, *West's Encyclopedia of American law* (Thomson/Gale 2004).

266 Bernard Rix, 'Jurisdictional contests: Who decides them? When? And with what degree of finality?' LSE Debating Jan Paulsson's Idea of Arbitration (2014) <https://www.youtube.com/watch?v=VZor_mYt1v4> accessed 18 October 2019.

267 See above in Chapter 2.

be subject to conclusive determination by the arbitral tribunal'.[268] He goes, however, even further and, following the US approach, links this presumption for the allocation of authority at the jurisdictional stage with the judicial review. His approach of distinguishing between the plenary review—arguably a *de novo* full review—on issues of validity and the limited review only on grounds of public policy for the 'arbitrators' determinations as to the scope and timeliness of arbitrable claims' is based according to his analysis on 'what issues are encompassed by a sensible interpretation of the parties' intention'. This is to suggest that the parties would favour one-stop-shop adjudication and would not want the horizontal fragmentation of their disputes.

Paulsson's first presumption is, indeed, the correct point of departure in creating a rule of temporal priority in favour of arbitral tribunals. The approach advocated in this thesis expands on this rule on the basis of the parties—presumptive as Paulsson puts it—will to arbitrate their disputes. This is not to suggest an across the board, horizontal, and absolute claim for all types of disputes. On the contrary, it is confined to international commercial disputes where party autonomy has an enhanced role and it provides for a pragmatic jurisdictional link corresponding to the parties' needs and choices. Furthermore, Paulsson's position does not go further than to examine the factual contours and legal pathways available to effectively turn this presumption into a pragmatic principle to regulate parallel proceedings.

4.3.3 Reversing the Default Position

4.3.3.1 Born's Bilateral Arbitration Treaties (BATs)

Gary Born has proposed, both as a theoretical framework and a legal text proposal, that arbitration can be established as the default mechanism to resolve commercial disputes between two States. The basis, background and gist of Born's argument is that '[…] international commercial arbitration can, in appropriate circumstances, utilize the concept of constructive consent, or arbitration without privity, developed in [Bilateral Investment Treaties,] BITs, in the context of a bilateral arbitration treaty, a BAT'.[269]

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[268] Paulsson 2013 (n 262) 81-82.

[269] Gary Born, "BITs, BATs and Buts: Reflections on International Dispute Resolution" in Young Arbitration Review (2011), 6-14. See also Petra Butler and Campbell Herbert, 'Access to justice for small and medium sized enterprises: The case for a bilateral arbitration treaty' (2014) 26 New Zealand Universities Law Review 186.

The rationale of reversing the current approach that litigation is the default mechanism for resolving disputes arising out of cross-border transactions is that arbitration is the primary method for resolving commercial disputes. While this is empirically proven, Born suggests that it can also provide the stepping stone for the adoption of bilateral—and even multilateral—arbitration treaties between States, thus reversing the default position in relation to the resolution of commercial disputes between these two—or more—States. Of a highly pragmatic nature, this approach is based on the following propositions:

First, it is a transplant from the concept of constructive consent—otherwise known as standing offer to arbitrate—from the investor-State arbitration and bilateral investment treaties. As such it requires the conclusion at an intra-State level of a bilateral or multilateral treaty.

Second, and as a result of the nature of its basis, Born's proposal for the adoption of a BAT will operate on a reciprocal basis for the States involved. This will, according to Born, result in enhanced commercial cooperation and transactions between nationals of the two or more contracting States. According to Born '[a]commitment to international arbitration to resolve commercial disputes would provide assurances to foreign traders considering entering into business with local merchants that future disputes would be fairly and efficiently resolved, and then enforced'.

Third, the subject matter scope of a BAT is confined to commercial transactions between nationals of the contracting States and the latter are free to decide on how wide this scope will be.[270]

Finally, gaps created from the lack of specific rules can be filled, according to Born with the adoption of the UNCITRAL Arbitration Rules. As he specifies:

> *[i]nternational arbitrations can be conducted perfectly well – and frequently are – based on nothing more than an agreement to arbitrate under the UNCITRAL Rules. No arbitral seat, no appointing authority, no additional procedural rules and no choice of substantive law is required for the validity,*

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[270] Gary Born, "BITs, BATs and Buts: Reflections on International Dispute Resolution" in Young Arbitration Review (2011), 6-14 '[t]his definition would ordinarily exclude consumer disputes, employment disputes and similar categories of non-commercial disputes, and be focused entirely on commercial, business disputes'.

and the practical efficacy, of such provisions.

Indeed, this approach has three significant advantages. First, it is doctrinally and structurally clear and simple without the need of resorting to intricate theories regarding the content of an arbitration agreement. Second, since it is based on a bilateral or multilateral treaty, it is based on reciprocity between sovereign States. Thus, the recognition and enforcement of both arbitration agreements and awards would be safeguarded within the scope of the BAT, i.e. within the territory of the two States. Finally, and partly contrary to the approach put forward by Cuniberti, Born does not argue for the abolition of the notion of consent as a basis for arbitration.[271] He is advocating, however, for a two-fold amendment to the current approach: (a) that the proposed solution is still a default position, that is the regulation of the matter of dispute resolution in case the parties have not opted for an agreement.[272] In other words, 'parties to commercial agreements would be entirely free to opt out of this default mechanism'; and (b) that consent is conceived in a similar manner as constructive consent in BITs. As Born explains, consent is 'dependent on a prescribed treaty framework, rather than on a negotiated arbitration agreement in a commercial contract'. A BAT would not create a standing offer of consent from the one side that the other side would be able to accept by the mere filing of a request to arbitrate a commercial dispute. It is, therefore, essentially adopting a rule that provides for different default provisions than the current ones.[273]

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271 Alan Scott Rau, despite disagreeing with the merits of such proposal, accepts that Born's approach is not arguing for disappearance of the contractual foundation of arbitration; Rau 2008 (n 254) 51 '[d]espite its rather heavy-handed reversal of our normal default rules, nothing in the conceptual underpinning of this proposal is necessarily incongruent with our foundational insistence on consent'.

272 In that sense, Born's proposal—similarly to Cuniberti's—goes beyond the scope of this thesis. The latter is only dealing with issues of contested arbitral jurisdiction, i.e. cases where the parties involved take different positions as to various jurisdictional issues on the basis of the arbitration agreement. Born's proposal is useful, however, in the present analysis as it considers that the position in case of a complete lack of an agreement should be for arbitration due to the existence of a BAT and on the basis of the presumed choice of commercial parties to adjudicate their disputes in arbitration. This is to suggest that a BAT or a unilaterally default approach would not contradict the approach advocated in here as they are based on the same premise.

273 See also Duarte Henriques, 'Bilateral Arbitration Treaties: A Few "Bits" More and No "Buts" Within the Portuguese Jurisdiction', Kluwer Arbitration Blog (14/04/2014)

This approach, however, is not lacking disadvantages. Firstly, and despite what Born argues in saying that '[…]problems of conflicts of positive and negative jurisdiction of the arbitral tribunal will also be reduced, if not eliminated', the proposed BAT approach, moves the issue of regulation of arbitral jurisdiction to a different place; instead of focusing on whether the parties consented to take their dispute to arbitration, the focus would now be whether the parties' dispute is one that falls within the scope of the BAT. While that seems a lesser problem than the jurisdictional issues that comprise the core of the analysis in the present thesis, the practice of investor-State arbitration has shown that the jurisdictional issues arising out of the BITs are no less troublesome and convoluted. Secondly, it necessarily involves wholly or partially the displacement of the New York Convention and the negotiation of independent bilateral treaties. While the New York Convention would not be required to be revoked from States that conclude such BATs due to the more favourable right provision in Article VII, the practical effect would be that, once two or more contracting States conclude a BAT, the New York Convention would no longer govern the enforcement of this award. Finally, as Rau points out, this reversal of the default position might turn to the disadvantage of less sophisticated players and small and medium enterprises that could find themselves in a situation where their options have been curtailed.[274] The same argument, however, can be advanced under the current approach with State litigation being the default mode. This is, indeed, all the more so taking into account the inherent unpredictability of cross-border litigation and the lack of a universal regime on rules of jurisdiction.

Born's proposal '[…] has to be grounded in a bias in favo[u]r of arbitration as a means to resolve disputes by contrast to recourse to national courts'.[275] While this thesis is based on the premise that international commercial disputes involving high stakes transactions and disputes are, indeed, more appositely adjudicated by arbitration, it is not advocating the adoption of a reversed default rule. The issues arising in the present thesis would also be present in their reversed form under a reversal of the default rule on a unilateral basis—

<http://arbitrationblog.kluwerarbitration.com/2014/04/14/bilateral-arbitration-treaties-a-few-bits-more-and-no-buts-within-the-portuguese-jurisdiction/> accessed 19 October 2019.

274 Rau 2008 (n 254) 51, fn 91.

275 Duarte Henriques, 'Bilateral Arbitration Treaties: A Few "Bits" More and No "Buts" Within the Portuguese Jurisdiction', Kluwer Arbitration Blog (14/04/2014) <http://arbitrationblog.kluwerarbitration.com/2014/04/14/bilateral-arbitration-treaties-a-few-bits-more-and-no-buts-within-the-portuguese-jurisdiction/> accessed 19 October 2019.

following Cuniberti's approach—or a bilateral basis—following Born's approach; rather, the argument of this thesis is that parties are given a primary choice between different dispute resolution streams, including arbitration and State litigation. As explained elsewhere in this thesis, and as established in the following section, the reality of parties opting for arbitration should at least be reflected in affording the two methods of dispute resolution a seat at the same table. This parallel primary availability of arbitration and litigation has consequences not only for the treatment of arbitral decisions, but also for the regulation of arbitral disputes.

4.3.3.2 Cuniberti: Arbitration without consent

Gilles Cuniberti, contrary to Born, does not utilise the concept of constructive consent at the core of his proposal. He, rather, introduces a theoretical model of default arbitration in absence of any arbitration agreement 'aiming at improving the resolution of international commercial disputes'.[276]

The distinguishing feature of this proposal is that it proposes the reversal of the current default position in favour of arbitration on the basis of principle and pragmatism. Then, only as a second stage, he considers the application through a bilateral/multilateral model or a unilateral one.[277] It is, therefore, based on the following propositions:

First, similarly to Born's proposal it is based on the premise that 'arbitration is a better mode of dispute resolution in an international setting because it is more neutral, and thus fairer' and, therefore, 'should become the default mode of resolution in international commercial disputes'.[278] This preference towards arbitration is not only based on its neutrality—indeed the primary factor for which the parties elect to go to arbitration—but also its procedural flexibility.

Second, regarding the scope of his model, it is described as involving only international commercial cases allowing States to decide issues of subject matter arbitrability in a similar manner as they able to do now. Cuniberti argues that an exception 'ought to be made on the ground of denial of justice'. More specifically, this could happen in cases

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276 Gilles Cuniberti, *Rethinking International Commercial Arbitration Towards Default Arbitration* (Edward Elgar 2017) 141; see also Gilles Cuniberti, 'Beyond contract - the case for default arbitration in international commercial disputes' (2009) 32 Fordham International Law Journal 417.

277 ibid 162.

278 ibid 165.

that, either the tribunal would be unable to grant the relief sought, or the parties cannot meet the costs of an arbitration.[279] This raises questions as to the inclusivity of such proposal in a similar manner that Born's approach was criticised by Rau as not safeguarding the interests of small and medium enterprises.

Third, it is based on the principle and policy consideration that the legitimacy of arbitral tribunals in achieving fairness of the arbitral process and ensuring that the tribunal would apply the law properly. As Cuniberti himself argues, there is no reason to expand the review of arbitral awards in order to enhance the fairness and legitimacy of the arbitral process. More specifically, he argues—although acknowledging that this would only solve half of the problem—that:

> *[t]he main rationale behind the proposed model is to enhance procedural fairness by allowing the parties to avoid courts and litigate before a more neutral forum. At the heart of the model, there would thus be the recognition that parties can legitimately fear local bias. There is no reason to believe, however, that judges could show bias in proceedings on the merits only. They could also show bias in review proceedings. They could systematically set aside awards finding against local parties. The concern of bias in review proceedings could be addressed by giving jurisdiction to a court perceived as neutral to entertain challenge proceedings. This would be done by setting the seat of the arbitration in a jurisdiction unrelated to the parties and, arguably, the dispute.*

Finally, considering the method of implementing this theoretical model of non-consensual arbitration, Cuniberti argues that this can be achieved in two ways: (a) unilaterally through national legislation; and (b) as Born proposes on the basis of international treaties, either bilateral or multilateral. In the former case, he argues that, since the process would not be based on the parties' consent but rather on a national statute, creating a model of commercial dispute resolution akin to traditionally conceived arbitral proceedings, this process would be characterized as judicial in the same manner that arbitral tribunals established by law to adjudicate in a compulsory manner have been

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[279] Cuniberti uses the example of contempt of court powers in this instance; ibid 144. While it is correct that tribunals do not have contempt of court powers, an alternative proposal as to the availability of inducing enforcement of orders or awards rendered by tribunals is considered below in p. 228 *et seq*.

considered as part of the judicial system.[280] As a result, the decisions rendered would be considered judicial decisions, thus falling out of the scope of the New York Convention and available for enforcement only via the regime in place for recognition and enforcement of foreign judicial decisions. In the latter case, Cuniberti argues that the foundation of the model would lie in international law and any awards rendered under this bilateral or multilateral agreement would be enforceable in the same manner that Iran-US Claims Tribunal's decision have been recognised in England on the ground of comity.[281]

In addition to these points, Cuniberti considers that this non-contractual approach will allow courts which utilise the concept of *forum non conveniens* to consider arbitration as well. In his opinion this is a result of the exclusive nature of an arbitration agreement which then bars any other option of a more appropriate court. The operation, however, and function of *forum non conveniens* can be utilised not in a direct transposition, but rather in assisting the court to determine whether to decide issues of arbitral jurisdiction itself or whether these are more appropriately addressed by the tribunal. In other words, the proposal in this thesis operates in the grey zone where there are two claims, one in favour and one against arbitration, the court can use the underlying principles of *forum non conveniens* to decide whether, the context of this case the probabilities should side with the pro arbitration claim or not. In the alternative, it is not denied that both the court

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280 See in particular addressing the issue of whether such 'arbitral tribunals' are considered part of the judicial system of a member state the case law from the European Court of Justice: *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss Case 109/88* [1989] ECR 03199; *Order of the Court in Merck Canada, Case C-555/13* [2014] EU:C:2014:92 where the Court distinguished such an arbitral tribunal from an arbitral tribunal which has been established by law and whose decisions are binding on the parties and where its competence is compulsory. See also Paschalis Paschalidis, 'Arbitral tribunals and preliminary references to the EU Court of Justice' (2016) 33 Arbitration International 663; Rafał Mańko, 'Briefing: Preliminary reference procedure' (2017) European Parliamentary Research Service 3 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf> accessed 23 October 2019.

281 Cuniberti 2017 (n 277) 163; *Mark Dallal v Bank Mellat* [1986] 1 QB 441 where the court held that:

> *[w]here two sovereign states have chosen to set up a tribunal to determine disputes between the nationals of their respective states in respect of choses in action for which the situs lies within the jurisdiction of those two states, there can be no warrant for the courts of this country to fail to recognize and treat as fully competent the decisions of that tribunal.*

and the tribunal have concurrent jurisdiction to decide the issue of the tribunal's jurisdiction. In this sense, the proceedings are truly parallel ones and the analysis can proceed. The court retains its discretion in these cases. The fact that the Arbitration Act 1996 uses mandatory language should not be construed as requiring a higher standard. If the court, when it has discretion can be satisfied with the good arguable case standard, then when it does not have discretion the standard should be the same, not higher. The legislative choice of the Arbitration Act 1996 and the New York Convention in favour of arbitration is clear and the courts should not place undue burden on the party wanting to arbitrate but rather on the other side.

In a similar manner to Born's proposal, this approach is putting forward an argument reversing the default position completely in favour of arbitration and, as such, it suffers largely from the same disadvantages. In particular, firstly it does require legislative amendment or conclusion of bilateral agreements and secondly does move the issues currently faced at the interlocutory stage of regulating arbitral jurisdiction to the inquiry on whether the parties agreed or not to derogate from these default provisions. As explained above, the gist of the proposal included in this thesis is to consider the regulation of arbitral jurisdiction in the grey area of disputed arbitration agreements and on the basis of the value that the manifestation of the parties' autonomy has in the context of international commercial disputes.

4.4 A Contemporary Private International Law Proposal on Arbitral Jurisdiction: from Subordination to Synergy

4.4.1 Arbitral jurisdiction in a Shifting Paradigm of Dispute Resolution

As analysed above, arbitration as a dispute resolution mechanism is premised on the same cornerstone principle of party autonomy that exclusive jurisdiction agreements are premised. This is not merely contractual autonomy but, rather, private international law or transnational party autonomy. The analysis in the previous Chapter focused on the historical and normative origins and justifications of transnational party autonomy considering the shift from either a purely substantive, individual, basis or an international State sovereigntist one to a transnational conception of State and non-State actors as equals in the context of private international law. This shifting has ramifications for the emerging paradigm of jurisdiction. As States and private actors are engaged in a relationship of equality in relation to their importance as sources of jurisdiction, the exercise of party autonomy becomes not only the connecting link, but also the normative

basis for the jurisdiction of the adjudicative body in question. This normative basis is the same both for jurisdiction and for arbitration agreements.

As seen above, this shifting paradigm also has ramifications for considering the position of arbitration as a dispute resolution mechanism and of arbitration agreements as the foundational element of this mechanism. The widespread acceptance and enforcement of arbitration agreements is not only reflective of the pro-arbitration stance of States and the benefits arising out of such recognition for the State themselves, but it is also evidence of this shifting paradigm of private international law.

Linking this analysis with the question of this thesis, the shifting paradigm and the relationship of equality between States and individuals in establishing jurisdiction affects the positioning of arbitration in comparison to litigation. If individuals and States are both considered as equally important sources in creating jurisdictional links and foundations, then arbitration should no longer be considered as subordinate and an exception of the natural course of things, which is litigation before State courts. The recognition of arbitration as a dispute resolution mechanism equal to State court litigation affects the current understanding and regulation of arbitral jurisdiction as seen in the previous Chapters. This is all the more so in the context of (a) international commercial disputes, and (b) the globalised arbitration and commercial community with the emergence of non-State actors that create their own resolution systems and institutions which are called to operate, provide services, and facilitate the resolution of cross-border disputes throughout the globe.

In this context, the approach proposed in this thesis utilises the analysis for the value, origins, and effects of private international law party autonomy. While it addresses the same fundamental questions posed by the concepts of competence-competence and separability, it focuses on developments and theories of private international law, transposing the analysis on the transnational paradigm of jurisdiction to arbitration and arbitral jurisdiction. It is seeking to provide an answer to the questions of who, when, and to what effect can determine the jurisdiction of an arbitral tribunal. The proposed approach is, thus, different from the theoretical approaches analysed in the previous Section.

First, it not based on the reversal of the default mode either on the basis of Born's BAT proposal or on the basis of Cuniberti's proposal of establishing a non-consensual model. Even in the context of such BATs or MATs, the relationship of courts and tribunals does

not truly become horizontal; rather the relationship remains a vertical one. It is the order that is reversed; arbitration takes the position of litigation as a default mode of dispute resolution between States ratifying such treaties. This is also the same under Cuniberti's argument for unilateral methods of non-consensual arbitration. Either of these approaches provides an argument for a complete reversal of the current structure, whereas the proposed solution does not pose the question as one of hierarchy and reversal of positions; rather, the question is formulated as one of complementarity and synergy in the area of arbitral jurisdiction based on an—at least disputed—choice of the parties to arbitrate.

As such, the analysis in the context of the proposed approach is limited to cases where there is an argument—at least from the one side—that a choice of arbitration has been made. This is especially considering the contextual considerations of international commercial disputes where jurisdiction is primarily established on the basis of exercising party autonomy and by choice of *forum* or arbitration. As a result, this thesis does not overlap with the proposals of Born and Cuniberti to establish a default rule of arbitration. Rather it poses the questions of who, how, and why should decide whether there is a proper exercise of party autonomy in the field of arbitral jurisdiction.

Second, it is not a presumptive allocation of authority between courts and tribunals. Although Paulsson's presumption is a pragmatic and flexible solution which is based on the widespread empirical acceptance of arbitration as a dispute resolution method, it is confined within the vertical, hierarchical relationship of State courts and arbitral tribunals.[282]

Finally, while it is based on the notion of party autonomy and does not abolish the consensual foundation of arbitration it is not a theory representing a dynamic relationship between courts and tribunals on the basis of an alleged core right of the court system to decide issues of arbitrability, or core consent as Rau has positioned. It is, however, similar to Rau's analysis as it considers the distinguishable questions of existence, validity, and scope issues differently. In a similar manner to Rau's proposal what is important to identify is the parties' choice to arbitrate at its core form. This is the expression and exercise of the parties' autonomy at the higher regulatory level of private international law, a choice which is not merely afforded the status of a jurisdictional link granted by one or more given States; it is rather an equally available pathway for individuals, all the

[282] See above in p. 94.

more so for parties engaging in cross-border trade. In the context of the proposed approach, and as analysed below, questions pertaining to the subject matter or personal scope of the agreement are appropriately dealt with in the context of the pathway chosen by the parties and of the definition of the subjective scope of the dispute in question. It is the same definition that allows States to provide limitations to the private international law autonomy of the parties in the form of regulating the right to arbitrate certain types of disputes.

As analysed elsewhere in this thesis,[283] States' interests in the context of arbitration are expressed in the context of regulating issues of substantive arbitrability. Traditionally, this expression is used as evidence for the State sovereignistic origins of arbitration and the fact that it is a right bestowed by sovereign States to individuals only to the extent that a given State is willing to grant it. In the context of the shifting paradigm of transnational jurisdiction and the relationship of co-equality, questions of substantive arbitrability—as well as public policy—are considered to express the sovereign rights of States in a similar manner States are in a position to limit or not—depending on bilateral or multilateral agreements they might have—the recognition and enforcement of foreign judgments. This is to suggest that limits to the right of the parties' powers exist under the shifting paradigm. These limits, however, are not expressive of a relationship of subordination of arbitration to State litigation.

The proposed approach is an argument positioned within the transnational paradigm of jurisdiction and within the contextual framework of international commercial disputes. It aims to provide for a delineation of arbitral jurisdiction in a manner that promotes synergy between courts and tribunals. To achieve that, it is informed by the literature on both the concept of party autonomy in private international law and the emerging third paradigm of private international law. As a result, it is targeted at bringing arbitration and litigation in convergence as to the standards and methods of regulating jurisdictional issues.

4.4.2 Horizontal Model of Arbitral Jurisdiction

4.4.2.1 Theoretical Foundation and Horizontal Choice

As Chapter 3 has established, transnational party autonomy has emerged as the central pillar of the shifting paradigm of jurisdiction in private international law and in the global

[283] See above in Chapter 3.

arena.[284] As analysed above, this is not only to suggest a synthesis of the internationalist and the individualistic approaches for the nature and obligations of arbitration and jurisdiction agreements, but it also provides the basis for a horizontal rather than a vertical relationship of courts and tribunals in the context of deciding on their own jurisdiction.

Such a horizontal relationship is not envisioned under internationalist approaches unless the relevant States enter into a bilateral or a multilateral treaty. Under these approaches, the freedom to choose a State or arbitral *forum* for the resolution of disputes is considered granted by sovereign States because it corresponds to a benefit for them. As such, any attempt to adopt a horizontal relationship between courts and tribunals can only be based on an agreement of two or more States to reciprocally acknowledge arbitration as a default mechanism of resolving certain types of disputes. This is, indeed, the basis of Born's suggestion with the establishment of BATs or MATs as well as Cuniberti's analysis for the principles behind such reversal.

Positioning the question of arbitral jurisdiction on the basis of the shifting nature of the transnational jurisdiction paradigm, the proposed model is based—as analysed above—on the equality of arbitration and State litigation as dispute resolution methods. This equality stems from the equality of State and non-State actors as sources of jurisdiction and gives parties a choice between arbitration and State litigation. This is a choice between two equal methods of dispute resolution of international commercial disputes. This is to suggest that the relationship between these two methods, as well as between the adjudicative bodies they encompass—State courts and arbitral tribunals—is a horizontal one. This relationship is akin to the one existing under both a substantive and an internationalist approach between courts of different States. As such the methodologically correct comparison is with exclusive jurisdiction agreements rather than any other contractual term.

Even in the context of a substantive individual paradigm of jurisdiction like the one of the common law, where jurisdiction and arbitration agreements are primarily viewed as creating enforceable rights and obligations for the parties,[285] arbitration and litigation remain at a hierarchical relationship with respect to the determination of arbitral

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284 See above in p. 53 *et seq*.

285 Although this is not entirely consistent with the effects that such agreements have in various aspects of the law on jurisprudence. It is more appropriate to consider both the procedural and substantive aspects of such agreements as parts of a single but multifaced entity.

jurisdiction. Courts are allowed to decide on issues of arbitral jurisdiction in the context of interlocutory, declaratory, and challenge proceedings. Although this availability in itself is not supporting necessarily a vertical relationship, the element of finality in such decisions as well as the standard applicable, is indicative of such a relationship. Under the traditional approach, the ability of State courts to intervene and decide finally questions of jurisdiction at the outset of any arbitral proceedings, is a result of the vertical conception of arbitration as a bestowal of State sovereignty and always subordinate to institutions of State sovereignty, such as State courts. The proposed approach does not seek to pull the rug below State courts' feet to decide such issues. It is rather seeking to establish a horizontal relationship transposing the existing analysis of courts in relation to the jurisdiction of other State courts in the context of the shifting paradigm of jurisdiction in private international law.

At the core of the proposed solution is the conception of arbitration and litigation as resting on equally strong normative grounds. This does not mean that arbitration and State litigation are of the same origin. It is suggesting, however, that where party autonomy is involved—primarily in the contextual framework of international commercial disputes—the normative foundations are the same and are related to the value and effects of party autonomy. This is the basis for a comparison between the approach followed by State courts when faced with an exclusive jurisdiction agreement for their own legal system or for the courts of a foreign legal system and the approach to be followed in relation to an arbitration agreement. As such the question is posed as one of delineation of jurisdiction among equal choices. As seen in the next Chapters this is in practice represented by a model of jurisdictional intersections where courts and tribunals may intersect in determining questions of arbitral jurisdiction but the regulation of the decisional traffic at these intersections is an outcome of the value attributed to the original and presumptive choice of the parties.

As such, the proposed approach can be depicted as establishing a system where State litigation and arbitration are presented to commercial parties as two parallel avenues in a motorway with a direction of resolving their disputes. These are lanes of equal width and require the same 'toll'-type of threshold to gain entry. After crossing this threshold and entering into one of the lanes, the proposed motorway system is not one consisting of tunnels where moving from the one to the other is impossible. To the contrary, such movement is possible. The difference, however, is on the basis of whether such movement is attempted jointly by both parties or unilaterally by one of them, either in favour or—

and most importantly—against the original choice. The original threshold question corresponds to issues usually addressed by negative competence-competence and, to a more limited extent, by separability. In addition, the movement between the two avenues addresses the various jurisdictional intersections between State courts and tribunals, including the possibility of undertaking measures to protect the jurisdiction of each stream against movements which are not allowed.

On this basis, and before analysing the characteristics of the proposed approach and the questions posed in the previous paragraph, the scenario considered in this thesis is summarised as a claim from one of the parties that an arbitration agreement exists and covers the disputes in question and a challenge of this claim by the other side. This scenario is compared with the equivalent scenario involving a claim from one of the parties that an exclusive jurisdiction agreement exists and covers the disputes in question and a challenge of this claim by the other side.

On the contrary, this thesis does not address a scenario where no claim is made on the basis of an arbitration agreement and the issue falls to be determined by the applicable default rules on establishing jurisdiction. This is because confirming the existence of a jurisdiction or arbitration agreement can alter—at least to a degree—the analysis. Using the same parallelism, in addition to the two lanes, there is always the option of a third pathway, which is not subject to a toll threshold, but is made available only if the other two avenues are closed or the parties opt not to choose either them. This latter avenue is addressed as the default choice, which is falls out of the scope of this thesis; it is, rather, the focus of default rules of private international law on jurisdiction, as well as of theories such as the ones by Born and Cuniberti for the reversal of the default position. Under these theories, the third, default, avenue is the arbitral one. This delineation is not to suggest, however, that these rules are completely irrelevant. Especially in the context of the English litigation system, establishing jurisdiction over one of the relevant parties is gateway through which the court is firstly engaged with the question.

4.4.2.2 Horizontal Model: Rules on Arbitral Jurisdiction

Jurisdictional intersections are present in the proposed analysis both at the outset, when considering the tribunal's jurisdiction and during the process of the arbitral proceedings when the adjudicatory body of the parallel lane—that is a State court—is engaging into questions of the existence of factual consent by the parties. Following the description and analysis of the theoretical basis of the proposed model, Chapters 5 and 6 will examine the

precise implications in the context of the current and restated approach in England and Wales. Before delving, however, into the machinery of the rules in the following two Chapters, the theoretical structure of the model can be translated into the first two provisions of the restated approach setting the general and overarching principles of the proposed model of arbitral jurisdiction.[286]

RULE 1—General Principles

> (1) The overriding objective of the following rules on regulation of arbitral jurisdiction is the fair resolution of jurisdictional disputes, the promotion of arbitration as a dispute resolution process in international commercial disputes, and the regulation of arbitral jurisdiction on the basis of the parties' choices;
> (2) Commercial arbitration and commercial litigation exist as two equal and parallel pathways for commercial parties in designing their dispute resolution mechanisms;
> (3) State courts shall engage in arbitral processes only to the extent specified in the following rules and provided that the necessary threshold is met.

The purpose of this rule is to provide the overriding objective for the regulation of arbitral jurisdiction and the effective handling of parallel litigation and arbitration proceedings in a cross-border commercial setting. The formulation of Rule 1 is similar to the one of Section 1 of the Arbitration Act 1996. This is not to suggest a mere reiteration of an existing rule. On the contrary, this rule is focused on the regulation of arbitral jurisdiction, parallel litigation and arbitration proceedings, and allocation of authority between courts and tribunals.

As analysed above, and as a result of the multilateral regime established by the New York Convention, regulation of arbitral jurisdiction creates a fertile ground for parallel proceedings. While there is indeed no superior claim for the courts of the seat of arbitration in relation to the courts of any other jurisdiction seized of the dispute under

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286 As explained in Chapter 1, these provisions, as well as the ones included in the following chapters, are not reform proposals of the Arbitration Act 1996; rather, they are aiming to constitute a restatement of the legal aspects of arbitral jurisdiction in England and Wales in the form of the rules provided by Dicey, Morris, and Collins or the Continental European tradition commentaries, such as the Nils Jansen and Reinhard Zimmermann, *Commentaries on European Contract Laws* (OUP 2018).

Article II(3) of the New York Convention, there is an *a priori* superior claim of the arbitrators.[287] Although not a direct result of the overriding objective of promoting arbitration, the recognition of such a 'superior claim' is a reflection of this objective, as well as of the role of arbitrators in the determination of arbitral jurisdiction.

The general principles included in this Rule refer limitedly to the scope of the present restatement. They are, thus, referring to the triangle of arbitral jurisdiction, parallel jurisdictional issues, and allocation of power between courts and tribunals for the resolution of such disputes. They are, however, reflective of the broader principles included already in Section 1 of the Arbitration Act 1996.

RULE 2—Party Autonomy

> (1) Arbitral jurisdiction is based on the parties' autonomy;
> (2) Party autonomy within the context of these Rules is an expression of the power of individuals to establish regulatory rules in the multifaceted and multifocal system of jurisdiction in cross-border commerce;
> (3) Party autonomy as a delineation mechanism of arbitral jurisdiction is expressed via the parties' adequate manifestation of consent to arbitrate their disputes, usually included in an arbitration agreement.

General—As analysed in the preceding Chapters the theoretical framework of this thesis, of the proposed solution, and of this restatement on the law of arbitral jurisdiction and parallel proceedings, is the proper understanding of party autonomy in private international law and arbitration. Such a proper understanding does not mean complete reconceptualization of party autonomy. It rather means due consideration for the nature, foundations, and operation of party autonomy in the context of private international law and arbitration.

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287 See *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2019] EWHC 3568 (Comm) at [69] per Andrew Baker J:

> *'[t]he a priori superior claim to determine whether the Moscow Claim is brought in breach of clause 50.1 of the Contract in fact would be that of the arbitrators. As an issue within that, or on its own, theirs too the a priori superior claim to determine the governing law of the Contract generally and of clause 50.1 in particular.'*

The Court of Appeal allowed in *Enka v Chubb* [2020] EWCA Civ 574 the appeal on the judgment as analysed below under Rule 3.

RULE 2(1)—As already analysed in Chapter 3, while the aphorism that arbitration is a creature of contract is used worldwide to suggest that there needs to be a contractual foundation to the power of arbitrators to adjudicate a given dispute, and as a distinguishing characteristic of arbitration in relation to State litigation, it is based on a particular conseptualisation of party autonomy. The formulation of the first paragraph in Rule 2 aims at putting the issue on its correct basis as established in Chapter 3. Firstly, it is not arbitration as a whole, as a legal order or dispute resolution mechanism, that is a creature of contract. The issue in focus under these rules is arbitral jurisdiction. Secondly, these rules do not adopt a substantive, purely contractual approach to the issues; rather, the focus is on the notion of party autonomy, which is defined in the following paragraphs.

RULE 2(2)—As analysed above in Chapter 3, party autonomy as a basis of jurisdiction in international commercial disputes represents a paradigm shift from traditional notions, concepts, and paradigms recognising only State sovereignty in international law. In the context of this shifting, instead of looking to justify the global effects of party autonomy in jurisdiction on the basis of individual or State-oriented foundations and justifications, the focus is on the altered and variated concept of sovereignty in a globalised legal system. Global law (re-)positions individuals at the centre of the legal analysis. This, in turn, follows the general trend in the context of modern post-Westphalian analysis in public international law to increasingly conceptualise individual as subjects and not objects of international law. As analysed above, the Westphalian era of exclusively State sovereigns is at a decreasing trajectory and globalisation has led to the rise of individuals both in terms of practical reality and in terms of legal standing. This is not a theoretical and an armchair criticism of the current Westphalian paradigm in international law. The rise of individuals, rather, has led to the need to re-conceptualise the nature and operations of private legal ordering, globalised legal systems, and at the end of the day of sovereignty itself. Individuals are not only subjects of international law but have the ability in a globalised world to shape and structure their relationships in a manner that puts to test traditional notions of Westphalian State sovereignty. Party autonomy in private international law and arbitration is thus playing an important role in this globalised and transnational paradigm. It is itself a connecting factor representing the ability of parties to connect their dispute to a particular legal order without the need for objective connecting factors.

RULE 2(3)—Following the previous paragraphs, Rule 2(3) defines both the content and the standard of expression for party autonomy in the context of establishing the

jurisdiction of an arbitral tribunal.

Instead of focusing on the existence of a contract, of an agreement between two or more parties to arbitrate their disputes, Rule 2(3) focuses on the notions of 'consent' and of its 'adequate manifestation'. This formulation draws on the one hand from the analysis of Rau in his model of allocation of authority on the basis of co-centric circles of different degrees of consent and on the other hand from the analysis of the basis of jurisdiction in multilateral statutes and conventions.

First, while consent in arbitration is, primarily, given and expressed via a—written and signed—arbitration agreement, the focus in examining the contours of the tribunal's jurisdiction is not required to be made in a similar way of assessing parties' consent in substantive contractual terms. Party autonomy at the level of private international law is about the regulation of power and sovereignty both between different States and between States and private legal ordering such as arbitration This difference between contractual and private international party autonomy mandates that the focus be on the role of consent rather than the role of agreement, exchange of promises or detriments between, or mutual accent of the parties. The objective is to establish whether and to what extent there is or has been an expression of consent by the parties, not considered as a group but each separately.

The use of the word 'agreement' in general, as well as in the context of this thesis, does not necessarily—although it will usually—mean a contractual agreement between the parties. There needs to be adequate expression of the autonomy of either of the parties to subject the resolution of a dispute to arbitration of one or the other kind—following Rau's approach the question of the scope of the agreement is dealt with at a later stage. This is a parallel drawn from the area of exclusive jurisdiction agreements both at the level of common law rules[288] and at the level of multilateral set of rules, such as Brussels I Recast

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288 *The Angelic Grace; Bankers Trust Co v PT Jakarta International Hotels & Development* [1999] 1 Lloyd's Rep 910; *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500; *Donohue v Armco Inc* (n 19); *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* [2003] 2 Lloyd's Rep 509; *Mackender v Feldia AG* [1967] 2 QB 590 (the court in England decided the validity of a Belgium jurisdiction clause); *Dubai Electricity v Islamic Republic of Iran Shipping Lines (The Iran Vojdan)* [1984] 2 Lloyd's Rep 380 (deciding whether a German jurisdiction clause is valid under German law); *Trendtex Trading v Credit Suisse* [1980] QB 628 (the court decided whether to stay jurisdiction in favour of an exclusive Geneva jurisdiction clause and whether the clause was valid); Fentiman 2015 (n 18) para. 16.42.

Regulation.[289] As Briggs argues in the context of Article 25 of this:

> *[a]rticle 25, as it now is, does use the language of 'agreement', and can certainly be read as though it were describing a contractual or quasi-contractual relationship. But it may be preferable to interpret 'if the parties... have agreed' as meaning that if one or more parties have agreed on the jurisdiction of a court, that court shall have jurisdiction in accordance with that agreement. In other words, there may be more than one unilateral agreement to accept jurisdiction.*[290]

Although the structure of the regimes is different, the inquiry into the consent of the parties in a power conferring manner can be correlated. This is all the more so in the context of the proposed model where a multifocal approach to the sources of adjudicatory power is adopted.

Second, coming to the notion of adequate manifestation, there is a distinction to be made. As a result of party autonomy being an expression of a higher regulatory level, there are two separate inquiries. The first inquiry can, and should, be undertaken in principle both by the presumably designated *forum* and by any other *forum*. During this stage, and considering both the interlocutory nature of the inquiry and the cross-border international element, the initial threshold required cannot be one of virtual certainty or high

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289 See Articles 25 and 31(2) of the Brussels I Recast Regulation. Under the combination of these two articles, it is only for the designated to decide the validity of the clause, not for the non-designated one. Recital (22) is clear in establishing that 'the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it'. See also Trevor Hartley, *Civil Jurisdiction and Judgments in Europe: the Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention* (OUP 2017) 140-141; Trevor Hartley, *Choice-of-court Agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention* (OUP 2013) 312-313; Andrew Dickinson, Eva Lein and Andrew James, *The Brussels I Regulation Recast* (OUP 2015) 340; Fentiman 2015 (n 18) para. 2.203; Andrew Dickinson, 'Surveying the Proposed Brussels I bis Regulation' (2010) 12 Yrbk Priv Intl L 247, 290; Justin Cook, 'Pragmatism in the European Union: Recasting the Brussels I Regulation to Ensure the Effectiveness of Exclusive Choice-of-Court Agreements (Analysis)' (2013) 4 Aberdeen student law review 76; Alexander Layton, 'Comments by Alexander Layton QC on the proposed recast of the Brussels I Regulation' (European Parliament, Directorate-General for Internal Policies, Legal Affairs, 2011) accessed 25 November 2012.

290 Briggs 2015 (n 25) 169.

probability; rather it can only be one of a good arguable case on the basis of the material available. If such standard is satisfied, as analysed in Chapter 5 below, a State *forum* has to stay its proceedings. In contrast to the first one, the second inquiry can only be undertaken by the presumably designated arbitral *forum*. Such *forum* is able and has the obligation to examine and determine fully the existence of adequate manifestation of consent on the basis of the parties' submissions and the examination of all the available evidence at the jurisdictional stage rendering a jurisdictional award.[291]

4.5 Adopting the Proposed Model

4.5.1 Arbitral Jurisdiction and State Regulatory Competition

The point of departure in considering the implementation of the proposed model for regulating arbitral jurisdiction at a State level is that it is based on a conceptualisation of arbitration as part of a global system of justice. As such, the basis of the proposal and the theoretical model is not contingent upon actual implementation by State legislators. The regulatory fragmentation, however, and the pragmatic need for a coherent and structured system delineating the role of State courts and arbitral tribunals at the jurisdictional stage leads to the creation of pragmatic rules within or in restatement of the current system. The adoption and implementation of such rules would allow the—direct or indirect—harmonisation of the fragmented approach observed at a global level.

Direct harmonisation could be achieved by means of internationally binding instruments. The obvious starting point would be the provisions of the New York Convention, which allows for an extensive degree of regulatory fragmentation between the member States. This is suggested by Article II(3) and the ability of a given Member State to adopt varying standards as to the degree of court involvement. It is also suggested by the approach of various courts as to the notion of public policy, which, as shown below, has to be interpreted in a restrictive and international looking manner. The New York Convention, however, is indeed a victim of its own success.[292] While amending the Convention is in itself a gordian task and achieving consensus under Article II(2) on the degree of the

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[291] See below in Chapter 5 the analysis under Rule 7.

[292] Stavros Brekoulakis, Julian Lew, and Loukas Mistelis, *The Evolution and Future of International Arbitration* (Wolters Kluwer 2016), para. 2.9; Franco Ferrari and others, *Conflict of Laws in International Arbitration* (Sellier 2011) 82; Freya Baetens, *Legitimacy of Unseen Actors in International Adjudication* (CUP 2019) 248.

courts' involvement is even more difficult, the proposal of Born analysed above for the establishment of Bilateral or Multilateral Arbitration Treaties can be used as a vehicle for individual or regional harmonisation.

A more feasible solution of indirect harmonisation would be the result of a soft model law approach,[293] primarily via the UNCITRAL Model Law. A model law approach is based on is a legislative text which 'is recommended to States for incorporation into their national law'.[294] It, thus, provides States with a default text for legislative adoption while preserving their autonomy to alter the rules for their own territory.[295] Several States—some exercising their autonomy by adopting amendments—have adopted the UNCITRAL Model Law, which remains the 'accepted international legislative standard for a modern arbitration law'.[296] The restated proposals can, therefore, be implemented at a model law type of legislative text. While the effectiveness and impact of such text would be directly linked to the identity of the drafting organisation—or even State—the existence of a restated approach would in itself be a step towards harmonising a fragmented system.

A top-down harmonisation on the relevant standard—from the perspective of an internationally binding instrument—has practical difficulties. The question arising therefore is one of the effects of a fragmented approach and of a regulatory competition amongst different States. As mentioned in the introductory Chapter, States have financial interests and benefits in having parties choosing their territory as the seat of commercial arbitrations. In a report by *Paris Place d'Arbitrage* from France the task force found that:

> *[t]he annual turnover of arbitration-related work (both as counsel and as*

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293 Kent Anderson, 'Testing the Model Soft Law Approach to International Harmonisation: A Case-Study Examining the UNICITRAL Model Law on Cross-Border Insolvency' (2004) 23 Australian Yearbook of International Law 1.

294 UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation 23.

295 UNCITRAL, Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, para. 3.

296 ibid, para. 2. As of today, legislation based on the Model Law has been adopted in 80 states in a total of 111 jurisdictions. See the online Status of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>, accessed 11 March 2020.

> *arbitrator) for law firms in Paris was more than € 200 million, and that these firms employ more than 500 professionals in their arbitration departments. The presence of the ICC International Court in Paris is a crucial element in attracting this work to Paris.*[297]

The financial benefits for States are usually connected with the establishment of arbitral institutions in their territory. This was the case in France on the basis of the abovementioned report, in Singapore with the creation of the Singapore International Arbitration Centre, as well as in India.[298] This not only explains the increasing number of arbitral institutions, but also the mirroring of the operation and flexibility of arbitral institutions and of the resolution of by State litigation with the creation of business or commercial courts.[299]

Financial benefits, as well as pressure from commercial institutions, such as chambers of commerce, provide incentives for States to be—and be perceived to be—arbitration friendly. As Rogers observed, on the basis of the scrutiny that national court decisions undergo on whether they support the efficacy of arbitration, States enter into a regulatory competition amongst themselves. This is a race to the top, characterised by effective enforcement of arbitration agreements and awards, as well as by reduced judicial and State interference with the arbitral procedures.[300] While arguments in favour of more judicial control and review of arbitration to increase its efficiency have been put forward, the primary reason for choosing arbitration remains the enforceability of the outcome on

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297 Durand-Barthez, Kleiman, Boivin, *Enquête relative à la localisation de la CCI et au role de Paris comme place d'arbitrage*, 24 November 2010.

298 See Alexis Mourre, 'Arbitral Institutions and Professional Organisations as Lawmakers' in Jean Kalicki and Mohamed Abdel Raouf, *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No. 20, Kluwer Law International 2020) 91.

299 Eidenmueller 2020 (n 21) (referring to the establishment of the Singapore International Commercial Court on 5 January 2015, the International Chamber of the Paris Court of Appeal on 7 February 2018, and the Netherlands Commercial Court on 1 January 2019. The Brussels International Business Court aims to become operational by 2020). See also Giesela Rühl, 'Building Competence in Commercial Law in the Member states' (2018) 58-63 <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604980/IPOL_STU(2018)604980_EE. pdf> accessed 10 February 2020; Gerhard Wagner, 'Rechtsstandort Deutschland im Wettbewerb: Impulse für Justiz und Schiedsgerichtsbarkeit' (2017) Beck, München 196-198.

300 Rogers 2018 (n 38).

the basis of common standards.[301] States are continuously supporting the operation of arbitral institutions and the proliferation of arbitration resolution of disputes because of the direct or indirect benefits they have. This regulatory competition not only leads to more efficient and arbitration friendly approaches, but it can also have a convergence effect as the various approaches move in parallel towards the top.

In this context, the approach adopted in the remaining Chapters of this thesis has an impact both at a national level and at a global one. While the proposal is primarily concerned with the regulation of arbitral jurisdiction in England and Wales, the implementation of such arbitration friendly approach will be an advantage in the regulatory competition between States. This is not only due to the basis of the proposal being a theoretical model which posits arbitration at a vertically equal level with litigation, but also due to the adoption of a default position of a limited judicial involvement at the interlocutory stage. The horizontal choice argument is, thus, becoming a vehicle towards the summit in the regulatory competition between States in a globalised world.

4.5.2 Private Regulation and Arbitral Jurisdiction

4.5.2.1 Arbitral Institutions as Private Regulators

If arbitral resolution of disputes is considered to be a market in itself or an area with market-like properties, then considerations of the role of private regulation of this market in a bottom-up rather than a top-down approach are also important. This is all the more so taking into account the basis of the proposed model, that is party autonomy. Private regulation in this context focuses on the direct or indirect effects of private actors in the arbitral dispute resolution sphere aiming at adopting the proposed model. Private actors are primarily taking the form of arbitral institutions and professional organisations having the capacity to formulate both their own rules of procedure and model clauses. Direct effects exist when such actors are creating rules which are applicable to a specific dispute whereas indirect effects refer to the regulatory incentives and directions created by the adoption of such rules by private actors.

Traditionally, arbitral institutions have been considered as service-provider actors, confined in the area of administering and providing support to the essential actors of an

[301] Eidenmueller 2020 (n 21).

arbitration, that is the parties and the tribunal.[302] Described as the 'backbone of the epistemic arbitration community'[303] arbitral institutions are not only service providers of administration services but are considered change-empowering actors in the classification proposed by Schultz.[304] This is to suggest that, despite their private nature and operation, they are capable of procuring change to the international arbitral regime. Arbitral institutions create and constantly improve and adapt their services to appeal to users. At the same time, however, they have the ability to create—and indeed create—both a flexible and dynamic system of rules and model clauses and a framework for State legislators to get inspired from in regulating their arbitration system. In the context of global legal regimes, the focus of law-making is also shifting from a creation of pure forms of State sovereignty to an amalgamation of private and State sources of law.[305]

This wider policy effects of arbitral institutions in promoting arbitration and in serving as regulatory examples for State regulators is in line with the ever-broader recognition of direct or indirect public aims in the operation of arbitral institutions.[306] As Warwas argues 'arbitral tribunals and public courts are not the only architects designing the public facet

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302 See Emmanuel Gaillard, 'Sociology of international arbitration' (2015) 31 Arbitration International 1, 5.

303 Alexis Mourre, 'Arbitral Institutions and Professional Organisations as Lawmakers' in Jean Kalicki and Mohamed Abdel Raouf, *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No. 20, Kluwer Law International 2020) 88

304 Thomas Schultz, 'Lawmaking in International Arbitration: what legitimacy challenges lie ahead?' in Jean Kalicki and Mohamed Abdel Raouf, *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No. 20, Kluwer Law International 2020) 48.

305 See Karl-Heinz Ladeur, *Public Governance in the Age of Globalization* (Ashgate 2003) where the author states that: 'private government, private regulation, and private justice are becoming central sources of law'. See also International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration 2012) xi–xiii, <http://www.arbitration-icca.org/publications/NYC_Guide.html> accessed 11 March 2020 ('[t]he ultimate growth of the rule of law, the expansion of international arbitration for resolving cross-border disputes and enforcement of awards depend on the sovereign national courts. It is thus hoped that this Guide will also play its small part in assisting judges around the world to participate in this continuing harmonization process and use the Convention in a way consistent with its letter and spirit').

306 Barbara Alicja Warwas, The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses (T.M.C. Asser Press 2017) 23.

of private international arbitration'.[307]

In the context of the 'Nudge' theory proposed by Thaller and Sustain,[308] arbitral institutions can be considered as choice architects capable of using their standards and operations as nudges towards change of the arbitration regime both at a party-to-party level and at a State regulatory level. As private actors, arbitral institutions do not have policy-making powers. The 'strongest card' in their effort to promote their standards is the validation of these standards by the arbitration market.[309] The relevant players in this market are parties, law firms, as well as arbitrators and other professional organisations. The validation of such standards by market players and the regulatory competition between institutions[310] is also affecting the regulatory competition between States in providing for pro-arbitration legal regimes.

First, the financial and societal benefits of arbitral resolution of disputes for States are directly linked with the establishment, operation, and growth of arbitral institutions in their territory. The more successful an institution is—either measured in terms of caseload or turnover—the more turnover is generated also for the States. By providing more flexible and party autonomy friendly services to the users of arbitration, institutions can increase their presence, caseload, and turnover.

Second, as institutions aim to appeal to the needs of the commercial community, the adoption of standards, rules, and model clauses which present certain convergence has indirect effects to the rules adopted at a State level. As Mourre observes,[311] '[t]here is a growing convergence between the rules promulgated by various players, conducive to greater harmonisation of arbitral practices that were previously determined to large extent

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307 ibid 67.

308 Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press 2008) 7; See also Daniel Watkins, 'A Nudge to Mediate: How Adjustments in Choice Architecture Can Lead to Better Dispute Resolution Decisions' (2010) 4 Am J Mediation 19; Antonis Karampatzos, *Private Law, Nudging and Behavioural Economic Analysis: The Mandated-Choice Model* (Routledge 2020) 22-23.

309 Stavros Gadinis, 'Three Pathways to Global Standards: Private, Regulator, and Ministry Networks' (2015) 109 American Journal of International Law 1, 3.

310 See Eidenmueller 2020 (n 21); Rogers 2018 (n 38).

311 Alexis Mourre, 'Arbitral Institutions and Professional Organisations as Lawmakers' in Jean Kalicki and Mohamed Abdel Raouf, *Evolution and Adaptation: The Future of International Arbitration* (ICCA Congress Series No. 20, Kluwer Law International 2020) 94

by local judicial culture and domestic procedural rules'. Examples of such bottom-up convergence in the field of arbitration are the rules on emergency and expedited procedures as well as third party funding. Rogers in her keynote address in the Cambridge Arbitration Day 2018 observed that:

> *[…] 10 years ago, the availability of interim relief in international arbitration was uncertain, the concept of an emergency arbitrator was virtually unheard of, and the notion of consolidation was pretty much unthinkable. But the need for these innovations, and the perceived advantage of enacting new rules to respond to these needs, has fuelled a race among institutions to produce new rules facilitating these practices.*[312]

4.5.2.2 Model Clauses in a Horizontal Choice Model

One of the ways arbitral institutions go beyond their administrative and supporting role and act as exemplars of globalisation and private law-making is with the adoption of 'model',[313] 'standard'[314] or 'recommended'[315] clauses. These clauses operate in providing parties with a pre-set clause which will enable them to submit their disputes to arbitration without the risk of their clause being found as defective or pathological.[316] They are a product of the non-administrative function of arbitral institutions aiming to enhance the effectiveness and predictability of outcome for parties by providing them with default, standard form, texts which can be incorporated in their contracts. In a similar manner to the operation of the UNCITRAL Model Law instruments, these clauses operate also at a different level. They provide a benchmark for the 'ideal' arbitration clause. The competition of arbitral institutions to attract more cases and appeal to commercial parties leads also to a race to the top for the more efficient, comprehensive, and commercial

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312 Rogers 2018 (n 38).

313 See SCC Model Clause <https://sccinstitute.com/our-services/model-clauses>.

314 See ICC Model Clause <https://iccwbo.org/dispute-resolution-services/arbitration/arbitration-clause/>.

315 See LCIA Model Clause <https://www.lcia.org/Dispute_Resolution_Services/LCIA_Recommended_Clauses.aspx>.

316 Indeed, one of the problems most often arising in arbitration practice is the pathological nature of clauses entered into contracts at the last minute, when the parties are rushing to close the transaction. As a result, they are known as midnight clauses and cause significant problems in practice. See Jan Paulsson and others, *The Freshfields Guide to Arbitration and ADR: Clauses in International Contracts* (3rd edn, Kluwer Law International 2011) ix.

friendly clauses. This process is, of course, in a dialectic relationship with the creation and amendment of regulatory standards on behalf of States. The adoption of model clauses with convergent characteristics operates as an incentive for States to adopt their standards towards the direction which appeals the most to commercial parties.

Model clauses are also important in providing standard or default positions for the parties to adopt in the context of the proposed horizontal model. From delegation clauses affecting the default regime in the allocation of authority to provisions providing for the exclusion of arbitral powers of enforcement or higher standards of review, parties can affect the relationship between State courts and tribunals in the context of the proposed model. The precise way of operation of these clauses, however, differs on the basis of whether a system which has adopted the proposed model in the previous Chapters or not.

First, in a legal system which has adopted the proposed horizontal choice model, standard form clauses operate within the contours of this system in providing the parties with texts which: (a) contain minimum requirements of adequate manifestation of consent; (b) allow for the parties to establish concurrent State-tribunal or exclusive State competence in deciding jurisdictional issues; (c) confirm the tribunal's power to grant enforcement orders; and (d) create monetary incentive mechanisms with the inclusion of deposit or liquidated damages clauses. In this context, model clauses are operating as they standardly do, but providing for a greater variety and detail of formulations.

Second, in the context of systems not having adopted a horizontal choice model, such clauses created by arbitral institutions can operate again in providing parties with standardised forms of agreements. These model forms would have a two-fold aim: (a) to ensure the compatibility of the agreement and its optional or additional parts with the approach adopted in the applicable legal system; and (b) to tailor and direct the approach towards a system of horizontal choice. For example, in the USA, model clauses can include delegation clauses expressly granting the tribunal the power to decide on jurisdictional matters. In addition, similar delegation clauses can be included in relation to the standard and depth of review at the enforcement or challenging stage of an arbitration. By including such clauses which operate within, or at the frontiers of, the approach adopted in a legal system, model clauses operate as nudges towards effecting changes in the arbitral legal regime. This is all the more so in legal systems with judicially driven development of the law, such as England and Wales.

4.5.3 Horizontal Choice and English Commercial Arbitration and Litigation

After establishing the theoretical content of the horizontal choice argument in regulating arbitral jurisdiction and before delving into considering the practical application and effects of this proposal, the analysis above has shown that a coherent and structured analysis on the basis of the shifting paradigm of transnational jurisdiction is required.

Such analysis, as provided above, is based on the proper understanding of private international law party autonomy and arbitral jurisdiction within and as an expression of the shifting paradigm of jurisdiction. This transition to a global scale affects not only the approach to jurisdiction in cross-border litigation, but also the concepts at the heart of issues of arbitral jurisdiction. Competence-Competence and separability doctrines have been the sacred artefacts of the law on arbitration and the relationship of courts and tribunals. They are, however, based on a relationship of vertical hierarchy, with arbitration being a form of detached creation bestowed from State sovereignty and always subject to it. Although this is primarily provided in jurisdictions of the civilian tradition and corresponds to an internationalist paradigm of jurisdiction, it is also present in the jurisdictional substantivism of common law traditions. The traditional conception considers arbitral jurisdiction as bestowed by and dependent on State sovereignty. As such, when a court or tribunal finds that the latter lacks jurisdiction the dispute returns to its natural jurisdictional birthplace.[317] This is not, however, consistent with both the theoretical foundation of the shifting paradigm and the practical realities of international commercial disputes in a globalised world.

In addition, in this context, arbitration and jurisdiction agreements present fundamental similarities as expressions of this higher and regulatory nature party autonomy. The traditionally accepted approach in England assimilates exclusive jurisdiction agreements and arbitration agreements as to their contractual effects. This is certainly one of the aspects where similarities are identified. The proposed solution, as analysed above, is based on a concurrent analysis of the treatment for jurisdiction and arbitration agreements in terms of the regulation of court and arbitral jurisdiction. This is not to suggest a complete fusion and assimilation. The existing differences, however, are encouraging rather than opposing the transposition of certain approaches present in court litigation to

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317 Stelios Kousoules expressing the traditional approach in Greek theory on arbitration. See Stelios Kousoules, *Diaitisia: ermineia kat' arthro: KPold 867-903, N. 2735/1999, Symvasi Neas Yorkis* (Sakkoulas 2004) 134.

decide on issues of arbitral jurisdiction. As shown above, as well as in the following Chapters, the approach of English courts on both procedural aspects represented by the notion of jurisdictional intersections and substantive aspects of positive and negative enforcement of arbitration agreements runs in parallel with the approach regarding exclusive jurisdiction agreements. In addition, the restatement proposals of the following Chapters are directed at regulating arbitral jurisdiction but can also form a basis for parallel arguments on the regulation of cross-border litigation jurisdiction in a multilateral, shifting, and transnational jurisdictional landscape.

The proposed solution not only brings convergence to the theoretical background for litigation and arbitration but also re-positions the inquiry into arbitral jurisdiction as a horizontal analysis. This type of analysis is not alien to the English approach. English judges and the English legal system are accustomed in dealing with such horizontal relationships in the context of *forum non-conveniens* and comity considerations. Judicial pragmatism and balancing of efficiency factors lie at the centre of the analysis under *forum non-conveniens* and discretional or case management stays. While the present proposal is not based on factors of economic efficiency it does represent a balancing exercise to determine which dispute resolution system the parties have chosen. As such, the judicial restraint English courts are accustomed to affording to other jurisdictions is of similar nature to the threshold requirements for the intersection between motorway pathways of the proposed system of dispute resolution.

The proposed model for regulating arbitral jurisdiction is based on a re-conceptualisation of traditional doctrines, the convergence of arbitration and litigation jurisdiction paradigms, and the principled transposition of legal methods and tools existing in either of the two pathways to properly regulate the jurisdictional intersections between them. As such, it has practical implications in the context of the English arbitration legal regime. In this context, the following Chapters seek to illuminate on the one hand the extent to which the current framework can be judicially applied in a manner conforming to the proposed regime, and the black letter reformed approach on the other hand.

In a similar manner to the horizontal relationship between various courts in a multilateral, multifocal system of global justice, States still have a role. Their rules are ones recognising this multilateral system. It is not a proposal for complete regulatory autonomy—or better described as anarchy. It is a proposal recognising the primordial role of party autonomy in a contemporary system of global justice and transnational paradigm of private international law. The focus cannot only be on State sovereignty as a source of

regulation of adjudicatory authority with the choice of the parties being subordinate to the will of the State. The focus should rather be on the various sources that affect or inform this allocation of regulatory authority on a multifaceted, multisource and multifocal system of global justice. The State recognition of such a system and multiplicity of sources by means of the adoption of rules of arbitral jurisdiction confirming the horizontal and systemic relationship of arbitral and State resolution of disputes is not inconsistent with this model. Such recognition is not in itself a bestowal but rather a pragmatic codification of this relationship. In this context, Chapters 5 and 6 will consider how this theoretical model can be pragmatically and practically transposed into the law and practice of England and Wales. The analysis of this theoretical model is not to suggest that the various local laws and regulations are no longer required.

5 ARBITRAL JURISDICTION: THE STATE COURTS' PERSPECTIVE

The analysis above in Chapters 3 and 4 has established the theoretical foundation and structure of the proposed horizontal model. A mere theoretical explanation and conceptualisation of this private international law proposal on regulating arbitral jurisdiction only goes so far. As delineated in Chapter 1, the aim of this thesis is twofold: (a) provide a theoretically coherent model of arbitral jurisdiction; and (b) apply this model within the context of the law and practice of arbitration—more specifically, arbitral jurisdiction—in England and Wales. In this context, Chapters 5 and 6 fulfil the latter of the two goals in considering separately the regulation of arbitral jurisdiction from the perspective of the two principal actors in this arena: State courts and arbitral tribunals.

The analysis below addresses items in the arbitral jurisdiction regulatory list which include both remedies akin to the procedural aspects of the arbitration agreements, and remedies akin to the substantive aspect of the same agreements. In addition, each section begins with the current system in England and Wales and re-conceptualises this approach both in the context of an unchanged statutory regime and in the context of a restatement proposal. This structure provides a coherent and holistic approach to each remedy.

5.1 Stay of Proceedings

As shown in Chapter 2, the existence—or mere threat—of parallel proceedings enhances the litigation and transaction risks for the parties in international commercial disputes. Examining self-restraint remedies used in litigation practice, one should start with the stay of proceedings before State courts. Requests for stays before State courts in favour of arbitration have one distinctive characteristic: the international and domestic regime applicable militates for a mandatory stay if the arbitration agreement is found to be valid and the dispute falls within its scope.

A stay of court proceedings commenced despite the apparent existence of an arbitration agreement (which covers the dispute in question) is requested by the defendant in these proceedings—and, in most cases, applicant in existing or imminent arbitration proceedings. The claim here is similar to the one for a stay in favour of an exclusive

jurisdiction agreement in favour of courts other than the English ones.[318] It normally takes the form of objecting to the court's jurisdiction on the basis of the existence of a valid arbitration agreement. In strict legal terms, this is not a question of *lis pendens*; rather, it is one of functional harmonisation and allocation of jurisdiction based on the choice of the parties. More specifically, this self-restraint remedy is considered an expression of the primacy given to the parties' choice as an expression of their autonomy.[319] If such choice is found, then there is no question of *lis pendens* because there are no two *fora* having the competence to decide on the merits of the case. Such a situation arises only in relation to the existence, validity, and scope of the arbitration agreement, which is a preliminary question to the one of a stay.

This self-restraint rule has found its statutory expression in an international level in Article II(3) of the New York Convention, providing that each Contracting State 'shall' recognise arbitration agreements in writing and, further, obliging a court of a Contracting State to refer the parties to arbitration if requested to do so by one of the parties in the context of an action in a matter which is the subject of an arbitration agreement, unless the court 'finds that the said agreement is null and void, inoperative or incapable of being performed'.[320] The fact that the New York Convention says nothing—at least in its black letter—about the standard to be applied by the courts in determining the validity of the agreement and in staying their proceedings, instead of creating a global congruence in cross-border recognition of arbitration agreements, has allowed, as seen in Chapter 4, national diversity to occupy this area of law resulting to a plethora of approaches.[321]

5.1.1 Stay of Proceedings under Section 9 Arbitration Act 1996

Applying to arbitrations seated both in England and overseas,[322] Section 9 of the

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318 To the extent that these courts are ones of a Member state of the European Union, under Article 31(2) of the Brussels I Regulation, granting the stay is mandatory for English courts. In case the exclusive jurisdiction agreement designates third states, the common law regime applies, and the stay is discretionary for the courts. It will, however, normally be granted unless there are strong reasons to the opposite.

319 See Chapter 3 above as well as the role of party autonomy as the measuring rod for the relationship between courts and tribunals and the regulation of risks in parallel litigation and arbitration proceedings as analysed in Chapter 4.

320 See *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 259 per Aikens LJ at [72].

321 See also George Bermann, *Arbitration and Private International Law* (Brill 2016) 222.

322 Arbitration Act 1996, Section 2(2).

Arbitration Act 1996, titled 'stay of legal proceedings', reflects Article II(3) of the New York Convention and provides the statutory regime for a request of a stay of the court's proceedings by a 'party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration'.[323] The effect of it is that, unless the court is 'satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed', it is under an obligation to stay its proceedings. There is no discretion for the court to invoke its inherent case management powers and refuse a stay if the prerequisites of the article are fulfilled.[324]

5.1.1.1 Mechanics of a stay

The options available to the court were considered by HHJ Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd.*[325] These can be summarised in three categories: (a) the court can decide on the basis of the affidavits that there is (option 1 as identified in *Birse*) or that there is not (option 4 as identified in *Birse*) a valid arbitration agreement covering the claim as brought by the applicant;[326] (b) the court can grant a stay on the basis that this issue is to be determined primarily by the tribunal on the basis of Section 30 and the principle of competence-competence;[327] and (c) the court can order a trial on the jurisdictional issue to determine the validity of the clause.

On the basis of the subsequent cases and the very wording of the Section, if the Section

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323 Arbitration Act 1996, Section 9(1).

324 Arbitration Act 1996, Section 9(4) ('[o]n an application under this Section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'). See also Joseph 2015 (n 16), para 11.09.

325 *Birse Construction Ltd v St David Ltd* [1999] BLR 194 at [3]; Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th edn, Informa law from Routledge 2014) 41.

326 As confirmed by Christopher Clarke J in *JSC BTA Bank v Ablyazov & Ors* [2011] 2 Lloyd's Rep 129 at [29] the important thing is that the court's decision will be taken only on the basis of the affidavits available.

327 HHJ Humphrey Lloyd QC held that the second option should only be exercised if the court is s 'virtually certain' that an arbitration agreement exists. This was later confirmed by the Court of Appeal in *Al-Naimi v Islamic Press Agency Inc*. It is, however, with respect submitted that this 'virtually certain requirement' does not come out of the Section itself and it imposes a higher standard than the one applicable to jurisdiction clauses. The case of using the inherently provided case management power is dealt with in the next Section. See also Merkin and Flannery 2019 (n 13)178.

is invoked—i.e. if the court does not invoke its inherent case management powers—, its structure is divided in two steps; each of which has a different addressee as to the burden of proof and—arguably—a different standard.

Under Section 9(1) of the Arbitration Act 1996 the starting point is the objection of the litigation defendant—and potential arbitration claimant although commencement of arbitration is not necessary to invoke this Section—who has to apply to the court for a stay asserting: (a) the existence of an arbitration agreement between the parties; and (b) the inclusion within the scope of the clause of the claim brought before the court by the litigation claimant.[328] Then, under Section 9(4) of the Arbitration Act 1996, the focus shifts to the litigation claimant who itself has to object to the application for a stay and satisfy the court that the agreement 'is null and void, inoperative, or incapable of being performed'. This was also the conclusion of Aikens LJ in *Aeroflot v Berezovsky*[329] undertaking for a first time a more structured approach to the interpretation of the statutory provision in focus.

5.1.1.2 Standard of proof

Despite this structured approach, Aikens LJ and other judges in previous or subsequent cases, have not—with few exceptions—addressed the point of the standard which either the litigation defendant—under Section 9(1) of the Arbitration Act 1996—or the litigation claimant—under Section 9(4) of the Arbitration Act 1996—has to meet. Although courts in England and Wales have been reluctant to approach this issue through the structure of the Arbitration Act 1996 and the overriding objective of limited judicial interference with arbitration, there is authority and principle suggesting: (a) that a different standard of proof can be applied in each step; and (b) that a *prima facie* standard can—and should—be deployed in all *Birse* options.

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328 See for this double threshold: *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 259 per Aikens LJ at [73]; *Fiona Trust & Holdings Corp v Privalov* [2007] 1 CLC 144 at [36] per Longmore LJ; *Albon (trading as NA Carriage Co v Naza Motr Trading Sdn Bhd (No 3)* [2007] 2 All ER (Comm) 513 at [15] per Lightman J; *JSC BTA Bank v Ablyazov* [2011] 2 Lloyd's Rep 129 at [31] – [33] per Christopher Clarke J; *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 at [49] – [50] per Popplewell J; *Birse Construction Ltd v St David Ltd* [1999] BLR 194; *Mercato Sports (UK) Ltd v Everton Football Club Co Ltd* [2018] EWHC 1567 (Ch).

329 *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 259.

Examining the authorities, the starting point is again the decision of Aikens LJ in *Aeroflot v Berezovsky.* Aikens LJ accepted, in considering the issue under *Birse* Option 1 and without further analysis, that under Section 9(1):

> *[i]f the court decides that it will and can determine whether or not there was a concluded arbitration agreement on the written evidence before it, then, in my view, the authorities establish that it is for the party asserting the existence of the concluded arbitration clause to prove it on a balance of probabilities.*[330]

While he did not further extrapolate on the reasons for accepting this high standard for the litigation defendant, while considering the standard of proof for the litigation claimant under Section 9(4) he embarked on an analysis of the provision itself holding that:

> *[…] the starting point must be the wording of Section 9(4). That stipulates that a stay will be granted unless the court is "satisfied" that the arbitration agreement is "null and void" or "inoperative" or "incapable of being performed". The wording in Article II of the New York Convention is stronger: it States "unless [the court] finds that" the arbitration agreement is "null and void" and so forth. The words "satisfied" and "find" suggest that, in the context of civil proceedings in the English court, the standard of proof which must be attained in order that the court should refuse a stay is one of the balance of probabilities.*[331]

While analysing the black letter of Section 9(4), Aikens LJ did not make the next step in also contrasting this with the black letter of Section 9(1) and determining whether the standard is the same for the two actors in the application for a stay.

Instead, he made the distinction between cases of category (a) above, i.e. where 'the court decides that it will and can determine whether or not there was a concluded arbitration

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330 See *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 259 per Aikens LJ at [73]. The current approach is also reflected in CPR 62.8(3), though the existence of that provision cannot determine what the correct approach should be. In any event, in an exceptional case (see fn.1 above) the power at CPR 62.8(3) could be used.

331 See *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 259 per Aikens LJ at [77]; see also *JSC BTA Bank v Ablyazov* [2011] 2 Lloyd's Rep 129 per Clarke J at [50] and *Golden Ocean Group Ltd v Humpuss lntermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm) at [54]. See also Dicey, Morris, and Collins 2012 (n 24) 829 ('Rule 44(1)').

agreement on the written evidence before it', and cases of categories (b) and (c), i.e. an inherent stay and a trial on the mater respectively.

First, he held that deciding whether a trial should be granted depends on whether such trial 'can be confined to a relatively circumscribed area of investigation' if the 'evidence and possible findings going to the issue of whether the arbitration agreement is "null and void" or "inoperative" also impinge on the substantive rights and obligations of the parties'.

Second, he accepted that where the court is 'satisfied' at the first stage under Section 9(1) but cannot determine on the basis of the written evidence the second stage under Section 9(4) and cannot order a trial, 'the right course for the court to take is to grant a stay under Section 9(4) and let the arbitral tribunal get on with determining the dispute.'.[332]

Third, on the standard to be applied, he referred to the decision Christopher Clarke J in *JSC BTA Bank v Ablyazov.* There, Christopher Clarke J held that in such a type of cases, 'the onus in that respect is on the party resisting the stay. If the applicant shows that it is arguable that the arbitration agreement is not "null and void etc", a stay will be granted'.[333] This was accepted by Aikens LJ in *Aeroflot* holding that '[t]his was because if it did so, then it must follow that the party resisting a stay could not discharge the burden on it of "satisfying" the court that the agreement was null and void'. If, however, in holding that, both judges were saying that the applicant for a stay—i.e. the litigation defendant—had to 'show' on any standard that the agreement was not null and void, they would be contradicting the express structure of Section 9. The understanding consistent with the structure and system of the Act can only be that the applicant has to prove to the standard of a good arguable case only the prerequisites of Section 9(1) and not of Section 9(4) of the Act.[334]

Popplewell J in *Golden Ocean* emphasised that 'a merely arguable case will not be sufficient if the Court can resolve the issue itself either on the application or by directing an issue to be tried'. In addition, he also expressed the view that it would be wrong to accept the contrary and extend the arguable case standard to cases where there is a direct

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332 *Aeroflot v Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 259 per Aikens LJ at [79].

333 *JSC BTA Bank v Ablyazov* [2011] 2 Lloyd's Rep 129 per Clarke J at [33].

334 See also *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm) at [54] where Popplewell J refers exactly to this point.

challenge to the existence and validity of the agreement—and, hence, no presumption could be established.[335] This view, with respect, does not take into account the whole structure of the Arbitration Act 1996, Section 9's two distinct stages, the treatment of this issue in other jurisdictions under the New York Convention, or general policy considerations.

The Supreme Court dicta that are often quoted in support of a sweeping balance of probabilities approach do not establish anything more than that the courts should 'determine' whether an agreement ever existed and that the decision under Section 9 is binding. First, in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan,* Lord Collins found without any more extrapolation that '[t]here there is an application to stay proceedings under Section 9 of the 1996 Act, both in international and domestic cases, the court will determine the issue of whether there ever was an agreement to arbitrate'.[336] Second, in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC*, Lord Mance—also a member of the court in *Dallah* who did not raise the point in his opinion—found referring to the Court of Appeal decision in *Fiona Trust* that Section 9 'represents a situation in which the court, rather than the arbitral tribunal, rules in the first instance on arbitral jurisdiction, and does so bindingly'.[337]

Drawing a parallel from the common law approach on exclusive jurisdiction agreements can provide the contours of what the party resisting arbitration has to prove. In that context, if the litigation defendant proves that there is a foreign exclusive jurisdiction agreement, this creates as recognised in *Donohue*[338] that a *prima facie* entitlement to a stay (or an injunction)[339] exists, and the burden shifts to the claimant to provide strong grounds that will justify the exercise of the court's inherent discretion not to grant the

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335 ibid at [58].

336 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 per Lord Collins at [97]. This case settles the debate on who has the final word in the issue of the existence and validity of the arbitration agreement. This is a whole different issue as to who will have the first word in the same issue. It is not self-evident that this is the court which also has the final word.

337 *AES v Ust-Kamenogorsk* (n 16) per Lord Mance at [52].

338 *Donohue v Armco Inc* (n 19).

339 See, however, below in Chapter 6 the different approach on the standard of proof for granting an anti-suit injunction and the criticism expressed therein.

stay. The courts will usually grant the stay as the 'underlying principle is that the court makes people abide by their contracts'.[340] Such a contractual agreement establishes a *prima facie* entitlement which requires strong reasons of procedural efficiency and equitable considerations to be thwarted. This is because—and contrary to the case of a stay under Section 9 of the Arbitration Act 1996—the stay remains a discretionary option. As such, these strong reasons refer to the equitable discretion of the English Courts and cannot be transposed in a literal manner to arbitration. They do, however, suggest that in terms of content, something more than a claim of inappropriateness is required. This is also the case in the context of the mandatory stay under Section 9 of the Arbitration Act 1996.

In the context of litigation, if the litigation claimant challenges the existence, validity, or scope of a foreign exclusive jurisdiction agreement, it is on the defendant to provide a good arguable case that the agreement exists. If there is such a challenge the burden is still one of proving jurisdictional facts and remains on the defendant to show to a good arguable case standard (as this is defined now in *Brownlie*[341] and *Goldman Sachs*[342]) that there is foreign exclusive jurisdiction agreement covering the dispute and the parties in question. If that is established, then the claimant has the burden to show strong reasons that the court should nevertheless not grant a stay.

Colman J in *Konkola* held that the defendants—and applicants for a stay on the basis of a Zambian exclusive jurisdiction agreement—had not made out a sufficiently good arguable case as to the existence or incorporation of the agreement. Addressing the question what the standard should be 'in order to assume for present purposes the applicability of a Zambian Jurisdiction Clause', held that:

> *[i]t is settled law that the evidential threshold for the purpose of establishing English jurisdiction where the issue is whether there should be permission to serve outside the jurisdiction is a good arguable case that the necessary factual foundation exists. […].*[343]

Despite the difference between the discretionary and mandatory nature of the stay, if one

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340 Following a purely contractual approach. See Dicey, Morris, and Collins 2012 (n 24), para. 12-149.

341 *Four Seasons Holdings Inc v Brownlie* [2017] UKSC 80 at [7].

342 *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34.

343 *Konkola Copper Mines plc v Coromin Ltd* [2006] EWCA Civ 5; [2006] 1 Lloyd's Rep 410.

were to transpose the litigation approach to arbitration and draw a proper analogy, the plausible evidence of a litigation defendant as to the existence and scope of the arbitration agreement should be enough to create a *prima facie* entitlement. The litigation claimant then would be able to challenge the agreement's validity or existence. In doing so, two formulations can be envisioned: (a) one establishing a different standard of proof for the two parties; and (b) one accepting that the standard for both parties at the interlocutory stage is the same and what changes is the content of what each side has the burden to prove. The former position provides that the claimant has to provide strong reasons or otherwise prove on a balance of probabilities standard that the agreement is null, void or otherwise inoperable. In the latter formulation, the transposition of the 'strong reasons' consideration only dictates the content and scope of what the litigation claimant resisting the arbitration agreement should prove rather than the standard of proof. This is to suggest something more than a simple claim is required to have a true parallel between litigation and arbitration proceedings. In addition, it is not frustrated, either in principle or in pragmatic terms, by the existing differences between arbitration and exclusive jurisdiction agreements.

The approach the Supreme Court took in *Brownlie*[344] and *Goldman Sachs*[345] outlining the proper standard of proof for service out cases supports the proposition that courts can only decide matters on a plausible evidentiary basis at this interlocutory stage of the proceedings. This is all the more so when arbitration is involved and the courts are prohibited from deciding whether an arbitration agreement exists if this relates to the substance of the case.

In addition, the mandatory rather than discretionary nature of the stay under the Arbitration Act 1996 after a challenge of the court's jurisdiction militates for a different approach but also reinforces the conclusion drawn from the parallel described above. This mandatory nature is the very reason that the defendant has to provide plausible evidence that the agreement exists and covers the dispute in question. It is also the reason that claimant's burden is to provide strong reasons, or in other words satisfy the court—on the basis of a balance of probabilities standard—that the agreement should not be relied upon

344 *Four Seasons Holdings Inc v Brownlie*, at [7].

345 *Goldman Sachs International v Novo Banco SA*.

because it is not valid or it is void. As Males J held in *Nori Holdings v PJSC Bank*[346] referring to Colman's J remarks in Toepfer:

> *[h]owever, there is an important distinction in this respect between the two kinds of clause. In the case of breach of an exclusive jurisdiction clause, the court has a discretion to grant a stay and may take account of factors going to such matters as forum non conveniens, whereas in arbitration cases a stay under Section 9 of the 1996 Act is mandatory. Colman J made this point in Alfred C Toepfer International GmbH v Societe Cargill France [1997] 2 Lloyd's Rep 98. In such cases the stay is mandatory however inconvenient that may be and regardless of whether the claim in court will nevertheless continue against other parties who do not have the benefit of an arbitration clause. Thus, while the test of "strong reasons" applies in both exclusive jurisdiction and arbitration cases, its application may produce a different result in the two situations. That is not surprising. The two situations are different as a result of the strong international public policy in support of arbitration reflected in the New York Convention.*[347]

Before considering the reformulation of this approach, especially in the context of the standard of proof, which is provided in the restatement proposal rules included in the following Sections, the obscure line between inherent stays and Section 9 of the Arbitration Act 1996 has to be clarified.

5.1.2 Inherent/Case Management Stays

The power to stay proceedings may also be exercised under the court's inherent jurisdiction or on the basis of its case management powers. This power and option for the court is not in strict terms a jurisdictional intersection of the two parallel proceedings; the focus here is on the efficiency and justice of the English proceedings as such.[348] The

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346 *Nori Holdings Limited et al v PJSC Bank Okritie Financial Corporation* [2018] EWHC 1343 (Comm).

347 *Alfred C Toepfer International GmbH v Societe Cargill France* [1997] 2 Lloyd's Rep 98.

348 Fentiman 2015 (n 18), para. 14.09:

> *'[s]trictly, the English court is case managing its own proceedings, not the parties' global dispute, still less any foreign proceedings. The decision whether to grant a stay may be influenced, as in a forum conveniens case, by the existence of a jurisdiction or arbitration clause in favour of an English or a foreign venue'.*

existence of an arbitration agreement and of parallel arbitration proceedings is merely the factual background against which the English courts decide to stay or not their proceedings. As the analysis below will show, this feature of the court's powers is the defining and distinguishing characteristic of this inherent discretionary stay from the one under Section 9 Arbitration Act 1996.

Firstly, the Court's inherent power is now statutorily expressed in a twofold way: (a) in Section 49(3) of the Senior Courts Act 1981—providing that nothing in the Senior Courts Act 1981 affects the power of the Court of Appeal or the High Court to stay any proceedings; and (b) under CPR 3.1(2)(f)—providing that the court 'may […] stay the whole or part of any proceedings or judgment either generally or until a specified date or event' (emphasis added). These are general provisions merely referring to the general discretionary powers of the English courts to stay any type of proceedings before them. The overriding objective and guiding principle for the courts in exercising their discretion to stay the proceedings before them is the efficiency of these very proceedings before them. As Lord Diplock described in *Bremer Vulkan* the court's inherent jurisdiction is a 'general power to control its own procedure so as to prevent its being used to achieve injustice'.[349] If the interests of justice for the parties are better served with the English proceedings stayed pending the determination of one or more issues in the foreign proceedings, the court will normally grant such a stay.

Focusing on arbitration and dispute resolution clauses, already from the *Channel Tunnel* case, English courts have stayed their proceedings where the contract provided for the disputes to be referred to a panel of experts (a dispute board) before they were referred to arbitration. Although the general principles upon which the courts decide these cases are not crystallised, the Court of Appeal gave some guidance in *Reichold*[350] while upholding Moore-Bick's J judgment at first instance to stay proceedings in England pending conclusion of arbitral proceedings in Norway. The circumstances in *Reichold* were, however, particular; the claimant had originally commenced litigation proceedings before the English courts against Goldman Sachs. After that, the same claimant, *Reichold,* commenced, against Jotun. Goldman Sachs was advising Jotun for the sales agreement that formed the basis of the arbitration proceedings in Norway. The two parallel

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349 *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, 976.

350 *Reichhold Norway ASA v Goldman Sachs International* [2001] 1 WLR 173.

proceedings were, therefore, instituted by the same party against two different defendants. Despite the different parties, Moore-Bick J—as upheld by the Court of Appeal—granted Goldman Sachs' application for a stay. He set the standard of 'rare and compelling circumstances' and considered that Reichold's parallel commencement of proceedings in Norway and in England was merely a tactic that met this standard. Essentially, Reichold was given a choice between the two proceedings. Subsequent cases have retained this high threshold[351]—differentiating on a case-by-case basis. In *Curtis and another v Lockheed Martin UK Holdings Ltd*,[352] the High Court accepted the standard set by *Reichhold* but did not grant the defendant's application to stay the determination of some issues in the action pending proceedings in Italy. In a similar vein, in *PPF Capital Source v Singh and another*,[353] the High Court refused to grant a stay of proceedings which substantially overlapped with those to be determined in a parallel arbitration, where one of the parties to the legal proceedings was not involved in the arbitration.

A similar approach has been followed in Singapore. Menon CJ in *Tomolugen Holdings*[354] established the guiding principles for the courts when considering whether to grant a stay pursuant to their inherent powers. The balance to be struck aims to serve the ends of justice and is achieved by considering: (a) the plaintiff's right to choose whom he wants to sue and where; (b) the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and (c) the court's inherent power to manage its processes to prevent an abuse of process.

Although these cases have shown the willingness of English courts to consider exercising their inherent case management powers to grant a stay in arbitration related matters, there is no reported case where the courts have temporarily stayed the proceedings before them, pending the determination—necessarily only in bifurcated cases where a separate partial final award on jurisdiction is rendered by the tribunal—by the tribunal on its jurisdiction

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351 *Stemcor UK Ltd v Global Steel Holdings Ltd and Pramod Mittal* [2015] EWHC 363 (Comm) where the court found that such circumstances existed on the facts. See also Paul Torremans and others, *Cheshire, North & Fawcett Private International Law* (15th edn, OUP 2017) 421 ('[t]he power to stay proceedings pending the determination of proceedings abroad will only be exercised in rare and compelling circumstances, such as where there are related foreign proceedings which cannot and should not be consolidated with the English proceedings').

352 [2008] EWHC 260 (Comm).

353 [2016] EWHC 3097 (Ch).

354 *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373.

and the existence, validity, or scope of the arbitration agreement.[355]

The important issue raised in regulating parallel proceedings and considering the jurisdictional intersections from the perspective of courts in this regard is the relationship between an inherent/case management stay and Section 9 of the Arbitration Act 1996.

In *Birse*, HHJ Humphrey Lloyd QC held that the court should stay its proceedings and let the tribunal decide its own jurisdiction under Section 30 Arbitration Act 1996 only if the court is 'virtually certain' that an arbitration agreement exists. This option was considered by the judge in this case, as well as in subsequent ones,[356] as being outside the scope of Section 9 Arbitration Act 1996; hence, it is a stay granted under the court's inherent powers. As Waller LJ held in *Al-Naimi*, provided that the parties have not agreed for the court to determine the issue, if the court is unsure whether a valid agreement exists, the appropriate course of action from a 'good sense and litigation management' standpoint is to allow the tribunal to consider the issue first.[357]

If this is the basis, then the standard should be the same as in *Reichold* and the focus should be on the efficiency and justice of the English proceedings and not on the comparative relevance of the arbitral proceedings either in England or overseas. One could argue that the standard of 'virtually certain' relating to the existence—and validity—of the arbitration agreement epitomises the *Reichold* standard in cases of stays. Section 9 Arbitration Act 1996 applies to both domestic and international arbitrations and the focus cannot be only on the efficiency of the English proceedings; it is also on the parties' global dispute, their arbitration agreement, and the proceedings themselves. Furthermore, the court's discretion is only limited in establishing—arguably on a *prima facie* standard—that an arbitration agreement exists. If that is satisfied, no other interests come in play; the stay is mandatorily granted.

The nature of the cases considered to fall in this category, however, could easily be dealt with under the remaining '*Birse* Options'. Indeed, as the analysis above suggests, if the litigation defendant, and stay applicant, has proved to a *prima facie*/good arguable case

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355 Only a passing reference exists in *Classic Maritime Inc v Lion Diversified Holdings Berhad and Limbungan Makmur SDN BHD* [2009] EWHC 1142 (Comm) at [23]-[26].

356 *Al-Naimi v Islamic Press Agency Inc* [2000] Lloyd's Rep 522. See also *Albon v Naza Motor Trading (No 3)* [2007] 2 Lloyd's Rep 1 at [24]; *British Telecommunications plc v SAE Group Inc* [2009] BLR 231 at [50] (Ramsey J).

357 *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522, 525 per Waller LJ.

standard that a valid agreement exists between the parties, which covers the disputes between them, then the court should stay its proceedings in favour of the arbitral tribunal which is the one to decide finally on the matter. The exception of Section 9(4) operates in a negative manner and, as argued above, requires a higher threshold. This is to suggest that what is considered by the courts to be a case of litigation management to be exercised only in extraordinary circumstances, that is when the court is virtually certain that an agreement exists, is essentially the default and correct application of Section 9 of the Arbitration Act 1996. Inserting this even higher threshold of virtual certainty in cases covered by Section 9 would contravene not only the purpose, but also the very black letter of the provision.

The analysis above begs the question of what is then left to be considered as truly case management stays as statute overrides principles developed in case law. These are cases where the stay is ordered against a non-party to the arbitration agreement and, hence, Section 9 is not engaged. Neither authority nor scholarship has dealt with the delineation of these two powers. Sir Richard Field in *China Export & Credit Insurance Corporation v Emerald* merely observed that 'the discretion can be exercised notwithstanding that the contract in question contains an exclusive jurisdiction clause and nor does a *forum non-conveniens* waiver preclude a stay'.[358] In *Stemcor UK Ltd v Global Steel Holdings Ltd*,[359] Hamblen J ordered a case management stay despite the existence of an exclusive jurisdiction clause for the English courts, in a case of a guarantee and indemnity from a third company with respect to obligations arising out of a sales contract containing a London LCIA clause. In that case, Section 9 could not be engaged, and the stay was granted primarily on the basis of the relative progress of the arbitration proceedings. The analysis of the court is, indeed, in technical terms one that operates by focusing only on the effectiveness and justice of the English court proceedings and is independent to any other proceedings, either litigation or arbitration. This is not to suggest, however, that the existence, progress, and effect of the proceedings is disregarded. The relative progress of the arbitral proceedings was the heavy weight factor in *Stemcor* which considered this alongside the risk of conflicting decisions as rare and compelling reasons to exercise its inherent powers.

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358 See *China Export & Credit Insurance Corporation v Emerald Energy Resources Ltd* [2018] EWHC 1503 (Comm) at [61]; Fentiman 2015 (n 18), para. 14.11 *et seq*.

359 [2015] EWHC 363 (Comm).

More generally, the cases where this power might be exercised are where the prerequisites of Section 9 Arbitration Act 1996 are not fulfilled on the facts of a given case but this is not attributed to one of the parties. For example, this is where a foreign arbitration involves one of the parties to the English judicial proceedings and the outcome of this arbitration would be substantially important for the issues in the English proceedings. Another example mentioned by Merkin and Flannery is when the Court is 'faced with a defence to a non-arbitrable claim (so not a formal counterclaim as such) which arises out of a separate contract containing an arbitration agreement'.[360] A third example they provide is:

> *[a] putative claimant A seeks permission to serve proceedings out of the jurisdiction on the putative defendant B, and B (who learns of the intended proceedings) resists the application and appears in court to contest the permission being given on the grounds that there is a valid arbitration agreement covering the claims in question. At that point in time, the court is merely considering whether to order B to be served substantively, so that there has been no formal service (and therefore the Section 9(3) condition for a Section 9 stay, i.e. formally acknowledging service, will not have been fulfilled). In those circumstances, if B can show that the claims in the proceedings which A wishes to issue would fall within the ambit of an arbitration agreement to which both are a party, it will be entitled to a stay under the court's inherent jurisdiction.*[361]

In conclusion, while the current treatment of the issue is to consider that cases of inherent or case-management stays are one of the options for the judge to exercise in cases where it is virtually certain that the agreement is valid, in a correct reading of the principle and policy of the Section, there is no overlap for three reasons. Firstly, any inherent court power cannot override the requirements of a statutory Section; hence, it necessarily operates in the areas not covered by the provision. Second, and on this basis, approaching Section 9 correctly repositions many cases that are now treated under the inherent case management powers of the court into the Section 9 pool. Finally, the requirements for granting a stay under the inherent powers are not to be found in cases of virtual certainty of the validity of the agreement but in a holistic examination of the facts to ascertain

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360 Merkin and Flannery 2019 (n 13), para 9.7.2

361 ibid.

whether rare and compelling reasons exist to exercise this power.

5.1.3 Restated Approach

Rule 3—Stay of Court Proceedings

> (1) Provided that the litigation defendant makes a good arguable case that there is adequate manifestation of consent to arbitrate, State courts shall not intervene at the interlocutory stage to decide on a jurisdictional issue and shall stay their own proceedings unless satisfied that:
>
> (a) both parties agree on such intervention; or
>
> (b) the party resisting arbitration satisfies the court with cogent evidence and strong reasons that the *prima facie* existent consent to arbitrate does not exist or is null and void and these reasons have been raised before the arbitral tribunal which gives its permission for one, more, or all of the relevant jurisdictional issues.
>
> (2) If no arbitration proceedings have been commenced and cannot be commenced, State courts shall not intervene at the interlocutory stage to decide on a jurisdictional issue and shall stay their own proceedings unless satisfied that:
>
> (a) both parties agree on such intervention; or
>
> (b) the party resisting arbitration satisfies the court with cogent evidence and strong reasons that the prima facie existent consent to arbitrate does not exist or is null and void.
>
> (3) Subject to the preceding paragraphs, State courts retain a residual discretion to order a stay on the basis of their case management powers.

General—Rule 3 is addressed to State courts.[362] It establishes positively the interference limits for State courts at the interlocutory jurisdictional stage. These limits follow the general principle established above that State courts shall not cross over to the 'arbitration stream' unless certain conditions are met. Rule 3 is based on the current statutory obligation of the courts in Section 9 of the Arbitration Act 1996, which, in turn, is an expression of the rule in Article II(3) of the New York Convention. It is not, however, merely a repetition of these rules; it is, rather, a restatement of the approach adopted in

[362] Necessarily the reference to state courts within this Rule, as well as within the following ones, is to the courts of England and Wales or to the courts of any *forum* seeking to adopt this theory.

England and Wales focusing on the theoretical framework developed in Chapter 4.

A rule establishing a mandatory stay of proceedings pending the arbitral determination of the substantive disputes is a rule regulating authority. Rule 3 is the core, the most fundamental, rule of allocating authority at a private international law level. It is a rule of delineation of sovereignty between two legal orders which operate at the same level. Following the principles set by Rules 2 and 4, as well as the analysis in Chapter 4, Rule 3 completes the analysis for regulation of arbitral jurisdiction depending on whether arbitral proceedings are commenced—Rule 3(1)—or not commenced and cannot be commenced—Rule 3(2). These Rules are applicable to the extent that the parties have not exercised their autonomy to include a delegation clause under Rule 3(3).

RULE 3(1)—The typical factual matrix addressed here is one where claims are launched by both sides both before the presumably chosen arbitral tribunal and before a State court. In this situation, where arbitration proceedings are already on foot—or for the same legal reasoning where arbitration proceedings are about to be commenced—State courts shall only examine whether there is adequate manifestation of consent, that is factual consent, and shall stay their proceedings if satisfied for the existence of such consent to a good arguable case standard.

At a second level, there are exceptions to the rule that a State court shall stay its proceedings constituting expressions of the theoretical model of parallel, yet interconnected, streams in a transnational dispute resolution setting. Rule 3(1) codifies two such exceptions which are applicable even if the court finds that there is factual consent:

First, if both parties agree that one or more of the jurisdictional issues should be decided by the State court rather than the arbitral tribunal, then the court's intervention is not contrary to the agreement of the parties. This, in turn, is an expression of the parties' autonomy to include a delegation clause on jurisdictional issues and requires proper examination and construction of the parties' specific agreement. If such agreement is found to exist, then both the tribunal and State courts shall abide by the specific regulatory rule set by the parties.

Second, State courts can intervene and decide jurisdictional issues trespassing into the arbitration stream if three conditions are cumulatively met: (a) strong reasons and cogent evidence are presented to the court by the party resisting arbitration; (b) the same reasons are raised before the arbitral tribunal as challenges to its jurisdiction; and (c) the arbitral

tribunal grants its permission for one, more, or all the jurisdictional issues be determined by the State courts.

The rationale behind the conditions under Rule 3(1)(b) is twofold: create a system of checks, balance and safeguard the autonomy of each of the dispute resolution streams. As such, the party wishing to resist arbitration will have to provide strong reasons and cogent evidence, first, before the arbitral tribunal in favour of which there is adequate manifestation of consent and, then, if the tribunal grants its permission after examining such evidence, the court will examine the same evidence. The participation of the resisting party in the arbitral proceedings which is done with the purpose of challenging the jurisdiction of the tribunal shall not be considered submission to the arbitral jurisdiction and shall not deprive that party from challenging the decision of the arbitrators before State courts.

In this manner, Rule 3(1) uses a similar formula to the one judicially developed under Section 9(4) of the Arbitration Act 1996 with amendments, however, corresponding to the nature and operation of the proposed theoretical model. First, the rule established in Section 72 of the Arbitration Act 1996 is reversed in the proposed approach. To challenge at the interlocutory stage the jurisdiction of a tribunal, the resisting party will have to prove to the State court directly that there is not a manifestation of consent and to challenge the jurisdiction of the tribunal and obtain its permission to resolve this issue before a State court. This formula is inspired by the one existing under Section 32 of the Arbitration Act 1996.

RULE 3(2)—The second factual scenario addressed in Rule 3(2) is one like *AES v Ust-Kamenogorsk,* where Party A commences litigation proceedings against Party B despite the—debatably existent—manifestation of consent to arbitrate, for example via an arbitration agreement. In such circumstances, where Party B—the one wishing to rely on the arbitration agreement—has no interest into commencing arbitration proceedings for a substantive claim against Party A, the question is whether the approach adopted in Rule 3(1) should be followed.

In such cases, pragmatism requires that the court deciding on a stay follow the same approach at the initial threshold stage. Therefore, if the party resisting the litigation proceedings—Party B in the example above—satisfies the court to a good arguable case that there is consent to arbitrate, then the stay of proceedings is mandatory for the court. The same should also be applied in—the practically unlikely—case that both parties agree

on such an intervention by State courts.

Pragmatism, however, dictates a variation as to the second exception. If no arbitration proceedings are on foot and none are envisioned, a State court shall be able to decide itself on the evidence brought by the litigation plaintiff—and party resisting arbitration—proving that the presumably existent—on a good arguable case standard—consent to arbitrate does not exist or is null, void, or otherwise invalid. To prove this, there need to be strong reasons and cogent evidence for the court not to exercise its obligation to stay proceedings when the matter is to be referred to arbitration.

The latter situation is, however, equally highly unlikely to occur in practice. As established in Rule 8(1), an arbitral tribunal can be established and decide on a declaratory basis whether it has or not jurisdiction. There is no need, therefore, for a party to commence arbitral proceedings and bring before the tribunal a substantive claim, for example for breach of contract from the other party(ies); rather, it is possible to commence declaratory jurisdictional proceedings. This is also alluded by Andrew Baker J in the decision in *Enka*[363] where, in circumstances similar to the factual scenario contemplated here, he accepted that the superior claim to decide on jurisdictional issues rests with the arbitrators. The decision has been reversed at the Court of Appeal with Popplewell LJ holding that:

> *[t]his curial jurisdiction to determine the arbitrators' substantive jurisdiction arises notwithstanding the international principle of Kompetenz-Kompetenz, reflected in our domestic law in s. 30 of the Arbitration Act 1996, that in the absence of contrary agreement the tribunal may rule on its own substantive jurisdiction. This is because the court of the seat always remains the primary arbiter of the substantive jurisdiction of the tribunal and will examine that jurisdiction not only in a challenge to the tribunal's ruling on its own substantive jurisdiction, but if necessary in advance of it.*[364]

Despite the fact that the decision was reversed and that Popplewell LJ held that the curial court remains the 'primary arbiter' for jurisdictional issues, the approach favoured in this thesis is based on the importance placed upon the constitution of the tribunal as a material

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363 *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2019] EWHC 3568 (Comm).

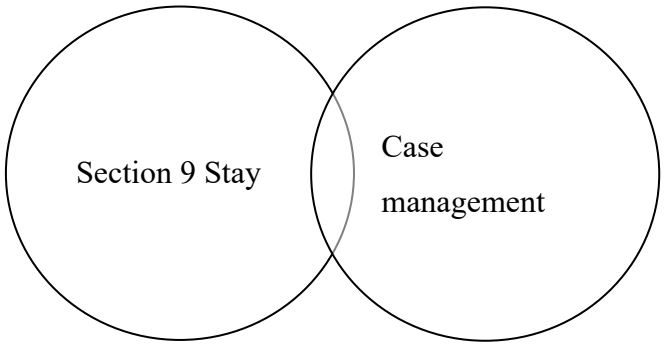
364 See *Enka v Chubb* [2020] EWCA Civ 574 at [53].

time for the delineation of jurisdiction between the curial State court and the tribunal. This is not to suggest a diminished role for the curial State court. On the contrary, it is a proposal based on a delineation of competences on the theoretical basis established in Chapter 4. As such, Rule 3 establishes that if the tribunal is constituted—all the more so with the sole purpose of declaring whether it has or not jurisdiction—then Rule 3(1) would be engaged, not Rule 3(2).

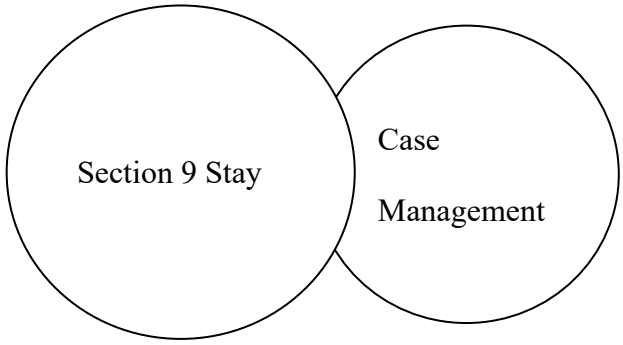
RULE 3(3)—Focusing on courts of England and Wales, Rule 3(3) recognises the residual discretion and power of the courts in this jurisdiction to stay their proceedings on a case management basis. As analysed above, the surrounding case management stays is the delineation with stays on the basis of an arbitration agreement. The current approach in jurisprudence is, at least, blurry in recognising the unfettered discretion of State courts to grant case management stays in cases where they should be applying the principled approach described in the Arbitration Act 1996.

In the context of this restatement proposal, case management stays are subject to Rules 3(1) and 3(2). The power of English courts to grant case management stays is truly residual and can only be exercised where the courts are not under an obligation to stay their proceedings under these Rules. In the analysis above, one example provided was granting a stay is granted against a non-party to the arbitration agreement and, hence, Section 9 of the Arbitration Act 1996 is not engaged. As such, the space for truly residual case management stays is limited as shown in the diagrams below:

Current approach



Reformed approach



5.2 Declarations of Validity: Cost Management Tools or Jurisdictional Encroachment?

Jurisdictional intersections do not only exist when the issue of the tribunal's jurisdiction and the existence, validity, or scope of the arbitration agreement are used as a shield to stay litigation proceedings. Under both the court's inherent jurisdiction and the system established by the Arbitration Act 1996, English courts can be requested to determine in declaratory proceedings the existence, validity or lack thereof of the arbitration agreement. This is to suggest that the request can be either for a positive or for a negative declaration. In either case, this acts as a sword that pre-emptively, concurrently, or after the arbitration proceedings, aims at giving the requesting party a higher ground in the jurisdictional dispute.

Under the system of the Arbitration Act 1996, a declaration by the courts as to the existence, validity, and scope of the agreement is seen on the one hand as an exceptional measure to be exercised only in the rarest circumstances, and on the other as a distinctive characteristic of the English arbitration system. More specifically, Sections 32 and 72 of the Arbitration Act 1996 are relevant. Although the prerequisites for both have been analysed and are settled by the Act itself and by the courts applying them, there is a glaring lack of a systematic treatment of the two paths available. As the analysis below will show, the threshold imbalance between a positive and a negative declaratory decision, as well as a judicially established barrier in a pre-arbitration positive declaration is at odds with the system and the overriding objectives of the Act. The shield and sword paths can co-exist if a systematic and coherent approach is adopted focusing on delineating the jurisdictional intersections between courts and tribunals and striking the right balance between the objectives of ensuring the existence of the parties' choice to arbitrate their

disputes.

5.2.1 Declaration under Section 32 of the Arbitration Act 1996

The first gate through which the issue of the tribunal's jurisdiction can positively come before a court is the application for a declaration as to the validity of the arbitration agreement under Section 32 of the Act.

This is different to the determination under Section 9 of the existence and validity of the arbitration agreement as an objection to the court's own jurisdiction through an application for a stay. The language of the two Sections is also different. While in Section 9(4) the court 'shall grant a stay'—connoting a mandatory requirement for the judges—, in Section 32(1), the court 'may […] determine any question'—connoting a discretion of the court which has to be exercised in the context of the overarching principle contained in Section 1(c) of the Act that, in matters governed by Part I of the Act, 'the court should not intervene' except to the extent provided in the Act itself.[365] In fact, the Departmental Advisory Committee (DAC) considered—and rightly so—that the power of the court under Section 32 is to be the exception that proves the rule and not the other way around; the rule for the drafters of the Act remains that the tribunal is and should be the one to have the first crack of the whip in determining its own jurisdiction.[366] This is further enhanced by the provision in Section 32(4) which provides the tribunal with the discretion—'may'—to continue its proceedings uninterrupted and even issue an award on the merits.[367] The drafters feared that this exceptional discretionary power of the courts might become the 'normal route for challenging jurisdiction'. This fear—despite the appraisal of this power as a distinct characteristic of the English arbitration system—has not been affirmed. The prerequisites of the provision and the application by the courts confirms the limited and exceptional character.

The court's power is qualified in a two-fold manner under the Arbitration Act 1996: (i) under Section 32(2), the application cannot be entertained, unless it is made by consent

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365 *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm).

366 See Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, paras. 141-147.

367 Given, however, that this might be an issue to come up again in setting aside proceedings under Section 67, the parties and the tribunal have to consider whether the final award will be liable to be set aside. In addition, the increase of costs and the potential delays would militate in favour of staying the arbitral proceedings until the determination of the point by the court.

or with the permission of the tribunal and the Court is also satisfied that the determination of the question is likely to produce substantial savings in costs; and (ii) the application is made 'without delay' at the earliest possible stage[368] and there is good reason why the matter should be decided by the Court.

There have been, however, only a few cases on this. In *Toyota Tsusho Sugar Trading Ltd v Prolat SARL*,[369] Cooke J held that determination by the court was likely to produce a substantial saving in costs and was satisfied that the application was made without delay. In *Azov Shipping Co v Baltic Shipping Co*[370] where the Court, in considering an application under a Section 9, found that if it were not to decide the questions on the existence of the arbitration agreement, a real danger would exist for two hearings: one before the tribunal determining its own jurisdiction and one before the court on a challenge under Section 67. In *Esso Exploration and Production UK Ltd v Electricity Supply Board,*[371] the Court granted an injunction because it considered it was clear that the tribunal's power did not extend to all issues arising in relation to the question of jurisdiction. On the other hand, in cases where the question of the tribunal's jurisdiction is inextricably tied in with questions going to the substance of the dispute, should be for the tribunal to decide.[372]

The practical reason that the parties might give their consent, or the tribunal gives its permission, for such an interlocutory judicial determination is the economy of proceedings. Indeed, both the costs incurred for the challenge procedure under Section 67 and the ones during the arbitral proceedings themselves could potentially be avoided through the procedure of Section 32.

The perceived practical advantages of such an early stage judicial determination of the tribunal's jurisdiction are not enough, however, to reverse the scheme established by Sections 30 and 32. These advantages are nullified by the systematic disparity of arms

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368 Section 40(2) of the Arbitration Act 1996 specifically requires any party applying to the court under Section 32 to take any necessary steps 'without delay'. This express duty is reflected in the requirement in Section 32 that the application be made 'without delay'. A failure to act without delay will mean that the court is unable to intervene on the jurisdictional issue.

369 [2014] EWHC 3649 (Comm).

370 [1999] 1 Lloyd's Rep 68.

371 [2004] EWHC 787 (Comm).

372 This resembles the 'arbitrability' question before US court examined above.

created by the regime of Section 72.[373] If the respondent refuses to participate in the arbitration—even for the purpose to contest the tribunal's jurisdiction—refuses to accept the offer of the applicant under Section 32, and delays until a later stage either the Section 72 or the Section 67 challenge to the tribunal's jurisdiction (via a declaration or injunction in the first case or via an application to set the award aside in the second case), then the waste of resources and time will be severe. These considerations, coupled with the current statement of the law regarding the standard to be applied under Section 67 for a complete rehearing,[374] appear to give the respondent a way to delay the proceedings, increase the costs, and challenge the jurisdiction of the tribunal at a later stage.

Furthermore, the recent development of the law in relation to positive declarations when no arbitration is afoot illuminates further the disparity between the options given to the two parties. Where, prior to the commencement of arbitration proceedings, the claimant, who asserts that there is a valid arbitration agreement covering its claim, applies to the court for a determination of the validity of the arbitration agreement, Judge Waksman QC in *HC Trading Malta Ltd v Tradlands Commodities SL*[375] held that the court should not entertain that application. The decision was based on the presumption that it would be possible for the applicant to commence arbitration proceedings and for the matter to be considered by the appointed tribunal.[376]

Judge Waksman QC considered the approach in *AES Ust-Kamenogorsk* both before the Supreme Court[377] and before the Court of Appeal[378] and distinguished—with the applicant's counsel agreeing at the oral hearing—the case before him on the basis of the applicant's settled intention to commence arbitration proceedings. On this basis, he concluded that: '[t]he claimant is clearly able to commence an arbitration in pursuance of that agreement whether or not he has yet done so, and *whether or not it is imminent*'

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373 This is extensively analysed in the very next Section.

374 See Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th edn, Informa law from Routledge 2014) 296.

375 ibid. The matter was not addressed in *AES v Ust-Kamenogorsk* (n 16) because no arbitration proceedings were on foot or about to be commenced.

376 *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm) at [3].

377 *AES v Ust-Kamenogorsk* (n 16).

378 *AES Ust-Kamenogorsk Hydropower Plant Llp v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647.

(emphasis added).[379] Although this conclusion is, indeed, true in cases such as the one Judge Waksman QC had to decide, with his last phrase he went even further. He held that, even if no arbitration is imminent, the mere fact that claimant is able to commence such an arbitration is the decisive factor and the application for declaratory relief under the court's inherent powers must fail.[380] This seems to be at odds with Lord Mance's findings in *AES Ust-Kamenogorsk* that if no arbitration is afoot and no arbitration is intended then Section 32, and the whole Act is not engaged. It was not the applicant's actual ability to raise such an arbitration claim, but rather its intention. Judge Waksman's QC himself held that in the *AES Ust-Kamenogorsk* type of cases—that is, where no arbitration was imminent or even contemplated:

> *[t]o force a party in those circumstances to start an arbitration claim solely for the purpose of establishing that the arbitrator would have jurisdiction in the event that the claim was made, was clearly absurd, even assuming that it would be possible to start an arbitration simply on those grounds.*

Furthermore, in the words of Rix LJ:

> *[i]t seems to me to be going too far to say that because an arbitral tribunal "may rule on its own substantive jurisdiction" (emphasis added), therefore the court ought always to regard the position as though there is an obligation on the parties and/or on the arbitrators for the arbitrators to rule on any dispute about their substantive jurisdiction.*[381]

This does not support the conclusion that 'whether or not' arbitration is imminent, the applicant can—and should—commence arbitration proceedings to engage the system of the Arbitration Act 1996. Furthermore, this is not in line with the case of a negative declaration under Section 72.

This is not to suggest or encourage the standalone determination of jurisdictional issues by a court rather than a tribunal. As analysed in Chapter 4, the proposal is for a delineation

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379 ibid.

380 See *HC Trading Malta Ltd v Tradlands Commodities SL* at [9] referring to the court's general inherent power to grant declaratory relief and CPR 40.20 makes clear that it can make such declarations whether or not any other relief is claimed.

381 *AES Ust-Kamenogorsk Hydropower Plant Llp v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 at [98].

of powers between courts and tribunals. In the context of the provisions of the Arbitration Act 1996 related to declarations, however, levelling the playing field would require the systematic interpretation of Sections 30, 32, and 72. This would require the parties to elect either between the early final judicial determination of the tribunal's jurisdiction via Sections 32 and 72, respectively, or the tribunal's determination of the matter under Section 30 with a subsequent review of the award on the matter and not a complete rehearing of the case.

5.2.2 Powers under Section 72 of the Arbitration Act 1996

The second option existing in the Arbitration Act 1996 for a declaration, among others, as to the existence and validity of the arbitration agreement is Section 72 which provides that:

> *[a] person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—*
>
> *(a) whether there is a valid arbitration agreement,*
>
> *[…]*
>
> *by proceedings in the court for a declaration or injunction or other appropriate relief.*

Although the remedial scope of this Section is wide, encompassing not only a declaration but also an 'injunction or other appropriate relief', the personal scope regulating who can use these remedies is narrow; it is only given to an alleged party to arbitral proceedings who does not take a step in these proceedings, even only for the purpose of challenging the jurisdiction of the tribunal. According to the DAC Report:

> *[a] person who disputes that an arbitral tribunal has jurisdiction cannot be required to take part in the arbitration proceedings or to take positive steps to defend his position, for any such requirement would beg the question whether or not his objection has any substance and thus be likely to lead to gross injustice. Such a person must be entitled, if he wishes, simply to ignore the arbitral process, though of course (if his objection is not well founded) he runs the risk of an enforceable award being made against him. Those who do decide to take part in the arbitral proceedings in order to challenge the jurisdiction are, of course, in a different category, for then, having made that choice, such people can fairly and properly be required to abide by the time*

limits etc. that we have proposed.[382]

The drafters of the Arbitration Act 1996 considered that a party has the right to completely ignore the arbitration proceedings, refuse to even challenge the jurisdiction of the tribunal before it, and, then, either at the same time or afterwards commence court proceedings to declare that the agreement is not valid. This negative declaratory remedy is not given—in its positive reverse form—to the party wishing to establish pre-emptively the validity of the agreement. Judge Waksman QC in *HC Trading Malta Ltd v Tradlands Commodities SL*[383] held that the proper course of action in such a case would be for the declaration applicant to commence arbitration proceedings so as the tribunal to consider the matter and only under the requirements of Section 32 to request the courts to decide on the validity or invalidity of the agreement.

In effect, Section 72 establishes two rules: (i) a passive right for a party to stay silent while the arbitration progresses; and (ii) a right of that silent party to request a declaration for the agreement's validity potentially coupled with an injunction, or any other appropriate remedy. These two rights could lead to a situation where Party A has commenced English arbitration proceedings against Party B and the latter does not participate in the proceedings and resorts directly to the courts of the seat for a negative declaration on the arbitration agreement, in effect circumventing the requirements of Section 32 and potentially torpedoing the arbitration proceedings with a negative declaration by the English courts which creates issue estoppel. Hence, even if the tribunal continues on and rules on its jurisdiction and the merits of the case, the court that will consider a—highly likely—application for setting aside, will be bound by that declaratory decision and will have to set aside the award on the ground of lack of jurisdiction.

Furthermore, while courts have emphasised that 'the court should, in the light of Section 1(1) of the Act, be very cautious about agreeing that [the Section 72] process should be so utilised', there is no case considering a systematic treatment of this Section with Section 32 of the act. The only treatment in case law is an *obiter* comment by Longmore LJ in *Fiona Trust* regarding the relationship with Section 9 of the Arbitration Act 1996. Longmore LJ held that:

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382 Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, para. 295.

383 ibid. The matter was not addressed in *AES v Ust-Kamenogorsk* (n 16) because no arbitration proceedings were on foot or about to be commenced.

> *[…] if the party who denies the existence of a valid arbitration agreement has himself (as the owners have here) instituted court proceedings and the party who relies on the arbitration clause has applied for a stay, the application for a stay is the primary matter which needs to be decided. It would only be if a stay were never applied for or were refused, but for some reason the party relying on the arbitration clause insisted on continuing with the arbitration that any question of an injunction should arise. Of course, Section 72 might well be applicable if the party denying the existence of an arbitration agreement had not started English proceedings and did not wish to do so.* [384]

The DAC seems to consider that the only downside for the passive stance of a party is that it 'runs the risk of an enforceable award being made against it'. While this is indeed a risk to be considered, the 'benefit' of potentially torpedoing the arbitration proceedings and/or gaining a better position for the post-award phase is indeed higher. There is a single reference in case law—albeit under the previous statutory regime—for another potential downside for such a course of action. Such an action before the English courts under Section 72 opens up the possibility of a counterclaim for substantive proceedings if the court finds that the agreement is invalid. As Lord Brandon held in delivering the decision of the House of Lords in *The Gladys*, after granting a stay instead of strike out of the defendant's (and arbitration claimant) counterclaim 'if the court decides that there was a contract but it did not incorporate the disputed clause, the sellers will be in a position to apply for the stay to be lifted so as to enable them to pursue their counterclaim'.[385] This is in line with the principle of submission to the court's jurisdiction enshrined in Section 33 of the Civil Jurisdiction and Judgments Act 1982.

A parallel drawn with Section 33 of the Civil Jurisdiction and Judgments Act 1982, however, points out the problematic nature of the provision in Section 72 of the Arbitration Act 1996. If it is considered sufficient for not submitting to the jurisdiction of the English courts to appear in the proceedings for the purpose of contesting the jurisdiction of the court, there is no detriment in accepting the same for an arbitration agreement. This is all the more so as Section 73 of the Arbitration Act 1996 protects the

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384 *Fiona Trust & Holding Corporation & ors v Yuri Privalov & ors* [2007] EWCA Civ 20, 2007 WL 2861 at [34] per Longmore LJ.

385 *Metal Scrap Trade Corporation Ltd. v Kate Shipping Co. Ltd.* [1990] 1 W.L.R. 115; [1990] 1 All E.R. 397 at 131 D per Lord Brandon; see also Joseph 2015 (n 16), para. 13.36.

objecting party's rights after the award has been rendered if that objection was raised timely.

Finally, considering the analysis and proposal made above on the standard of proof required for a stay, the same can be applied here. Unless the party contesting the jurisdiction of the tribunal proves on a balance of probabilities standard that the agreement is invalid or void or non-existent, the court should dismiss such action upholding the validity of the agreement and staying its proceedings. This is in line with the principle of competence-competence in Section 30 of the Arbitration Act 1996 and does not deprive the contesting party of any of its rights if it maintains its objection. In any case, and under a construction of the provisions of the Act as a whole,[386] if both parties agree or the tribunal gives permission, a declaration under Section 32 remains available for either side.

386 This is also called systematic interpretation of the provisions of a statute and it is one of the primary canons of interpretation in civilian systems which operate in the form of a code. As Diggory Bailey and Luke Norbury argue '[a]n Act or other legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument'; see Diggory Bailey and Luke Norbury, *Bennion on statutory interpretation* (LexisNexis 2017). See also *Secretary for Justice v Ma Po Kwan* [2016] HKCA 322 at [58]; *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd* [2004] UKHL 7, [2004] 2 All ER 141 at [38].

5.2.3 Restated Approach

RULE 4—Declaratory Powers

(1) State courts shall have the power to grant a declaratory judgment on one, more, or all of the jurisdictional issues provided that—

(a) the Court is satisfied that there is no adequate manifestation of consent; or

(b) the other party(ies) so agree; or

(c) the tribunal grants its permission.

(2) A party alleged to be a party to a dispute who takes no step in the proceedings shall not be entitled to request a State court to grant a negative declaration as to the agreement's validity, unless—

(a) the State court is satisfied that there is no adequate manifestation of consent; or

(b) the other party(ies) so agree; or

(c) the tribunal grants its permission;

(3) State courts shall not have the power to grant a declaration before the constitution of the tribunal unless—

(a) the State court is satisfied that there is no adequate manifestation of consent; or

(b) the State court is satisfied that party requesting the declaration provides the court with cogent evidence and strong reasons supporting this declaration; or

(c) both parties agree on such intervention.

General—The second instance where courts' jurisdictional determinations intersect with the tribunal's jurisdiction is the possibility for a court to grant positive or negative declaratory powers. As analysed in the previous Section, such power already exists in the context of Sections 32 (on positive) and 72 (on negative) of the Arbitration Act 1996. The judicial treatment and interpretation, however, of such declaratory powers is not consistent with the overarching principle of regulating arbitral jurisdiction on the basis of party autonomy and of a horizontal relationship between courts and tribunals. Such horizontal relationship, at first sight, mandates that declaratory powers for the jurisdiction of either side of the 'streams' are, in principle, an unwarranted trespass.

Rule 4 codifies the principles pertaining to the courts' declaratory powers distinguishing between types of cases where both parties participate or intend to participate in the

proceedings (Rule 4(1)), types of cases where one party does not take part to the arbitration proceedings and reaches out to State court's for a negative declaratory judgment as to the agreement's validity and scope (Rule 4(2)), and, finally, types of cases where there is no arbitration currently or intended to be on foot (Rule 4(3)).

RULE 4(1)—Rule 4(1) encapsulates the general rule on the court's declaratory powers as to the tribunal's jurisdiction. These powers can extend—as is the case with the court's general intervention powers—to one or more jurisdictional issues including questions of validity and existence of the parties' consent to arbitrate. While this a Rule which applies to both positive and negative declarations regarding such jurisdictional issues, one should distinguish between subsection (a) and subsections (b) and (c) which provide the grounds upon which a State court can grant a declaratory judgment on an arbitral jurisdiction issue.

Under the ground provided in subsection (a), a State court can only grant a negative declaration on arbitral jurisdiction. This is to suggest that, regardless of whether the court was asked to grant a positive or a negative declaration, if the court is satisfied that there is not even adequate manifestation of consent can grant a negative declaration. This is indeed the reverse side of the coin for an application for a stay of the court's own proceedings and the initial threshold remains the same. While it is enough in order to grant a stay for the court to find on a good arguable case that there is factual consent to arbitrate, the reverse is required for a negative declaration; the court needs to be satisfied that the threshold is not met. It is, therefore, more difficult to satisfy the same standard from this side of the coin. Subsection (a) constitutes an expression of the general principle that a shred of consent needs to be manifested to enter into one of the two streams described in Chapter 4. If there is not even that, party autonomy and the rule on horizontal choice does not even become part of the equation.

Subsections (b) and (c) allow State courts to grant either a positive or a negative declaration and constitute expressions of party autonomy, albeit each in a different way. These grounds correspond to the existing structure and requirements of Section 32 of the Arbitration Act 1996. Under subsection (b), party autonomy is directly involved. State courts shall have jurisdiction to grant a declaration if the other parties so agree. While this might be seen as an encroachment to the tribunal's general right to determine its own jurisdiction, parties are free to exercise their autonomy partially or wholly to allow State courts to grant a declaration on a specific issue. Under subsection (c), the court has the power to grand a declaration if the tribunal grants its permission to do so in a similar manner and with similar requirements to the existing Section 32 of the Arbitration Act

1996.[387]

RULE 4(2)—Considering a situation where the one party does not take part in the arbitral proceedings at all, Rule 4(2), despite its reverse wording, extends Rule 4(1) and does not allow the non-participating party to request a declaratory judgment unless either of the three grounds is satisfied. This is to suggest, first that the analysis of the grounds is similar to the one under Rule 4(1), and second that this rule limits the broad powers afforded to the non-participating party by Section 72 of the Arbitration Act 1996. As analysed above, under the latter provision, the non-participating party has the right to request at any given point, either at the interlocutory stage or after the award has been rendered, a negative declaration from the supervisory courts. While the declaratory powers of the courts are not denied in the system proposed in this thesis, equal treatment of the parties in a horizontal model where the initial threshold is crossed requires the non-participating party either to wait and challenge the jurisdictional award or take part in the arbitral proceedings and challenge the jurisdiction of the tribunal.

Three observations have to be made with respect to Rule 4(2). First, participation in the arbitral proceedings with the sole purpose of challenging the jurisdiction of the tribunal shall not be considered submission to the tribunal's jurisdiction. In other words, a party taking a step in the arbitral proceedings to challenge the jurisdiction of the tribunal shall not be considered subject to the jurisdiction of the tribunal. Second, the ground in subsection (c), at least doctrinally and in principle, does not necessarily require the resisting party's participation in the proceedings to challenge the tribunal's jurisdiction. While this might be the practically envisioned scenario, the formulation in Rule 4(2) does not require the party's participation in the proceedings. Third, similarly to Rule 4(1), a State court shall have the power to grant a negative declaration if the initial threshold is not satisfied.

RULE 4(3)—In Rule 4(1), the constellation of facts envisioned is nothing but common in practice. As analysed above, such were the facts in *AES v Ust-Kamenogorsk* as well as in *HC Trading.* While in the context of an anti-suit injunction request, the Supreme Court in *AES v Ust-Kamenogorsk* decided that there was no requirement for the injunction applicant to commence proceedings before an arbitral tribunal, the High Court in *HC Trading* held that a positive declaration could not be requested by the court before the

[387] See above in p. 145 *et seq*.; See also Merkin and Flannery 2019 (n 13) 359.

constitution of the tribunal.

Rule 4(3) is based on the premise that the 'superior' claim for deciding jurisdictional disputes rests on the tribunal.[388] As such, it provides that State courts shall not be able to grant a declaration unless either of the three grounds are fulfilled. While subsections (a) and (c) are subject to the same analysis as the equivalent subsections in Rules 5(1) and 5(2), subsection (b) merits separate analysis as it touches upon the issue dealt with by the Hight Court in *HC Trading.*

Rule 4(3) subsection (b) constitutes the reverse side of the coin of Rule 3(2) subsection (b). Rule 3(2)(b) qualifies the mandatory grant of a stay of proceedings if the party resisting arbitration provides the court with cogent evidence and strong reasons that the agreement is invalid. Similarly, and on the reverse, Rule 4(3)(b) qualifies the prohibition for declarations if the tribunal has not been constituted and there is no real possibility for such constitution. Rule 4(3)(b) applies primarily in cases of an application for a positive declaration, that is one confirming the jurisdiction of the tribunal. This is because applications for negative declarations are dealt with primarily under Rule 4(3)(a). It is, however, conceivable that the request does not meet the requirements of Rule 4(3)(a) because there is factual consent, but the requesting party provides strong reasons and cogent evidence that, nevertheless, the agreement is not valid.

5.3 Enforcement of Arbitration Agreements: Traditional and Equitable Remedies

5.3.1 Court-Ordered Anti-Suit Injunctions

Turning to the opposite side of the coin of requesting a stay of local litigation proceedings in favour of arbitration, one of the most successful and powerful tools a party has under English law is a court-ordered injunction to restrain the recalcitrant defendant from pursuing a claim in a *forum* other than the chosen arbitral tribunal in breach of an arbitration agreement. Without dealing in detail here with the nuances of court-ordered injunctions,[389] a summary of the foundation, the grounds, and the discretional operation

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388 ibid.

389 This is extensively analysed in Fentiman 2015 (n 18) paras. 16.01 *et seq*.; Thomas Raphael, *The Anti-Suit Injunction* (2nd edn, OUP 2019); Thomas Raphael, *The Anti-Suit Injunction - Updating Supplement* (OUP 2015).

of this relief as evolved before English courts is useful to illuminate the availability of similar type of orders granted by arbitral tribunals as analysed in Chapter 6.

The point of departure is the equitable origins[390] of the court's power to restrain a defendant from pursuing a claim in litigation despite the existence of an arbitration clause. This equitable power has now found statutory expression in Section 37 of the Senior Courts Act 1981.[391] These origins in equity are fundamental to several propositions and conclusions. Firstly, it is aiming to prevent injustice against the unconscionable behaviour of the defendant which takes the form of pursuing—or attempting to pursue—a claim before a non-chosen *forum*. Secondly, and again as required by Section 37(3) Senior Courts Act 1981, the injunction is granted *in personam* against a defendant who is amenable to the jurisdiction of the English courts. In addition to this personal jurisdiction over the defendant, under comity considerations, the English court must have subject matter jurisdiction, or, as it is usually referred to in case law, 'an interest in the case'. Thirdly, as an equitable relief, an injunction is granted by the court considering both the effect it has on the defendant (balance of equities) and the—indirect[392] yet important—effect it has on foreign proceedings (need to observe the requirements of comity).[393] In other words, it is perceived by some as an encroachment on the judicial sovereignty of the *forum* before which the order debtor has, or intends to, commence proceedings. Finally, the applicant has to apply promptly for an injunction and the court might not exercise its discretion if it finds that the applicant came in equity without clean hands.

In cases of exclusive jurisdiction or arbitration agreements the test applied by English

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390 David Raack, 'A History of Injunctions in England Before 1700' [1986] 61 Indiana L.J. 539.

391 Section 37 Senior Courts Act 1981 provides that: '[t]he High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so'.

392 This indirect nature of the effect in foreign proceedings was not enough to convince the EUCJ to allow an anti-suit injunction granted by English courts in favour of an agreement to arbitrate in *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Incorporated, Case C-185/07* [2009] ECR I-663 or in favour of an exclusive jurisdiction agreement in *Turner v Grovit, Case C–159/02* [2004] ECR I–3565.

393 *AES v Ust-Kamenogorsk* (n 16) per Lord Mance favouring a more cautious approach and *The Angelic Grace* (Millett LJ) expressly advocating against restrictions on the basis of possible offense from foreign courts.

courts is the same as in the case of granting a stay.[394] As explained by Lord Bingham in *Donohue*:

> *[i]f contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum.*[395]

The principle of holding parties to their agreements operates the same way either in the case of granting a stay of local proceedings or in granting an injunction to restrain the improper commencement of a claim abroad. The difference in case of an arbitration agreement is that—as discussed above—granting a stay operates under the rules of Article II(3) of the New York Convention and Section 9 of the Arbitration Act 1996 in addition to the inherent right of the court to stay its proceedings where appropriate. In the reverse situation of granting an injunction, the same standard of Section 37 applies on the basis of the negative undertaking not to pursue the adjudication of the dispute elsewhere, as clarified by the Supreme Court in *AES v Ust-Kamenogorsk.* This is to suggest that, in both cases, the issue is one of enforcing the parties' contractual bargain.[396] On this basis, and unless strong reasons to the contrary exist, the Court will ordinarily grant the injunction. As observed by Lord Bingham the word 'ordinarily' is used:

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394 This, however, is not to suggest that the principles are exactly the same. As mentioned by Lord Bingham in *Donohue v Armco Inc* (n 19) at [24] and extrapolated by Lord Goff in *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, 896 concerns of comity arise only in the case of anti-suit injunctions; not in the case of granting a stay. This is, indeed, true in principle in the case of an arbitration agreement where the stay is granted solely on the basis of the parties' choice and not of any comity considerations.

395 *Donohue v Armco Inc* (n 19*)* at [24] per Lord Bingham.

396 ibid at [24] per Lord Bingham ('where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it').

> *[…] to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. […] Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case.*

Case law following Lord Bingham's proposition seems to suggest that the existing or intended breach of the arbitration agreement as a breach of a substantive or legal right of the party is sufficient to show the unconscionable behaviour of the defendant. The court's discretion in granting the injunction still exists; it is an equitable remedy and the circumstances of each individual case, either from the applicant's or the defendant's side, are the ones determining whether the aims of justice require that this unconscionable behaviour should be remedied via an injunction. Fentiman, however, argues that the existence of a substantive or legal right is merely a prelude to whether the respondent's conduct is unconscionable.[397] As he puts forward, an anti-suit injunction is a procedural relief which enforces a contractual right in circumstances where the breach of that right is unjust within the terms of Section 37. In other words, the breach of the arbitration agreement is only one element—a necessary one—towards the establishment of the unconscionable behaviour. In this construction the discretion of the court seems to exist at the stage of establishing the unconscionable behaviour. If such behaviour is found, the prerequisites of Section 37 and the aims of justice are satisfied and, hence, the injunction is rendered.

This could be seen as being at odds with the argument often expressed before foreign courts at the stage of enforcement of such injunctions that they do not infringe the court's

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397 Fentiman 2015 (n 18), para. 16.18 where the issue is analysed in the different context of the applicable law on the availability of anti-suit injunctions as a relief. The better approach seems that to be that the implicit and anterior question of applicable law does arise as well in the case of an arbitration agreement as the violated right and the answer is one of applying Section 37 Senior Courts Act as overriding mandatory provisions of the *lex fori.* Briggs, however, argues to the contrary that the question of law is indeed different in cases of substantive/legal rights such as exclusive jurisdiction and arbitration agreements; see Adrian Briggs, 'The unrestrained reach of an anti-suit injunction: a pause for thought' [1997] Lloyd's Maritime and Commercial Law Quarterly 90.

sovereignty because they are simply a judgment on the parties' substantive rights.[398] If granting the anti-suit injunction is not merely a question of a breach of the arbitration agreement but also in addition of something else—of a behaviour that reaches the threshold of unconscionability—, then the injunction is not merely a judgment on the parties' substantive rights but also on the manner these rights were violated and on the procedural conduct of the defendant. Hence, extra objections might be raised at the enforcement stage if the injunction is considered a procedural relief.

The different grounds of unconscionability, however, suggest that a distinction should be drawn. On the one hand, in case of a substantive right arising out of an arbitration agreement, the predominant element for the unconscionable behaviour of the defendant is the breach of the negative obligation of this agreement in itself.[399] The extra elements arising out of the equitable origins of the relief should not be considered as altering the nature of the injunction as a remedy against a breach; they are establishing the discretionary character of the remedy, which remains one against a substantive breach with the burden being on the defendant to prove that the ends of justice—in the form of strong reasons[400]—require the injunction not be granted. On the other hand, where the

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398 Fentiman 2015 (n 18), para. 16.19.

399 *Donohue v Armco Inc* (n 19) at [23]-[24] per Lord Bingham; *AES v Ust-Kamenogorsk* (n 16) at [1] per Lord Mance. One may argue that bringing proceedings before the English courts to grant an anti-suit injunction is in itself a breach of the agreement to arbitrate. The response there, however, can be that the supervising courts of the seat of arbitration, when the defendant is within their personal jurisdiction also have a subject matter jurisdiction or an interest in the case. It has also been argued that there is no need for the arbitration to be seated in England for the court to have jurisdiction; see Briggs 2015 (n 25) 555 with reference to the Bermuda Court of Appeal decision in *IPOC International Growth Fund Ltd v OAO CT Mobile* [2007] Bermuda LR 43. This, however, is to suggest that an English court would only need to have personal jurisdiction over the defendant and not subject matter jurisdiction. The latter is established only in the case of the courts of the arbitral seat.

400 These reasons are not—and should not—be considered the same as the ones in the inquiry of a stay on *forum non-conveniens* grounds. The analysis of appropriateness is irrelevant in this case; the injunction is enforcing a negative covenant of the contract. The extremities that might be generated in this case are alleviated by correct application of comity considerations both at the stage of asserting jurisdiction (subject matter) and exercising the discretion of the court. See also *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14, noted by Richard Fentiman (2012) Cambridge Law Journal 27; *AES v Ust-Kamenogorsk* (n 16) at [61] per Lord Mance, who observed that, despite

injunction is based on the procedural unconscionability of the defendant, no breach of a substantive obligation can be identified. It is the vexatious or oppressive behaviour of the defendant that triggers the remedial response of the English courts upon the application of the other party on the basis of Section 37. This analysis is significant for any parallels drawn below in relation to arbitral enforcement orders. Indeed, the jurisdictional basis and the discretionary granting of these orders can be equated with the court-ordered remedies; either as a breach of the substantive obligation undertaken in the agreement to arbitrate or as a procedural tool in ensuring the proper conduct of the parties and the jurisdiction of the tribunal itself.[401]

The preceding analysis was based on the premise of the court's discretion to grant this type of injunction. Despite seemingly broad, in practical terms this discretion will 'ordinarily' be exercised unless strong reasons exist.[402] Another limitation at the discretion stage has been seemingly put in place by the elusive notion of comity.[403] Despite this is not a thesis on the operation of comity, in this context, it is enough to refer to the role of comity as a mechanism of self-limitation for the courts exercising their discretion to grant anti-suit injunctions, where such exercise would be considered as an encroachment to the sovereignty of other States. Where the ground for granting the injunction is the violation of an arbitration agreement, there are, however, limited practical consequences from the application of comity as a limitation mechanism. This is because the New York Convention has crystallised in its rules such comity considerations. In fact, the only relevant consideration should be whether the specific jurisdictional issue in question has been addressed by the foreign court on the basis of the New York Convention or its own national rules. It is clear, though, both under the doctrine of separability and under Article V(1)(a) of the New York Convention, that such judgment on the validity of an arbitration agreement cannot be done, arbitrarily, on the basis of the foreign *forum*'s national rules but has to be done in accordance with the law

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the breach of the negative covenant in the arbitration agreement, in some cases it might be more appropriate for the English courts to leave it to the foreign court to recognise and enforce the parties' agreement to arbitrate.

401 See below in Chapter 6. Such parallels are not an exact mirror image, though. The differences in the nature and sources of the tribunal's jurisdictional powers, lead to a different point of departure and different considerations for the tribunal when exercising its discretionary powers.

402 *Donohue v Armco* Inc (n 19).

403 *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14.

the parties subjected the agreement or, in any case, under the law of the seat of arbitration.[404] Comity in this context, is therefore, confined from the New York Convention and should not be used in lieu of a proper analysis and application of the provisions of this Convention.

The acceptance of this power, primarily exercised by English courts, is not the same in other jurisdictions or within the European Union.

On the one hand, jurisdictions of a civilian tradition are reluctant—or, rather, quite opposed—to the acceptance of such relief. There are, however, some—increasing in number—voices to the contrary. In Germany, the same Court of Appeal in Dusseldorf that has refused to accept the enforcement of an English anti-suit injunction,[405] has also accepted that the victim of abusive foreign proceedings has a substantive claim in delict against the claimant to these foreign proceedings. Such claim may entitle the victim to an injunction to prevent the wrongful conduct in support of its substantive right. This is based on Section 1004 of the German Civil Code which provides for interferences with the ownership of a person that, '[i]f the ownership is interfered with by removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction'.[406] In

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404 In *AES v Ust-Kamenogorsk* (n 16), the foreign court had declined to enforce the agreement, and had done so on grounds unknown to English law (the law governing the agreement), in circumstances where the English court was not required to recognize or enforce the foreign court's decision. In addition, usually and unless the parties have provided for something different, an arbitration agreement providing for London as a seat, will ordinarily be governed by English law; see also *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2013] 1 WLR 102; *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] EWCA Civ 574; *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2020] EWCA Civ 6..

405 Dusseldorf Regional Court of Appeal's decision in *Re the Enforcement of an English Anti-Suit Injunction Case* [1997] ILPr 320 at [14]-[19], where the judges refused to enforce an anti-suit injunction granted Here, the court refused to follow an anti-suit injunction granted by the English courts against a German citizen breaching a London arbitration agreement. The court's rationale summarises the objections against anti-suit injunctions on the basis of an alleged infringement of the sovereignty of the German state and the jurisdiction of the German court

406 German Civil Code (Bürgerliches Gesetzbuch of 2 January 2002, BGBl. I 42, Section 1004(1), unofficial translation.

addition, in France, the support is two-fold: (a) the *Cour de Cassation*[407] focused on the contractual nature of the remedy as one enforcing substantive rights; in this context, the sole purpose of the order is to prevent or remedy a breach of a pre-existing contractual obligation; (b) French law recognises the notion of *astreintes.* This is a legal measure aiming to induce fulfilment of the addressee's obligations by a judicial decision under the threat of a pecuniary sanction.[408] As Landrove and Greuter analyse, the *astreinte* is a pecuniary measure consisting of a sum of money which might be progressive in relation to the duration of delay and it is also a comminatory measure as one of a threat.[409] In other words, the function of the *astreintes* is analogous to the one of a threat of contempt of court in the English legal system. Both constructions aim at incentivising voluntary compliance with an order or judgment. *Astreintes* are based on the fundamental distinction between *juridictio* and *imperium*. The court ordering *astreintes* is not required to have *imperium* as such. They are deprived themselves of any direct enforcement measure and, only in case of non-compliance, there is the need of *imperium* –of the power to enforce the content of the order.[410]

On the other hand, while the UK was still a Member State of the European Union and provided that a reciprocal regime will be put in place,[411] English courts have no power to grant an anti-suit injunction when proceedings in breach of an arbitration agreement have been commenced before a court of a Member State of the European Union. This was made clear in *West-Tankers* where, despite the existence of an arbitration exception in

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407 *Zone Brands International INC v In Zone Brands Europe* - Cass. Civ 1re, 14 oct. 2009, n° 08-16.369 et 08-16.549.

408 Juan Carlos Landrove and James John Greuter, 'The civil "astreinte" as an incentive measure in litigation and international arbitration practice in Switzerland: is there a need for incorporation?' in Christine Chappuis and others (eds), *Harmonisation Internationale du Droit* (Schulthess 2007) 523.

409 ibid.

410 ibid*;* Olivier Luc Mosimann, *Anti-suit Injunctions in International Commercial Arbitration* (Eleven International Pub. 2010) 135.

411 See Faidon Varesis, 'Nori Holdings v PJSC Bank and the tale of anti-suit Injunctions' (2019) 35 Arbitration International 275; Andrew Dickinson, 'Close the door on your way out-Free movement of judgments in civil matters-A' Brexit' case study' (2017) 3 Zeitschrift fur Europaisches Privatrecht; Andrew Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' (2016) 12 Journal of Private International Law 195; Kate Davies and Valeriya Kirsey, 'Anti-Suit Injunctions in Support of London Seated Arbitrations Post-Brexit: Are All Things New Just Well-Forgotten Past' (2016) 33 J Int'l Arb 501.

Article 1(2)(d) of the Brussels I Regulation,[412] the CJEU found that an anti-suit injunction is still prohibited. The proceedings for the injunction themselves might fall out of the scope of the Brussels I Regulation, but the proceedings before the foreign court—Italian in that case—were found to be within the scope of the Regulation. More specifically, the determination in focus is the one of the foreign courts on whether the existence of the arbitration agreement mandates a stay of the local proceedings.

The question that has been raised, discussed and debated in the aftermath of the *West Tankers* decision, is whether the Brussels I Recast Regulation[413] has indeed unsettled the position with the inclusion of Recital 12, clarifying the exception of Article 1(2)(d).[414] Some support had been provided by Advocate General Wathelet in his opinion on *Gazprom*.[415] In summary, he argued that through Recital 12, the Brussels I Recast Regulation effectively reversed the judgement in West Tankers. The Court, however, in the same case did not address this issue and—as expected—distinguished Gazprom on the basis that anti-suit injunctions ordered by arbitral tribunals fall within the exception of Article 1(2)(d) of the Regulation, and are, hence, permitted. Another argument under the same category is that the conceptual basis of West Tankers—this means that, if the main issue falls within the regulation, the preliminary one equally falls inside as well, and hence a *Turner* situation is identified—has, now, been shuttered.

The counter-argument, however, is officially provided by Males J in *Nori Holdings v PJSC Bank.*[416] Recital 12(2) cannot be used as a 'sweeping'[417] mechanism to exclude as a whole any proceedings, where the validity of an arbitration agreement is contested. As Males J noted, if that were to apply on the facts of *West Tankers*, it would mean that the Italian proceedings would be excluded from the Regulation by the mere involvement as a preliminary matter of the validity of the arbitration agreement. Recital 12(2) does not

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412 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ 212/1.

413 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ 2 351/1.

414 See Recital (12) in the Brussels I Recast Regulation.

415 *Gazprom OAO, Case C-536/13* [2015] 1 WLR 4937.

416 *Nori Holdings v PJSC Bank.* See also Faidon Varesis, 'Nori Holdings v PJSC Bank and the tale of anti-suit Injunctions' (2019) 35 Arbitration International 275.

417 *Nori Holdings v PJSC Bank*, at [93].

go that far. It merely provides that any decision on the validity of the arbitration agreement—and not any proceeding or decision where the validity of the arbitration agreement is involved—is excluded from the rules on recognition and enforcement.[418]

5.3.2 Specific Performance Order: the Positive Obligation

The ground for granting an anti-suit injunction, as analysed above, is the negative obligation that either party will not institute in any *forum* other than the chosen arbitral *forum*. As seen in Chapter 3, however, there is also a positive side of the obligations in the arbitration agreement. This suggests immediately the existence of another remedy against a breach of the agreement, that of specific enforcement to compel arbitration.

This obligation also constitutes the primary and anterior rule, the breach of which triggers—in the form of a secondary rule—the remedies prescribed in international and national legal texts. The primary remedy—or more broadly response—to such a breach is to 'refer the parties to arbitration'.[419] Whereas a court in 'staying' its own proceedings is paying heed to the negative obligation 'not to submit', a court referring parties to arbitration is paying head to the positive obligation 'to submit'. This is not to suggest that there is a limitless obligation on the courts to refer parties to arbitration regardless of the parties' agreement. The necessary implication is, again, that an agreement has to exist, be valid, and cover the particular dispute. This raises important questions on the standard, time of assessment, and depth of the court's inquiry in assessing these aspects, which will be dealt in the restatement of the approach for both equitable remedies. Certain aspects, however, will be dealt with in examining the principles and underpinnings of the approach in the US and the UK.

5.3.2.1 The US approach

Despite the existence of the wording in both Article II(3) of the New York Convention as well as in Article 8(1) of the UNCITRAL Model Law that courts should refer the parties to arbitration provided they identify a valid arbitration agreement, arbitration laws—*legae arbitri*—do not usually prescribe for a specific remedy to enforce the positive aspects of the agreement. Before examining the availability of such a remedy of specific performance in England and Wales regardless of the lack of a specific provision in the

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418 ibid, at [94].

419 In the wording of Article II(3) of the New York Convention.

English Arbitration Act, the approach in the USA merits examination.

Section 4 of the Federal Arbitration Act (FAA) specifically provides that the party that is in the aggrieved position from the other side's failure to abide by the provisions of the arbitration agreement has the right to request the court for an order compelling the recalcitrant party to arbitration.[420] Applying both in federal and state courts,[421] the FAA has long been interpreted as establishing a pro-arbitration approach.[422] In this context, under the FAA valid arbitration agreements are irrevocable and enforceable, except on grounds that exist at law or in equity for the revocation of any other type of contract.[423] As the US Supreme Court has described courts in the US are 'rigorously enforc[ing]' arbitration agreements according to their terms'.[424] Despite the criticism of this approach that is treating arbitration agreements as 'super contracts'[425] and not merely as 'any other type of contract', US courts have a statutory obligation to compel arbitration upon request of the party.

This is not to suggest that courts are a mere rubber stamp for the party's request. When a petition[426] or motion[427] to compel arbitration is filled, the court has to be satisfied that 'the making of the agreement for arbitration or the failure to comply therewith is not in

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420 FAA, Section 4 provides that:

> *[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United states district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.*

421 *Southland Corp. v Keating*, 465 U.S. 1, 15-16 (1984)

422 Laura Bettenhausen, 'FAA and the USERRA: Pro-Arbitration Policies Can Undermine Federal Protection of Military Personnel' (2007) J Disp Resol 267.

423 FAA, Section 2.

424 *Am. Express Co. v Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

425 Richard Frankel, 'The arbitration clause as super contract' (2013) 91 Wash UL Rev 531; Thomas Stipanowich, 'Punitive damages and the consumerization of arbitration' (1997) 92 Nw UL Rev 1.

426 At the initial stage of filing before the courts, acting as a sword.

427 When the other side has already commenced an action case and the request to compel acts as a shield.

issue' before making a mandatory, non-discretional,[428] order 'directing the parties to proceed to arbitration in accordance with the terms of the agreement'. Courts, therefore, have to examine whether there is a valid arbitration agreement between the parties covering the dispute at issue before enforcing it 'according to its terms'.[429]

By such an order, a US court having personal jurisdiction *vis-à-vis* the recalcitrant party essentially enforces the obligations arising from Article II(3) of the New York Convention. Correctly perceived, this is an order of specific performance of the arbitration agreement.[430] As a result of the personal nature of the order, the courts will have to grant it whether or not the arbitration takes place or is to take place in the US or abroad. The effectiveness of these injunctions is bolstered, as is the case of anti-suit injunctions, with the threat of financial penalties and criminal proceedings against the party in case of violation.

When the recalcitrant party has commenced litigation proceedings in the US, the defendant in these proceedings usually files a motion to compel along with a stay of the litigation proceedings pursuant to Section 3 of the FAA. This is because the court must issue a stay of proceedings if it finds that the parties should be compelled to arbitrate a dispute, but only on the application of one of the parties. Such obligation is the FAA's equivalent of Article II(3) of the New York Convention. There is a split approach in various Circuit courts on whether federal district courts have discretion in dismissing an action, without prejudice, when compelling arbitration of a dispute.[431] A stay of litigation

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428 *Dean Witter,* 470 U.S. at 218; Philip G Phillips, 'A Lawyer's Approach to Commercial Arbitration' (1934) 44 Yale LJ 31, 33; Sidney Simpson, 'Specific Enforcement of Arbitration Contracts' (1934) 83 University of Pennsylvania Law Review and American Law Register 160; Legislation, 'Statutory Tinkering with Specific Performance' (1934) 47 Harv L Rev 1036, 1041.

429 *Patriot Const. & Equip., L.L.C. v Quad states Const., L.L.C.,* 2014 WL 1340035 (W.D. La. Apr. 2, 2014.

430 *Joseph Muller Corp. v Commonwealth Petrochems., Inc.*, 334 F.Supp. 1013, 1018 (S.D.N.Y. 1971). See also *Slatnick v Deutsche Bank AG*, 2006 U.S. Dist. LEXIS 94836; *Fujian Pac. Elec. Co. v Bechtel Power Corp.,* 2004 U.S. Dist. LEXIS 23472; *Commercial Metals Co. v Balfour, Guthrie & Co*., 577 F.2d. 264 (5th Cir. 1978); *Nat'l R.R. Passenger Corp. v Missouri R.R. Co*., 501 F.2d 423, 425-26 (8th Cir. 1974); Spear v Cal. state Auto Ass'n, 831 P.2d 821, 824 (Cal. 1992); *Crawford v Feldman*, 604 N.Y.S.2d 585 (N.Y. App. Div. 1993); state *of W. Va. ex rel. Ranger Fuel Corp. v Lilly*, 267 S.E.2d 435 (W. Va. 1980).

431 The First, Fifth and Ninth Circuits have ruled in favour of such a discretion (for example in *Cortés-*

will usually be preferable to dismissal for the party claiming the dispute is arbitrable because a stay is a non-appealable interlocutory order.

Considering the criticism expressed against the US approach, this can be summarised in two policy concerns: (a) the risk of unnecessary judicial intervention with the very arbitral tribunal and its power to determine its own jurisdiction; and, (b) the risk of conflicting or inconsistent orders coming from courts out of the seat of the arbitration. Common answer to both objections can be found if one considers that the compelling order is of personal nature and is also an order which does not have extraterritorial effect. It is effective—and in fact permissible—as long as the defendant is amenable to the jurisdiction of the court and the courts also have subject matter jurisdiction; either under the FAA or under the New York Convention. Furthermore, the content of this order—when granted—is that the recalcitrant party should either commence or appear and defend its case before the tribunal, which includes any objections that party might have against the tribunal's jurisdiction. Finally, there is no reason to consider this as an interference to the arbitral tribunal's jurisdiction; the exercise the court conducts is the same with the one it conducts when deciding on staying its own proceedings under Section 3. The court has to be satisfied that a valid agreement exists and that this agreement covers the dispute at hand.

5.3.2.2 The position in the UK and a proposal for a remedy of specific performance

The absence of statutory provisions in England and Wales is not attributed to a contra-arbitration position adopted. Born argues that this can be 'traced to historic English common law hostility to arbitration agreements, and in particular to the rule that arbitration agreements were not specifically enforceable'. The position seems to be that the indirect enforcement of the arbitration agreement by the two-sided coin of staying local proceedings and granting an anti-suit injunction in case of foreign proceedings is considered enough. English courts will readily and easily grant anti-suit injunctions enforcing and giving effect to the negative obligation of the arbitration agreement but will

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Ramos, 836 F.3d at 130) whereas the Second, Third, Seventh, Tenth and Eleventh Circuits, have held that a stay of proceedings must be entered under the FAA if the party asserting the right to arbitration requests a stay (see, for example, *Katz v Cellco P'ship*, 794 F.3d 341, 346 (2d Cir.), cert. denied, 136 S. Ct. 596 (2015)). In *Henry Schein, Inc. v Archer & White Sales*, Inc., 2019 WL 122164, at [6] the US Supreme Court with Justice Kavenaugh giving the opinion of the Court, expressly rejected the 'wholly groundless exception' and expressly left open the question of whether incorporation of institutional rules in fact delegates the arbitrability question to the arbitrator.

not exercise the same discretion in case of the positive obligations.

The reason behind this approach cannot be based solely on the lack of a statutory equivalent to Section 37 of the Senior Courts Act 1981 in relation to the remedy of specific performance. An explanation might be provided by the traditional judicial hostility against arbitration. As, however, argued by Brekoulakis, historically when the courts were applying statutes that were introduced as early as the 17th century they were ready to 'enforce arbitration agreements and implement the policy favouring arbitration'. It was where no such statutes existed that the courts took longer to develop a policy favouring the enforcement of arbitration agreements on the basis of 'the idea that arbitration agreements cannot oust the jurisdiction of English courts'.[432] This has nothing to do, however, with an opposition of English courts to the idea of arbitration. It is merely a question of using well-established doctrines and principles with the correct amount of adaptation to bring the adjudication system closer to the parties' choice. These principles have been analysed extensively in Chapters 3 and 4 of this thesis when examining the role of party autonomy in choosing to arbitrate in a particular jurisdiction.

Another explanation may be based on the general approach English courts take in relation to the remedy of specific performance. If courts are generally not inclined to grant a remedy of specific performance, they will not grant this in relation to an arbitration agreement. This justification, though, does not adequately explain the approach of courts to grant injunctions enforcing the negative obligations of the arbitration agreements, even if such obligations are considered as a 'silent concomitant'.[433] Furthermore, even if one were to consider the differences between a stay of litigation and an order compelling arbitration in the affirmative ordering the defendant to do something,[434] there is conceptually no such difference with an order to the defendant 'not to pursue' litigation.

The starting point in examining the availability of a remedy of specific performance for the breach of the positive obligation in the arbitration agreement is the acceptance, even at the highest level of English authority, that the arbitration agreement has indeed two

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432 Stavros Brekoulakis, 'The Historical Treatment of Arbitration under English Law and the Development of the Policy Favouring Arbitration' (2019) 39 Oxford Journal of Legal Studies, 125 arguing that English arbitration emerged as a dispute resolution system organically as part of, rather than antagonistic to, the English judicial system.

433 *AES v Ust-Kamenogorsk* (n 16), at [1] per Lord Mance.

434 See *Kulukundis Shipping Co. S/A v Amtorg Trading Corp*., 126 F.2d 978, 987 (2d Cir. 1942).

types of obligations; a negative—enforceable via an injunction—and a positive one—enforceable via an order of specific performance. There is, however, old authority from early 19th and 20th century that specific performance cannot be granted of arbitration agreements.[435] Moulton LJ in *Pena Copper Mines Ltd v Rio Tinto Co Ltd*[436] held that:

> *[o]f course, the courts of law are for the purpose of enforcing contracts between parties. But it by no means follows that that part of the court which at the moment has the power of granting injunctions which operate in personam will always interfere so as - if I might use the phrase – specifically to enforce a contract. In a great number of cases the parties are at liberty to commit a breach subject to liability to damages in the courts of law for having thus broken their contract. Now, an arbitration clause in England in an English contract – I am now speaking without any complications as to a foreign country at all –* ***was always regarded by the courts of law and courts of equity in England as one which would not be specifically enforced, but as to which, in a person broke the contract. the other party must content himself with damages****.* (emphasis added)

On this basis he concluded that:

> *[t]he parties could not be compelled to go to arbitration. They cannot now; but an appeal to the courts can be stopped, and that indirectly enforces the arbitration clause. Therefore, the status of an arbitration clause in England is that it will not be specifically enforced, but by proper proceedings in you can prevent the other party from appealing to the English courts in respect of any matter which by contract ought to be decided by arbitration.*

The opposition expressed by Moulton LJ does not stem from an inherent hostility of the courts against arbitration or arbitration agreements. It is part of the general—and predominant at that time—conception that the only remedy as of right in common law for a breach of contract is a remedy of damages. Specific performance is an equitable remedy to be rarely and cautionary granted by English courts only if damages are inadequate and only if there are no other limiting factors such as the 'the heavy-handed nature of the

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435 *Street v Rigby* (1802) 6 Ves Jun 815, 31 ER 1323, 1324–1325; *Gourlay v Duke of Somerset* (1815) 19 Ves Jun 429, 34 ER 576; *In Re Smith and Service* (1890) 25 QB 545 (CA).

436 (1911) 105 LT 846 (CA), 852.

enforcement mechanism'.[437]

Despite these early authorities, there have been exceptional cases where a remedy akin to the one argued here was granted. *Penn v Lord Baltimore*[438] is a case where the court accepted the claim for specific performance of a contract—more specifically of an arbitration clause prescribing the appointment of commissioners to resolve a boundary issue. Despite the particular facts of the case, it was firmly established that court has jurisdiction to enforce a pre-existing personal relationship between the parties.[439] Furthermore, and more recently, there is Canadian authority in *Axia Supernet Ltd v Bell West Inc*[440] for a mandatory injunction against a recalcitrant party, ordering it to arbitrate. Although the dispute resolution clause in that case was bolstered with a provision that the 'parties have agreed to implement a dispute resolution mechanism to resolve issues in dispute in a timely and effective manner', and contained a multi-tier clause for negotiation, mediation, and then arbitration, there is nothing to suggest that the positive obligation has to be provided in express and written terms in order for the courts to enforce it.[441]

Despite this scarce treatment in case law, there is nothing to suggest in a compelling and persuasive manner that a remedy of specific enforcement should not be in law or in principle be granted to enforce the positive obligations of an arbitration agreement. There are, in fact, similarities between the current approach—that is, enforcing only the negative

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437 *Co-operative Insurance Ltd v Argyll Holdings Ltd* [1998] AC 1 (HL) at [12] per Lord Hoffmann.

438 (1750) 1 Ves Sen 444, 27 ER 1132.

439 Briggs 2015 (n 25) 385.

440 2003 ABQB 195 (Alberta).

441 One should also consider the matter raised by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, where he held that:

> *[w]hat springs to mind at once is that the application of this formula to [the arbitration clause] requires the court to do the impossible, namely to refer the dispute to the arbitrators, whereas it is to the panel of experts that the matter must first be sent if it is to be sent anywhere at all. If the English legislation had followed the Convention, as strictly speaking it should have done, it would have been hard to resist the conclusion that the duty to stay does not apply to a situation where the reference to the arbitrators is to take place, if at all, only after the matter has been referred to someone else.*

See also, *Westco Airconditioning Ltd. v Sui Chong Construction and Engineering Ltd*, Court of First Instance, High Court of the Hong Kong Special Administrative Region, Hong Kong, 3 February 1998, No. A12848.

aspects—and the proposed one—that is, utilising the full spectrum of equitable remedies to enforce both the negative and the positive aspects of an arbitration agreement.

First, both remedies are equitable in their origins. In English contract and commercial law whereas injunctions are there as a remedy against a breach of the negative obligation, a remedy of specific performance is against a breach of a positive obligation. Both remedies were developed as a way to mitigate the rigidity of the common law system that regards damages as the primary—inherent and as of right—remedy against a breach of a contractual obligation. As equitable, both remedies are discretionary for the court and, as Lord Mance observed in *AES v Ust-Kamenogorsk*, the operation of such remedies is independent from the statutory regime of the Arbitration Act 1996. He only referred to and dealt with a request of declaration and an anti-suit restraining order against the defendant that commenced proceedings in Kazakhstan.

This is not to suggest, however, that Lord Mance ruled out the possibility of a positive order of specific performance, for two reasons. First, under the factual circumstances of the case, the claimant in the English proceedings—and defendant in the proceedings in Kazakhstan—had not commenced and was not intending to commence arbitration proceedings against the other party; it was the latter that had commenced proceedings in Kazakhstan in breach of the arbitration clause. The claim in England was that, if the defendant wanted to pursue a claim that was covered by the arbitration agreement, it had to do so in arbitration in London and not before the courts in Kazakhstan. Hence, there was no interest for the claimant to pursue an order affirmatively requiring the defendant to commence arbitration proceedings. Second, Lord Mance in the very first sentence of his judgment in *AES v Ust-Kamenogorsk* held that '[a]n agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever *forum* is prescribed'.[442]

Furthermore, there is now a statutory provision in Section 37 of Senior Courts Act 1981 crystallising the equitable inherent powers of the courts to 'grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so'; this is not to suggest, however, that the courts do not possess the equitable power to prevent injustice by those subject to their jurisdiction by way of specific performance of the parties' legal rights.

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442 *AES v Ust-Kamenogorsk* (n 16), at [1] per Lord Mance.

Second, and considering the common prerequisite of injunctions and specific relief, damages are considered in both cases to be an inherently inadequate remedy by the courts. Steyn LJ in *Continental Bank NA v Aeakos Compania Naviera SA*[443] held that damages are an inherently ineffective remedy in cases of breach of an exclusive jurisdiction agreement. The same has been held in case of arbitration agreements. Despite the fact that this is not an absolute rule—as examined in the very next Section—it shows that this is not a limitation to be used as an argument against the availability of specific performance of the positive obligations of the arbitration agreement.

Finally, considering the 'heavy-handed nature of the enforcement mechanism'[444] as a limitation and objection to the remedy of specific performance in English law, the nature of the positive obligation is the exact reverse side of the negative one. In fact, if an anti-suit injunction is considered the other side of the coin of a stay of local proceedings, then a positive, affirmative referral of the parties to arbitration can be seen as the natural extension of staying. The observance of both an anti-suit injunction and a specific performance can be made through the threat of contempt of court consequences.

Considering the effect of the New York Convention, and although Section 9 of the Arbitration Act 1996 only refers to a stay of local court proceedings and not to a referral to arbitration, one has to examine whether such obligation is established in Article II(3) of the New York Convention. The latter provides that, if a valid arbitration agreement exists, courts in Contracting States shall 'refer the parties to arbitration'. This is also what Article 8 of the UNCITRAL Model Law provides, which served as basis for the Committee's proposals on Section 9 of the Act. Aikens LJ held in *Aeroflot* '[t]hat [Article II(3) New York Convention] has been translated into the terms of Section 9(1) so as to give a party the right to apply for a stay of proceedings'.[445] While the DAC Report on the Arbitration Act 1996 makes it clear that the drafters had in mind '[a]rticle 8 of the Model Law, our treaty obligations, and other considerations'[446] it is silent on the issue of referral or whether they opted not to adopt the language of the Model Law.

Considering, however, the wording and drafting history of Article 8 itself, the Working

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443 [1994] 1 WLR 588 (EWCA).

444 *Co-operative Insurance Ltd v Argyll Holdings Ltd,* at [12] per Lord Hoffmann.

445 *Aeroflot v Berezovsky* per Aikens LJ at [73].

446 Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill, February 1996, para. 50

Group in the Analytical Commentary to the Model Law seems to equate—although not with a specific analysis or justification—the phrase 'shall refer to arbitration' with a stay of proceedings explaining that '[a]s under the 1958 New York Convention, the court would refer the parties to arbitration, *i.e. decline (the exercise of its) jurisdiction*' (emphasis added).[447]

Considering the exact meaning of the word 'refer' in the context of the New York Convention, its origins can be traced back to the 1923 Geneva Protocol on Arbitration Clauses. The latter provides that the 'tribunals of the Contracting Parties [...] shall refer the parties on the application of either of them to the decision of the arbitrators'. At the United Nations Conference on International Commercial Arbitration, the particular wording was an original proposal of Sweden which was then amended by the drafters of the Convention.[448] The *travaux préparatoires* are, however, completely silent on the scope of the obligation of courts to refer parties to arbitration. Courts in the USA have held that the regime provided in Section 4 of the Federal Arbitration Act is not contrary to the New York Convention.[449] Considering, however, whether the Convention itself provides for a positive referral to arbitration, the only judicial treatment can be found in *Hi-Fert Pty Ltd. v Kuikiang Maritime Carriers Inc* where the Australian Federal Court held that the courts should only grant a remedy of stay, but cannot compel the parties to arbitrate if they do not wish to do so.[450] Furthermore, Poudret and Besson argue that 'the expression […] should not be taken literally' and that 'the Convention […] leaves the

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447 UNCITRAL Working Group, 'Analytical Commentary to the Model Law' A/CN.9/264, 24, at para. 3. The same approach has been adopted in Australia where the Australian Federal Court in *Hi-Fert Pty Ltd. v Kuikiang Maritime Carriers Inc*., Federal Court, Australia, 26 May 1998, NG 1100 & 1101 of 1997 interpreted the equivalent provision of the Australian International Arbitration Act (Section 7(2)) and held that the expression 'shall refer the parties to arbitration [...] should not be taken as to having the meaning of obliging the parties to arbitrate'.

448 1923 Geneva Protocol on Arbitration Clauses, Article 4; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-First Meeting, E/CONF.26/SR.21, pp. 17-23; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Consideration on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/L.59.

449 *Hartford Accident & Indemnity Co. v Equitas Reinsurance Ltd*., 200 F. Supp. 2d 102 (at 107–109) (US District Court for the District of Connecticut, US).

450 *Hi-Fert Pty Ltd. v Kuikiang Maritime Carriers Inc*., Federal Court, Australia, 26 May 1998, NG 1100 & 1101 of 1997

choice of sanction to national law, the essential aspect being that the court does not enter on the merits and does not try the dispute'.[451] The conclusion seems to be that the New York Convention does not prohibit, but at the same time does not militate towards a positive order compelling the parties to arbitration. It is up to national laws and the principles contained therein to provide such remedy.

5.3.2.3 Principle and practical considerations

Courts from 1911 onwards have been silent in England on the availability of this remedy and commentators have only focused on the availability of anti-suit injunctions. Considering the matter under English contract law, principle also suggests that courts have the ability to enforce the positive obligation of the arbitration agreement via an order of specific performance or a mandatory injunction requiring the party to participate to arbitration proceedings. This is for two primary reasons: (a) the nature of the obligation in question is such so as to allow the courts to exercise their equitable power; and (b) there is no continuous obligation to require a heavy enforcement mechanism.

First, as analysed above, the positive obligation of the arbitration agreement means that the parties undertake against each other to submit their disputes to the chosen arbitral *forum*. This is to suggest, that the claiming party has to submit a request or notice of arbitration before the chosen arbitral *forum* and the defending party has at least to participate in the proceedings to dispute the jurisdiction of the arbitral *forum*. A further consequence of the positive obligation is that the parties to the arbitration agreement undertake to abide by the contents of the tribunal's decision. This obligation, however, is enforced by way of enforcing the award itself either under the relevant *lex arbitri* or the New York Convention.

Considering the positions of the parties, a claiming party to arbitration proceedings facing also foreign court proceedings brought in breach of the arbitration agreement, will have an interest in compelling the recalcitrant defendant not only to stop the foreign proceedings but also to appear before the tribunal. This has the practical consequence to avoid the situation of *ex parte* proceedings and default awards which are seldom

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[451] Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007), para 494. See also Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers, 1981) 129.

performed by the parties. In addition, if the defendant participates in the proceedings, the position of the claiming party to achieve a favourable settlement is enhanced as the former's position is diminished. On the contrary, in a factual situation like the one in *AES v Ust Kamenogorsk*, the claimant in the English proceedings and defendant in the foreign court will have no interest in pursuing the positive, affirmative compelling order of the defendant to file a notice of arbitration against it; all the more so, in a mandatory fashion.

Furthermore one should also bear in mind that, aside of the prohibitory injunction 'not to continue' the foreign proceedings, in appropriate cases the court will also grant a mandatory anti-suit injunction 'requiring the injunction defendant to obtain the equivalent of a stay of the foreign proceedings or even to discontinue them'.[452] On the basis of the exceptional nature of these cases, and based on the old English authorities cited above, Raphael notes that: 'at least in general, mandatory injunctions should not be granted to force a party to take positive steps to arbitrate or litigate in the chosen *forum*, as parties are free to elect whether or not to advance a claim at all'.[453] This, however, ignores the different constellations described above. In the second, *AES v Ust Kamenogorsk* type of cases, there is no legitimate reason for the English claimant to force the defendant—and claimant in the foreign proceedings—to advance an arbitration claim. Such a party has a dual interest: (a) in barring the other recalcitrant party from continuing the foreign proceedings; and (b) in ensuring that the arbitration agreement is considered valid before the courts of the seat. The first one can be attained either with a standard prohibitory anti-suit injunction or with a mandatory injunction ordering the party to request a stay. The second one can be attained via a declaration for the validity of the arbitration

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452 Thomas Raphael, *The Anti-Suit Injunction* (2nd edn, OUP 2019), para. 3.38 with references therein; *British Airways Board v Laker Airways Ltd* [1984] QB 142 (CA), 203; *Hemain v Hemain* [1988] 2 FLR 388 (CA), 389C and *Toepfer International GmbH v Société Cargill France* [1997] 2 Lloyds Rep 98, 102, 111; *Masri v Consolidated Contractors International Company SAL (Re: Anti-Suit Injunction)* [2008] EWCA Civ 625, at [6]–[7]. In *Turner v Grovit*, a mandatory order was granted by the Court of Appeal and is set out at [2002] 1 WLR 107 (HL), 113–114, at [16]. The question of whether a mandatory order should be granted was only mentioned and not explored in the Court of Appeal's judgment [2000] QB 345 (CA), 350B, 364F, and was apparently debated subsequently at an unreported hearing. See also *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 Lloyds Rep 784, 792–794.

453 Thomas Raphael, *The Anti-Suit Injunction* (2nd edn, OUP 2019), para. 3.38.

agreement.[454]

In a first situation, an order of specific performance compelling the recalcitrant defendant to appear before the tribunal is akin to a mandatory injunction to request a stay. The defendant's obligation in both cases is binary; it either performs the specific action—file a request for a stay or file a defence before the tribunal—or not.

Second, and connected with the nature of the obligation, the traditional objection of contract law established by Lord Hoffmann in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*[455] is not posing an obstacle for the acceptance of such remedy. The enforcement and observance mechanism in both cases is not heavy for the ordering court and the contempt of court threat is enough to secure such observance. The nature of the obligation as a positive one, instead of a negative one, does not alter the observance methods. It is not a continuous obligation; rather, it is one that can be broken down to specific actions required in each case by the existing applicable law, rules, and orders of the tribunal. In fact, the court will most likely be informed for a further or continuing breach of the arbitration agreement by the party wishing to enforce it. This breach will either be to refuse to file a request for a stay, to commence litigation proceedings or to refuse to file the necessary submissions as required by the arbitration rules applicable to the case.

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454 See above for the discussion on Section 32 of the English Arbitration Act; see also the analysis of Lord Mance in *AES v Ust-Kamenogorsk* (n 16).

455 [1997] UKHL 17.

5.3.3 Restated Approach

RULE 5—Enforcing the Arbitration Agreement: Equitable Remedies

> (1) Provided that State courts have personal jurisdiction over the party(ies) and the applicant satisfies the court to a balance of probabilities standard that there is an agreement to arbitrate, the court shall have the power to grant equitable, *in personam*, remedies against a present or imminent breach of the arbitration agreement;
>
> (2) Equitable remedies of the previous paragraph include:
>
> (a) injunctions restraining the breaching party from commencing or continuing litigation or arbitration proceedings in a different *forum*; or
>
> (b) specific performance orders specifying the positive steps the breaching party has to take in the arbitral proceedings.
>
> (3) The court's power is discretionary and shall be exercised with caution and due regard to comity. The party resisting the application for such equitable remedies shall have to provide strong reasons that justice requires the remedy not be granted;
>
> (4) A party violating an order under Rule 5(2) shall be deemed in contempt of court.

General—Rule 5 codifies and refers to the existing approach English courts take on granting equitable remedies in the form of injunctions restraining litigation parties from breaching their obligation in the contract. As it is evidently suggested, English courts would need to have jurisdiction over the defendant either on the basis of its presence within the jurisdiction or on the basis of a service out application. In the latter case, the seat of arbitration being in England is a decisive factor in determining whether service out of the jurisdiction can take place.[456] In this context, despite the decision of Andrew Baker J at the High Court in *Enka,* suggesting that *forum (non) conveniens* considerations become important even in the context of procedurally based applications for anti-suit injunctions, the Court of Appeal allowed the appeal and reversed the judgement. Popplewell LJ held that '[t]he Judge's approach was wrong in principle. The English court as the court of the seat of the arbitration is necessarily an appropriate court to grant an anti-suit injunction and questions of *forum conveniens* do not arise'.[457]

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456 See Civil Procedure Rules 62.5(1).

457 *Enka v Chubb* [2020] EWCA Civ 574.

In addition, as the matter is analysed above on the basis of Section 37 of the Senior Courts Act 1981, the analysis of Rule 5 is confined primarily on the following four comments:

First, the remedies available under Rule 5 are equitable and are, thus, premised on the court having personal jurisdiction of the party or parties against which the remedies are granted. This follows from the equitable and *in personam* nature of these remedies. As analysed above and by Fentiman,[458] questions of applicable law are less important in this context. The statutory basis of such court granted equitable remedies is Section 37 of the Senior Courts Act 1981. This is to suggest that, regardless of what the applicable law to the contract or the arbitration agreement might be, this is procedural rule which in any case can—and should—be considered as part of the mandatory overriding provisions of the *lex fori*.[459]

Second, the ground of such remedies is the breach of the arbitration agreement and such remedies aim at enforcing the promises included in such an agreement. This is not contrary to the dual nature of the agreement as analysed above in Chapter 3; in fact, it is precisely based on this nature. While recognising the procedural nature of such agreements constitutes the justification for a mandatory stay of proceedings if such agreement exists, the enforcement of the agreement by way of injunction or specific performance is based on the contractual aspects of this agreement. The power to grant such injunctions might be statutorily based in Section 37 of the Senior Courts Act, but the operation is purely contractual. They, indeed, constitute remedies for the breach of the arbitration agreement, viewed from its contractual side.

Third, such equitable remedies as defined in Rule 5(2) include both the remedy of anti-suit injunctions aiming at restraining a defendant from breaching the negative obligation under the arbitration agreement, and remedies of specific performance of the arbitration agreement. While, as analysed above, the first category is accepted without hesitation from the legislator—Section 37 Senior Courts Act 1981— and the courts—for example, in the *AES v Ust-Kamenogorsk*—, scholars are hesitant in accepting the second category as a valid remedy for the breach of an arbitration agreement. In fact, as analysed above, the DAC Report for the Arbitration Act 1996 specifically referred to compelling orders as not consistent with the principles in Section 72 of the Act.[460] Rule 5(2) reverses such

458 Fentiman 2015 (n 18), para. 16.17.

459 ibid.

460 See above in p. 170.

approach and allows courts to provide specific performance orders on the basis of the analysis provided above and the fact that there is no reason, in principle or in practice, for such orders not being granted.[461]

Finally, the requisite standard of proof for the court to grant such injunctions is one of the balance of probabilities. This is, indeed, a reversal of the current standard of 'high degree of probability' that there is an arbitration agreement. This latter standard was accepted as the applicable one by the High Court in *Malhotra*[462] by reference to the judgment of Christopher Clarke J in *Transfield Shipping Inc v Chiping*.[463] The latter held that:

> *[...] the appropriate test is whether or not the applicant has shown on the material adduced at the interlocutory hearing a high degree of probability that there was such an agreement. It is one thing to enforce a clear agreement to arbitrate or one which on an interlocutory basis can be seen to be highly likely to be established. It is another to restrain a party from litigating in a foreign country where the position is less clear than that.*[464]

The justification provided therein for a higher standard than the one of a good arguable case, as well as to the one of balance of probabilities, which is the general standard of proof in civil proceedings, seems to rest on notions of comity and the fact that the injunction is granted with the purpose of restraining a defendant pursuing foreign proceedings.

A similar justification might be found in the involvement of another *forum*. This justification, however, requires analysis in the context of parallel proceedings. By themselves, parallel proceedings are not unconscionable; they are part of the game of cross-border litigation. When parallel proceedings are instituted each *forum* can decide on its own jurisdiction and has to do so without the interference of the other parallel avenues. In order for the one avenue to cross into the other(s) without the consent of both parties, a higher threshold has to be put in place. If, however, for any reason (e.g., service in or service out) one of the parties is found to be subject to the jurisdiction of the granting adjudicatory body, then there is no reason to establish a higher standard of proof provided

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461 See extensively above in p. 165 *et seq*.

462 *Malhotra v Malhotra & Anor* [2012] EWHC 3020.

463 *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (Comm).

464 ibid, para. 52.

the other prerequisites are met.

This standard of proof—higher than the general civil one—cannot be justified even if one considers that the inquiry in anti-suit injunction proceedings is one of enforcing the terms of a contractual agreement. In fact, this is indeed raising a difference with the case of a stay of proceedings and a similarity with the case of declaration or a decision on damages. The basis in the present case is the agreement itself—more precisely the contractual aspects of this agreement. This contractual promise is the basis for the remedy of injunction, specific performance, declaration, or damages against a breach of that promise, whereas it is one of the ingredients taken into account for a stay of proceedings. Therefore, as the exercise is one of identifying the existence of a substantive right, there is no justification for a standard of proof higher than the one of balance of probabilities.

5.4 Enforcement of Arbitration Agreements: Damages

5.4.1 Damages in the Law and Practice of England and Wales

Leaving aside the remedy of anti-suit injunctions, another remedy against the breach of the negative aspect of an arbitration agreement is an award on damages flowing out of a breach of that agreement.[465] At least one of the remedies for a breach of contract is an award of damages. The application of this principle in the context of jurisdiction or arbitration agreements was originally accepted in common law jurisdictions, where the conceptualisation of such agreements as products of a contractual bargain is well established.[466] Such a remedy has been, however, accepted in other jurisdictions—with or without objections being raised.

Considering the extent of damages—that is, the various heads of damages—that can be claimed, one comes across three possible scenarios. First, as was the case in *Union Discount,*[467] the foreign court might simply decline jurisdiction without making an order on costs; hence, the only losses incurred are the legal costs in defending these

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465 Born 2014 (n 95) 1305.

466 *Union Discount Co v Zoller* [2002] 1 WLR 1517; *Donohue v Armco Inc (n 19)*; Despite an initial hostility against the remedy—Steyn LJ in *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588 (EWCA) held that damages are an inherently ineffective remedy in cases of breach of an exclusive jurisdiction agreement—courts have readily awarded damages for such breaches.

467 *Union Discount Co v Zoller* [2002] 1 WLR 1517.

proceedings.[468] Recovering these damages does not present considerable difficulties and courts have readily awarded such damages. As Briggs argues, a claim on damages for breach of an arbitration agreement before another *forum* (either judicial or arbitral) does not contradict the decision of the first *forum* to award costs under its own law if the claim there was dismissed.[469]

Second, the foreign court might accept jurisdiction, rendering a judgment on the merits of the case.[470] Such matrix triggers the question of whether the innocent party can recover not only the legal costs incurred, but also any amount awarded by the non-chosen *forum*.[471] This is undisputed under English law. In *Starlight Shipping* the Court of Appeal held that the damages can amount to the extent necessary to reverse the adverse effects of having to litigate in a non-chosen *forum*, including sums that the foreign court would oblige the party to pay.[472] The objection usually raised against such damages is that, in reality, they constitute a claw-back of the judgment of the foreign court. It is important that the English judgment was delivered before the Greek courts decided on jurisdiction, hence being a pre-emptive strike against the recalcitrant party.[473] Had the case been reverse, the issue would be one of recognising the judgment under the Brussels I Regulation. In the context of arbitration, though, the tribunal cannot be considered bound by a decision rendered by a court, other than that of the seat, disregarding the existence of the arbitration agreement. The result of having one award and one State judgment—as

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468 Albert Dinelli, 'The Limits on the Remedy of Damages for Breach of Jurisdiction Agreements: The Law of Contract Meets Private International Law' (2014) 38 Melb UL Rev 1023, 1035; Daniel Tan, 'Breaking Promises to Litigate in a Particular *Forum*: are Damages and Appropriate Remedy?' [2003] LMCLQ 435; Nick Yeo and Daniel Tan, 'Damages for Breach of Exclusive Jurisdiction Clauses' in Sarah Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing 2003) 403–432.

469 Briggs 2008 (n 43) 308.

470 *Starlight Shipping Co v Allianz* (n 43). It is clearly established that the party in breach of an exclusive jurisdiction agreement is liable to provide damages for the costs incurred and any other monies the non-chosen court awards in this regard. See also Stuart Dutson, 'Breach of an Arbitration or Exclusive Jurisdiction Clause: The Legal Remedies if It Continues', (2000) 16 Arbitration International 89.

471 *CMA CGM SS v Hyundai Mipo Dockyard Co* [2008] EWHC 2791(Comm), [2009] Lloyd's Rep 213.

472 *Starlight Shipping Co v Allianz* (n 43) coming after *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2013] UKSC 70, [2014] 1 All ER 590.

473 Fentiman 2015 (n 18) 116.

undesirable as it may be—has to be regulated under the provisions of the New York Convention. Furthermore, the question is whether the *res judicata* effect extends to the allocation of costs as well.[474] However, the separate procedural nature of such allocation—in many instances a matter involving no judicial discretion—cannot be used as a basis for using a *res judicata* or issue estoppel objection to a damages claim for breach of the arbitration agreement; a claim, based on a breach of a contractual provision. Hence, even if the concept of *res judicata* was involved, there would be a different legal basis in the two proceedings.

The third scenario reveals the limited efficiency of the damages remedy as it is currently perceived. It takes place at a time directly after the breach of the agreement, when the innocent party is informed of the improper State court proceedings. Damages as a remedy operates *post factum*, that is after the breach has happened and the foreign proceedings have been commenced. The traditional response is that its purpose is also to defuse any incentives for breaching the agreement by knowing that damages will be awarded. If one, however, focuses on the possible constructions under the applicable legal regime, a different image is revealed. Under English law, a claimant may recover losses resulting from a single cause of action which include compensation also for the future or prospective damage reasonably anticipated as the result of the defendant's wrong, whether such future damage is certain or contingent.[475] Such damages, however, must be recovered in one action once and for all.[476] A claimant cannot bring another action to repair possible shortcomings in the recovery of the damages as such recovery is barred under *res judicata.*[477] Reasonably anticipated damages arising out of the breach of an arbitration agreement can be quantified to the amount claimed by the recalcitrant party before the foreign courts. At the moment of the breach, this represents the reasonably anticipated amount of losses for the innocent party.

Considering the objections that have been raised against the remedy, one should start from the argument that the arbitration agreement—much like an exclusive jurisdiction agreement—is of a procedural nature. Hence it cannot be equated with any other

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474 ibid 309.

475 James Edelman (ed), *McGregor on Damages* (20th edn, Sweet & Maxwell 2018), para. 11-024.

476 ibid, para. 11-032.

477 *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46 at [17] per Lord Sumption.

provision of the contract. The procedural consequences of the arbitration agreement are undeniable. It does provide the tribunal with the power to adjudicate a dispute and courts should respect that power under Article II(3) New York Convention. The promises, however, of the parties contained in this agreement are equally clear. Recently, the Spanish Supreme Court did award the damages remedy for breach of the choice of court agreement to the wronged party.[478] Furthermore, a tribunal seated in Switzerland, approved in a partial award the request of the claimant for findings regarding the violation of the arbitration clause and compensation for damages.[479] Finally, an arbitral tribunal under the Zurich Chamber of Commerce, found that: 'arbitration agreements comprise not only a procedural component but also a substantive component, the latter insofar as two parties subject to private law commit to certain duties to act and not to act'.[480]

Furthermore, under the rules of remoteness of damages as explained in *Hadley v Baxendale*,[481] a claimant may only recover losses which may reasonably be considered as arising naturally from the breach or those which may reasonably be supposed to be in the contemplation of the parties at the time the contract was made. Both the legal costs of defending court proceedings and a possible adverse judgment on the merits for the innocent party can be considered as consequential damages in the form of loss of the right to sue in the designated court or as expenses arising out of the breach.[482]

In a fault-based system,[483] and in the scenario that the State court accepts jurisdiction and decides on the merits of the case, the argument against the recoverability of any heads of damages is that the breach was not attributed to a fault of the party because the State court found that the arbitration agreement was null, void or otherwise inoperable. This argument, however, misses the point that, on the basis of the existence of a *prima facie*

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478 *Sogo USA Inc v Angel Jesus*, STS (Sala de lo Civil, Sección 1ª), 12 January 2009, Repertorio de Jurisprudencia 2009/544; see Santiago Álvarez González, 'The Spanish Tribunal Supremo Grants Damages for Breach of a Choice-of-Court Agreement' (2009) 29 IPRax: Praxis des Internationalen Privat-und Verfahrensrechts 529; Sara Sanchez Fernandez, 'Choice of Court Agreements: Breach and Damages within the Brussels I Regime' (2010) Yearbook of Private International Law 382-385.

479 Partial and Interim Award of November 19, 2008, referenced in Swiss Federal Tribunal 4A_444:2009.

480 *Zurich Chamber of Commerce Case No 525* [Resolution of 16 February 2004], unpublished.

481 *Hadley v Baxendale* [1854] EWHC 70 Courts of Exchequer.

482 James Edelman (ed), *McGregor on Damages* (20th edn, Sweet & Maxwell 2018), para. 4-022.

483 Such as the one established under Article 276 of the German Civil Code (BGB).

valid arbitration agreement, it is the mere act of the party that disregards that agreement that triggers the breach of the arbitration agreement. Furthermore, the tribunal, having decided on its own jurisdiction, regards the arbitration agreement as valid, hence any act of the party contrary to that agreement is considered a breach, regardless of what the courts of a State other than the seat decide on the matter.

Furthermore, and as raised by the defendant in *Mantovani*,[484] an argument on the basis of mitigation of losses could be made. If the party claiming damages has not appeared before the foreign court to dispute the jurisdiction of the court, raise a plea for a stay under the national law and/or Article II(3) New York Convention, and even fight the merits of the case, it might be regarded as not having complied with a duty to mitigate its losses.[485] If it does do so, however, it might be deemed as submitting to the court's jurisdiction or even waiving its rights to arbitration.[486] The practical significance is evident. It is submitted that if a party maintains its objections and defends the merits of the case on the basis of the mitigation obligation, it should not be considered as submitting to the jurisdiction of the foreign court.

5.4.2 Restated Approach

Rule 6—Enforcing the Arbitration Agreement: Damages

> (1) Provided that English courts have jurisdiction over the question of an arbitration agreement's breach and the court is satisfied to a balance of probabilities standard that there is an agreement to arbitrate which was breached, the court shall have the power to award damages against the party(ies) in breach.
> (2) Such damages include:
> (a) costs and fees incurred for defending the proceedings in breach;
> (b) any damages awarded by the non-chosen *forum*.
> (3) In assessing the damages, the court shall be able to take into account and award as prospective losses the amount of claim before the non-chosen *forum*.

GENERAL—While Rule 5 codifies equitable remedies aiming at enforcing the terms of the

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484 *Mantovani v Carapelli Spa* [1980] 1 Lloyd's Rep 375 (CA) at [267].

485 Jane Wessel and Sherri North Cohen, 'In tune with Mantovani: the "novel" case of damages for breach of an arbitration agreement [2001] Int'l Arb LRev 65.

486 See Briggs 2015 (n 25) 558.

arbitration agreement at the material time of breach of this agreement, Rule 6 allows the aggrieved party to receive monetary compensation in terms of damages for breach of the agreement. In considering the basis, availability, and effectiveness of such remedy, the following comments should be made:

First, and contrary to the analysis under Rule 5, the basis of this aspect of enforcing an arbitration agreement is nothing more than the contractual aspects of this agreement. This is, therefore, a contractual remedy; a remedy as of right under the common law. This nature is to suggest that issues of applicable law to the arbitration agreement become theoretically much more important in a situation where this law is not English law. Only if the law applicable to the arbitration agreement recognises damages as a remedy available for breaching the arbitration agreement, this remedy can be granted by an English court applying this foreign law. This is a result of the fragmented approach analysed above in Chapter 3 as to the nature of the arbitration agreement.

The recognition, however, of the dual nature of such an agreement leads to a different conclusion. If, regardless of the approach taken by the jurisdiction of the law applicable to the arbitration agreement, the English restated law on arbitration—as codified in Rule 6(1)—prescribes the court's power to grant a remedy of damages for a breach of an arbitration agreement governed by English or foreign law, then this rule is to be considered again as part of the overriding mandatory provisions of the *forum* and the conflict of laws inquiry should stop there.

Second, Rule 6(2) clarifies the current approach in English law and jurisprudence in relation to the heads of damages recoverable in the context of such a claim. These include both legal expenses and fees in defending non-chosen proceedings and clawback damages the applicant had to pay before the non-chosen *forum*. While the jurisdiction power of the courts of England and Wales to grant such damages is firmly established by the Court of Appeal in *Starlight Shipping*,[487] the enforceability of the latter type of damages outside the territory of the supervisory *forum* is depending on the rules of recognition and enforcement of *forum recognitionis*. This is proved by the aftermath of *Starlight Shipping*. At the enforcement proceedings of the English orders of enforceability granted on the basis of the judgment in *Starlight Shipping* awarding clawback damages for the breach of a *forum* selection agreement, the Greek court decided that such judgment cannot be

487 *Starlight Shipping Co v Allianz* (n 43).

enforced on the basis of public policy grounds of Article 34(1) of Brussels I Regulation.[488] More specifically, Piraeus 1st Instance Court granted *exequatur*,[489] but the Court of Appeal found that the orders in question constituted 'quasi anti-suit injunctions'. The judges held that:

> *[i]t is true that both the English court and the Judge issuing the orders did not issue anti-suit injunctions. However, judgments hindering the progress of litigation initiated in Greece by ordering damages, and warnings for further damages against the claimants in the Greek proceedings, are included both in the ruling and the orders aforementioned. Consequently, the above contain "quasi" anti-suit injunctions, which pose barriers towards free access to Greek courts, in violation of Article 6.1 ECHR and Articles 8.1 & 20 of the Greek Constitution, the provisions aforementioned belonging to the core of public policy in Greece.*[490]

While this is a particular ruling assimilating clawback damages with anti-suit injunctions, it shows that granting clawback damages is not the end of the story when such orders have to be enforced in another jurisdiction, particularly the one where the original judgment against which damages are granted is rendered.

Third, another issue analysed above and usually referred as the main drawback of a claim for damages is their effectiveness at the material time of the breach, given the difficulties, in principle and in practice, of quantification. More specifically, English courts have long held that they are ready to grant anti-suit injunctions because damages are inherently an inadequate remedy against the breach of the agreement to arbitrate. [491] As analysed below, however, in the context of damages granted by arbitral tribunals[492] and as established in

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488 In that case, Brussels I Regulation was applicable.

489 *Case Number 3461/2015*, Piraeus Court of First Instance, unreported.

490 Unofficial translation of Piraeus Court of Appeal, *Case Number 371/2019*; see Apostolos Anthimos, 'Awaken the Guardian: UK damages for breach of a choice of court agreement violate Greek public policy' Conflict of Laws.net, September 19, 2019 <http://conflictoflaws.net/2019/awaken-the-guardian-uk-damages-for-breach-of-a-choice-of-court-agreement-violate-greek-public-policy/> accessed 29 March 2020.

491 See, among others, *The Angelic Grace*, where Millett LJ, as he was then, said this at [96]: '[t]he justification for the grant of the injunction... is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy'.

492 See below in p. 232.

Rule 6(3) courts can utilise the concept of prospective loss and grant clawback damages going up to the level of the claim raised before the non-chosen *forum*.

Prospective loss is, by its nature, subject to many uncertainties. This is not to suggest that courts, in such cases, shall not be satisfied that requirements of causation and foreseeability are fulfilled on the facts of the case. It is to suggest, however, that the circumstances of such cases and the restated arbitration law should lead courts to follow a pragmatic approach and award damages already at a point where damages cannot yet be assessed with certainty. The mechanics of such option are analysed above[493] and are an item for a further work after this PhD thesis.

Fourth, the relationship between Rules 5 and 6 is not one of hierarchy. This is not to suggest an alteration in the common law conception of the relationship between damages and equitable remedies of injunctions or specific performance in contract law. The particular nature of *forum* selection clauses with transnational elements dictates, however, an approach based on the circumstances and the timing of a request. While, as mentioned in the previous point, injunctive relief and specific performance orders are primarily more apposite at the interlocutory stage of the proceedings, damages can be more appropriate at a later stage where the innocent party has actually incurred expenses despite the granting of interlocutory measures. Such damages might also be more appropriate to be granted by the arbitral tribunal as established in Rule 11.[494]

Finally, and following from the previous comment, the court's power to award compensatory damages, which can be quantified by reference to the amount claimed by the defendant before a non-chosen *forum* in breach of the agreement to arbitrate, is conceptually and pragmatically distinct from the court's power to sanction a party in contempt of a court's order. It is also conceptually different from the court's power to

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493 See above in p. 181 *et seq*. It is enough to refer here to the dictum of Williams LJ in *Chaplin v Hicks* that '[t]he fact that damages cannot be accessed with certainty does not relieve the wrongdoer of the necessity of paying damages'.

494 See also *Nori Holdings v PJSC Bank* at [102]:

> *[i]n circumstances where the arbitrators have power to award such relief [order for an indemnity or an award of damages] […], where Gazprom leaves no room for doubt that any award by the arbitrators, whether of an anti-suit injunction or of an indemnity or damages, would not be incompatible with the Brussels Regulation and would be entitled to recognition and enforcement under the New York Convention, […] it is preferable in my view to defer a decision on this aspect of the claimants' claim.*

enforce a monetary sanctions order granted by the tribunal by under Rule 11. Such orders, as analysed below, can take the form of peremptory orders and the court is merely granting its imperium powers as a supervisory court in support of the arbitration. This is enforcement in an indirect form and is subject to similar constraints as analysed above in relation to clawback damages. Whether and how harmonisation can be achieved in relation to such sanction powers is a matter falling outside the scope of this Restatement and this thesis.

5.5 Post-award Intersections: Jurisdictional Review and Control

5.5.1 Grounds and Standard of Review

Rule 7—Grounds and Standard of Review in Challenge and Enforcement Proceedings

> (1) A party resisting the arbitral proceedings, may request the annulment of a domestic award or the non-enforcement of a foreign award in relation to jurisdictional issues only on the basis of that party establishing that one of the following grounds is fulfilled:
>
> (a) the arbitration agreement was non-existent;
>
> (b) the arbitration agreement was invalid or otherwise inoperable and the tribunal's decision erred in finding to the contrary; or
>
> (c) the tribunal erred in defining the subjective or objective scope of the agreement.
>
> (2) In examining the ground under (1)(a), the court shall conduct a de novo review unless the parties have specifically agreed otherwise in their agreement with a separate delegation clause;
>
> (3) In examining the grounds under (1)(b) and (c), the court shall conduct a limited deferential review of the tribunal's decision on the basis of the facts established by the tribunal.

General—Rule 7 deals with the aftermath of a jurisdictional award rendered by the tribunal. As mentioned below,[495] these awards might include the tribunal's decision on jurisdiction, declarations on the agreement's validity and scope, orders of enforcement, or damages. Rule 7 mirrors the approach adopted in the Arbitration Act 1996 and in the

[495] See above in p. 216.

New York Convention regarding the grounds for refusing enforcement, but also includes tailored grounds addressing the particularities of jurisdictional awards. It also includes specific rules on the standard or depth of review for the court considering the analysis on the higher claim of arbitrators to decide on their own jurisdiction.

Following the format adopted by various laws worldwide, including the UNCITRAL Model Law and the New York Convention, Rule 7(1) establishes an exhaustive and limited list of grounds which can serve as a basis for setting aside or refusing the enforcement of the award. While the two mechanisms serve different purposes—the one being a sword against the award's existence and the other being a shield against its enforcement—[496], the grounds are the same.

Following the analysis in Chapter 4,[497] Rule 7(1) follows a tripartite classification of the grounds, which is not reflected in current arbitration laws but has been flagged in jurisprudence and scholarly writings.

First, if the arbitration agreement was non-existent, meaning that there is no factual consent present, the court can set aside or refuse to enforce the award. As established by Rule 7(2), the standard or depth of review for the court here is a *de novo* one. This is merely confirming the approach of the court in *Fiona Trust* and in *Dallah*.[498] The tribunal has a higher claim in deciding first issues of manifestation of consent, but State courts at the stage of enforcement or setting aside of the final product can autonomously review the facts of the case and establish whether such manifestation exists. While this power of State courts might seem as a breach to the system of parallel avenues proposed in this thesis, the existence of consent to arbitrate between the parties or by a party individually is the cornerstone of the tribunal's powers and any other adjudicatory body presented with the product of this adjudication shall have the power to decide on whether the foundation of the former's powers even exists. This is to suggest that State courts have the power to examine all evidence for themselves. The content, however, of the court's determination is limited. The court shall only determine *de novo* if consent exists on the facts; not

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496 Trevor Cook, and Alejandro Garcia, *International Intellectual Property Arbitration* (Kluwer Law International 2010) 311.

497 See above in p. 110 *et seq*.

498 Jan Kleinheisterkamp, 'Lord Mustill and the Courts of Tennis–Dallah v Pakistan in England, France and Utopia' (2012) 75 The Modern Law Review 639; Devika Khanna, 'Dallah: The Supreme Court's Positively Pro-Arbitration No to Enforcement' (2011) 28 J Int'l Arb 127.

whether such consent is also valid. This determination relates only to the inner circle in the model suggested by Rau.[499]

The validity of the parties' or party's consent to arbitrate is primarily for the tribunal to decide. If, therefore, a State Court at the review stage determines on the basis of a de novo review that the tribunal was correct in finding that there is adequate manifestation of consent, then the decision of the tribunal on the contours and validity of such consent shall be given deference. This is to suggest that the State court shall not conduct a de novo examination of the facts, but rather it shall determine whether the tribunal, on the basis of the facts itself had established, erred in finding that the parties or party validly and genuinely consented to arbitrate.

The same standard of review is applied in relation to ground (c) which allows the setting aside or refusal of enforcement of a jurisdictional award if the tribunal has erred in defining the subjective or objective scope of the agreement. Following the analysis in Chapter 4 on the approach of the proposed model, the tribunal has the higher claim in deciding questions of scope. As such, its decision should be given deference and the State court is only allowed to decide on whether the tribunal's decision was correct on the basis of the facts the latter established.

Finally, following the overarching effect of party autonomy, Rule 7 allows the parties to exercise their autonomy in a similar manner that US delegation clauses operate[500] and accord the same deferential standard the Rule provides for the decision on the existence of the arbitration agreement as well. On the same basis, parties can decide on the opposite direction and allow State courts to review the decision of the arbitrators on a *de novo* basis. While both directions are consistent with the proposed role of party autonomy in private international law as a regulatory mechanism, this specific choice of the parties can be challenged itself as not valid in a similar fashion to US delegation clauses.

5.5.2 Conflict of Judgments

Two conflicts of judgments can be envisioned in regulating parallel proceedings: (a) a conflict between two jurisdictional judgments; and (b) a conflict between two substantive decisions on the merits of the case. Both these situations can arise in relation to the courts

499 See above in p. 87.

500 See above in p. 83; Also *Rent-A-Ctr, W., Inc. v Jackson*.

of the seat or in relation to foreign courts and the principles to be applied are largely the same.

First, if there is already a State court decision on the existence or validity of the arbitration agreement, the question as to the effect of this decision—or even proceedings—was analysed above. The subsequent question relates to the conflict between two jurisdictional decisions, one by the court and one by the tribunal. It is obvious that this situation can only arise where the courts of the seat or foreign courts have issued a positive or a negative declaration on the arbitration agreement and the tribunal has issued a separate partial award on jurisdiction as a result of bifurcated proceedings. In all other situations—including a case where the court grants or refuses to grant a stay under Section 9 of the Arbitration Act 1996—the matter will be dealt with in a conflict of substantive judgments. If the State judgment results from the courts of the seat—for example where in relation to an English seated arbitration, the English courts have issued a negative declaration under Section 32 or 72 of the Arbitration Act 1996—then conflict is resolved in favour of the State judgment which has *res judicata* effect. An English court called upon to recognise—enforcement is not yet an issue—the jurisdictional award of the tribunal will be bound by the decision on the validity of the agreement. This is not the same where the decision is one of a foreign court. Provided there is no reciprocal arrangement for the recognition and enforcement of such judgments on jurisdiction, the tribunal's decision should be recognised.

Second, and most commonly observed, the situation might arise as to a conflict of substantive judgments, one from a court and one from an arbitral tribunal. For the outcome of this analysis it is irrelevant whether the tribunal is seated in England or overseas. It is not irrelevant, however, whether the court is an English one or an overseas one. While the outcome is the same in the case where the State court is the one of the seat of arbitration—with *res judicata* or issue preclusion being accommodated within the public policy exception—the situation is different in relation to a foreign court decision.

On the one hand, the enforcement of the arbitral award will be made through the Arbitration Act 1996. On the other hand, the enforcement of the foreign substantive judgment will be subject to different regimes depending on the relationship of the court of origin with the English courts as *forum recognitionis.* If the court of origin is a court of a member State of the EU, then the Brussels I Regulation Recast applies and the solution is provided by Article 73 of the Brussels I Recast Regulation and Recital 12 which give precedence to the obligations of the member State of recognition arising out

of the New York Convention. If, however, the Regulation does not apply, then under Section 32 of the Civil Jurisdiction and Judgments Act 1982, protects against enforcement of a judgment obtained overseas in breach of an arbitration agreement.

This statutory exception to the enforcement of a foreign judgment strengthens the role of *forum* selection agreements—both exclusive jurisdiction and arbitration agreements—to the extent that the Brussels I Regulation does not apply. Although in its statutory form this exception was introduced in 1982 with the Civil Jurisdiction and Judgments Act, it enshrines the common law aversion towards such judgments obtained in breach of a *forum* selection agreement.[501] In understanding the operation of this exception the point of departure is that in common law recognition and enforcement regime, the foreign court is considered to have international jurisdiction if the defendant was present and that the assessment of the breach of the agreement is a matter for the English court as *forum recognitionis.* This is to suggest: (a) that not only is the English Court not bound by the decision of the overseas court,[502] but it also conducts an enquiry according to its own understanding, principles, and policy to determine the validity, enforceability, and scope of this agreement; and (b) that a possible submission of the defendant to the foreign proceedings converts the mandatory refusal of recognition into a discretionary one where the courts exercise an 'evaluative judgment'[503] on whether they should recognise or enforce the foreign judgment.[504]

This is, indeed, different from the enquiry the English courts—much like any other court of a contracting State—are undertaking in enforcing a domestic or a foreign award under the Arbitration Act 1996 or the New York Convention respectively; the important connecting factors are the choice of the parties or, subsidiary, the seat of arbitration. In effect, in both cases the Courts will most likely—but not necessarily—apply the law of England and Wales either as the law of the seat or as the *lex fori* in assessing the validity of the arbitration agreement.

As this analysis suggests, the outcome of a potential conflict between an award and a

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501 Briggs 2015 (n 25) 725; *Ellerman Lines Ltd v Read* [1928] 2 KB 144. See also *Bank St Petersburg v Arkhangelsky* [2014] EWCA Civ 593, [2014] 1 WLR 4360.

502 See Section 32(3) CJJA.

503 Fentiman 2015 (n 18), para. 18.21

504 *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, [2012] 1 WLR 920, at [149] per Rix LJ.

foreign or domestic court judgment will depend on the *forum recognitionis*' analysis on the existence, validity, and scope of the arbitration agreement under the exception of Section 32(2) Civil Jurisdiction and Judgments Act 1982. Although this is presented as a conflict, the analysis is indeed unilateral. The English court will not engage into a comparative analysis of the appropriateness, quality, merits or demerits of the two decisions. Rix LJ merely observed in *AES v Ust-Kamenogorsk* that: '[t]he merits of that exception appear to speak for themselves'.[505] The court will analyse on the basis of principle whether the foreign proceedings were in breach of an arbitration agreement; and that, regardless, of whether this arbitration agreement was providing for arbitration in England or overseas. A pragmatic approach, however, of this principle, might allow the assessment of the arbitral award in a comparative manner with the foreign court decision if the defendant in the foreign proceedings has submitted to the jurisdiction of that court.

505 ibid.

6 Arbitral Jurisdiction: Issues Before Arbitral Tribunals

Regulation of arbitral jurisdiction is not only examined from the perspective of State courts, but it also—and primarily—raises the same issues from the perspective of arbitral tribunals themselves. Chapter 6 follows the same structure adopted in Chapter 5 considering instances where jurisdictional issues arise either in the context of giving procedural effect to the content of the parties' consent to arbitrate or enforcing the obligations undertaken by the parties.

6.1 Competence to Decide Jurisdictional Issues *Redux*

The tribunal's competence to decide jurisdictional issues not only is of fundamental importance in regulating arbitral jurisdiction, but it also has been used throughout the arbitration literature, as seen in Chapter 4, in addressing a number of issues. Disentangling these issues raised at an interlocutory stage is also to suggest that the relevant terms have to be re-considered. This is not a mere renaming of the same issues, but rather an attempt to coherently analyse the different aspects and issues arising in the regulation of arbitral jurisdiction.

As alluded above in the analysis of the State regulation, the Arbitration Act 1996 although it has a separate sub-part on the 'jurisdiction of the arbitral tribunal' containing Sections 30 to 32, also includes other Sections regulating the stay of proceedings[506] and the rights of parties not participating at all in the proceedings.[507] Taking the black-letter law provisions in turn, Section 30(1) provides for the primitive rule of—positive—competence-competence as a default setting: '[u]nless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction'. The ruling of the tribunal on its jurisdiction, however, can be 'challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part'.[508] Regulating the

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506 Arbitration Act 1996, Section 9; see further on the stay above in p. 127.

507 Arbitration Act 1996, Section 72; see further above in p. 149.

508 Arbitration Act 1996, Section 30(2).

timing and manner of an objection of arbitral jurisdiction before the tribunal itself, Section 31(1) provides that any such objection to the substantive jurisdiction of the tribunal 'must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction'.[509]

The right of the tribunal to rule on its own jurisdiction is not exclusive; it is qualified in three respects, which have already been analysed in Chapter 5 of this thesis. First, Section 32 Arbitration Act 1996 permits the judicial determination on a 'preliminary point of jurisdiction under certain procedural conditions and provided that either both parties agree in writing on that or the tribunal gives its permission and a court finds that addressing the question is likely to produce substantial savings in costs'. Second, a party that does not take part in the proceedings, has the right under Section 72 Arbitration Act 1996 to challenge arbitral jurisdiction by way of a declaration or injunction. Finally, a court can decide—at the interlocutory stage—the existence, validity, and scope of the arbitral jurisdiction in the context of substantive proceedings commenced before it and a request for their stay under Section 9 Arbitration Act 1996.

In considering now the relevant issues, a two-stage approach is proposed. At the first stage, one should identify which issues are addressed to courts, which to tribunals, and which are addressed to both. It is only through this first stage that the question of regulation of authority and competence in deciding on arbitral jurisdiction can be answered effectively and coherently.

Firstly, both courts and tribunals are involved in considerations of whether they—each separately—have jurisdiction to hear the substantive claims raised before them. The extent and relationship of these considerations is identified at the second stage. These considerations are to be dissociated from the issues of timing and depth of the court's inquiry into arbitral jurisdiction. Finally, both courts and tribunals are concerned with the issue of the effects that the jurisdictional decision of the one or the other has respectively. This is an issue usually presented as a competence-competence issue; it is, however, appropriately to be characterised as an issue of *res judicata* as the question is: what is the effect of a jurisdictional decision of an adjudicatory body on the proceedings of another

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509 These objections before arbitral tribunals will only be elaborated in connection and in relation to the parallel objections before state courts and in relation to the rights of parties opting not to participate in the proceedings.

adjudicatory body.

Secondly, the competence-competence doctrine in arbitration—as it has so far been analysed—encompasses not only core questions of establishing the right of arbitrators to decide on their jurisdiction and the relationship between this right and the right of the supervising courts to decide on issues arbitral jurisdiction, but also questions addressed to courts while performing their supervising or enforcing duties. The questions of whether and when a court can decide on the tribunal's jurisdiction are issues touching upon the relationship between courts and tribunals. By contrast, questions regarding the depth and standard of the court's inquiry are related to the regulation of arbitral jurisdiction which are not necessarily included in the concept of competence-competence.

It is, therefore, preferable to make the following distinctions when addressing the issue of competence-competence:

i. When addressing the core question of whether the tribunal has in itself power to decide on its own jurisdiction the more appropriate term to be used is 'arbitral competence-competence'. This is merely to suggest that a given jurisdiction allows the tribunal to conduct an independent inquiry to its own jurisdiction. The basic premise is that a tribunal is not obliged to stay its own proceedings or even decline jurisdiction only on the basis that a court action has been filed. On the contrary, the reference to arbitral competence-competence it is not suggesting either that the tribunal has to conduct this inquiry or that it is the exclusive judge of the issue.

ii. Considering the involvement of State courts at the interlocutory stage—the area now covered by the positive and negative competence-competence distinction—the appropriate terms to be used are 'concurrent competence-competence' and 'temporal competence-competence'. The first is to suggest that both courts and tribunals have—at least in principle—the right to decide on the arbitral competence at the foot of the proceedings, i.e. at the interlocutory stage.[510] The

[510] Arbitrators might offer an opinion on the limits of their own authority, but without in any way restricting the court's consideration of the same question. Although the arbitration does not necessarily stop, neither do related judicial actions.

second, is essentially what is now termed as negative competence-competence, [511] i.e. a rule of temporal priority of the tribunal over the court to decide jurisdictional issues. The main issues arising in attempting to regulate both these types of jurisdiction are: (a) the depth of the court's inquiry in the arbitral jurisdiction either to determine the issues finally or to refer; and (b) whether and how the courts can and/or should examine the arbitral jurisdiction even before arbitral proceedings are on foot.[512]

iii. Expanding on the temporarily exclusive competence of tribunals to decide on their own jurisdiction, a third formulation of 'absolute competence' is conceivable. This is to suggest that a tribunal does not only get to have the first opportunity to address the issue but to be the only one to have that opportunity. The arbitrators' decision on their jurisdiction is final and any court review is confined at the post-award stage only at a deferential treatment. As Park observes, however, and as it is evident from the US practice, that requires the courts finding that the parties have actually agreed to such finality.[513]

Positioning the approach of the English legal regime in the framework of the abovementioned distinctions the English legal system currently seems to be one of concurrent competence-competence of courts and tribunals in regulating arbitral jurisdiction. At the same time, it is possible for the parties to contract out of that regime and provide for exclusive competence-competence,[514] transforming the jurisdictional question into one of substance that the tribunal can determine definitively.

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511 See *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891 at [34] per Longmore LJ. See also Emmanuel Gaillard, 'L'effet negative de la competence-compétence' in Jacques Haldy and others, *Etudes de Procédure et D'arbitrage En L'honneur De Jean-François Poudret* (Faculté de droit de l'Université de Lausanne 1999). The negative effect might be considered as part of the arsenal of doctrinal tools to combat dilatory tactics of a party wishing to sabotage the proceedings. See Emmanuel Gaillard, 'Les manœuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international' (1990) 4 Revue de l'arbitrage 759.

512 See *HC Trading Malta Ltd v Tradlands Commodities SL*.

513 See Park 2007 (n 2) 23 and fn 52 ('[h]owever, such a result requires that judges first determine that the parties did in fact agree to such finality').

514 See also Born 2014 (n 95) 1213; *LG Caltex Gas Co v China Nat'l Petroleum Co* [2001] EWCA Civ 788; *Vee Networks Ltd v Econet Wireless Int'l Ltd* [2005] 1 Lloyd's Rep. 192, 198 (QB); *Astro Valiente Compania Naviera v Pakistan Ministry of Food & Agric.* [1982] 1 All ER 823 (Comm).

Considering the above, one could restate the approach as follows:

Rule 8—Competence to Decide Jurisdictional Issues

> (1) The arbitral tribunal shall have the power to decide on any jurisdictional issue (arbitral competence-competence);
> (2) Subject both to the following paragraph and Rule 3, the power of the tribunal on the basis of the preceding paragraph shall be exclusive at the interlocutory stage.
> (3) The parties can agree on a delegation clause, granting State courts concurrent or exclusive competence to decide on one, more, or all of the relevant jurisdictional issues, including questions of existence, validity, and scope of such delegation clause.

General—Rule 8 summarises the restated position as set out above in relation to the triangle of arbitral competence to decide jurisdictional issues, default allocation of jurisdictional authority between State courts and tribunals on such issues, and contractual delegation of such authority. The operation of the rule is to serve as the overarching and general principle for the regulation of arbitral jurisdiction which expresses in practical terms on the basis of a rule. It is, thus, supplementing the Rules regulating the stay of court proceedings, declaratory powers, and enforcement of the contractual aspects of the agreements to arbitrate. Such procedural, substantive, contractual, or equitable remedies are intersections which operate within the limits and guidelines of the general principle of allocation of jurisdictional authority between courts and tribunals. In turn, as analysed above, this allocation is the practical reflection of the transnational party autonomy principle in private international law and arbitration.

RULE 8(1)—Known in the literature and case law as positive competence-competence, Rule 8(1) is the embodiment (restated) of the analysis above on the terminology of this primordial doctrine in international arbitration. Expressed in a positive way towards the arbitral tribunal, it clarifies the position adopted in favour of the tribunal having power to decide every jurisdictional issue. This rule suggests that the position in the proposed theory is that the tribunal's adjudicative powers do extend by default to jurisdictional issues.

This is not only a rule of practical significance as analysed above, but it is also a necessary consequence of the transnational conception of dispute resolution in international commercial disputes. If arbitration and litigation are two equal choices for the parties

existing at the same level in a horizontal relationship, the tribunal shall have the right to determine both whether the threshold for entering into the arbitration stream is met at the interlocutory stage and whether the tribunal's jurisdiction is in fact proved by examining all the evidence.

The practical significance of the statutory embodiment of this Rule is that parties need not expressly grant the tribunal the power to decide upon questions of its jurisdiction. This is to suggest a reversal of the 'clear and unmistakable language' rule currently followed by the jurisprudence in the USA, as well as of the practice adopted in various jurisdictions and arbitral institutions for model clauses including stipulations to that effect. A given tribunal has the power to decide upon any and all jurisdictional issues as defined above[515] and as analysed in Chapter 1.

RULE 8(2)—Rule 8(1), establishing positively the tribunal's broad power to decide on jurisdictional issues, cannot be read in isolation from the remaining paragraphs of Rule 8. Rule 8(2), therefore, establishes a rule of temporary exclusivity for the tribunal's power to decide jurisdictional issues. This rule aims at providing a statutory/black letter expression of the elusive notion of negative competence-competence. As analysed above in Chapter 4, this Rule does not express a default position whereby State courts can never get involved in deciding or reviewing jurisdictional issues. On the contrary, following the approach adopted in France and the rationale expressed in *Dallah*,[516] it establishes a rule of temporal exclusivity for the tribunal.

This default position is based on the relationship of horizontal equality existing between arbitration and State litigation. If there is adequate manifestation of consent to arbitrate, then State courts shall refrain from considering jurisdictional issues and the superior claim would lie with the arbitrators. As established above, the default rule is that State courts shall have the ability to examine at an initial threshold level whether there is factual consent to arbitrate.

RULE 8(3)—As provided in the black-letter law formulation of Rule 8(2), the default position is qualified firstly by Rule 8(3) and the parties' autonomy to agree otherwise. This is an expression of the primordial role that party autonomy has at every stage of arbitral resolution of disputes, including the interlocutory, jurisdictional stage.

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515 See above in p. 106 *et seq*.

516 *Dallah v Ministry of Religious Affairs, Government of Pakistan*.

This rule expresses a reversal of the approach adopted in the USA where *Rent-a-Centre* delegation clauses serve as an expression of clear and unmistakable language—following the *First Options* formulation—that the parties wanted jurisdictional—gateway—issues to be dealt with by the arbitrators.[517] If, as established above, a consequence of the horizontal relationship of arbitration and State litigation and of the role of party autonomy in private international law is that arbitrators have a broad power to decide on jurisdictional issues—Rule 8(1)—and this power is by default temporarily exclusive at the interlocutory stage—Rule 8(2)—, then parties can also reverse this position via a delegation clause. As Rule 8(3) provides in its black letter, such delegation clauses may refer to one, more, or all jurisdictional disputes. While fragmentation of adjudication might in principle be contrary to the expectations of commercial parties involved in cross-border deals, the interlocutory, final and binding, determination of a jurisdictional issue by a State court might be key in certain circumstances for facilitating a settlement or the smoother resolution of the substantive disputes in arbitration. Parties can jointly agree on such delegation via a supplementary clause in their original contract, at any given point prior to the rise of the dispute, or even after the dispute itself has arisen.

RULE 9—Jurisdictional Awards

> (1) If the jurisdiction of the tribunal is challenged or a request is made for a positive declaration, unless otherwise agreed by the parties, the tribunal shall grant a separate decision on jurisdiction in the form of a jurisdictional award;
> (2) A positive jurisdictional award, accepting the tribunal's jurisdiction, may be challenged before the supervisory courts by the resisting party only on the ground of Rule 7(1)(a). Any such challenge shall not impede the tribunal's examination on the merits of the case;
> (3) A negative jurisdictional award, declining the tribunal's jurisdiction, may be challenged before the supervisory courts by the losing party on one of the grounds in Rule 7(1).

General—The theoretical conception of arbitration and litigation as two pathways in the context of a cross-border dispute resolution motorway has practical consequences not only to the relationship between courts and tribunals, but also to the conduct of the proceedings. An expression of the proposed model of regulating parallel proceedings is

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517 *Rent-A-Ctr, W., Inc. v Jackson*, 130 S.Ct. 2772, 2778 n.1; *First Options of Chicago, Inc. v Kaplan* (1995) 514 U.S. 938.

the establishment of a default jurisdictional rule in favour of a separate jurisdictional award being issued if the jurisdiction of the tribunal is challenged or a party requests a declaration affirming or denying the tribunal's jurisdiction.

This departure from the current approach of opt-in bifurcation and the establishment, under Rule 9, of an opt-out bifurcation of proceedings is a natural consequence of the recognition of a higher claim to the arbitrators in deciding their own jurisdiction; it is aiming at disentangling the gordian knot of the potentially parallel jurisdiction of courts and tribunals in jurisdictional matters by including specific rules about the aftermath of such positive and negative jurisdictional awards in paragraphs 2 and 3, which have to be read in conjunction with Rule 7.

RULE 9(1)—The tribunal's default power and obligation to grant a jurisdictional award is qualified by two types of rules included in Rule 9(1). First, this default rule applies only in situations where the tribunal's jurisdiction is challenged by one of the parties participating in the process—even if such participation aims only at challenging the jurisdiction of the tribunal—or either of the participating parties requests the tribunal to confirm in a positive declaratory manner its jurisdiction with an award. In such circumstances the tribunal is under an obligation to bifurcate the proceedings and render a positive or negative jurisdictional award.

Second, however, this is an opt-out, default rule, allowing the parties to exercise their autonomy and decide otherwise. Such a decision can be part of the arbitration agreement or—although more rarely for pragmatic reasons—can be reached after the dispute has arisen. Such an opt-out mechanism is consistent with and constitutes an expression of the overarching role of party autonomy in regulating issues of arbitral jurisdiction. The rationale of adopting a default rule in favour of a separate jurisdictional award aims at safeguarding the efficiency of the proceedings and allowing both parties to determine issues of jurisdiction that might impede the substantive determination of the dispute.

RULE 9(2)—Dealing with the consequences following a positive jurisdictional award, Rule 9(2) establishes a rule expanding on the approach adopted under the current system of the Arbitration Act 1996.[518] Under this system a resisting party, regardless of whether

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[518] Similarly see UNCITRAL Model Law, Article 8. See, however, the approach followed under Article 16(3) of the Greek Law on International Arbitration (Law 3975/1994). Under this approach, if the

the tribunal has decided over its own jurisdiction, can challenge the tribunal's jurisdiction before national courts without this, however, impeding the tribunal from continuing the examination of the merits of the dispute.

In a system, however, where (a) the first point of challenging the tribunal's jurisdiction is and should be the tribunal itself, and (b) the default rule is that the tribunal has the obligation under the conditions of Rule 8(1) to render a jurisdictional award, such award can be challenged before national courts but only on the limited ground that the arbitration agreement, and hence the manifestation of consent, was non-existent and the tribunal erred in this respect. This review, limited in scope, aims at establishing that the bifurcation procedure will not be used as a dilatory tactic while, at the same time, safeguarding the interests of a party reasonably putting forward arguments against the existence of its consent to arbitrate.

The effect of Rule 9(2) is to allow the tribunal not only to decide on its own jurisdiction, but also to perform its adjudicative duty and render a final award on the merits. Therefore, Rule 9(2) is based on the same premise as Rule 8; recognising the tribunal's higher claim to decide on jurisdictional issues while including checks and balances for manifest cases of complete lack of consent to arbitrate. In this manner, it reflects and constitutes the natural consequence of the grounds included in Rules 3 and 4 allowing court intervention when the court is satisfied with cogent evidence and strong grounds that there is no adequate manifestation of consent. While this specific content of proof is required at the interlocutory stage, the court's review on the existence or non-existence of the consent to arbitrate, as established in Rule 7, is a *de novo* one considering all circumstances.

RULE 9(3)—Following the analysis for positive jurisdictional awards, Rule 9(3) cuts the gordian knot of whether negative decisions of arbitrators are considered awards which can be subject to challenge proceedings to the affirmative on both fronts. Paragraph 3 is the converse side of paragraph 2 and allows the losing party to challenge a negative jurisdictional award on the basis of the grounds and in accordance with the review standards prescribed in Rule 7. As this type of award is the final disposition of the tribunal, Rule 7 should be applied in its totality. The theoretical and pragmatic difficulty of the consequences of annulling a negative jurisdictional award is outside the scope of

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tribunal decides to render a separate jurisdictional award—itself not mandatory under Article 16(1)—positive award shall only be challenged alongside the award on the merits.

this thesis. One possible solution, however, would be for a new tribunal be constituted either by the parties themselves or, failing an appointment by the parties, by the overseeing institution or appointing authority in a similar manner that multi-party proceedings are dealt with.[519]

6.2 Stay of Arbitration Proceedings

In a similar manner to a State court staying its own proceedings, an arbitral tribunal can also engage into self-restraint and stay its own proceedings. More specifically four situations can be envisaged: (a) the tribunal has been constituted and at the same time the defendant in these proceedings initiates litigation proceedings for the same dispute—or, to the extend this is allowed from the procedural regime, for the sole purpose of determining the validity of the agreement; (b) the court in the previous case has already ruled that there is not a valid agreement; (c) the court has already ruled on the merits; and finally (d) instead of a State court and an arbitral tribunal, the parallel proceedings exist between two or more tribunals.

While, at first sight, the self-restraint of an arbitral tribunal seems similar to the stay of court proceedings in favour of arbitral ones, it presents two principal differences. First, such stay is—in most cases and under most laws[520]—not mandatory but, rather, discretionary for the tribunal. This is so, even in the context of the determination of the validity and scope of the arbitration agreement. Second, contrary to State courts which have to enforce the statutory provisions or the contents of the procedural law applicable, an arbitral tribunal has to exercise its discretion by balancing the imperatives of performing the adjudicatory task entrusted to it by the parties on the one hand and the duty to render an enforceable award on the other.

Addressing the particularities of each situation involves the examination of the tribunal's discretion through the prism of three considerations: (a) the power—and the obligation—

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519 *Siemens v Dutco* decision of the French Cour de Cassation (7 January 1992 – XV Yearbook Com. Arb. (1992) 124 *et seq*.. Stefan Kroll, 'Siemens–Dutco Revisited? Balancing Party Autonomy and Equality of the Parties in the Appointment Process in Multiparty Cases' (2010) <http://arbitrationblog.kluwerarbitration.com/2010/10/15/siemens-dutco-revisited-balancing-party-autonomy-and-equality-of-the-parties-in-the-appointment-process-in-multiparty-cases/> accessed 6 April 2020.

520 See, however, Section 10(9) of the Singapore International Arbitration Act which provides for a discretion to the state court to stay its own proceedings.

to decide on its own jurisdiction on the basis of the principle of competence-competence (Article 30 of the Arbitration Act 1996); (b) the duty to render an enforceable award; and (c) the obligations of the arbitrators towards the parties by virtue of the contractual relationship between them. An extra element that becomes important only in the second and third situations is the preclusive effect—either in terms of *res judicata* or issue estoppel—of the court judgement on jurisdiction (in the second scenario) or on the merits of the case (in the third scenario).

In the first scenario—which was also the basis for the analysis of a stay from State courts—the overarching justification and consideration for a stay from either side is the need to avoid making contradictory decisions in the same case and the economy of the arbitration procedure. Since the matter is not regulated in an international level by the New York Convention, one has to resort to national laws as well as policy considerations, which, however, might stem from the pro-arbitration regime of the New York Convention.

Under English law, the tribunal has discretion to stay or not its proceedings pending a judicial determination of its jurisdiction. The starting point is the affirmation in Section 30(1) of the Arbitration Act 1996 of the tribunal's power rule on its own substantive jurisdiction; positive competence-competence is hence firmly established in the Act. The application available 'to a party to arbitral proceedings', under Section 32(1), to request a determination of 'any question as to the substantive jurisdiction of the tribunal' does not result to an automatic stay of the arbitral proceedings; under Section 31(5) the tribunal 'may' stay its proceedings whilst such judicial determination is on foot. The only case it 'shall' stay is 'if the parties so agree'.[521]

It follows from the above that, under English law, which grants the discretion to the tribunal to stay or continue its proceedings, the question is one of exercising this discretion under the prism of the tribunal's duty towards the parties. These obligations stem from the—express or implied—contractual relationship between the arbitrators and

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521 Compare the approach in Singapore under Section 10(9) of the Singapore International Arbitration Act where it is for the court to decide whether the tribunal should stay or not its proceedings. The Singapore High Court in *BLY v BLZ & Another* [2017] SGHC 59 clarified that: (a) the default position is that the arbitration proceedings will not be stayed automatically, but (b) only judicially and with reference to all the circumstances of the case. These circumstances must be special ones to reverse the presumption under the default position.

the parties. In commercial cases especially, the duties of the arbitrators exist only towards the parties, which have entrusted the particular tribunal with the task of adjudicating their dispute. Arbitrators are, therefore, akin to service providers and have to deliver what they promised to the parties. Regardless of the theoretical difficulties and disagreements in identifying the basis of arbitration as contractual, procedural, or quasi-procedural, the fact that the arbitrators have undertaken the duty to adjudicate the dispute cannot be overlooked. Part of these obligations—often expressly described in the arbitration laws or the institutional rules applicable[522]—is the duty to render an enforceable award. This is not only the overarching objective of arbitration proceedings as a method of 'resolving [a dispute] in a final and binding manner'; but is, also, part of the good standard of performance the arbitrators owe to the parties.

6.3 Enforcing the Arbitration Agreement: Arbitral Enforcement Orders

Intervention in the form of commands, i.e. injunctions, is not only available from courts as analysed in Chapter 5. Tribunals can also intervene to safeguard their own jurisdiction and to ensure that the parties will abide by the arbitration agreement. On this basis, this section examines the mode and spectrum of remedial responses that a tribunal has in granting arbitral enforcement orders.[523] In particular, the focus is on orders as a form of command coming from the tribunal, the jurisdiction and discretion of the tribunal to grant them and their enforcement. The analysis in this section can and will be combined with the analysis in the following section on the availability of damages, declarations, or monetary incentives coming from an arbitral tribunal.

6.3.1 Jurisdiction to Grant Arbitral Enforcement Orders

Considering the tribunal's jurisdictional power to intervene and protect its own jurisdiction, two possible paths can be envisaged. First, a tribunal could grant the order as an interim measure on the basis the *lex arbitri* and the arbitration rules applicable.

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522 See for example LCIA Rules 2014, Article 31.

523 The term is used and preferred in comparison to arbitral anti-suit injunctions as it conveys more accurately the enforcement nature of the inquiry. This nature is not, however, inconsistent with the approach adopted as it operated within the arbitration stream and on the basis that there is consent to arbitrate. In addition, it is consistent with the dual nature of the arbitration agreements as analysed in Chapter 3.

Second, the tribunal can utilise its remedial powers against a substantive wrong on the basis of the obligations arising out of the arbitration agreement and grand a permanent injunctive or compensatory relief. In other words, the mode of the tribunal's intervention can either take the form of a procedural order or of a permanent remedy for a breach of a contractual obligation. In the former case, there is no need to invoke a breach of the negative undertaking as a contractual obligation. It is, rather, the factual underpinning triggering the intervention of the tribunal. The choice between the two depends primarily on the method of enforcement, which will be separately dealt with in the following section.[524]

6.3.1.1 Arbitral enforcement orders as procedural tools

In examining arbitral enforcement orders as interim measures, the legal basis for such power of the tribunal is to be found in the *lex arbitri* and—to the extent that they have specific provisions—in the arbitration rules applicable. This is an expression of the tribunal's general power to regulate the proceedings in the manner it deems appropriate. The purpose of such orders is to regulate the adverse effects of parallel proceedings up to the point that the tribunal renders a final award.[525] After that point, according to this approach, it is a matter for the principles of *res judicata* or estoppel to regulate the relationship and precedence between the award and possible parallel proceedings or conflicting judgments.

In England, under Section 39 of the Arbitration Act 1996, if the parties have so agreed—expressly or by way of reference to the rules of an institution—the tribunal shall have 'the power to order on a provisional basis any relief which it would have power to grant in a final award'. Furthermore, this is how the UNCITRAL Working Group on Arbitration approached the issue during the 2006 revision of the Model Law.[526] It clarified that anti-suit injunctions are covered by Article 17(2)(b), prescribing that the tribunal may order a

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524 See below in p. 213.

525 Olga Vishnevskaya, 'Anti-Suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil' (2015) 32 J Int'l Arb 173, 178; Philippe Fouchard and others, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 395.

526 Report of UNCITRAL Working Group on Arbitration on the Work of its 39th Session, 2006, UN Doc A/61/17, at [92]-[95]; Olga Vishnevskaya, 'Anti-Suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil' (2015) 32 J Int'l Arb 173, 173.

party to '(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or *prejudice to the arbitral process itself*' (emphasis added).

A similar procedural framework has been adopted under Article 183 of the Swiss Federal Statute on Private International Law. On this basis, several tribunals seated in Switzerland have issued anti-suit type of orders as provisional measures. In *ICC Case No 8307*, the tribunal, referred to its power under the said article of the Swiss *lex arbitri* and Article 23 of the ICC Arbitration Rules 1998 to order any provisional measures.[527] In a case under the International Arbitration Rules of the Zurich Chamber of Commerce,[528] the arbitrators went further and confirmed their power to order such measures in the basis of the *lex arbitri* and the rules, unless the parties have expressly excluded this power. Finally, in *ICC Case No 16240*, the tribunal refused to order a permanent order and held that:

> *[…] the main value of anti-suit injunctions is to prevent parallel proceedings, which might lead to the unfortunate outcome where conflicting decisions are rendered with regard to the same matter. Anti-suit injunctions are thus useful in affording arbitral tribunals the time necessary to render final awards.*[529]

One of the particularities of this approach is that the granting of such orders is contingent upon the fulfilment of certain prerequisites. Under the Model Law, for example, aside from the establishment of *prima facie* jurisdiction and a reasonable possibility of success on the merits, the request must establish that urgency exists for the grant of such orders, otherwise irreparable harm will be suffered.[530] Furthermore, the ICC Rules require

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527 Interim Award of 14 May 2001 in *ICC Case No 8307* as published in Emmanuel Gaillard, *Anti-Suit Injunctions In International Arbitration: IAI Seminar, Paris, November 21, 2003* (Juris Publ. 2005) 308. See also other ICC cases: ICC Case No 1512, [1976] YBCommArb 128; ICC Case No 3896, [1983] 110 JDI 914; ICC Case No 5650 14 YBCommArb 85; ICC Case No 8887 [2000] 11 ICC Bulletin 91; ICC Case No 10596 as published in Jean-Jacques Arnaldez, Yves Derains and Dominique Hascher, *Collection of ICC arbitral awards, 2001-2007* (vol 5, ICC Pub. 2009) 315; ICC Case No 18563 (2014) ICC Bulletin Special Supplement 2014: Procedural Decisions in ICC Arbitration 89.

528 *Zurich Chamber of Commerce Case No 240/93* [1997] YBCommArb 211.

529 *Final Award of 3 December 2012 in ICC Case No 16240*, at [142], disclosed in the enforcement proceedings before the Russian Commercial Court of Kemerovo Region, Case No A27-16183/2012.

530 In cases of emergency, the provisions of Emergency Arbitration under several arbitration rules have

provisional measures to be appropriate. It is submitted that in the context of arbitral enforcement orders the inquiry is and should be focused on the existence of an arbitral bargain in the form of an arbitration agreement which is disregarded and threatened by the recalcitrant party.

The advantage of granting such orders as interim measures is that they provide an immediate response to the realised or threatened aggravation of the tribunal's jurisdiction. Their nature is preventive rather that corrective aiming to ensure that the tribunal will be able to carry out its function. Their real effectiveness, however, hinges upon the ways that they can be enforced, either directly—as partial awards—or indirectly—with the assistance of the courts of the seat.[531]

6.3.1.2 As awards

Leaving aside the procedural framework of interim measures and focusing on the nature of the obligation under the arbitration agreement, the arbitral tribunal can grant relief against a substantive wrong, i.e. a breach of contract. The literature on the topic vaguely refers to the arbitration agreement itself and the doctrine of competence-competence as a legal basis.[532] To make this reference more specific, the legal basis is the negative obligation undertaken by the parties in their arbitration agreement as analysed in Chapter 3 and in a similar manner to anti-suit injunctions granted by English Courts.[533] This remedy is focusing on the substantive effect of the dual nature of arbitration agreements.

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been utilised. See more: Andrea Carlevaris and Jose Ricardo Feris, 'Running in the ICC Emergency arbitrator rules: The first ten cases' (2014) 25 ICC International Court of Arbitration Bulletin 34; Sebastian Besson, 'Anti-Suit Injunctions by ICC Emergency Arbitrators' in Andrea Carlevaris and others, *International Arbitration Under Review: Essays in Honour of John Beechey* (ICC Product No 772E 2015).

531 See below in p. 213 *et seq*. See also generally Nigel Blackaby and others, *Redfern & Hunter on International Commercial Arbitration* (6th edn, OUP 2015) 316; Born 2014 (n 95) 2441; Stephen Berti and Heinrich Honsell, *International arbitration in Switzerland: an introduction to and a commentary on articles 176-194 of the Swiss private international law statute* (Kluwer Law International 2000) Article 183.

532 Emmanuel Gaillard, 'Anti-suit Injunctions Issued by Arbitrators' in Albert Jan Van den Berg, *International Arbitration 2006: Back to Basics?* (Kluwer Law International, 2007) 229; Frédéric Bachand, 'The UNCITRAL Model Law's Take on Anti-Suit Injunctions, in Anti-suit Injunctions in International Arbitration' in Emmanuel Gaillard, *Anti-Suit Injunctions in International Arbitration: IAI Seminar, Paris, November 21, 2003* (Juris Publ. 2005) 102.

533 See above in p. 156 *et seq*. regarding court-ordered anti-suit injunctions.

As analysed in the restatement proposal below, the tribunal can grant such enforcement orders as well as damages as analysed in the following section under the law applicable to the arbitration agreement—in most cases the same as the *lex contractus*.

Conceptually, an anti-suit order by the tribunal could be conceived as nothing more than a remedy against the breach of this negative covenant of the parties. The power of the tribunal to consider the breach[534] and to order remedies against it derives again from the arbitration agreement. As put by Rix J in *Re Q's Estate*,[535] a decision to opt for arbitration necessarily involves giving the arbitral tribunal exclusive jurisdiction over substantive matters. Hence, the arbitral tribunal has the power to decide on matters of its own jurisdiction and to protect its own jurisdiction, without, however, being able to decide on the jurisdiction of another *forum*.[536]

The injunctive order in this instance takes the form of an order 'not to do' or 'not to continue doing' something, that is, in the form of a prohibitory injunction. Under Section 48 of the Arbitration Act 1996, the tribunal expressly has the remedial power to order an injunction in the form of ordering 'a party to do or refrain from doing anything'. Such an order under English law is a stand–alone equitable remedy for negative obligations 'not to do something[537] and it is available even if damages are adequate and available for the innocent party. [538] In similar circumstances of contractual obligations 'not to do something', Civil law jurisdictions consider the remedy of specific performance as the primary one in case of a contractual breach.[539] It is only when this primary remedy is

534 Philippe Fouchard and others, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999), paras. 388 and 647; Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 390.

535 *Re Q's Estate* [1999] 1 Lloyd's Rep 931.

536 See Laurent Levy, 'Anti-Suit Injunctions Issued by Arbitrators' in Emmanuel Gaillard, *Anti-Suit Injunctions in International Arbitration: IAI Seminar, Paris, November 21, 2003* (Juris Publ. 2005).

537 See *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 2 WLR 898; [1997] 3 All ER 297, at [11] per Lord Hoffmann; Andrew Burrows, 'Judicial Remedies' in Andrew Burrows, *English Private Law* (3rd edn, OUP 2013), paras. 21.202–21.203.

538 Andrew Burrows, 'Judicial Remedies' in A Burrows, *English Private Law* (3rd edn, OUP 2013), para. 26-065.

539 Basil Markesinis, Hannes Unberath, and Angus Johnston, *The German Law of Contract: a Comparative Treatise* (Bloomsbury Publishing 2006) 388.

unavailable, in law or in fact, that damages are granted.[540] For civil law traditions, an anti-suit order by the tribunal should be nothing more than a remedy of specific performance of the arbitration agreement that has been breached by a recalcitrant party. [541]

Relatively few tribunals have considered this approach. In *ICC Case No 8307*, Professor Pierre Tercier held that: 'it is not contested that an arbitrator has the power to order the parties to comply with their contractual commitments, the agreement to arbitrate being one of them'.[542] He did not clarify, however, whether such a power is one of procedural or substantive nature. Furthermore, in *ICC Case No 5896*, the tribunal held that: 'where a perpetual (or permanent) injunction is sought from a court the injunction is itself the remedy sought. It is a remedy which differs from damages only in that it is preventive rather than compensatory'.[543] Parallels can also be drawn from the practice of investment tribunals holding that the non-aggravation of the dispute is in-itself a valid basis for such injunctive relief.[544] As Gaillard proposes, this can be a valid jurisdictional basis in the case of commercial arbitration[545] and it is directly linked with the negative aspect of the arbitration agreement. Finally, the practice of the Iran-United States Claims Tribunal proves useful. In *E-Systems* the tribunal considered the power to order such remedy as part of the inherent powers of the tribunal.[546]

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540 ibid 398.

541 For example, according to Section 890 I ZPO, execution in such cases is by court decree issuing fines or ordering the imprisonment of the debtor. See also Emmanuel Gaillard, 'Anti-suit Injunctions Issued by Arbitrators', in Albert Jan Van den Berg, *International Arbitration 2006: Back to Basics?* (Kluwer Law International, 2007) 229.

542 *ICC Case No 8307*.

543 *ICC Case No 5896*.

544 *Hrvatska Elektroprivreda d.d. v Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008, at [33]; *Libananco Holdings Co. Limited v Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, at [7].

545 Emmanuel Gaillard, Anti-suit injunctions in international arbitration: IAI seminar, Paris, November 21, 2003 (Juris Publ. 2005).

546 The majority opinion in *E-Systems, Inc. v The Islamic Republic of Iran, Bank Melli Iran*, Iran-US Tribunal, Award No ITM I3-388-FT, Case No 388, E, 4 February 1983, 2 Iran-United states Claims Tribunal Rep (1983) 51) stated: '*This Tribunal has an inherent power to issue such orders as may be necessary to* […] *ensure that this Tribunal's jurisdiction and authority are made fully effective'.*

Such a measure is more expansive than any other interim measure.[547] First, the order in this context is not a temporary or provisional one, but, rather a permanent remedy that ceases to exist only if the recalcitrant party abides by its content. Secondly, the prerequisites for the availability of the order as a remedy of specific performance are not linked with the need to prove urgency or that the harm of the responding party is less than that of the requesting party in a balance of harms exercise. Finally, such measure can be incorporated into a jurisdictional award and it is more easily combined with an award of damages for breach of the arbitration agreement.

6.3.2 Enforcement

Unless the orders bolstered with monetary relief in the form of sanctions or the award on damages can be enforced, the recalcitrant party will not have a strong incentive to abide by the order. While the notions of incentivising voluntary compliance with the order have been analysed above, depending on the mode of the intervention, the enforcement can either be with direct the judicial assistance of the courts of the seat or directly as partial or final awards under the New York Convention.

6.3.2.1 Enforcement as procedural orders

If the order granted by the tribunal is not considered as a partial award, the only way to enforce it is to seek the assistance of the courts of the seat of arbitration. Different laws (*legae arbitri*) take different approaches on the issue. For example, Section 41(5) Arbitration Act 1996 allows the tribunal to grant a peremptory—also called an 'unless'—order setting a final deadline for the defaulting party to comply with the original direction of the tribunal, including not commencing litigation proceedings. If that party fails to comply, then Sections 41(6) and (7) of the Arbitration Act 1996 set out a number of sanctions which the tribunal is entitled to apply, including adverse inferences, a cost allocation order, and an award in default. Following such an order, Section 42(1) empowers the courts to enforce it, meaning to use their powers of imperium against a possible further breach of the order by the defaulting party. The significance here is that the result of such continuing breach is that the defaulting party will be found in contempt

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547 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), para. 8.4.4.

of court.[548] Such power is linked with procedural matters. It is submitted, though, that an order of the kind discussed can be granted exactly on the basis of the tribunal's powers to regulate the arbitral procedure.

Article 183(2) of the Swiss Private International Law Act (PILA) provides that, if a party does not voluntarily comply with tribunal-ordered provisional measures, the arbitral tribunal may request the assistance of the competent court. Like the Swiss law, most national legislations include provisions for the enforcement of provisional measures ordered by a tribunal seating in their territory. The need to adopt some kind of judicial enforcement mechanism was evident during the 2006 amendment of the UNCITRAL Model Law. The new provisions—post amendment—include in Article 17H(1) a specialized regime for judicial enforcement of provisional measures adopted under Article 17. Article 17H(1) provides that:

> *[a]n interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court irrespective of the country in which it was issued.*

The last part of the paragraph is particularly important as it allows the enforcement of the measures outside the arbitral seat. Hence, if a given State has adopted the full 2006 version of the UNCITRAL Model Law and an order of the kind discussed here will be enforceable subject to limited exceptions similar to those applicable to the recognition and enforcement of awards.

The problem in the case analysed here arises because in most cases the provisional relief or order issued by the tribunal is of a character that is not available under the law of the judicial enforcement *forum*. For example, if a tribunal seated in London issued an anti-

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548 Arbitration Act 1996, Section 42(1); *Emmott v Michael Wilson & Partners* [2009] EWHC 1 (Comm) (court should not '*act as a rubber stamp*' for peremptory orders made by tribunal; however, court should not 'review the decision made by the tribunal and consider whether the tribunal ought to have made the order in question') David Sutton and others, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015); Michael Mustill and Stewart Boyd, Commercial arbitration (Butterworths, London 1989) and Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England: Commercial Arbitration 2001 Companion Volume* (Butterworths 2001); Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths 2009).

suit order against a recalcitrant party that has commenced litigation proceedings in France, Germany, or Italy, the law of the enforcement *forum* might not consider the order as available for enforcement under local law. In such a case, the response would be two-fold. First, the contractual nature of the obligation and the breach occurred by the recalcitrant party are the important elements. It is submitted that, if the enforcement courts focus on that aspect, as the French *Cour de Cassation* did, the sole purpose of the order is to prevent or remedy a breach of a pre-existing contractual obligation.[549] Hence, in the case where the tribunal has issued the order and the courts of the seat have issued a decree or order of judicial assistance to the enforcement of the order, both orders should be considered by foreign courts as a remedy against a contractual breach. No violation of State prerogative or public policy can arise in this case. Second, it is submitted that State courts, even where local law does not provide the same type of relief, should take into account their own notions and order an analogous or similar form of enforcement. In the context of parallel proceedings this can be an order for specific performance of the obligation under the arbitration agreement, which in effect is similar to an anti-suit order from the tribunal. Courts, especially in the US, consider that awards of specific performance and of injunctive relief do not violate the notion of international public policy.[550]

Finally, one should consider the effect that the CJEU driven prohibition of court-ordered anti-suit injunctions[551] has on the enforcement of arbitral orders of the same kind. As extensively analysed elsewhere,[552] CJEU has ruled that court ordered anti-suit injunctions are incompatible with the Brussels regime whereas same injunctions ordered by arbitral tribunals fall within the exception of Article 1(2)(d) of the Brussels I Regulation, and are, hence, permitted. Although the CJEU focused on whether enforcement of a partial award containing such an order was contrary to the regime of the Regulation, the matter of

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549 *Zone Brands International INC v In Zone Brands Europe* - Cass. Civ 1re, 14 oct. 2009, n° 08-16.369 et 08-16.549.

550 *See NTT DoCoMo, Inc. v Ultra* 2010 WL 4159459 (SDNY) [3].

551 *Gazprom OAO, Case C-536/13* [2015] 1 WLR 4937; *West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurtá SpA), Case C-185/07* [2009] AC 1138; *Turner v Grovit. Case C-159/02* [2005] 1 AC 101; *Turner v Grovit* [2001] UKHL 65, [2002] 1 WLR 107.

552 And will not be analysed here in further detail as it extends beyond the scope of the present analysis. Indicatively see Joseph 2015 (n 16) and Emmanuel Gaillard, *Anti-Suit Injunctions in International Arbitration: IAI Seminar, Paris, November 21, 2003* (Juris Publ. 2005).

judicial enforcement of an order not in the form of an award was left unanswered. Hence, there is still scope under *Gazprom* for a national court at the seat to provide its *imperium* powers in enforcing the arbitral order and this situation should not be equated with the one in *West Tankers*. The difference lies in the distinction between jurisdiction and imperium. The courts of the seat assist in the enforcement of an order made by the tribunal. Hence, not only is the matter covered by the arbitration exception of Article 1(2)(d) of the Regulation, but also there is no application of the principle of mutual trust.

It is submitted that the supervisory court of the seat can—and should—be called upon to assist in the enforcement of such orders and that such assistance does not violate any notion of mutual trust or public policy. In addition, if this order is taken to the courts where parallel litigation has been commenced, these courts should consider first the contractual nature of the obligation breached, second, the nature of the tribunal's order, and third that similar remedies can be used under their own law in case of a contractual breach (e.g. a remedy of specific performance).

6.3.2.2 Enforcement as partial awards

The point of departure is to determine whether an order prohibiting the recalcitrant party from commencing or continuing litigation proceedings can be issued as a partial award, i.e. an award that is both final and binding in disposing a particular claim or claims without, however, rendering the tribunal *functus officio.*[553] Provided that the award is considered binding (i.e. when the award is not subject to internal arbitral appeals) it is liable for recognition under the provisions of the New York Convention. Whether this route is available, it is a matter of the applicable *lex arbitri* and the rules of arbitration. Following the above–mentioned distinction regarding the jurisdictional basis,[554] two approaches can be identified. If the anti-suit order is issued as a permanent remedy against any breach of the arbitration agreement, then it can be issued as a partial award. This happened in *Gazprom*, where the tribunal, operating under the rules of the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), issued a partial award ordering Lithuania to withdraw certain of its court claims.[555]

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553 Born 2014 (n 95) 3620.

554 See above in p. 207.

555 *Gazprom OAO v Ministry Of Energy Of The Republic Of Lithuania*, SCC Arbitration No V (125/2011); *Gazprom OAO* (Case C-536/13), [2015] 1 WLR 4937.

If, however, the order is issued as an interim measure pursuant to the provisions of the chosen arbitral rules or the *lex arbitri,* the question is whether this order of an interim nature, even if issued as an interim award can qualify as an award under the New York Convention. It is submitted that an order of this kind, despite the historically existing opinions against that,[556] can be considered as finally disposing of the claim brought before the tribunal for the period of time until the final grant of the award on the merits. Such awards are not only a step towards the grant of the final award, but they genuinely dispose a claim brought before the tribunal against the recalcitrant party.[557] As Born argues, there are no sound policy reasons for refusing the judicial enforcement mechanism for tribunal ordered provisional measures in general.[558]

This is all the more so if a prerequisite for granting such orders is the confirmation of the tribunal's jurisdiction. If the tribunal holds in a final and binding manner that it has jurisdiction over the substantive matters brought before it, then the anti-suit order has the purpose of preserving this jurisdiction. It is merely preserving the procedural integrity of the proceedings –not the status of the substantive contract and the goods that are at stake. Hence, it is distinguished from other interim measures. This was the position in *Four Seasons v Consorcio*, where the Eleventh Circuit Court[559] in the US confirmed a partial award that required the respondent to terminate proceedings in Venezuelan courts. The tribunal issued the anti-suit order as provisional relief incorporated in the partial award confirming its jurisdiction.

Such an approach, however, is not universally accepted. Some consider any interim order of the tribunal as not qualifying as an 'award' for the purpose of enforcement under the New York Convention as they do not finally determine matters submitted to arbitration.[560]

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556 See Born 2014 (n 95) 2512; Christopher Boog, *Die Durchsetzung einstweiliger Massnahmen in internationalen Schiedsverfahren: aus schweizerischer Sicht, mit rechtsvergleichenden Aspekten* (Schulthess Verlag 2011), para. 379; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007), para. 633.

557 See Born 2014 (n 95) 2514; Robert von Mehren, 'The Enforcement of Arbitral Awards under Conventions and United states Law' (1983) 9 Yale Journal of International Law 362-63.

558 See Born 2014 (n 95) 2516.

559 *Four Seasons Hotels & Resorts BV v Consorcio Barr*, SA, 377 F.3d 1164 (11th Cir 2004).

560 Note of the Secretariat on the Possible Future Work in the Area of International Commercial Arbitration, U.N. Doc. A/CN9/460 [121], XXX UNCITRAL Yearbook 395, 410 (1999); Judgment of 13 April 2010, DFT 136 III 200 [2.3.3] (Swiss Federal Tribunal).

Hence, it is preferable for the tribunals to issue such orders or awards on damages as permanent measures finally disposing the question.

Provided that the order is classified as an award under the meaning of the New York Convention or the relevant *lex arbitri* in case of enforcement at the seat of arbitration, the courts of the enforcing State have to give regard to the award and enforce the award. This is granted in Article III New York Convention subject to the limited exceptions provided in Article V. Not only are these grounds limited in number, they are also limited in scope. They should be construed restrictively as exceptions to the general rule of Article III and the objective of the Convention to facilitate cross-border enforcement of the awards.[561]

There are three grounds that could be invoked by the recalcitrant party at this stage either against the anti-suit order, or against an award of damages; (i) a claim that the tribunal found an agreement to arbitrate where there is none under Article V(1)(b), (ii) a claim that the tribunal violated the agreement of the parties or the *lex arbitri* as to the procedure under Article V(1)(d), and (iii) a claim that the order violates the public policy of the State of enforcement under Article V(2)(b). Before analysing these three grounds, one should point out that a claim under Article V(1)(c), which applies where the claim is one against the tribunal's exercise of its authority is not applicable here. Article V(1)(c) applies in cases of excess of authority towards the substantive claims and not in cases of the arbitrators' procedural rulings.[562] Such claims would be more pertinently addressed under Article V(1)(d).

First, Article V(1)(a) of the New York Convention provides for non-recognition of foreign and non-domestic awards where the award-debtor establishes that the putative arbitration agreement was not valid.[563] As arbitration is a creature of consent, the claim would be that the tribunal, by issuing the order on the basis of its own competence, found an arbitration agreement (or more accurately, a ground to base its jurisdiction to render

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561 See the Preamble of the New York Convention and *Judgment of 3 June 1988*, (1990) XV YBCommArb 499 (Florence Corte d'Appello). Also Born 2014 (n 95) 3412; Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 693-694; Philippe Fouchard and others, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 966; Nigel Blackaby and others, *Redfern & Hunter on International Commercial Arbitration* (6th edn, OUP 2015) 616.

562 Born 2014 (n 95) 3556. If, however, the anti-suit order is seen as a permanent remedy for breach of the arbitration agreement, then a claim might be formulated that the tribunal acted *ultra petita*.

563 ibid 3448.

the order) where no agreement exists. This is a claim closely related with the proceedings before the foreign court where the recalcitrant party has opted to commence litigation proceedings. There, the claim is that the arbitration agreement is invalid, null, void, or otherwise inoperative; hence, there is no obligation under Article II(3) New York Convention to refer the matter to arbitration. That claim, however, can only be combined with an attack against the validity or existence of the agreement itself, an extension of which the order is. Hence, the 'usual' choice of law rules of the New York Convention apply to this matter and the law applicable is the one governing the arbitration agreement or failing any indication thereof, the law of the seat. This means that if the agreement or the order is existent and valid under these laws, then the court of enforcement cannot use this ground to refuse the enforcement of the agreement and of the partial award incorporating the order.

Second, Article V(1)(d) of the New York Convention gives a ground for refusal in cases where the tribunal failed to comply with the parties' provisions regarding the arbitral proceedings.[564] The claim would be that, since the parties' agreement is silent regarding the grant of the order, there is no ground for the jurisdiction of the tribunal. In such cases of silence, however, the tribunal has discretion and courts have been reluctant to recognise a ground of Article V(1)(d) in such cases of broad discretion. Furthermore, it could be argued that such an order constitutes a violation of the *lex arbitri* or the arbitral rules providing for the grant of interim measures. Courts, however, have repeatedly upheld that tribunals have an inherent authority to issue interim or provisional measures[565], as well as to grant injunctive or declaratory relief.[566] The question is, indeed, one of the substantive requirements of granting provisional measure and the tribunal's decision in

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564 The text provides for non-recognition or non-enforcement of an award where '[…] the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.

565 Born 2014 (n 95) 3305; *CE Int'l Res* Holdings *v SA Minerals Ltd P'ship*, 2013 WL 2661037 (SDNY); *First Option Mortg., LLC v S & S Fin. Mortg. Corp.*, 743 SE2d 574; *Pukuafu Indad v Newmont Indonesia Ltd*, [2012] SGHC 187 (Singapore High Court) (recognizing arbitrators' power to issue interim relief).

566 *Totes Isotoner Corp. v Int'l Chem Workers Union Council*, 532 F3d 405, 410 (6th Cir 2008) (Recognizing arbitrators' authority to grant quasi-injunctive relief in the form of cease and desist orders); *Eyewonder, Inc. v Abraham*, 2010 WL 3528882 (SDNY) (arbitrator's award of injunctive relief was not excess of authority; parties' agreement authorized such relief); Robert Merkin and Louis Flannery, *Arbitration Act 1996* (4th edn, Informa 2009) 121-22.

this regard should be reviewed with a standard of deference. Hence, no *de novo* assessment of the merits of that decision is allowed and the scope for the recognising court is quite limited on the basis of the rules and the *lex arbitri*.

Finally, an objection could be raised under Article V(2)(b) that the enforcement of a partial award incorporating an anti-suit order is contrary to the public policy of the recognition *forum*. Although this is a matter of each recognizing State, analysing the issue under the overriding objective of the New York Convention—the facilitation of cross-border recognition and enforcement of arbitral awards—provides the context of the argument against such objection.

First, this is not a matter falling within the notion of international public policy under Article V(2)(b). The meaning of 'public policy' should be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[567] Although not expressly stated in the black letter of this Article, having regard to the purpose of the Convention which is to facilitate cross-border enforcement of arbitral awards, 'public policy' should be confined only to flagrant violations of the core notions of the social, political, and economic structure of a given State. The argument against arbitral enforcement orders is that they impede the jurisdiction of the foreign courts that have seized the dispute for which an arbitration has commenced.[568] It is submitted that, even in the context of court-ordered anti-suit injunctions, courts have found that they do not impede the notion of public policy.[569] If one takes into account the private nature of arbitral tribunals and the *in personam* effects against the recalcitrant party, the argument against their enforcement becomes weaker. Furthermore, even if one were to consider the conclusions of the CJEU in *West-Tankers*[570]

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567 Article 31(1), Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

568 *Re the Enforcement of an English Anti-Suit Injunction Case* [1997] ILPr 320 (Dusseldorf Regional Court of Appeal).

569 *Zone Brands* (n 104); *Rintin Corp., S.A. v Domar, Ltd.*, 374 F. Supp. 2d 1165 (S.D. Fla. 2005), affirmed 476 F.3d 1254 (11th Cir. 2007); *Telenor Mobile Communications AS v Storm LLC* 524 F. Supp. 2d 332 (S.D.N.Y. 2007), affirmed 584 F.3d 396 (2d Cir. 2009); Julie Bédard, 'Chapter 14: Anti-suit Injunctions in International Arbitration' in Laurence Shore and others (eds), *International Arbitration in the United States* (Kluwer Law International BV 2016) 310-311.

570 *West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurtá SpA), Case C-185/07* [2009] AC 1138.

in the context of the EU Jurisdiction regime,[571] the same Court in *Gazprom*[572] distinguished the case of arbitral enforcement orders since arbitral tribunals and courts are not of the same standing in this regard, hence there is no room for applying a mutual trust exclusion.

Secondly, considerations of arbitral efficiency require enforcement of the order despite the existence of parallel litigation proceedings. In the context of international commercial disputes the choice of the parties was to arbitrate any given dispute and even if a court before which parallel proceedings have been brought has—for any reason—decided that the agreement was inoperative or void, the tribunal itself has ruled on its jurisdiction and such decision is entitled to be treated with deference under the pertinent ground of Article V(1)(a) and not under public policy.[573]

Therefore, there is only limited scope for refusing the enforcement of such partial awards on the basis of an error of the tribunal. Such error can either be in asserting its own jurisdiction or due to manifest error in rendering the order as a provisional measure where the prerequisites in the arbitration rules or the *lex arbitri* were not fulfilled.

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571 The situation has not yet arisen under Brussels I Recast Regulation.

572 *Gazprom OAO, Case C-536/13* [2015] 1 WLR 4937.

573 This raises the point of the relationship between courts and tribunals in relation to the existence, validity and scope of the arbitration agreement as well as questions of negative competence-competence and allocation of authority. For the purposes of the present analysis, the argument is that since the tribunal has affirmed its jurisdiction, the only ground available is under Article V(1)(a) and not V(2)(b) of public policy.

6.3.3 Restated Approach

RULE 10—Enforcing the Arbitration Agreement: Arbitral Enforcement Orders

> (1) A tribunal seated within the jurisdiction, unless otherwise agreed by the parties, shall have the power to grant remedies, either as interim procedural orders or as final partial awards, to the effect of:
>
> (a) restraining the resisting party from commencing or pursuing proceedings in another *forum*; and/or
>
> (b) ordering the participation of the resisting party to the arbitration proceedings.
>
> (2) The tribunal may exercise its power under the preceding paragraph by:
>
> (a) granting an interim procedural order, provided that it is satisfied to a good arguable case standard that it has jurisdiction and that a breach of the agreement exists or is imminent. The order shall be granted only if the harm threatened to the applicant is greater than the one to the defendant; or
>
> (b) granting a final partial award, provided that it is satisfied to a balance of probabilities standard that it has jurisdiction and that a breach of the agreement exists or is imminent.
>
> (3) In case of tribunals seated overseas, such orders may be granted on the basis of:
>
> (a) the relevant arbitration law and/or the arbitration rules on provisional measures; or
>
> (b) a direct power conferred by the parties in their agreement; or
>
> (c) the tribunal's inherent power to protect its own jurisdiction;
>
> (d) the tribunal's adjudicative mandate by remedying a breach of the arbitration agreement.

General—Following Rule 5 considering the court's powers in enforcing the obligations arising out of a chimeric arbitration agreement, this Rule codifies the power of tribunals to grant orders protecting their jurisdiction and the conditions for exercising it. Furthermore, Rule 10 deals with the question of power and form of restraining one or more of the parties to an arbitration agreement and can be combined with the power under Rule 11 to grant damages and monetary sanctions as analysed in the respective part of the latter rule.

RULE 10(1)—In the first paragraph, Rule 10 positively establishes the power of a tribunal seated within the jurisdiction to grant orders akin to the equitable remedies discussed

above in Rule 5. These powers of a tribunal, however, are not equitable. They are derived from the tribunal's adjudicative duty and purpose. As analysed above and as established in paragraph 2 of this Rule, this duty may be materialised either in a procedural form or in a substantive one, depending on the approach adopted by the particular tribunal. What lies in the centre of the tribunal's analysis and power is a breach of the agreement to arbitrate, which either forms the basis for a substantive remedy or informs the tribunal's procedural power to protect its own jurisdiction via an order of the relevant kind.

As analysed above, arbitrators possess a higher claim in determining issues of their own jurisdiction.[574] This higher claim also justifies the recognition of the tribunal's power to grant remedies akin to the ones provided under Rule 5. As Andrew Baker J confirmed in *Enka*, referring to the decision of Males J in *Nori Holdings*, that:

> *[a]rbitrators sitting under English curial law and properly seized of a question as to the scope of the arbitration agreement are entitled by way of final relief to make an award ordering a respondent to cease pursuit of, terminate or withdraw court proceedings making a claim falling within that scope as determined by them.* [575]

This approach favoured by Andrew Baker J in *Enka* is the one also adopted in this thesis. As mentioned above in the analysis under Rule 3, this restatement proposal does not favour the position adopted by Popplewell LJ in the decision reversing the judgment by Andrew Baker J on this point.[576] Before considering the form of such order, however, Rule 10(1) provides that the order can be of either injunctive or of specific performance type. This mirrors the approach adopted above in Rule 5 and is wholly consistent with the objective of safeguarding the tribunal's jurisdiction. An arbitral tribunal can, therefore,

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574 See above in Chapter 5 and also *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2019] EWHC 3568 (Comm).

575 See *Nori Holdings Limited et al v PJSC Bank Okritie Financial Corporation* [2018] EWHC 1343 (Comm) at [101]. See also Faidon Varesis, 'Nori Holdings v PJSC Bank and the tale of anti-suit Injunctions' (2019) 35 Arbitration International 275.

576 See *Enka v Chubb* [2020] EWCA Civ 574. The respectful disagreement of this thesis with the approach adopted by Popplewell LJ is focused only on the particular element of the 'superior claim' of the arbitral tribunal to determine its own jurisdiction. The proposal adopted, as analysed above in Rule 3, places emphasis on the constitution of the tribunal as the material time for the delineation of jurisdictional competence between the curial State court and the arbitral tribunal. This is borrowed from the approach adopted in Germany as analysed above in Chapter 4.

make an order—regardless of the form—to the effect that the order debtor is to: (a) stop pursuing, withdraw, or terminate proceedings commenced in a non-chosen *forum*; and/or (b) take positive step in the arbitration proceedings by way of submitting written submissions or appearing in the oral hearing.

While there is considerable flexibility in arbitration proceedings for such a remedy, issues of applicable law to the substance of the dispute, to the arbitration agreement, as well as to the arbitral proceedings and the relationship of such laws are important in providing the machinery, framework, and limits of the tribunal's powers.

The answer depends on the form of the relief requested, that is interim or final, and the legal basis for such a relief. If granted as an interim order or interim award, the issue remains purely within the applicable *lex aribtri*—that is Rule 10(1) in the context provided here. If, on the contrary, the remedy is granted as a final relief in the form of a final (partial and jurisdictional) award, both the *lex arbitri* and the law applicable to the arbitration agreement are relevant. An award of final relief is granted as a remedy for a breach of the arbitration agreement and should, in principle, be based on the law applicable to the arbitration agreement. Drawing, however, a parallel argument from the approach in court-ordered equitable remedies and considering the dual nature of arbitration and of arbitration agreements justifies the conclusion that the power of the court to grant a remedy is based on Rule 10(1) and is informed by the breach of the arbitration agreement. What is, thus, important is the identification and establishment of a breach of the agreement to arbitrate on the basis of the law applicable to it, which is then remedied by the final relief granted by the tribunal on the basis of the *lex arbitri*—that is Rule 10(1). In other words, the existence of a breach is a matter for the law applicable to the arbitration agreement whereas the remedial response of such a breach is a matter for the relevant *lex arbitri*.

Finally, as the tribunal's power is a default one and the parties, either in their arbitration agreement or after the dispute arises, have the ability to agree otherwise. This is another expression of the role of party autonomy in arbitral jurisdiction. In itself, the ability to opt out of the application and consequences of a rule is present in both levels of party autonomy, contractual and transnational. This qualification of Rule 10(1) is the reverse of the ability of the parties to opt-in for the tribunal's power to grant such enforcement

orders in legal systems and jurisdictions which do not statutorily grant this power.[577]

RULE 10(2)—As already alluded to in the analysis of Rule 10(1), a tribunal can materialise its power to grant arbitral enforcement orders in two forms: (a) as interim—procedural orders or interim awards; and (b) as final relief in the form of an declaration and order in an arbitral award. Different in kind, the choice between the two forms is not merely one of preference for the tribunal but of different requirements for each of the two forms. These requirements, in turn, inform the strategic choices of the parties. Rule 10(2) is important as it codifies these requirements and establishes a different standard of proof required for each of the two forms.

First, if the tribunal, upon the request of a party, grants interim relief, the form shall be one of a procedural order or an interim award the tribunal's power is conditioned upon three requirements: (a) that the tribunal has jurisdiction; (b) that a breach of the agreement exists or is imminent; and (c) that the threatened harm to the applicant is greater than the one to the defendant. These requirements have to be established to a good arguable case standard. As the remedy is requested at an interlocutory stage as an interim procedural order or an interim award, the applicable standard of proof can only be one of a good arguable case. While this standard is beneficial for the applicant, the remedy shall not be granted unless a risk of harm exists and this harm of the applicant trumps the harm suffered by the defendant as the result of the order. In addition, while the interim nature of these enforcement orders increases the pragmatic utility they have in a cross-border setting at the early interlocutory stages, they can realistically be granted only for a limited period of time until the final determination of the tribunal's jurisdiction. Finally, the order can be of restraining or participating type but, in the latter case, only for the participation at the jurisdictional stage, at least for challenging the tribunal's jurisdiction. While this might be an order provisionally mandating the participation of the defendant it does not prejudice the tribunal's decision on its jurisdiction. or ordering the form for imminent or existing breaches of the arbitration agreement.

Second, the form of final relief is necessarily one of a final partial jurisdictional award with which the tribunal confirms its jurisdiction and restrains the defendant or orders its participation to the remainder of the proceedings. An order by the tribunal to the defendant to participate until the final determination of the substance of the claims is by

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577 See Rule 9(3).

its nature not interim, but final relief. In this form of relief, the applicant must satisfy the requirements of the tribunal's jurisdiction and the defendant's breach of the agreement to a balance of probabilities standard. The difference in terms of standard is justified from the final nature of the remedy. As the ground upon which such orders are granted is the breach of the agreement to arbitrate, in establishing this breach, the tribunal necessarily would need to confirm its own jurisdiction.

RULE 10(3)—While paragraphs 1 and 2 of Rule 10 apply as a default statutory mechanism for tribunals seated within the jurisdiction, paragraph 3 applies in case of a tribunal seated in a foreign jurisdiction and deals with the grounds of the tribunal's power to grant such orders. This paragraph is formulated in an alternative format as the ground of such power may be found in different sources. To the extent that a tribunal is seated within the jurisdiction and these restated Rules apply, paragraph 1 establishes the jurisdictional basis of the tribunal. The power of the tribunal may be statutory—as is the case in Rule 10(1)—, contractual on the basis of the parties' agreement to arbitrate, inherent on the basis of the tribunal's general procedural powers, and, finally, a power resulting from the tribunal's adjudicative mandate to remedy a breach of contract, including a breach of the arbitration agreement.[578]

6.4 Monetary Sanctions and Damages as Tools Bolstering Arbitral Enforcement Orders

Court-ordered anti-suit injunctions are an effective tool of taming the unruly horses of recalcitrant defendants due to the contempt of court consequences they bring.[579] An arbitral tribunal, on the contrary, cannot enforce itself an arbitral anti-suit order; it does not have effective coercive powers. Such orders can be enforced either as awards or with the assistance of the supervisory court of the seat.

The focus is on the various mechanisms that an arbitral tribunal can utilise as a form of 'self-help' to incentivise the recalcitrant party to abide by its orders. This is indirect enforcement with another meaning. It is no longer a *stricto sensu* enforcement of the

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[578] The analysis and precise formulation of such alternative jurisdictional grounds is outside the scope of this thesis as it favours an approach whereby this power forms part of the remedial arsenal granted to a tribunal by virtue of the *lex arbitri*.

[579] See for example the recent decision in *Dell Emerging Markets (EMEA) Ltd & Ors v Systems Equipment Telecommunications Services S.A.L* [2020] EWHC 561 (Comm) (13 March 2020).

tribunal's order, but, rather, a set of incentives diffusing the party's denial to conform with the order. At this stage, the analysis is focused on the voluntary compliance with the order. Traditionally, this issue has been addressed with orders on costs[580] and adverse inferences on the merits of the case.[581] In the context of the arbitral enforcement orders, the question of the tribunal's remedial responses to incentivise performance of the agreement and of its orders is central.

6.4.1 Monetary Sanctions

The strongest form of incentive a tribunal can attach to the order are civil sanctions in the form of monetary relief. If either party is aware that arbitral sanctions will follow as a result of their conduct, they will have an incentive not to breach the presumably valid arbitration agreement.[582] Two issues immediately arise: first, what is the legal basis for the tribunal to entertain such a claim, and, secondly, which are the possible objections to the jurisdiction, appropriateness, and effectiveness of such relief.

6.4.1.1 Power to grant sanctions

The tribunal's jurisdiction is clearly established when the *lex arbitri* provides so expressly.[583] Unfortunately, the only jurisdiction expressly permitting such sanctions is France. An *astreinte* in French law is a legal measure aiming to induce fulfilment of the addressee's obligations by a judicial decision under the threat of a pecuniary sanction.[584]

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580 Different rules and different jurisdictions adopt various approaches regarding the rules of allocating the costs. Such costs are limited to the legal fees and costs of the parties (party costs) as well as to the costs of the tribunal, institution and any facilities used (sometimes called arbitration costs). Furthermore, under most institutional rules, the tribunal can take into account the procedural behaviour of each party, which might even allow for a total shifting of the costs on the recalcitrant party or the allocation of costs on an indemnity basis. See ICC Arbitration and ADR Commission Report on Decisions on Costs in International Arbitration, (2015) 2 ICC Dispute Resolution Bulletin 4-5; Louise Merrett 'Costs as Damages' (2009) 125 LQR 468; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International BV 2012) 1214; Article 31 ICC Rules; *ICC Case No 11670* (mentioning as a factor any abusive requests and delaying tactics of the parties). Also see *ICC Case No 8486; ICC Case No 7645; ICC Case No 8528*.

581 Born 2014 (n 95) 2391-2393.

582 ibid 1305.

583 See below in the restated approach.

584 Juan Carlos Landrove and James John Greuter, 'The civil "astreinte" as an incentive measure in

It is a pecuniary measure consisting of a sum of money which might be progressive in relation to the duration of delay and it is also a comminatory measure as one of a threat.[585] In other words, the function of the *astreintes* is analogous to the one of a threat of contempt of court in the English legal system.[586] Both constructions aim at incentivising voluntary compliance with an order or judgment. *Astreintes* are based on the fundamental distinction between *juridictio* and *imperium*. The court ordering *astreintes* is not required to have *imperium* as such. They are deprived themselves of any direct enforcement measure and, only in case of non-compliance, there is the need of *imperium* –of the power to enforce the content of the order.[587]

If, however, the *lex arbitri* is silent in relation to this power, one should investigate whether a tribunal can issue such *astreintes*-like sanctions in its own motion. It has been suggested that there must be an explicit agreement of the parties in their arbitration agreement or a provision in the *lex arbitri* for such judicial penalties to be available.[588] Such opinion, however, disregards first, that commercial parties choosing arbitration want to encompass everything under this method as an 'one stop shop'[589] and second that the tribunal has a mandate on the basis of the agreement to resolve effectively the dispute and deliver a final, binding, and enforceable award. On this basis, and in order to protect its own jurisdiction, the tribunal has inherent powers to sanction the improper behaviour

litigation and international arbitration practice in Switzerland: is there a need for incorporation?' in Christine Chappuis and others (eds), *Harmonisation Internationale du Droit* (Schulthess 2007) 523.

585 ibid.

586 See Yock Lin Tan, 'Contempt Order and Judicial Attachment of Equitable Property-Jurisdiction, Recognition or Choice of Law' (2017) 29 SAcLJ 401; Carlo Vittorio Giabardo, 'Disobeying Courts' Orders-A Comparative Analysis of the Civil Contempt of Court Doctrine and of the Image of the common law Judge' (2017) 10 J Civ L Stud 35.

587 ibid*;* Olivier Luc Mosimann, *Anti-suit Injunctions in International Commercial Arbitration* (Eleven International Pub. 2010) 135.

588 Pierre Mayer, 'Imperium de l'arbitre et mesures provisoires', in Jacques Haldy and others, *Etudes de procédure et d'arbitrage en l'honneur de Jean-François Poudret* (Faculté de droit de l'Université de Lausanne 1999) 442; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007), para. 540; Bernhard Berger and Franz Kellerhals, *Internationale und Interne Schiedsgerichtsbarkeit in der Schweiz* (2006) [1156].

589 *Fiona Trust and Holding Corporation v Privalov (also known as Premium Nafta Products Ltd v Fili Shipping Co Ltd)* [2007] UKHL 40; [2007] 4 All ER 951.

of the parties, including with an *astreintes*-like order.[590] In *ICC Case No 7895*, considering the issue under the ICC Rules, the tribunal held that:

> *[t]he granting, in a final arbitral award, of* ***an injunction coupled with a fine for noncompliance****, although not specifically foreseen in the ICC Rules,* ***is in no way inconsistent with them****. […] Article 11 gives arbitral tribunals the power to grant interim or conservatory measures, unless a mandatory provision of the relevant national procedural law or an express stipulation of the parties requires otherwise.* ***There is no reason to treat the procedural device of an injunction coupled with a fine differently***. (emphasis added)[591]

Such sanctions are final and binding provided that they are issued as a permanent and not provisional measure. This can be the case even if the final amount is dependent on the period of time that the recalcitrant party will continue not to comply with the order.[592] This power, however, is not accepted without objections. While this issue is dealt with at the final part regarding the enforcement of these sanctions,[593] there are objections levied against the very power or the arbitrators to grant such sanctions. The primary one is centred around the nature of the sanctions as well as the very nature of arbitration itself.

Sanctions of the type contemplated here might be considered of punitive nature, hence out of the scope of the tribunal's remedial powers. The private nature of arbitration is central in this issue. If arbitrators derive their power from a contract, i.e. the arbitration agreement, they cannot sanction the parties if these sanctions penalise, in reality, their behaviour. As Born, however, argues a distinction should be made between sanctions of public and private nature.[594] Arbitrators cannot impose public law sanctions on the parties, a power reserved only for judges as public officers vested with public power. On the contrary, they can impose sanctions of private nature in the form of monetary

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590 International Law Association, Committee on International Commercial Arbitration, *Report for the Biennial Conference in Washington DC*, (April 2014); Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 British Yearbook of International Law 231; c.f. also in relation to provisional measures: Franz Schwartz, *The Practices and Experience of the ICC Court* (ICC Publishing 1993) 57-58.

591 ICC Case No 7895.

592 Olivier Luc Mosimann, *Anti-suit injunctions in international commercial arbitration* (Eleven International Pub. 2010) 140.

593 Born 2014 (n 95) 2316.

594 ibid.

penalties. As shown above,[595] and despite the predominant view,[596] this is the case even if the arbitration agreement does not specifically address the issue and the arbitration rules or law are equally silent as a result of the tribunal's inherent powers. Such powers derive from the mandate the arbitrators have to adjudicate the disputes brought before them and the need for '*efficient and swift resolution of disputes without protracted litigation, could not be achieved but for good faith arbitration by the parties*'.[597] Hence, arbitral tribunals do possess the power to order sanctions, even in the context of civil law jurisdictions,[598] provided that these sanctions do not include criminal or other public law elements that extend beyond the mandate of the tribunal.

6.4.1.2 Enforcement of sanctions

If the order is incorporated into the final award on the merits, the question becomes one of enforcing that award along with the incentives described above in Part 3. If the end product can be enforced, strong incentives exist on the party to abide by its content.

The core objection that could be raised is that the monetary incentives, especially in the form of *astreintes*–like sanctions or liquidated damages that might exceed the compensatory measure, are contrary to the public policy of the enforcing State. The debate is focused around the allegedly penal or punitive nature of these sanctions against the recalcitrant party.

First, these monetary sanctions are of a private and contractual nature. They affect only the parties to the arbitration and arise from a breach of contract between these parties. They only operate among the parties as a result of their own choice to submit their

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595 See above in p. 227.

596 According to this, the power of arbitrators to order sanctions—if any such power exists—is linked with an express provision in the arbitration agreement. See Olivier Luc Mosimann, *Anti-Suit Injunctions in International Commercial Arbitration* (Eleven International Pub. 2010); Born 2014 (n 95) 2316 with references therein, especially *Inter-Chem Asia 2000 Pte Ltd v Oceana Petrochem*, 373 FSupp2d 340, 356-58 (SDNY 2005).

597 *Reliastar Life Ins Co v EMC Nat'l Life Co*, 564 F3d 81 (2d Cir. 2009).

598 See Carole Malinvaud, 'Non-Pecuniary Remedies in Investment Treaty and Commercial Arbitration', in Albert Jan van den Berg (ed), *50 Years of the New York Convention* 210 (ICCA Congress Series No 14 2009); Alexis Mourre, 'Judicial Penalties and Specific Performance in International Arbitration', in Laurent Lévy and Filip De Ly (eds), *Interest, Auxiliary and Alternative Remedies in International Arbitration* (Dossier V of the ICC Institute of World Business Law 2008) 60.

disputes to arbitration. Focusing on the result of punishing the party's recalcitrant behaviour misses their primary purpose of providing incentives against a breach of the arbitration agreement and in favour of compliance with the orders of the tribunal. Such monetary sanctions are only ordered by the tribunal as financial incentives to ensure compliance. The tribunal's order is nothing more than a method of ensuring compliance with the original agreement of the parties to arbitrate their disputes. Such agreement is not a mere procedural choice of the parties. It has an international element and courts have not accepted violation of public policy in case of contractual penalties. Local public policies do not apply in such instances of foreign transactions.[599]

Furthermore, even if the sanctions are considered as punitive damages, it is submitted that they still do not reach the threshold of violation of public policy. If the recognition *forum* is one of common law tradition, the availability is well settled to the extent that they are not disproportionate.[600] Punitive damages are relatively common in the US, especially in the context of commercial and contract cases. In civil law traditions, the response from some courts is that these damages contravene notions of public policy.[601] Many of these countries, however, have in their own national legal systems notions similar to punitive damages; or, at least, they recognize instances that damages exceed the compensatory scheme and are awarded for other reasons, e.g. cases of 'moral damages'[602] or penalty

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599 Born 2014 (n 95) 3678; *Chelsea Football Club Ltd v Mutu*, 849 FSupp2d 1341 (SDFl 2012) (confirming foreign award of monetary damages); *Judgment of 13 January 1999*, 11 Sch 06/98 (Oberlandesgericht Dresden). On the other hand, Russian courts have denied recognition of awards of contractual penalties or liquidated damages on the grounds that they were excessive or disproportionate: See *Judgment of 2 February 2010, Lugana Handelsgesellschaft GmbH v OAO Ryazan Metal Ceramics Instrumentation Plant*, XXXV YBCommArb 429 (Russian S. Arbitrazh Ct.) (2010).

600 Hugh Beale, Andrew Burrows, and Joseph Chitty, *Chitty on Contracts* (32nd edn, Sweet & Maxwell, London 2015), para. 26-178.

601 *Judgment of 4 June 1992*, 1992 WM 1451 (German Bundesgerichtshof); *Judgment of 19 January 2007, P.J. v Fimez*, Case No 1183 (Italian Corte di Cassazione); *Judgment of 15 October 2001*, 37 Riv Dir. Int'l Priv Proc. 1021 (Venice Corte d'Appello) (2002). Compare *Judgment of 1 February 1989*, 1991 BJM 31 (Basel-Stadt Zivilgericht) (recognizing judgment for punitive damages) and *Judgment of 12 July 1990*, DFT 116 II 376 (Swiss Federal Tribunal); Alexis Mourre 'Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator' (2006) 22 Arbitration International 108.

602 See for example: French Civil Code, Article 1382; German Civil Code, Article 253; Austrian Civil Code, Article 1325.

clauses or even notions of 'reasonable compensation'.

Under the construction of Article V(2)(b) New York Convention and the notion of international public policy, it is submitted that the recognition courts should undertake a two stage approach. First, taking into account the purpose of the sanctions as deterring the breach of the arbitration agreement or the further aggravation of the dispute, they would have to examine their own national legal systems on whether a similar approach can be undertaken. Second, and if the first stage fails, they would have to determine the extent in which these sanctions constitute punitive damages, taking into account the international character of the dispute and the needs of efficiency in arbitration. As Born notes 'it is difficult to see why a recognition *forum*'s public policy would by its own terms apply to a transaction having no material connection to the *forum*'.

6.4.2 Enforcing the Arbitration Agreement with a Damages Award

6.4.2.1 Combining an arbitral enforcement order with a damages award

While the tribunal's power to award damages for breach of the arbitration agreement seems to be a rather uncontroversial topic,[603] the effectiveness of such damages, especially in relation with an arbitral enforcement order is a topic not explored.

The main question arising here is the relationship between the two remedies and how they can be combined to bolster the tribunal's jurisdiction. Furthermore, if one is to consider the situation at the time of breaching the obligation under the arbitration agreement, the importance of this solution is intensified. At this stage, the State courts will not have ruled on the jurisdiction or the merits of the case brought wrongly before them. Hence, only a portion of damages in terms of legal costs will have been realised. The issue in this regard is whether the tribunal can combine the two remedies and whether, as a matter of contract law, is prohibited from requesting future or prospective losses to be realised before the State court.

First, the tribunal can grant damages along with the jurisdictional determination of the case in a partial award. Such an award can be preceded by or can itself include the anti-suit order. In either case, damages in this formulation have a pure compensation purpose

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603 *Nori Holdings v PJSC Bank*. See also Julio César Betancourt, 'Damages for breach of an international arbitration agreement under English arbitration law' (2018) 34 Arbitration International 511; Paul Todd, 'Damages for breach of an arbitration agreement' (2018) Journal of Business Law 404.

for the losses already incurred up to this point or reasonably to be incurred by the innocent party as a result of the parallel litigation proceedings. The distinctive feature of this formulation is that damages are awarded by the tribunal regardless of whether the recalcitrant party decides to comply with the order or not. Two problems immediately arise. First, at this stage, the tribunal can only quantify the limited damages already incurred (e.g. preliminary litigation expenses, filing costs) plus the damages reasonably anticipated during the course of the foreign court proceedings. Despite the fact that the tribunal would be capable to make this calculation,[604] it would necessarily involve a great deal of speculation. Second, the award of damages in this case cannot act as an incentive of voluntary compliance with the order, but only as a stand–alone disincentive for breaching or continuing the breach of the arbitration agreement.

Secondly, the tribunal, after granting the anti-suit order—regardless of the format that this will take—it can include damages for breach of the arbitration agreement in a subsequent separate award or in the final award on the merits of the case. The distinctive characteristic in this formulation is that the order acts as the 'last chance' of the recalcitrant party to comply with the negative obligation in the arbitration agreement. The downside is that the foreign court proceedings will, necessarily, be more advanced and further losses will have been incurred. The quantification of these losses, however, as well as for the prospective ones, will be easier. If the tribunal has decided not only on its jurisdiction, but also on the merits of the case, it would then be easier to determine the prospective losses for the innocent party in relation to the amount claimed before the State court.

604 See above in p. 181 *et seq*. for a more detailed analysis on the quantification of damages.

6.4.2.2 Restated approach

Rule 11—Damages and Monetary Sanctions

> (1) Provided that the tribunal has confirmed its jurisdiction and is satisfied that a breach of the arbitration agreement has been committed or is imminent on the basis of the law applicable to the arbitration agreement allows it, it shall have the power to award damages against the resisting party as a remedy against this breach.
>
> (2) The tribunal shall also have the power to grant monetary sanctions against the recalcitrant party. These monetary sanctions cannot in any case exceed triple the amount awarded by the tribunal as compensatory damages for the breach of the agreement.
>
> Such orders may also be granted on the basis of:
>
> (a) a direct power conferred by the parties in their agreement; or
>
> (b) the tribunal's inherent power to protect its own jurisdiction; or
>
> (d) the tribunal's adjudicative mandate by remedying a breach of the arbitration agreement.
>
> (3) The tribunal's power to grant monetary sanctions under the preceding paragraph may be combined or follow a Rule 9 order in the form of a damages award.

General—Mirroring the availability of damages under Rule 6, this Rule establishes the remedial power of the tribunal itself to award damages for a breach of the arbitration agreement. Moving beyond the compensatory damages for the breach of the agreement, Rule 11(2) establishes a broader power for the tribunal to grant monetary sanctions against the recalcitrant party committing a breach of the agreement to arbitrate. Such power is statutorily provided in Rule 11(2) and is not mutually exclusive with other remedies granted by courts or tribunals.

RULE 11(1)—The analysis under Rule 6 applies in the context of the tribunal's power to award damages subject to the following two comments.

First, the recurring question of applicable law to the issue is answered in a similar manner to the analysis under Rule 10. A tribunal has the power under Rule 11(1) to award damages provided that it has confirmed its jurisdiction and is satisfied that there is an existing or imminent breach. Whether such breach exists is informed by the applicable law to the arbitration agreement. In other words, Rule 11(1) provides for the remedial power of the tribunal to respond to a breach of an agreement to arbitrate; whether this

breach exists is a question of the law applicable to that agreement. This distinction is fully consistent not only with the conception of the arbitration agreement as one of dual nature but also with the general approach of the Arbitration Act 1996 to regulate the remedial powers of tribunals regardless of the applicable law to the substance of the dispute.[605]

Second, the effectiveness and utility of tribunal ordered damages awards is different. This is primarily on the basis of a two-fold consideration. Firstly, the awarding body in this case is the same that is deciding the merits of the case and these will form part of the overall damages awarded through the tribunal's final award. Although they may form part of a jurisdictional award, they are still damages awarded as a remedy for a breach of an obligation. Secondly, the timing of the tribunal awarding damages is different to the one of the damages awarded by the court and that might affect the parties' tactical considerations in the course of their cross-border dispute.

Considering that the tribunal has the higher claim in deciding—and also protecting—its own jurisdiction and is the one to decide on all breaches of the parties' obligation from a principled point of view the tribunal seems to be more apt and apposite in deciding and awarding damages for the breach of the agreement to arbitrate.

RULE 11(2)—After establishing the tribunal's remedial power to award compensatory damages, Rule 11(2) contains two provisions: (a) the statutory recognition of the tribunal's power to grant sanctions in monetary form against a non-participating or in broader terms against a recalcitrant party. In addition, it includes alternative jurisdictional bases for a foreign seated tribunal if the arbitration law at the seat of arbitration does not recognise explicitly this power. This, in turn, is to suggest that Rule 11(2) operates both for English tribunals and overseas ones provided there is one of the bases listed and that the local arbitration law does not include a relevant prohibition; and (b) a limit to the amount a tribunal can impose as sanctions.

The analysis above under the current system considered the issue of tribunal ordered sanction through the lack of a statutory power to grant non-compensatory damages based on the parties' behaviour, including whether they participate or not in the proceedings. The lack of such mechanism led to the conclusion that a tribunal could only grant damages to the extent that they did not violate the penalty rules of the applicable law. Rule 11(2) explicitly grants an arbitral tribunal seated in England and Wales the power to include

605 See Section 48 of the Arbitration Act 1996.

non-compensatory elements to its decisions. From a technical point of view, the form of these decisions can, again, be twofold; either as procedural orders, which are then enforced with the assistance of the courts of the seat of arbitration or as a final relief in the form of an award to be enforced under the relevant arbitration laws and the New York Convention.

Despite the fact that the statutory recognition of such a power to the tribunal solves the problem of conformity with contract law principles on penalty jurisdiction, the same problem remains at the enforcement stage, especially in a jurisdiction that does not recognise at all non-compensatory damages. This issue is, in turn, related with the second provision established in this paragraph. Rule 11(2) does not aim to introduce a provision granting the tribunal unlimited powers in sanctioning parties. On the contrary, it establishes a limit creating a ceiling to the level of triple the amount awarded by the tribunal as compensatory damages for the breach of the agreement to arbitrate.

Linking the amount of the monetary sanctions with the compensatory damages and limiting them to a proportionate amount of such damages creates a reasonable framework within which the tribunal can manoeuvre without, in principle, violating notions of procedural fairness or international public policy. As analysed above, the question of punitive damages in most common and civil law jurisdictions is one of reasonable correlation to the amounts awarded as compensatory damages.[606] In this way, this limit operates as a safeguard of the international enforceability of an award of the tribunal sanctioning a recalcitrant party.

RULE 11(3)—The last paragraph of Rule 11 provides the relationship between the tribunal's power to grant enforcement orders under Rule 10 and its power to grant monetary sanctions for improper behaviour. As proposed above, the combination of such orders with monetary sanctions can effectively bolster their effectiveness in the first place, thus indirectly incentivising parties to voluntarily comply with their content.

6.5 Contractual Undertakings

In addition to the powers of the tribunal granted by the procedural law, commercial parties can minimise the litigation risk inherent in multi-state transactions already at the stage of

606 See above in p. 231.

negotiations with effective contract drafting.[607] First, they can make it clear that any court proceedings will constitute a breach of the arbitration agreement. Secondly, they can include an undertaking to pay liquidated damages or indemnify in case of such breach. Thirdly, it is possible to agree that both parties will pay a deposit as security against a possible breach. While the first is a crystallisation of the negative obligation under the arbitration agreement and its purpose is to provide certainty in jurisdictions where such obligation is not immediately accepted, the second and third are additional undertakings by the parties with the purpose of enhancing the compliance with the arbitration agreement. The effect of these undertakings is to deter one party from breaching its obligation being aware that indemnities, liquidated damages, or the amount deposited will be effectively claimed by the innocent party.

Expressed as a restated Rule in the context of the motif provided for in this thesis the contractual undertakings parties can include in addition to their agreement to arbitrate are as follows:

Rule 12—Contractual Undertakings: Damages and Deposit Clauses

(1) The parties can include a liquidated damages or indemnity clause in their agreement to arbitrate;
(2) The parties can include a deposit clause in their agreement to arbitrate.

Rule 12(1)—The first modification the parties can use is a liquidated damages clause to circumvent issues of quantification. Such clauses operate by determining *ex ante* the amount to be paid as damages for the breach of a contractual provision. Moreover, this contractual fixing has to comply with the criteria set out in statutes or developed by the courts for their validity, especially in regards to penalty clauses.[608] If, however, the clause is held to be enforceable, it can be invoked by the innocent party irrespective of the loss actually suffered.[609] Under English law, the Supreme Court found in *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* (Lords Neuberger and Sumption giving the majority opinion) that a clause is considered a penalty if it '[…] is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any

607 Fentiman 2015 (n 18) 121; Ahmed 2017 (n 16) 85; Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International BV 2012) 662.

608 Hugh Beale, Andrew Burrows, and Joseph Chitty, *Chitty on Contracts* (32nd edn, Sweet & Maxwell, London 2015), para. 26-007.

609 ibid, para. 26-178A.

legitimate interest of the innocent party in the enforcement of the primary obligation'. As the majority held, whether a clause is a penalty is a question of construction and the result is that this clause is considered to be void and is stricken out of the contract.[610]

As in common law, liquidated damages clauses are likely to be contentious in other jurisdictions on the basis of being of penal nature.[611] Many civil law jurisdictions have a similar prohibition on penalty clauses, although they allow for mitigation by the courts.[612] The clause is not considered to be void in its entirety but rather only to the extent that exceeds the measure that the proportionality test determines to be just and fair for this case. Indicatively, the Council of Europe issued a Resolution on Penalty Clauses in 1971, recommending the States to allow penalty clauses, but the penalty amount may be reduced by the courts if they are manifestly excessive, or if part of the main contractual obligation of the contract has been performed.[613] The test of reasonableness test in common law is similar to the civil law test of whether the penalty amount is 'manifestly excessive' or 'excessive'.[614]

Secondly, the parties can include an indemnity clause in their contract; each undertaking—as a primary obligation—to indemnify the other in the event that proceedings are commenced before a non-competent *forum*.[615] Such an indemnity clause played a significant role in *Starlight Shipping*[616] where the parties—in the context of an exclusive jurisdiction agreement—had agreed to an indemnity against future acts, such as bringing certain proceedings before a foreign court. Longmore LJ, giving in the judgment of the Court of Appeal held that the indemnity clause was properly drafted so as to oblige the party in breach to indemnify the other against the loss resulting from the

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610 Sarah Worthington, 'Penalty Clauses' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 367.

611 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 662.

612 Article 1152 of the French Civil Code; Article 1382 of the Italian Civil Code; Article 812 of the Portuguese Civil Code; Article 343 of the German Civil Code.

613 Resolution 78(3) of the Committee of Ministers of the Council of Europe – Relating to Penal Clauses in Civil Law.

614 Reed Smith, 'Liquidated Damages and Penalty Clauses: A Civil Law versus common law Comparison' (Spring 2008) The Critical Path 5.

615 Fentiman 2015 (n 18) 122.

616 *Starlight Shipping Co v Allianz* (n 43).

breach of the exclusive jurisdiction agreement.[617] Furthermore, in *Svendborg*, the defendant brought proceedings in breach of an agreement before the courts of Guinea and Hong Kong. The English High Court considered these actions a breach of the agreement and awarded the claimants damages both for their litigation expenses abroad and an indemnity—on the basis of a clause in the contract—in respect of future costs and expenses incurred in the foreign court jurisdiction.[618]

The advantage of such a clause is that it falls outside the scope of the penalty rule. As it is considered a primary obligation it is not one operating on the basis of the breach of a contractual obligation.[619] The question arising is whether drafting such indemnity as a primary and independent obligation is possible in the case of breaching the arbitration agreement. An indemnity, however, does not imply that suing contrary to an arbitration agreement is a breach of contract.[620] This is determined by the law applicable to that agreement.[621] Creating a quasi-guarantee obligation for each side, an indemnity clause operates independently from an excusable conduct. It is the mere act of bringing an action contrary to the terms of the indemnity that triggers the primary obligation under that clause. By including such clause, parties are able to be secured against expenses incurred, regardless of the applicable standard on recoverability of damages for breach of the arbitration agreement.

To be effective, an indemnity clause has to be cleverly drafted so as to make clear that the obligation is to 'indemnify' and cover any loss, expense, or damage suffered by the other party. As Ahmed argues, '[a] comprehensive and well drafted clause must itemise all potential litigation costs and expenses, to avoid any argument that litigation costs are a normal business expense which should be met'.[622] In addition, it should cover the damages possibly awarded by the State court wrongly seized of the dispute. A wording covering both costs and damages could be that, '[either party] shall keep the other party harmless and shall indemnify any and all losses, damages, and costs incurred in

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617 Briggs 2015 (n 25) 583.

618 Jose Rossel, 'Arbitration Costs as Relief and/or Damages' (2011) 28(2) J Int'l Arb 125-126; Joseph 2015 (n 16), para. 14.07.

619 Fentiman 2015 (n 18) 121.

620 ibid 121; Briggs 2008 (n 43) 176.

621 Ahmed 2017 (n 16) 87.

622 ibid 86.

proceedings before a non-competent *forum*'.[623] Under this construction, the focus is on the acts of the non-competent *forum* rather than the action of the recalcitrant party to commence proceedings before that *forum*.

Rule 12(2)—The second modification that the parties can include in their dispute resolution agreement is a guarantee in the form of a deposit. Under English contract law, a deposit is a sum payable to secure a party's performance and which can be validly forfeited if the contract is justifiably terminated following that party's default.[624] The nature and analysis of deposits in contract law presupposes a repudiation or default that amounts to a repudiation of the contract. So far, the analysis has been focused in contracts for sale of land, where the deposit is normally limited up to a 10 per cent of the contract value.[625]

Transferring the operation of deposits from contracts for sale of land to arbitration agreements, the parties in their clause can agree that, if a dispute arises both parties deposit an amount with the arbitral institution or a third-party escrow agent, as a security for good behaviour during the arbitration. While such construction is an effective method of ensuring proper behaviour during the proceedings, it seems to presuppose that both parties participate in the proceedings. If one party is truly recalcitrant and refuses to participate in the arbitration proceedings having already commenced litigation proceedings in another *forum*, how can it be forced to pay the deposit when the dispute has arisen and the two sides are preparing for battle? Two points can be put forward in this regard. First, commencing litigation proceedings in breach of an arbitration agreement is a default of the negative obligation included therein, amounting to a repudiation of the contractual agreement to arbitrate by the defaulting party. Second, as a matter of English law, if the duty to pay the deposit has arisen—i.e. if the prerequisite for a negotiations period has been fulfilled with no success and the right to resort to arbitration has been established—and not paid, the amount can be subject to forfeiture if the termination of the contract is attributed to the defaulting party.[626] Hence, the forfeiture

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623 For an alternative wording see Briggs 2008 (n 43)160.

624 Neil Andrews, *Contract Rules: Decoding English Law* (Intersentia 2016) 365.

625 *Mayson v Clouet* [1924] AC 980 (PC); Neil Andrews, *Contract Law* (2nd edn, CUP 2015) 552.

626 *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 WLR 435, [449G–456F]; *Griffon Shipping LLC v Firodi Shipping Ltd ('The Griffon')* [2013] EWCA Civ 1567, [2014] 1 All ER (Comm) 593; *Hardy v Griffiths* [2014] EWHC 3947 (Ch) at [107], [109], [117].

rule can work if the commencement of litigation proceedings before any State court is considered to be a default of the obligation undertaken with the arbitration agreement.

Such a clause can be effective only if it is enforced upon the recalcitrant party. It is submitted that the tribunal has jurisdiction to declare the deposit clause triggered on the basis of the non-performance of obligation under the arbitration agreement. This, in turn, leads to the existence of a right to forfeit the amount withheld as deposit from the third party holding or the recalcitrant party itself—depending on the formulation of the deposit clause. Furthermore, the tribunal can issue a partial award ordering the forfeiture of the deposit amount as a result of the defaulting party's breach of the deposit clause. As is the case with indemnity and liquidated clauses, the effectiveness of deposit clauses is largely dependent on the drafting adopted by the parties. It is important that the parties operate within the limits of the applicable law on deposits and specify the instances triggering the forfeiture of the deposit.

7 CONCLUSIONS: ARBITRAL JURISDICTION ARCHITECTURE

Arbitral jurisdiction in not merely a technical subsection of the law on arbitration regulating the power of a tribunal to adjudicate the case. It is an area where fundamental questions arise as to the nature of arbitration as a dispute resolution mechanism, the nature and limits of the tribunal's adjudicatory power, the relationship between arbitration and litigation, and, most importantly, as to the role of party autonomy in cross-border commercial disputes. Similar questions arise in the context of cross-border jurisdiction in private international law. The nature, however, of arbitral powers as seemingly resting purely on the parties' choices intensifies the importance of the answers to these questions. This is not to suggest that arbitral jurisdiction does not form part of transnational jurisdiction in cross-border commercial dispute. On the contrary, the relationship between a general analysis of private (and public) international law jurisdictional questions and questions of arbitral jurisdiction is one similar to Siamese one; they are closely conjoined and intertwined.

As the analysis above—both at a theoretical and pragmatical level—has shown, the proper analysis of the foundations, operation, and effects of party autonomy in private international law and arbitration can provide the basis for re-designing the vertical system of regulating arbitral jurisdiction. This theoretical and practical re-design of the currently vertical system of arbitral jurisdiction is the basic proposition of this PhD thesis and its intended contribution.

The first step in making this contribution was provided in Chapter 2 with the contextual analysis of international commercial disputes and arbitration. Such contextual analysis was useful not only in identifying the characteristics of international commercial disputes, but also in considering such disputes, and the subsequent questions of adjudicatory power of the State or arbitral bodies tasked with the resolution of such disputes within the context of economic globalisation and the rise of individuals in the post-modern era. In this context, party autonomy retains the primordial role in providing for the specific standards of substantive justice between the relevant parties, but also in having regulatory consequences between the various actors in the global commercial arena.

These regulatory features and consequences of party autonomy in private international law were distinguished in Chapter 3 by the simple fact of the contractual autonomy of the parties to regulate the substantive rights and obligations of their relationship. In this context, a choice of *forum*, in the form of either an exclusive jurisdiction or arbitration agreement, operates therefore at two levels: (a) concerning substantive justice and fairness of the obligations between the parties; and (b) concerning distributive justice and the regulatory level of adjudicatory power between different legal systems. Chapter 3 focused on the notion of paradigms of jurisdiction in cross-border disputes, and the role of party autonomy as a shifting paradigm of jurisdiction in an era of globalised relationships. The role and nature of transnational party autonomy as a regulatory paradigm of jurisdiction is based on, and provides evidence of, an alteration on the conception of State sovereignty as the only source of jurisdiction. The analysis in Chapter 3 proceeded on the basis of contemporary theories of private international law and considered that party autonomy has regulatory effects on the power to adjudicate. This is to suggest that the source of such power is no longer considered to be only State sovereignty; rather the approach is multifocal in considering also the will of the parties as relevant at this higher regulatory level. Party autonomy thus has an emerging role as foundation of a different conception of the origins of arbitration and its relationship with other modes of dispute settlement.

This foundation of party autonomy is also the basis for the argument proposed in Chapter 4 for the regulation of arbitral jurisdiction. Considering also comparative and other theoretical approaches on regulation of arbitral jurisdiction, the argument put forward in this thesis is that arbitral jurisdiction can be more appropriately regulated in a globalised commercial arena with a horizontal, rather than a vertical, relationship. This horizontal relationship is not only a result of party autonomy being considered as a shifting paradigm of jurisdiction, but it is also proof of this paradigm and a pragmatic justification of the rise of individuals and private actors in cross-border relationships. This horizontal relationship is a result of the multifocal approach to the sources of adjudicatory power in cross-border jurisdiction. It can be depicted as a system of two parallel streams each of which requires a certain threshold to enter, but do not exclude the transition between the two streams. It is exactly at these two points, the initial entrance and the transition from the one stream to the other that jurisdictional questions arise.

As mentioned in Chapter 1, this is not merely a theoretical account of the regulation of arbitral jurisdiction; rather, it provides for an analysis of the law and practice on arbitral

jurisdiction in England and Wales. The objective of Chapters 5 and 6 was, thus, to reconcile the pragmatic and flexible approach of English law on private international law and arbitration with the model of horizontal and multifocal sources of adjudicatory competence by proposing a restatement. This practical exercise and the accompanying proposal do not conflict with the content of the theoretical framework expressed above. On the contrary, they provide a case-study of how this framework can be reflected, implemented, and enshrined in practice. In a similar manner to the horizontal relationship between various courts in a multilateral, multifocal system of global justice, States still have a role in the proposed model. Their rules are recognising this multilateral system. It is not a proposal for complete regulatory autonomy—or better described as anarchy. It is a proposal recognising the primordial role of party autonomy in a contemporary system of global justice and a transnational paradigm of private international law. The focus cannot only be on State sovereignty as a source of regulation of adjudicatory authority with the choice of the parties being subordinate to the will of the State. The focus should rather be on the various sources that affect or inform this allocation of regulatory authority on a multifaceted, multisource and multifocal system of global justice. The State recognition of such a system and the multiplicity of sources, via the adoption of rules of arbitral jurisdiction confirming the horizontal and systemic relationship of arbitral and state resolution of disputes, is not inconsistent with this model. Such recognition is not in itself a bestowal but rather a pragmatic codification of this relationship.

Focusing on the law and practice of England and Wales, Chapter 5 adopted the point of view of State courts dealing with issues of arbitral jurisdiction, while Chapter 6 adopted the point of view of arbitral tribunals in dealing with the same issues. Following the two streams of the horizontal model presented at the end of Chapter 4, these two Chapters analysed the same issues from two different perspectives. Following the dual structure of this thesis, the internal analysis in each Chapter was informed by the following considerations: (a) first, the analysis proceeds from examining whether and how the existing framework corresponds and can be adapted to correspond to the proposed model to a proposal on a restatement of the framework, statutory and judicial; and (b) second, the analysis focuses on both the procedural and the substantive aspects of the agreements to arbitrate moving from a consideration of judicial or arbitral stays of jurisdiction to the enforcement of agreements with substantial remedies. This twofold consideration is not contrary to the proposition adopted in Chapter 3 about arbitration agreements expressing the parties' autonomy at a secondary, higher regulatory level. As analysed in this Chapter

these two aspects of the agreements to arbitrate are not mutually exclusive. The parties can conclude an agreement on two different levels, one higher, regulatory level and one substantive corresponding to notions of substantive fairness between them.

Above all, as this thesis has sought to demonstrate, regulating arbitral jurisdiction is not merely a question of setting out technical rules affecting commercial parties. It is part of a design of global justice which requires stable foundations and structural integrity. Party autonomy lies at the heart of this construction.

ANNEX: RESTATEMENT ON THE REGULATION OF ARBITRAL JURISDICTION

RULE 1—General Principles

(1) The overriding objective of the following rules on regulation of arbitral jurisdiction is the fair resolution of jurisdictional disputes, the promotion of arbitration as a dispute resolution process in international commercial disputes, and the regulation of arbitral jurisdiction on the basis of the parties' choices;

(2) Commercial arbitration and commercial litigation exist as two equal and parallel pathways for commercial parties in designing their dispute resolution mechanisms;

(3) State courts shall engage in arbitral processes only to the extent specified in the following rules and provided that the necessary threshold is met.

RULE 2—Party Autonomy

(1) Arbitral jurisdiction is based on the parties' autonomy;

(2) Party autonomy within the context of these Rules is an expression of the power of individuals to establish regulatory rules in the multifaceted and multifocal system of jurisdiction in cross-border commerce;

(3) Party autonomy as a delineation mechanism of arbitral jurisdiction is expressed via the parties' adequate manifestation of consent to arbitrate their disputes, usually included in an arbitration agreement;

Rule 3—Stay of Court Proceedings

(1) Provided that the litigation defendant makes a good arguable case that there is adequate manifestation of consent to arbitrate, State courts shall not intervene at the interlocutory stage to decide on a jurisdictional issue and shall stay their own proceedings unless satisfied that:

(a) both parties agree on such intervention; or

(b) the party resisting arbitration satisfies the court with cogent evidence and strong reasons that the prima facie existent consent to arbitrate does not exist or is null and void and these reasons have been raised before the arbitral tribunal which gives its

permission for one, more, or all of the relevant jurisdictional issues.

(2) If no arbitration proceedings have been commenced and cannot be commenced, State courts shall not intervene at the interlocutory stage to decide on a jurisdictional issue and shall stay their own proceedings unless satisfied that:

(a) both parties agree on such intervention; or

(b) the party resisting arbitration satisfies the court with cogent evidence and strong reasons that the prima facie existent consent to arbitrate does not exist or is null and void.

(3) Subject to the preceding paragraphs, State courts retain a residual discretion to order a stay on the basis of their case management powers.

RULE 4—Declaratory Powers

(1) State courts shall have the power to grant a declaratory judgment on one, more, or all of the jurisdictional issues provided that—

(a) the Court is satisfied that there is no adequate manifestation of consent; or

(b) the other party(ies) so agree; or

(c) the tribunal grants its permission.

(2) A party alleged to be a party to a dispute who takes no step in the proceedings shall not be entitled to request a State court to grant a negative declaration as to the agreement's validity, unless—

(a) the Court is satisfied that there is no adequate manifestation of consent; or

(b) the other party(ies) so agree; or

(c) the tribunal grants its permission;

(3) State courts shall not have the power to grant a declaration before the constitution of the tribunal unless—

(a) the Court is satisfied that there is no adequate manifestation of consent; or

(b) the Court is satisfied that party requesting the declaration provides the court with cogent evidence and strong reasons supporting this declaration; or

(c) both parties agree on such intervention.

RULE 5—Enforcing the Arbitration Agreement: Equitable Remedies

(1) Provided that State courts have personal jurisdiction over the party(ies) and the applicant satisfies the court to a balance of probabilities standard that there is an agreement to arbitrate, the court shall have the power to grant equitable, *in personam*, remedies against a present or imminent breach of the arbitration agreement;

(2) Equitable remedies of the previous paragraph include:

(a) injunctions restraining the breaching party from commencing or continuing litigation or arbitration proceedings in a different *forum*; or

(b) specific performance orders specifying the positive steps the breaching party has to take in the arbitral proceedings.

(3) The court's power is discretionary and shall be exercised with caution and due regard to comity. The party resisting the application for such equitable remedies shall have to provide strong reasons that justice requires the remedy not be granted;

(4) A party violating an order under Rule 5(2) shall be deemed in contempt of court.

Rule 6—Enforcing the Arbitration Agreement: Damages

(1) Provided that English courts have jurisdiction over the question of an arbitration agreement's breach and the court is satisfied to a balance of probabilities standard that there is an agreement to arbitrate which was breached, the court shall have the power to award damages against the party(ies) in breach.

(2) Such damages include:

(a) costs and fees incurred for defending the proceedings in breach;

(b) any damages awarded by the non-chosen *forum*.

(3) In assessing the damages, the court shall be able to take into account and award as prospective losses the amount of claim before the non-chosen *forum*.

Rule 7—Grounds and Standard of Review in Challenge and Enforcement Proceedings

(1) A party resisting the arbitral proceedings, may request the annulment of a domestic

award or the non-enforcement of a foreign award in relation to jurisdictional issues only on the basis of that party establishing that one of the following grounds is fulfilled:

(a) the arbitration agreement was non-existent;

(b) the arbitration agreement was invalid or otherwise inoperable and the tribunal's decision erred in finding to the contrary; and

(c) the tribunal erred in defining the subjective or objective scope of the agreement.

(2) In examining the ground under (1)(a), the court shall conduct a de novo review unless the parties have specifically agreed otherwise in their agreement with a separate delegation clause;

(3) In examining the grounds under (1)(b) and (c), the court shall conduct a limited deferential review of the tribunal's decision on the basis of the facts established by the tribunal.

Rule 8—Competence to Decide Jurisdictional Issues

(1) The arbitral tribunal shall have the power to decide on any jurisdictional issue (arbitral competence-competence);

(2) Subject both to the following paragraph and Rule 3, the power of the tribunal on the basis of the preceding paragraph shall be exclusive at the interlocutory stage.

(3) The parties can agree on a delegation clause, granting State courts concurrent or exclusive competence to decide on one, more, or all of the relevant jurisdictional issues, including questions of existence, validity, and scope of such delegation clause.

Rule 9—Jurisdictional Awards

(1) If the jurisdiction of the tribunal is challenged or a request is made for a positive declaration, unless otherwise agreed by the parties, the tribunal shall grant a separate decision on jurisdiction in the form of a jurisdictional award;

(2) A positive jurisdictional award, accepting the tribunal's jurisdiction, may be challenged before the supervisory courts by the resisting party only on the ground of Rule 7(1)(a). Any such challenge shall not impede the tribunal's examination on the merits of

the case;

(3) A negative jurisdictional award, declining the tribunal's jurisdiction, may be challenged before the supervisory courts by the losing party on one of the grounds in Rule 7(1).

RULE 10—Enforcing the Arbitration Agreement: Arbitral Enforcement Orders

(1) A tribunal seated within the jurisdiction, unless otherwise agreed by the parties, shall have the power to grant remedies, either as interim procedural orders as final partial awards, to the effect of:

(a) restraining the resisting party from commencing or pursuing proceedings in another *forum*; and/or

(b) ordering the participation of the resisting party to the arbitration proceedings.

(2) The tribunal may exercise its power under the preceding paragraph by:

(a) granting an interim procedural order, provided that it is satisfied to a good arguable case standard that it has jurisdiction and that a breach of the agreement exists or is imminent. The order shall be granted only if the harm threatened to the applicant is greater than the one to the defendant; or

(b) granting a final partial award, provided that it is satisfied to a balance of probabilities standard that it has jurisdiction and that a breach of the agreement exists or is imminent.

(3) In case of tribunals seated overseas, such orders may be granted on the basis of:

(a) the relevant arbitration law and/or the arbitration rules on provisional measures; or

(b) a direct power conferred by the parties in their agreement; or

(c) the tribunal's inherent power to protect its own jurisdiction;

(d) the tribunal's adjudicative mandate by remedying a breach of the arbitration agreement.

Rule 11—Damages and Monetary Sanctions

(1) Provided that the tribunal has confirmed its jurisdiction and is satisfied that a breach

of the arbitration agreement has been committed or is imminent on the basis of the law applicable to the arbitration agreement allows it, it shall have the power to award damages against the resisting party as a remedy against this breach.

(2) The tribunal shall also have the power to grant monetary sanctions against the recalcitrant party. These monetary sanctions cannot in any case exceed triple the amount awarded by the tribunal as compensatory damages for the breach of the agreement.

Such orders may also be granted on the basis of:

(a) a direct power conferred by the parties in their agreement; or

(b) the tribunal's inherent power to protect its own jurisdiction; or

(d) the tribunal's adjudicative mandate by remedying a breach of the arbitration agreement.

(3) The tribunal's power to grant monetary sanctions under the preceding paragraph may be combined or follow a Rule 9 order in the form of a damages award.

Rule 12—Contractual Undertakings: Damages and Deposit Clauses

(1) The parties can include a liquidated damages or indemnity clause in their agreement to arbitrate;

(2) The parties can include a deposit clause in their agreement to arbitrate.