CHAPTER 11

A Matter of Characterisation Distinguishing Issues of Arbitral Jurisdiction and Admissibility of Claims

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§11.01 INTRODUCTION

It is axiomatic that arbitration is a matter of contract and, therefore, the legitimacy of arbitration depends on the fundamental premise that parties are not required to arbitrate without their consent.[1] Arbitrators enjoy dispute resolution authority only when the parties have validly agreed to submit their disputes to arbitration.

Disputes often arise regarding the existence, validity, or enforceability of an alleged agreement to arbitrate. Those disputes impact on and imperil the arbitrators' jurisdiction. But some disputes that at first glance appear to involve a jurisdictional challenge might, in fact, relate to the *admissibility* of the substantive claims. Consider, for example, the scenario presented by escalation clauses. Escalation clauses are contractual provisions setting forth more than one dispute resolution method to operate in sequential order. They require compliance with the first agreed method (e.g., mediation) before initiating the next one (e.g., arbitration). Disputes that a party has failed to comply with one of those contractual pre-arbitration requirements present a question of characterisation. They could be characterised as 'jurisdictional', 'admissibility', or 'procedural' issues.

1. *See, e.g.*, George A. Bermann, The 'Gateway' Problem in International Commercial Arbitration, 37 *Yale Journal of International Law* (2012), p. 5. For a discussion about arbitration 'without consent', *see also*, Gabrielle Kaufmann-Kohler et al., *Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast Track Dispute Resolution*, 17 *Arbitration International*, no. 2 (2014), pp. 173-210 DOI: 10.1023/a:1011250312120.

They could be understood as *jurisdictional issues* based on the argument that the arbitration agreement does not provide arbitrators with authority (jurisdiction) until the pre-arbitration dispute resolution methods have been complied with. Complying with them would be viewed as a condition precedent to the parties' consent to arbitrate.

The same claims could, also, be characterised as *admissibility* defences. The argument would be that although the arbitration agreement vests arbitrators with jurisdiction, it does not permit the assertion of substantive claims until after the agreed pre-arbitration requirements have been satisfied.

Like the admissibility defences, if the pre-arbitration requirements were characterised merely as part of the *procedural steps*[2] for the resolution of the dispute, failure to comply with them would not affect the jurisdiction of an arbitral tribunal to decide the substantive dispute. This characterisation can be assimilated to admissibility (or, more generally, non-jurisdictional) issues because it would usually not affect the 'adjudicative power' of the arbitral tribunal to decide the substantive dispute. They would affect the temporal aspect of the exercise of that power.

Before proceeding, it is important to make here a caveat. For the sake of simplicity and the sole purpose of this chapter, procedural steps and admissibility defences will be treated together under the term 'admissibility' to distinguish them from jurisdictional issues.

In that understanding, the correct characterisation of an issue as jurisdictional (or not) matters in terms of the allocation of competence to decide that controversy. It also matters regarding the standard of court review where arbitrators have preliminarily decided that issue.[3] This chapter addresses that characterisation and distinctions. It starts with a brief description of the competence-competence principle, its source, extent, and limitations (§11.02). It then introduces a closely linked principle: separability (§11.03), before discussing the challenges of identifying disputes concerning the jurisdiction of arbitrators and the admissibility of the claims (§11.04). The final section contains the concluding remarks (§11.05).

§11.02 COMPETENCE-COMPETENCE

It is uncontroversial that arbitrators have the authority to rule on their own jurisdiction. This is known as the competence-competence principle, and it operates as a tool to foster the efficacy of commitments to arbitrate and procedural efficiency in arbitration.

2. *Westco Airconditioning Ltd v. Sui Chong Construction & Engineering Co. Ltd*, [1998] HKCFI 946, Hong Kong Court of First Instance, 3 February 1998, para. 12: Failure to comply with preliminary steps does not render the arbitration agreement null and void, inoperative or incapable of being performed. The court referred the parties to arbitration, to complete the agreed preliminary procedural steps.
3. George A. Bermann, The Role of National Courts at the Threshold of Arbitration, *International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series*, no. 19 (2017), pp. 450-451.

In practical terms, competence-competence channels a policy choice against dilatory manoeuvres.[4] Without it, a challenge to the arbitral tribunal's jurisdiction would stall arbitration proceedings until a national court settles the objection. It would transform the promise to arbitrate into an illusion because even 'the most feeble challenge would abort the proceedings, and the parties (…) would be thrown into the courts when that is exactly contrary to their bargain.'[5]

The competence-competence principle is as commendable as uncontroversial in contemporary arbitration law and practice. It is such a fundamental feature of arbitration that it has found normative recognition almost universally, including national arbitration legislation,[6] institutional arbitration rules, international conventions,[7] and case law.[8] Article 16(1) of the UNCITRAL Model Law ('Model Law') articulates the competence-competence principle in these terms:

> The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

The principle is aligned with the Model Law's purpose because it fosters efficiency in dispute resolution as 'it impedes unmeritorious tactical challenges, which would otherwise flourish like weeds.'[9] The Model Law's preparatory works further reveal that the drafters of Article 16(1) discussed and rejected a suggestion to start the paragraph with the phrase 'unless otherwise agreed by the parties'.[10] This rejection is not simply anecdotal but instructive of how some textual 'silences' should be interpreted in the context of the Model Law, especially given the clear and specific consideration that the drafters paid to the instrument's wording. The textual silence is not an oversight but a deliberate choice against language that carries a specific meaning and legal effect. That drafting decision and the principle's fundamental role in the

4. *See*, *e.g.*, the Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, A/CN.9/207 (14 May 1981), para. 88.
5. Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013), p. 54.
6. For example, Swedish Arbitration Act, section 2; Hong Kong Arbitration Ordinance (Cap. 609), section 34; Switzerland Private International Law Act, Art. 186(1); Singapore Arbitration Act, Art. 16(1) (Model Law); English Arbitration Act (1996), section 30; Germany Arbitration Act (Book 10 ZPO), section 1040(1); Mexico Commercial Code, Art. 1432; Peru Arbitration Law, Art. 41(1), Spain Consolidated Arbitration Law, Art. 22(1), France, Code of Civil Procedure (Decree 2011-48), Art. 1465; Mauritius International Arbitration Act (2008), section 20; amongst many others.
7. For example, the European Convention on International Commercial Arbitration (1961), Art. V(3); ICSID Convention, Art. 41; Inter-American Convention on International Commercial Arbitration (Panama Convention, 1975), Art. 3, refers to the Inter-American Commercial Arbitration Commission, which in its Art. 18.1 explicitly provides for the competence-competence principle.
8. *See* §11.05 below.
9. Paulsson, *The Idea of Arbitration* (*supra* n. 5) p. 57.
10. Summary Records of the 315th Meeting, A/CN.9/246, annex; A/CN.9/263 Add.1-2, A/CN.9/264 (10 June 1985), paras 24-26. Nevertheless, States may deviate from the model when adopting it and permit parties to exclude (or limit) the arbitrators' competence-competence. *See*, Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, A/40/17 (21 August 1985), para. 151.

effective functioning of arbitration led some authorities to suggest that competence-competence features a mandatory character.[11] And one scholar even stated that the principle forms part of transnational public order.[12]

Although with two textual dissimilarities, the text of Article 16(1) was modelled on Article 21(1) of the UNCITRAL 1976 Arbitration Rules. According to the Rules, '[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction'. The Model Law uses the phrase 'may rule' instead of 'shall have the power to rule', and it does not refer to 'objections' but to the arbitrators' power to rule over their own jurisdiction ('The arbitral tribunal may rule on its own jurisdiction'). However, these textual differences do not carry a significant degree of disparity in their interpretation and application.[13]

The New York Convention does not contain a provision like the one in the UNCITRAL Model Law and the Arbitration Rules. It does not explicitly address the competence-competence principle, and its scant legislative history shows that its drafters did not debate the matter. Still, nothing in its text or legislative history indicates that the Convention prevents arbitrators from determining jurisdictional disputes. On the contrary, recognition of the competence-competence principle can be inferred from the language of Article V.

Two of the Convention's grounds to resist the recognition and enforcement of foreign awards relate to the validity (Article V(1)(a)) and scope of the parties' agreement to arbitrate (Article V(1)(c)). At least impliedly, the Convention assumes that arbitrators render awards on the substantive dispute despite the parties having challenged their jurisdiction. Had the arbitrators found in favour of a jurisdictional objection, there would be no award on the merits or at least on the dispute outside the scope of the arbitration. By the same logic, if the party aggrieved by the invalidity or scope of the arbitration agreement failed to raise its challenge during the arbitral proceedings, and, therefore, there is an arbitral decision on the substantive matter, then this would (generally) be taken as the party having relinquished its jurisdictional objection.

Competence-competence is not a novel device exclusive to the realm of arbitration. As Bermann noted, the principle achieves for arbitration what we practically assume in litigation: national courts determine by themselves whether they have jurisdiction over a given case.[14] But despite the high degree of recognition and acceptance of the competence-competence principle, there are different visions regarding its source. The following section then addresses the source of the arbitrators' competence to determine their jurisdiction.

11. Howard M. Holtzmann et al., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International, 1989), p. 480 ('The principle of Kompetenz-Kompetenz is a mandatory one in the Law, that is, the parties cannot agree to limit the power of the arbitral tribunal to rule on its jurisdiction.').
12. Pierre Lalive, Ordre Public Transnational (ou réellement international) et Arbitrage International, *Revue de l'Arbitrage*, no. 3 (1986), p. 350, para. 352.
13. *See* Commission Report A/40/17, para. 152.
14. George A. Bermann, *International Arbitration and Private International Law: General Course on Private International Law* (Martinus Nijhoff, 2017), pp. 103, 107.

[A] The Source of the Competence-Competence Principle

In the Model Law context, competence-competence is a non-contractual, statutory construct. It is counter-intuitive to argue that the arbitrators' power to rule on their jurisdiction derives from the agreement whose existence or validity is disputed or uncertain. Consequently, the arbitrators' authority does not originate from the putative arbitration agreement but from the statutes (based on Article 16(1) Model Law) that recognise it and the New York Convention.

Distinctively, competence-competence in the United States (a non-Model Law jurisdiction) has a contractual basis. As a default rule, jurisdictional matters are reserved for national courts, not the arbitrators, unless the parties have clearly and unmistakably intended to delegate the decision of jurisdictional issues to arbitrators.[15] This is also the case in Israel (another non-Model Law jurisdiction), where the arbitration law does not recognise in arbitrators the authority to decide jurisdictional disputes. However, parties can explicitly and specifically authorise them to do so.[16]

Some authors describe competence-competence as an inherent power of the arbitrators' adjudicatory role and essential to them carrying out their tasks properly.[17] Other authors describe competence-competence as a 'legal fiction'[18] rooted in policy considerations favouring arbitration. Its pragmatic purpose is to defeat the logic and circularity of the argument that bases arbitral competence-competence on an arbitration agreement that is contended.[19]

Others acknowledge that although competence-competence is one of the effects of the (even putative) arbitration agreement, the basis of such a power is not the arbitration agreement itself nor the principle of *pacta sunt servanda*. Its source is found in arbitration legislation. First, the arbitration law of the seat of the arbitration 'and, more generally, the laws of all countries liable to recognise an award made by arbitrators concerning their own jurisdiction'.[20] Somewhat similar, another scholar has

15. *See*, *e.g.*, *AT&T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, United States Supreme Court, 7 April 1986, p. 649 ('Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.'); reiterated in *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, US Supreme Court, 22 May 1995, p. 939.
16. Daphna Kapeliuk-Klinger, 'National Report for Israel', in *ICCA International Handbook on Commercial Arbitration*, ed. Bosman (Kluwer Law International, 2019), p. 26.
17. Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 6th ed. (Oxford University Press, 2015), pp. 339-340. Also, Emmanuel Gaillard et al., 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators', in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, ed. Emmanuel Gaillard and Domenico di Pietro (Cameron May, 2008), p. 259.
18. Julian D.M. Lew et al., *Comparative International Commercial Arbitration* (Kluwer Law International, 2003), p. 333, paras 14-16; Stavros Brekoulakis, The Negative Effect of Competence-Competence: The Verdict Has to Be Negative, *Austrian Arbitration Yearbook* (2009).
19. Brekoulakis, *ibid.* pp. 239, 251.
20. Philippe Fouchard et al., *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), pp. 399-400, para. 658.

stated that the arbitrators' jurisdictional power derives from national laws and institutional arbitration rules.[21]

A more nuanced assessment of the source of arbitral authority distinguishes between jurisdictional grounds. Born, for example, takes the position that an agreement to arbitrate could be the source of the arbitrator's competence-competence in cases where the existence or validity of the agreement is not disputed (e.g., challenges to the scope of the agreement). In those cases, the decision-making powers would be part of the arbitrator's inherent adjudicatory attributes.[22] However, where the jurisdictional question concerns the existence or validity of the agreement to arbitrate, the arbitrators' competence-competence rests 'on the positive force of national, and international, law.'[23]

Born also concedes that virtually all national arbitration regimes 'presume' arbitral competence-competence, as part of the 'basic objectives of the arbitral process and the inherent powers and mandate of an adjudicatory tribunal'.[24] Reflecting on the wide acceptance of competence-competence in practice (regardless of the applicable law), the author suggests that it could be considered 'a general principle of international law and an inherent power (absent contrary agreement) of an arbitral tribunal'.[25]

The Model Law (and statutes that adopt it) dissipates these potential controversies by codifying the competence-competence principle with broad, comprehensive language. It does not distinguish between disputes concerning the agreement's existence, validity, or scope. The inclusive wording of Article 16(1) stretches to cover all those disputes: '[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'. But the arbitrators' power to rule on their jurisdiction is limited. The limitations are addressed in the next section.

[B] Limits to the Arbitrators' Authority

A contextual reading of Article 16(1) of the Model Law impacts the arbitrators' competence-competence, which is not exclusive nor conclusive. It is correct to qualify this important principle as the arbitrators' authority to consider and determine their own jurisdiction as '*provisional*' or '*preliminary*'. At least regarding the decisions

21. William W Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction', in *International Arbitration 2006: Back to Basics?*, ed. Albert Jan van den Berg, ICCA Congress Series (Kluwer Law International, 2007), p. 59.
22. Gary B. Born, *International Commercial Arbitration*, 3rd ed., vol. 1 (Kluwer Law International, 2021), p. 1167.
23. *Ibid.*
24. *Ibid.*, p. 1152. Professor Park, instead, suggests that agreements to submit jurisdictional questions to arbitrations must be honoured but not presumed. *See*, Park, *The Arbitrator's Jurisdiction* (*supra* n. 21) p. 62.
25. Born, *International Commercial Arbitration* (*supra* n. 22) p. 1162.

where the arbitrators decide against the objections and find they do enjoy jurisdiction to resolve the substantive dispute.[26]

The arbitrators' decision on jurisdiction is provisional because it is reviewable at different stages and by different courts. At the seat of the arbitration, the judiciary could decide the issue immediately after the arbitrators have assumed jurisdiction in a preliminary ruling (Article 16(3) Model Law). This could also be done at the end of the proceedings, should the arbitrators have answered the jurisdictional question together with the award on the merits (Article 34 Model Law). A court other than the ones at the seat of the arbitration could also review the arbitrators' jurisdiction in an action for recognition and enforcement of the award (Article 36 Model Law and Article V New York Convention).

Further, jurisdictional issues may arise and need to be determined by national courts before any arbitral proceedings have started (or even whilst they are in course), in the context of a substantive court action covered by an arbitration agreement (e.g., Articles 8 Model Law and II(3) New York Convention).[27]

A basic understanding of arbitration requires reiterating an essential expression of the principle of 'party autonomy'. All the scenarios of judicial determination mentioned above are hypothetical because national courts do not have a spontaneous obligation to review the arbitrators' jurisdiction. Given that the disputing parties may opt to wave their jurisdictional objections, the court review and determination materialise only at a party's request. But there are exceptions to this general rule. Matters concerning arbitrability and public policy affect arbitral jurisdiction and limit party autonomy, and national courts could review them ex officio where a party files a substantive action or seeks the recognition or enforcement of an arbitral award.

Some authorities argue that the competence-competence principle is limited regarding the effects it produces. It is undisputed that competence-competence produces a *positive* effect. But for some authors, the principle also triggers a *negative* one.[28]

That arbitrators enjoy the authority to determine their own jurisdiction is known as the *positive* effect of the competence-competence principle. The *negative* effect moves the spotlight away from the arbitral tribunal and focuses it on national courts.[29] In a nutshell, the negative effect encapsulates the idea that vesting arbitrators with competence-competence necessarily entails divesting national courts of the authority to *conclusively* determine jurisdictional questions at the threshold of an arbitration.[30]

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26. The decisions whereby the arbitrators find that they lack jurisdiction are final, not provisional. These are discussed below.
27. The extent of the court review of jurisdictional issues before or after the arbitrators have preliminarily decided the matter may vary depending on several factors (e.g., the ground for the challenge, the national approach, the instance at which the challenge is brought to court, etc.). This chapter does not embark on that discussion.
28. The strongest voices behind this argument are Fouchard et al., *International Commercial Arbitration* (*supra* n. 20) p. 401, para. 660.
29. *See, e.g.*, Gaillard et al., *Negative Effect of Competence-Competence* (*supra* n. 17) p. 260 ('[A] court that is confronted with the question of the existence or validity of the arbitration agreement must refrain from hearing substantive arguments as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had an opportunity to do so.').
30. For example, Art. 8(1) of the Model Law, Art. II(3) of the New York Convention.

Therefore, in that scenario, the crucial feature of the negative dimension of the competence-competence principle is that it establishes a rule of priority in favour of arbitrators.

In the context of the Model Law, whether the language of Article 16(1) shadows the powers of national courts (Article 8(1)) is controversial. Some authorities conclude that recognising the negative effect 'best fits with the Model Law's legislative history, its basic structure and underlying principles'.[31] There are equally strong views that do not recognise the negative aspect of competence-competence.[32]

Whether the Model Law allows or imposes the negative effect is a thorny and thought-provoking question. Judge Judith Prakash wittily compared that question and the dichotomy of the prima facie or full merits standard of review that it entails with the brain teaser in the question: Which came first, the chicken or the egg?[33] But its answer exceeds the scope of this chapter, which is limited to a closely related but distinct matter: the characterisation of challenges aimed at the jurisdiction of arbitrators or at the admissibility of the parties' substantive disputes.

§11.03 SEPARABILITY

In addition to the competence-competence principle, some laws codify another essential tool related to jurisdictional disputes: the *separability* presumption. For example, the second and third sentences of Article 16(1) of the Model Law provide that, in determining whether the arbitral tribunal has jurisdiction:

> [A]n arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.[34]

The separability presumption complements the competence-competence principle. While competence-competence recognises the arbitrators' power to determine their own jurisdiction, separability permits isolating the arbitration clause. It protects it from *automatically* running the same fate as the contract in which it appears. It then follows that the arbitration agreement may be valid even where the rest of the contract

31. *See*, *e.g.*, Frédéric Bachand, Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?, 22 *Arbitration International*, no. 3 (2006), p. 465 DOI: 10.1093/arbitration/22.3.463.
32. *See*, *e.g.*, Brekoulakis, *The Negative Effect of Competence-Competence* (*supra* n. 18) p. 238. Bermann, *International Arbitration* (*supra* n. 14), p. 15; Paulsson, *The Idea of Arbitration* (*supra* n. 5) p. 58 (The negative effect of competence-competence 'is not an inevitable corollary of allowing the arbitral tribunal to proceed when faced with a jurisdictional objection'.).
33. *Malini Ventura v. Knight Capital Pte Ltd and others*, [2015] SGHC 225, Singapore High Court, 27 August 2015, paras 1, 19.
34. The separability presumption in the Model Law was modelled on its parallel in Art. 21(2) of the UNCITRAL 1976 Arbitration Rules. *See*, Secretariat Report A/CN.9/207, para. 54, Report of the Working Group on International Contract Practices, on the Work of its Third Session, A/CN.9/216 (23 March 1982), para. 34, and approved at an early drafting stage, according to the Report of the Working Group on International Contract Practices, on the Work of its Fourth Session, A/CN.9/232 (10 November 1982), paras 47-48.

is not, as long as the grounds for invalidity do not directly affect the arbitration clause itself.[35]

That arbitration clauses are separable from the rest of the contract has become a vital presumption for determining jurisdictional challenges. It is considered a part of the 'generally accepted principles of arbitration'[36] and a common-sense tool in applying legal rules to recognise the parties' intention,[37] even a transnational rule of international commercial arbitration.[38] Having achieved such a status, the separability presumption is not a tool exclusively reserved for arbitrators. It is equally available for national courts, which rely on it when deciding on arbitral jurisdiction.[39] It is, therefore, also useful for the characterisation contest between jurisdiction and admissibility.

§11.04 JURISDICTION VERSUS ADMISSIBILITY

The terms 'jurisdiction' and 'admissibility' are not used consistently. They are often used interchangeably as if they were synonyms. They are not, and the distinction between them matters. It matters not because of terminological fussiness but regarding the allocation of competence to decide them and their effect over substantive disputes. It matters also in terms of the reviewability of the arbitrators' decisions: national courts can review jurisdictional but not admissibility decisions.

The distinction bears special relevance at the threshold of an arbitration when interpreting Article 8(1) of the Model Law and Article II(3) of the New York Convention. Non-jurisdictional matters invariably trigger the court referral to arbitration that those articles provide for.

This section introduces a conceptual description of those issues, explains why the distinction mentioned above matters, and highlights the determining factor to distinguish jurisdictional objections from non-jurisdictional ones.

35. Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General, 18th session, A/CN.9/264 (25 March 1985), para. 2.
36. *See*, *e.g.*, *Enrique C. Wellbers S.A.I.C. A. G. v. Extraktionstechnik Gesellschaft für Anlagenbau M.B.M. s/ Ordinario,* La Ley, 1989-E-302, National Court of Appeals (Comm), Argentina, 26 September 1988 ('[T]he principle of the autonomy of the arbitration clause is internationally accepted and, as such, incorporated in the Model Arbitration Law (Article 16(1)). … the Model Law (…) generally reflects accepted principles in the matter and can be considered to make up for the absence of a specific national norm.').
37. *Comandate Marine Corp. v. Pan Australia Shipping Pty. Ltd,* [2006] FCAFC 192, Federal Court of Australia, 20 December 2006, para. 228.
38. Fouchard et al., *International Commercial Arbitration* (*supra* n. 20) p. 202, para. 398.
39. One of the earliest and leading decisions oft-cited and studied internationally is that of the Supreme Court of the United States, in the *Prima Paint* case, where the Court confirmed that '(…) except where the parties otherwise intend – arbitration clauses as a matter of federal law are "separable" from the contracts in which they are embedded'; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 405 (1967), United States Supreme Court, 12 June 1967, para. 402. *See also*, Holtzmann et al., *A Guide to the Model Law* (*supra* n. 11) p. 305, where the authors explain that not only arbitrators but also courts can rely on the separability presumption when deciding jurisdictional issues.

[A] Jurisdiction

Jurisdiction is a prerogative to hear and settle disputes.[40] Jurisdictional issues, then, relate to the arbitrators' (legal) *authority* to settle substantive disputes. Jurisdiction determines, essentially, 'whether an adjudicatory body has authority to entertain a claim'.[41]

Given that party agreement is the foundation of arbitration, the notion of jurisdiction (legal authority) is closely linked to 'party consent'. In the absence of consent to arbitrate, arbitrators are not vested with jurisdiction.[42] Hence, jurisdictional challenges usually relate to the very *existence* of a *valid* agreement to arbitrate (and of its scope). That happens, for example, when the arbitration agreement is so poorly drafted that it is impossible to determine the parties' intention to settle disputes in arbitration. These 'pathologically incurable' clauses take aim at the forum where the parties should ventilate their controversies (arbitration or litigation) and at the decision-maker who should settle them (arbitrator or judge).

There are other defective[43] arbitration clauses that, notwithstanding their shortcomings, reveal the parties' intention to arbitrate. This happens, for example, when parties have entered into a 'blank clause',[44] or an arbitration clause that mistakenly refers to non-existent arbitral institutions or appointing authorities, or contains defective choice-of-law clauses, or other defects.[45] Although these defective or imperfect clauses do not call into question the parties' intention to arbitrate, they, too, constitute jurisdictional matters because they cast doubts on the effectiveness or validity of the agreement.[46]

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40. When addressing the distinction between questions of jurisdiction and admissibility, arbitrators Professor Vaughan Lowe Q.C, Judge Charles N. Brower and Christopher Thomas, Q.C concluded that '[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal'; *Hochtief AG v. The Argentine Republic, Decision on Jurisdiction,* ICSID Case No. ARB/07/31, 24 October 2011, para. 90.
41. ALI, Restatement (Third), U.S. Law of International Commercial and Investor-State Arbitration § 2.8 – Reporter's Notes.
42. Bermann, *The Role of National Courts* (*supra* n. 3) p. 450.
43. Born prefers and suggests using the term 'convalescent' rather than 'pathological' arbitration clauses. He supports that idea on the large number of authorities that rely on the application of the 'validation principle' and of 'effective interpretation' approach to give effect to commercial parties' intention to resolve their international disputes by arbitration. *See*, in general, Gary Born et al., 'Rethinking "Pathological" Arbitration Clauses: Validating Imperfect Arbitration Agreements', in *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy*, ed. Sherlin Tung et al. (Kluwer Law International, 2019).
44. That is, a clause that 'does not specify either the method for appointing the arbitrators or the number of arbitrators comprising the tribunal'. For example: 'The parties agree to resolve their disputes in arbitration', or 'In case of any dispute, arbitration.' Fouchard et al., *International Commercial Arbitration* (*supra* n. 20) p. 497.
45. *See, e.g., Insigma Technology Co Ltd v. Alstom Technology Ltd,* [2009] SGCA 24, Singapore Court of Appeal, para. 31: '[W]here the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars.'
46. Arbitration agreements are not recognised and enforced if they are inoperative or incapable of being performed; according to, e.g., Art. II(3) New York Convention and Art. 8(1) Model Law.

Other common jurisdictional disputes relate to the identity of the parties bound by the arbitration agreement, whether the dispute can be determined in arbitration, and (or) whether it falls within the scope of the agreement.[47]

In sum, jurisdictional issues relate to the arbitration agreements' existence, validity, and scope. However, the parties' agreement and other factors may trump the possibility of commencing (or continuing) arbitral proceedings without calling the arbitrators' jurisdiction into question. Instead, these would be matters of admissibility.

[B] Admissibility

Admissibility refers to the existence of constraints on the parties' right to file their claims.[48] Those constraints prevent the arbitrators from exercising their authority (jurisdiction) to hear and settle substantive disputes.[49] Admissibility issues, then, focus on the claims and not on the decision-maker or forum where the claims will be discussed. Typically, they question the enforceability of the claim and relate it to its nature or particularities.[50] Examples could include whether the claim has been affected by a statute of limitation. This happens where statutory time limits bar actions that seek (e.g.) compensation for damages, regardless of the forum (arbitration or litigation).[51] Claims may also be affected by a contractual time limitation. For example, where the parties' agreement provides that in case of a dispute, the same must be brought to arbitration not later than [e.g., thirty days or any other period] or not before the expiry of a period of time from the moment the dispute arose.[52]

47. *BBA and others v. BAZ and others*, [2020] 2 SLR 453, Singapore Court of Appeal, 28 May 2020, para. 78: '… arguments as to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional, as are questions of the claimant's standing to bring a claim or the possibility of binding non-signatory respondents'. Also, *see*, *e.g.*, *MS 'Emja' Braack Schiffahrts KG, v. Wärtsilä Diesel Aktiebolag,* Case No. Ö 3175/95, Supreme Court of Sweden, 15 October 1997, where the Swedish Supreme Court found that a party that succeeds both the rights and obligations of another in a contract cannot be permitted to circumvent a related arbitration clause.
48. Park, *The Arbitrator's Jurisdiction* (*supra* n. 21) p. 74.
49. *Ibid*.; Michael Hwang et al., 'The Chimera of Admissibility in International Arbitration', in *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, ed. Neil Kaplan and Michael Moser (Kluwer Law International 2016), pp. 287-288: '[a] decision on admissibility is nothing more than a decision on the procedure of the arbitration undertaken by the tribunal in the exercise of its discretion'.
50. *BBA v. BAZ*, [2020] 2 SLR 453 para. 79: '[A]dmissibility …asks whether a tribunal may decline to render a decision on the merits for reasons other than a lack of jurisdiction ….'
51. CIArb, 'Jurisdictional Challenges', in *International Arbitration Practice Guideline* (Chartered Institute of Arbitrators, 2015), para. 6 of the Preamble and Art. 3.
52. *See*, *e.g.*, *Grandeur Electrical Co. Ltd v. Cheung Kee Fund Cheung Construction Co. Ltd,* [2006] HKCA 305, Hong Kong Court of Appeal, 25 July 2006 p. 27 ('Notwithstanding the expiry of the [contractual] time limit, the arbitration agreement remains operative, as it remains possible for the Plaintiff to proceed to arbitration, and to apply to the arbitrator for an extension of time within which to refer the matter to arbitration.'). The Swiss Federal Supreme Court drew the opposite conclusion in DFT 4P.284/1994, reported in 14 ASA Bulletin 673 (1996).

Other admissibility issues include whether the claimant waives its right to arbitrate the dispute, involves determinations of res judicata issues,[53] or whether the claim is 'ripe' (or stale) for arbitral decision. The latter is usually discussed where a party fails to satisfy contractual pre-arbitration requirements. As anticipated in the introduction of this chapter, that happens when the parties stipulate a sequence of amicable or cooperative (rather than confrontational) methods of dispute resolution[54] before commencing arbitration. For example, parties commonly agree to a cooling-off period in their dispute resolution clauses. When a dispute arises, they should negotiate to amicably settle it during that period before submitting it to the arbitrators' decision. Similarly, dispute resolution clauses may require the parties to submit their controversies to mediation or conciliation prior to arbitration.

The English High Court decision in *PAO v. Ukraine* illustrates the conceptual distinction between 'admissibility' and 'jurisdiction' issues. In that decision, Justice Butcher explained that jurisdictional disputes are concerned with the *existence* or not of adjudicative power and its limits. Conversely, admissibility challenges deal with the *exercise* of that adjudicative power:

> Issues of jurisdiction go to the existence or otherwise of a tribunal's power to adjudge the merits of a dispute; issues of admissibility go to whether the tribunal will exercise that power in relation to the claims submitted to it.[55]

A successful jurisdictional objection interrupts the proceedings because it deprives the arbitrators of the authority to decide on the admissibility and merits of the claim. Meanwhile, a successful objection to the admissibility of a claim requires the tribunal to dismiss the claim (or perhaps stay or postpone the proceedings) because it affects the arbitrators' opportunity and timing to decide the dispute, not its investiture.[56]

Thus, the distinction between jurisdictional and non-jurisdictional questions is not solely a matter of optics. Identifying on which side of the conundrum the issue falls is possible and significant.

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53. *See*, *e.g.*, *BTN and others v. BTP and others,* [2020] SGCA 105, Singapore Court of Appeals, 20 October 2020, paras 64, 71: '… the doctrine of *res judicata* falls within the concept of admissibility of claim: it takes aim at the claim, and not at the defect of the improper forum'. *See also*, Gretta L. Walters, *Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems?*, 29(6) *Journal of International Arbitration* (2012), p. 675 DOI: 10.54648/joia2012041, where the author concludes that, 'neither logical, practical, nor policy reasons can justify treating res judicata objections as issues that affect the jurisdiction of an arbitral tribunal'.
54. Klaus Peter Berger, *Law and Practice of Escalation Clauses*, 22(1) *Arbitration International* (2006), p. 2 DOI: 10.1093/arbitration/22.1.1.
55. *PAO Tatneft v. Ukraine,* [2018] EWHC 1797 (Comm), England and Wales High Court (Commercial Court) Decisions, 13 July 2018 para. 97. Similarly, *see*, *Republic of Sierra Leone v. SL Mining Ltd,* [2021] EWHC 286 (Comm), England and Wales High Court (Commercial Court) Decisions, 15 February 2021, para. 18.
56. James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford University Press, 2019), p. 667.

[C] The Jurisdiction-Admissibility Distinction Matters

The immediate effect of a decision on inadmissibility (of claims) and one on lack of jurisdiction (of a tribunal) is similar. In both cases, the arbitration cannot continue. Yet, the correct conceptualisation of an issue as jurisdictional (or not) matters in terms of the allocation of competence to decide the issue. Before the arbitrators have decided on them, a court seized of action covered by an arbitration agreement could hear and answer jurisdictional questions.[57] But, it should not assess and settle objections related to the admissibility of the claims. Arbitrators should decide those matters, with a final and binding effect on the parties.

The correct conceptualisation of an issue as jurisdictional (or not) also matters regarding the standard of court review after arbitrators have preliminarily decided on that issue.[58] Generally, jurisdictional decisions are reviewable, while admissibility decisions are not. Arbitral decisions assuming jurisdiction may be extensively reviewed and invalidated by a competent court.[59] Conversely, arbitral findings on the admissibility of a claim are considered substantive matters and, therefore, not reviewable.[60]

Admittedly, some courts may conceptualise a legal point as procedural and others as substantive in character.[61] Consider, for example, the situation where a party in court proceedings raises a statutory time-bar defence to resist the referral to arbitration. The court may generally approach controversies involving statutes of limitations as substantive matters and, thus, governed by the law applicable to the merits.[62] But courts in a different jurisdiction might treat statute of limitations questions as procedural matters,[63] governed by the law of the forum.[64]

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57. Articles 8(1) of the Model Law and II(3) of the New York Convention. The controversies lie on the extent (prima facie or full) of the court's determination of the jurisdictional dispute.
58. Bermann, *The Role of National Courts* (*supra* n. 3) pp. 450-451.
59. *See*, Arts 16(3) and 34(2)(a)(i) of the Model Law.
60. Park, *The Arbitrator's Jurisdiction* (*supra* n. 21) pp. 81-83. *See also*, Jan Paulsson, 'Jurisdiction and Admissibility', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ed. Gerald Aksen and Robert Briner (ICC Publishing, 2005), p. 601.
61. *See*, *e.g.*, Saar A. Pauker, Substance and Procedure in International Arbitration, 36(1) *Arbitration International* (2020), pp. 8-12 DOI: 10.1093/arbint/aiaa005.
62. CIArb, 'Jurisdictional Challenges', para. 6 of the Preamble and Art. 3.
63. Gary B. Born, *International Commercial Arbitration*, 3rd ed., vol. 2 (Kluwer Law International, 2021), '[i]n some (particularly U.S.) jurisdictions, statutes of limitations have been regarded as "procedural" … . In contrast, civil law states generally regard statutes of limitations as "substantive"', (at §19.03[G][2]). *See*, *e.g.*, the decision in *Chain Sales MKTG., INC. v. Roach*, NY Slip Op 51946, Supreme Court, Suffolk County (US), 10 December 2019, where the court held that determining if a claim is time-barred is a threshold issue that the court must decide, whilst whether a demand for arbitration was properly served is for an arbitrator to decide. Similarly, the decisions of the Indian Supreme Court in *Noharlal Verma v. Disst. Coop.Central Bank Limited*, (2008) 14 SCC (para. 27) and *Kamlesh Babu v. Lajpat Rai Sharma*, (2008) 12 SCC 577.
64. This is not necessarily the case for arbitral tribunals; Pauker, *Substance and Procedure*, (*supra* n. 61) p. 6 ('[i]n international arbitration, characterizing a legal issue or question (…) as procedural rather than as substantive, does not necessarily mean the lex arbitri (…) will apply to that question or issue'.). In this sense, *see*, *e.g.*, *Rual Trade Limited v. Roman Romanov, Vladimir Romanov and Ukio Banko Investicine Grupe UAB*, Swedish Court of Appeal, 24 February 2012.

This then triggers an antecedent choice-of-law enquiry. It requires the court to identify the law applicable to the given dispute, ascertain its content, and apply it to the facts of the case. There could be uncertainties on whether the law governing the merits refers to substantive matters only or procedural too (e.g., statute of limitations).[65] Therefore, whether an issue is characterised as procedural or substantive is relevant as it will impact on *who* should decide them (exclusively or concurrently) and the extent, if at all, of judicial scrutiny. This resonates with Bermann's distinction between 'gateway' and 'non-gateway' issues, according to which the former may be addressed by either a court or an arbitral tribunal, whichever is asked first, but non-gateway issues are uniquely for the arbitrators to decide in the first instance.[66]

The words of the arbitral tribunal in *Abaclat v. Argentine* illustrate the need to characterise these controversies properly. In its Decision on Jurisdiction and Admissibility, the arbitrators explained that:

> Although a lack of jurisdiction or admissibility may both lead to the same result of a tribunal having to refuse to hear the case, such refusal is of a fundamentally different nature and therefore carries different consequences:
>
> (i) While a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment.
> (ii) While a decision refusing a case based on a lack of arbitral jurisdiction is usually subject to review by another body, a decision refusing a case based on a lack of admissibility can usually not be subject to review by another body.
> (iii) Whereby a final refusal based on a lack of jurisdiction will prevent the parties from successfully re-submitting the same claim to the same body, a refusal based on admissibility will in principle not prevent the claimant from re-submitting its claim, provided it cures the previous flaw causing the inadmissibility.[67]

The explanations of the nature and effects of jurisdictional/admissibility matters in the context of investment and commercial arbitration are conceptually similar. For this reason, while the award in *Abaclat v. Argentine* was rendered in the context of an investment dispute, the passage quoted has been endorsed by arbitrators in commercial disputes.[68]

But the distinction between jurisdictional and admissibility issues is not always as clear as day and night; the distinctiveness blurs in the twilight zone.[69] Yet, as

65. *See, e.g.*, Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012), p. 989 ('The general presumption is that a choice of law deals with substantive and not procedural matters. Nevertheless, problems of classification will at times give rise to uncertainty … where different legal families have different views on characterisation.').
66. Bermann, *The 'Gateway' Problem* (*supra* n. 1) p. 8.
67. *Abaclat and others (Case formerly known as Giovanna A Beccara and Others) (Claimants) and The Argentine Republic (Respondent), Decision on Jurisdiction and Admissibility,* ICSID Case No. ARB/07/5, 4 August 2011, para. 247.
68. *See, e.g.*, *Final Award in ICC Case 19581*, August 2014.
69. I borrow the 'twilight zone' metaphor from the award in *Methanex Corporation v. the United States of America,* Partial Award (Preliminary Award on Jurisdiction and Admissibility),

Paulsson put it, '…only a fool would argue that the existence of a twilight zone is proof that day and night do not exist'.[70]

[D] The Twilight Zone Between Jurisdiction and Admissibility

A question that frequently lands in the twilight zone between admissibility and jurisdiction is the failure to comply with pre-arbitration requirements in a multi-tiered (or escalation) dispute resolution clause.[71] As mentioned above, if the pre-arbitration step is understood as jurisdictional, the parties' agreement would be viewed as granting arbitrators adjudicatory authority only after it has been complied with.[72] It would constitute a condition precedent to the parties' consent to arbitrate.[73] Thus, the precondition would amount to 'an element of "acceptance" of the agreement to arbitrate, such that the offer cannot be accepted until that condition is fulfilled'.[74]

If, instead, the failure to comply with the pre-arbitration requirements is understood as an admissibility matter, the parties may only assert substantive disputes after the conditions have been satisfied. However, the authority of the arbitrators is not contested. The United States Supreme Court decision in the *BG v. Argentina*[75] arbitration is an opposite example. It addressed the jurisdictional/non-jurisdictional debate related to pre-arbitration requirements. The Supreme Court dealt with this issue by answering the question: who – court or arbitrator – bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy?

A substantive dispute had arisen under the Bilateral Investment Treaty (BIT) between Argentina and the United States, and it was decided in arbitration under the UNCITRAL Rules in Washington DC.[76] Though this was an investor-State arbitration, its analytical value applies to commercial arbitrations too. In part, because the Supreme Court stated that '[a]s a general matter, a treaty is a contract, though between

UNCITRAL, 7 August 2002 para. 139, where the tribunal used it to acknowledge that 'it is perhaps not easy to define the exact dividing line [between jurisdiction and admissibility], just as it is not easy in twilight to see the divide between night and day.'

70. Paulsson, *Jurisdiction* (*supra* n. 60) p. 601.
71. In Sweden, e.g., authors have concluded that '[i]t is uncertain under Swedish law what the consequences are of commencing an arbitration in disregard of any previous tiers'; Anders Relden et al., 'The Arbitration Agreement', in *International Arbitration in Sweden: A Practitioner's Guide*, ed. Annette Magnusson et al. (Kluwer Law International, 2021), p. 101.
72. For example, if the contract provides that 'no arbitration shall take place unless X'.
73. Conversely, in *BG Group v. Argentina*, the US Supreme Court understood that even if characterised as a condition precedent, a pre-arbitration requirement should be treated as a procedural one, the breach of which does not have jurisdictional consequences. *BG Group Plc v. the Republic of Argentina,* 572 U.S. 25 (2014), 134 S.Ct. 1198, Supreme Court of the United States, 5 March 2014, pp. 1207, 1209.
74. Bermann, *The Role of National Courts* (*supra* n. 3) p. 451.
75. *BG Group Plc v. the Republic of Argentina,* 572 U.S. 25 (2014), 134 S.Ct. 1198.
76. Since the seat of the arbitration was Washington DC, the *lex arbitri* was the Federal Arbitration Act, which is not based on the UNCITRAL Model Law.

nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent.'[77]

The decision of the Supreme Court highlights two crucial points for the characterisation quest. One is the essential role of the parties' intention at the time of the conclusion of the arbitration agreement. The other is the Court's conclusion that pre-arbitration procedural conditions are (generally) non-jurisdictional requirements. They fall within the power of arbitrators to decide, subject to deferential curial review, if any.[78]

Invoking Article 8 of the BIT, BG Group commenced arbitration against Argentina. Whilst denying the substantive claims, Argentina disputed the tribunal's jurisdiction and the admissibility of the claims. Amongst other grounds, Argentina argued that BG Group initiated arbitration without first litigating its claims in Argentina's courts, as the arbitration agreement required. The agreement provided that recourse to arbitration was possible after the parties had litigated the matter for eighteen months at the investment's host State courts (i.e., Argentina), (i) without receiving a final decision, or (ii) where the parties were still in dispute even after the court decision.[79]

In finding that the claims were admissible, the arbitral tribunal concluded that BG had an obligation to litigate in Argentina before bringing its claims to arbitration. However, the State's conduct had waived, or excused, BG Group's failure to comply with the local litigation requirement. The tribunal found that Argentina's legislation had 'hindered' recourse 'to the domestic judiciary'.[80] Therefore, it would have been absurd and unreasonable for BG Group to have complied with the pre-arbitration requirement.[81]

Argentina challenged the award before the US courts. Although the District Court confirmed the award, the Court of Appeals vacated it. It treated the matter as a jurisdictional one and, thus, it reviewed de novo the existence of arbitral authority. The Court of Appeals emphasised that it was bound to identify and enforce the parties'

77. *BG Group Plc v. the Republic of Argentina,* 572 U.S. 25 (2014), 134 S.Ct. 1198, p. 1208. This is not a new doctrine. The US Supreme Court's jurisprudence has long predicated that treaty interpretation differs from statutory interpretation because treaties are contracts, not acts of legislation. *See*, in general, Curtis J. Mahoney, Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties, 116 *Yale Law Journal* (2007) DOI: 10.2307/20455741. For a comprehensive description of the evolution of treaty interpretation in the U.S., *see*, Evan Criddle, The Vienna Convention on the Law of Treaties in US Treaty Interpretation, 44 *Vanderbilt Journal of International Law* (2003).
78. The Supreme Court found support for this approach in earlier decisions, in which it had held, for example, that '… "procedural" questions which grow out of the dispute and bear on its final disposition" are presumptively not for the judge, but for an arbitrator, to decide'. *Howsam v. Dean Witter Reynolds, Inc,* 537 U.S. 79 (2002), Supreme Court of the United States, 10 December 2002, p. 84.
79. Article 8(1)(2) of the Argentina-UK BIT.
80. In response to a financial crisis, Argentina passed emergency measures and stayed all court proceedings that challenged them, including the ones that BG Group alleged had affected its rights under the relevant BIT.
81. *BG Group Plc. v. the Republic of Argentina*, UNCITRAL, Final Award, UNCITRAL, 24 December 2007, paras 146-147. On the merits, the arbitral tribunal awarded BG Group over USD 185 million in compensation for Argentina's breaches of its treaty obligations. *Ibid.*, para. 467(464).

intent, and, in doing so, it noted that the parties had desired, and the arbitration agreement *explicitly* required, judicial proceedings prior to arbitration.[82]

The Court also noted that BG Group had not disputed its ability to commence a lawsuit in Argentina. Instead, it had argued that the requirement was meaningless as no court could ever decide such complex disputes in eighteen months.[83] Therefore, the appellate court found that BG Group was not excused from complying with the pre-arbitration requirement. Given the failure to abide by the pre-arbitration jurisdictional[84] requirement, the arbitral tribunal lacked the authority to decide the substantive dispute. Further, it reiterated that the parties' intention controls whether a court or an arbitrator should answer the jurisdictional question.[85] It also recalled that the default position was that the authority to answer those questions rested on the court unless there was 'clear and unmistakable' evidence that the parties had agreed otherwise.[86] Consequently, the Court of Appeals found that it was a matter for courts to decide de novo (without deference to the arbitrator's decision).

Subsequently, the Supreme Court granted BG Group's petition for *certiorari*, disagreed with the Court of Appeals, and reversed its decision. It characterised the litigation requirement as a purely procedural condition precedent to arbitration rather than a precondition on the parties' consent to arbitrate.[87] In the Supreme Court's view, the litigation requirement 'determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all.'[88] Hence, to the question 'who –court or arbitrator – bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy?', the Supreme Court answered that the matter was for the arbitrators to decide, and courts must review their decisions with deference.

The *Sierra Leone v. SL Mining*[89] case before an English court also dealt with the nature of pre-arbitration requirements in a commercial setting. The dispute resolution clause between the parties provided for a three-month cooling-off period. Failure to amicably settle disputes within that period entitled the parties to submit the dispute to an ICC tribunal.

The case reached the English High Court as a recourse against the arbitral award. The arbitrators had found that they enjoyed jurisdiction and that the claims were admissible despite the claimant 'prematurely' resorting to arbitration. In declining to

82. *The Republic of Argentina v. BG Group Plc,* 665 F.3d 1363, Court of Appeals, Dist. of Columbia Circuit, pp. 1372-1373. The court also noted that the BIT provided 'a prime example of a situation where the "parties would likely have expected a court" to decide the jurisdictional issue.'
83. *See BG Group v. Argentina,* UNCITRAL, Final Award, para. 142.
84. Different from *procedural* requirements concerning the arbitral process itself, and, therefore, reviewable de novo.
85. *The Republic of Argentina v. BG Group Plc,* 665 F.3d 1363, p. 1369.
86. The US Supreme Court case law established this rule; *see, e.g., AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938.
87. *BG Group Plc v. the Republic of Argentina*, 572 U.S. 25 (2014), 134 S.Ct. 1198, pp. 1207, 1209.
88. '[A] claims-processing rule that governs when the arbitration may begin, but not whether it may occur (…).' *Ibid.*, p. 1207.
89. *Republic of Sierra Leone v. SL Mining Ltd,* [2021] EWHC 286 (Comm).

set aside the award, the court explained that where the question relates to whether a claim could be brought to arbitration (i.e., whether arbitration is the proper forum), the issue is typically one of jurisdiction and is subject to judicial review. However, if the point relates to whether a claim should not yet (or at all) be heard by the arbitrators, the issue is typically one of admissibility, and the tribunal decision is final.[90]

An earlier English decision had treated an agreed (four-week) negotiation period as a jurisdictional matter. That is, as a condition precedent to be satisfied before the arbitrators would have *legal authority* (jurisdiction) to hear and determine the dispute.[91]

In Switzerland, compliance with a mandatory mediation agreement appears to qualify as an issue of jurisdiction (*ratione temporis*), in the understanding that jurisdiction is transferred from state courts to arbitration only once such mediation has been conducted.[92] This exemplifies how thorny and unsettled characterisation might be, even within a legal system.

Similarly, the Singapore Court of Appeals understood a contractual pre-arbitration requirement as a jurisdictional matter. It concluded that the required steps 'were conditions precedent to any reference to arbitration' and stressed that the arbitration agreement itself referred to 'disputes…which cannot be settled by mediation…'.[93] In the Court's view, the arbitration agreement could not be invoked because its conditions precedent had not been fulfilled. Therefore, the Court held that the arbitrators had wrongly assumed jurisdiction.[94] Similar circumstances arose a few years later in *Swissbourgh v. Lesotho,* but Menon CJ took the opposite approach. He clarified that the failure to exhaust local remedies was a matter that went towards the *admissibility* of the claim, not the tribunal's jurisdiction.[95]

Interestingly, in *X. Ltd v. Y. S.p.A,* the Swiss Federal Supreme Court eschewed the characterisation debate altogether and opted for a pragmatic solution when deciding the consequence of a party's failure to comply with a mandatory pre-arbitration conciliation. Although the Court set aside the arbitrators' award that had assumed jurisdiction, it stayed the arbitral proceedings. It also kept the same arbitral panel in

90. *Ibid.*, para. 18.
91. *Emirates Trading Agency Llc v. Prime Mineral Exports Private Ltd*, [2014] EWHC 2104 (Comm), England and Wales High Court (Commercial Court) Decisions, 1 July 2014, para. 73. However, it is fair to mention that the court did not engage in a conceptual debate to distinguish jurisdictional and non-jurisdictional issues. Perhaps that discussion was unnecessary for the judge concluded that '[t]he arbitrators have jurisdiction to decide the dispute (…) because the condition precedent to arbitration (…) was satisfied.'
92. *See* Marco Stacher, Jurisdiction and Admissibility under Swiss Arbitration Law–the Relevance of the Distinction and a New Hope, 38(1) *ASA Bulletin* (2020), pp. 55, 59 (commenting on the decision of the Swiss Federal Supreme Court in DFT 142 III 296). The Court adopted the same characterisation (jurisdiction, rather than admissibility) with respect to time limits to initiate arbitration -DFT 4P.284/1994 DOI: 10.54648/asab2020005.
93. *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another,* [2013] SGCA 55, [2013] 1 SLR 973, Singapore Court of Appeal, 18 October 2013, para. 54.
94. *Ibid.*, para. 63.
95. *Swissbourgh Diamond Mines (Pty) Ltd v. the Kingdom of Lesotho*, [2018] SGCA 81, para. 206.

place until the required conciliation process was conducted. Lastly, the Court left it for the arbitrators to determine the timeframe for the arbitration to resume.[96]

Arbitral tribunals have also wrestled with this characterisation issue. The *ICC* Cases 16083[97] and 16262[98] are illustrative. In the former, the respondent had argued that the claimant's failure to comply with *amicable negotiations* and submit its claims to a Dispute Adjudication Board before commencing arbitration affected the arbitrators' jurisdiction rather than the admissibility of the claims. But the arbitral tribunal disagreed with the respondent's characterisation. It found no evidence that the parties' consent to arbitration was contingent on compliance with the various agreed pre-arbitral procedures'.[99] Nor that the parties would have preferred to submit their disputes to state courts if one party failed to comply with the pre-arbitration requirements. The tribunal concluded that the contractual preconditions, if applicable, were not a condition precedent to jurisdiction but a condition precedent to the admissibility of the claims.

In *ICC* Case 16262, the tribunal limited its analysis to the way the parties had characterised and argued the issue. It noted that the contract provided for all disputes to be first referred to a Dispute Adjudication Board and found that the reference to such a Board was a 'condition precedent to arbitration'. Since that condition had not been satisfied, the arbitral tribunal found that it lacked *jurisdiction*. In its decision, the tribunal explicitly indicated that the respondents had not pursued a separate argument that, if the tribunal had jurisdiction, the claimant's claim was nevertheless inadmissible.[100]

These examples are representative of the recurring characterisation debate regarding jurisdictional and non-jurisdictional disputes. Case law also evidences that characterising an issue as jurisdictional or otherwise is not a box-ticking exercise. It depends on the agreement of the parties in each case.[101]

[E] The Distinguishing Factor Between Jurisdictional and Admissibility Issues

This chapter does not claim to hold the key to an across-the-board distinction between jurisdictional and admissibility issues. However, it does cast light on some pivotal

96. *X.__ Ltd v. Y.__ S.p.A*, 4A_628/2015, Switzerland Federal Supreme Court, 16 March 2016.
97. *Interim Award in ICC Case 16083*, July 2010.
98. *Partial Award in ICC Case 16262*, May 2010. For an analysis on the 'jurisdiction or admissibility' approaches taken by arbitrators in construction disputes, *see*, José Ricardo Feris et al., Jurisdictional Issues in Construction Arbitration, *ICC Dispute Resolution Bulletin 2017*, no. 4 (2017).
99. *ICC Case 16083*, para. 65(b).
100. *ICC Case 16262*. For an analysis on the 'jurisdiction or admissibility' approaches taken by arbitrators in construction disputes, *see*, Feris et al., *Jurisdictional Issues* (*supra* n. 98).
101. In Rau's view, '… everything always reduces itself ultimately to "agreement" – and since the allocation of power responds to the choice of the appropriate default rule, it is hard to see the objection to allowing the parties to vary the assumed baseline presumption by contract.' Alan Scott Rau et al., BG Group and Conditions to Arbitral Jurisdiction, 43 *Pepperdine Law Review* (2015), p. 128.

factors. Admittedly, resolving jurisdictional challenges involves an interpretative examination of the parties' intentions and the wording of their contract.[102] Therefore, identifying and determining the parties' intentions serve as 'the touchstone and the lodestar'[103] in the characterisation quest.

In interpreting the parties' intention, the decision-maker can presume that the parties viewed the pre-arbitration conditions as procedural steps in their agreed dispute resolution process.[104] Consequently, it is natural that those steps are placed on the admissibility (not jurisdictional) side of the dividing line[105] and that arbitrators (not judges) are empowered to interpret the pre-arbitration requirements.[106] Dispelling the parties' presumptive intention would require clear reasons and evidence that the procedural steps were conditions precedent to consent to arbitrate. In that situation, courts would also be entitled to review and interpret the requirements.

The lodestar may take the form of a question and enquiry whether the objecting party aims at the arbitrators or the claim. Paulsson, for example, approaches that question with a result-driven test based on the reason behind a (potentially) successful challenge. If the outcome of the challenge translates into the impossibility of bringing the claim to the forum seized, then the dispute could be characterised as a jurisdictional one.[107] The dispute hinges on the 'investiture of the arbitral tribunal as such'.[108] Where, instead, the reason for the successful challenge is that the claim should not (yet or at all) be heard, then the dispute could be characterised as one on admissibility.[109]

With different words but similar content, the Singapore Court of Appeal talks about a 'tribunal versus claim' test to distinguish whether an issue focuses on jurisdiction or admissibility:

> [T]he 'tribunal versus claim' test underpinned by a consent-based analysis should apply for purposes of distinguishing whether an issue goes towards jurisdiction or admissibility. The 'tribunal versus claim' test asks whether the objection is targeted at the tribunal (in the sense that the claim should not be arbitrated due to a defect in or omission to consent to arbitration), or at the claim (in that the claim itself is defective and should not be raised at all).[110]

102. Born, *International Commercial Arbitration* (*supra* n. 22) pp. 999-1000.
103. Park, *The Arbitrator's Jurisdiction* (*supra* n. 21) p. 80.
104. *C v. D*, [2022] HKCA 729, Hong Kong Court of Appeal, 7 June 2022, para. 57.
105. This is the approach that Born and others prefer. *See*, Born, *International Commercial Arbitration* (*supra* n. 22) p. 1000. Also, Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018), pp. 282-283.
106. Born, *International Commercial Arbitration* (*supra* n. 22) p. 1001. *BG Group Plc v. the Republic of Argentina,* 572 U.S. 25 (2014), 134 S.Ct. 1198, p. 1212: '… evidence that shows the parties had an intent contrary to our ordinary presumptions about who should decide threshold issues related to arbitration.'
107. Paulsson, *Jurisdiction* (*supra* n. 60) pp. 614-616. Hwang and Lim put it in similar terms: 'the … question which the tribunal [or a court] should be asking itself is whether or not the objection, if factually proven, would impinge upon the consent of the objecting party to the arbitration, so as to amount to a jurisdictional objection.' Hwang et al., *The Chimera of Admissibility in International Arbitration* (*supra* n. 49) pp. 287-288.
108. Paulsson, *Jurisdiction* (*supra* n. 60) p. 617.
109. *Ibid*.
110. *BBA v. BAZ*, [2020] 2 SLR 453, paras 76-77.

More recently, the Hong Kong Court of Appeal confirmed the 'tribunal versus claims' test, cementing the (generally accepted) understanding that the pre-arbitration requirements in 'escalation clauses' involve issues of admissibility of the claim(s) rather than arbitral jurisdiction.[111]

If we were to set a timeline or rule of priority for the intention-finding exercise, the admissibility-related enquiry would generally take place after the tribunal's jurisdiction has been established.[112] It is by a positive finding of jurisdiction[113] that arbitrators can assess the parties' substantive arguments on the admissibility of the claims. That includes whether a condition precedent to arbitration exists and whether it was fulfilled.[114]

§11.05 CONCLUSION

The correct characterisation of jurisdictional and admissibility disputes is crucial. It determines the preliminary allocation of decision-maker powers and the post-decision extent of court review.

As an attribute of arbitral tribunals, jurisdiction is synonymous with the legal authority to settle substantive disputes. Jurisdictional disputes, therefore, revolve around the existence, validity, and scope of that authority. Issues of admissibility, for their part, question the opportunity for a tribunal to exercise its (existent) authority.

Ingenious lawyering (or ignorance rather than design) may blur the distinction between an issue of jurisdiction and admissibility. Given the contractual nature of arbitration, the touchstone and the lodestar rest on the parties' intention. After all, party agreement is the doorway to arbitration. Their consent is foundational, as it creates an authority that did not exist: the arbitrators' authority to hear and settle the parties' substantive disputes. It is also dimensional because it shapes the jurisdictional contours. To delimit the extent of power, it first needs to exist.

It is no surprise then that the decisive task in the characterisation exercise is to establish whether the parties intended to arbitrate their substantive disputes, and the intended nature of their pre-arbitration agreements.

111. *C v. D*, [2022] HKCA 729, 7 June 2022.
112. Yas Banaiftemi, The Impact of Corruption on 'Gateway Issues' of Arbitrability, Jurisdiction, Admissibility and Procedural Issues, 13 *D. Baizeau, RH Kreindler, Addressing Issues of Corruption in Commercial and Investment Arbitration: Dossiers of the ICC Institute of World Business Law* (2015) para. 17: 'Admissibility is … decided after a tribunal has affirmed its jurisdiction, whereas objections to jurisdiction strike at the logically prior ability of a tribunal to give rulings as to the admissibility or merits of a claim.'
113. Admittedly, arbitrators render jurisdictional decisions only (as a rule) where a party challenges them. Therefore, a decision on admissibility of a claim(s) does not always require a decision on jurisdiction.
114. CIArb, 'Jurisdictional Challenges', Art. 3. Paulsson, *Jurisdiction* (*supra* n. 60) pp. 607-608.