

# Villanova University Charles Widger School of Law

---

From the Selected Works of John Y Gotanda

---

August, 2001

## An Efficient Method for Determining Jurisdiction in International Arbitrations

John Y Gotanda, *Villanova University School of Law*



Available at: <https://works.bepress.com/gotanda/10/>

## Articles

### An Efficient Method for Determining Jurisdiction in International Arbitrations

JOHN YUKIO GOTANDA \*

*International arbitration has become the preferred method for resolving disputes between parties of different nationalities, because it theoretically offers them a neutral forum to quickly and economically settle their differences. Unfortunately, the methods currently being used to determine challenges to the jurisdiction of arbitral tribunals often frustrate these objectives because these methods do not use the most efficient procedure to resolve such challenges. This article offers a new approach for handling jurisdictional challenges that would provide arbitrators with uniform guidelines for resolving these claims and decrease the amount of time and the cost to resolve the dispute.*

I.	INTRODUCTION.....	12
II.	OVERVIEW .....	15
	A. Time Period for Raising Jurisdictional Challenges.....	16
	B. Grounds for Challenging the Tribunal's Jurisdiction.....	18
	C. Procedures for Resolving Jurisdictional Challenges.....	20
	1. National Laws and Arbitral Rules on Determining Arbitral Jurisdiction.....	22
	2. Commentators and Tribunal Decisions on Determining Arbitral Jurisdiction .....	25

---

\* Professor of Law and Director of the J.D./M.B.A. Program, Villanova University School of Law. Thanks are due to Karen Albright, Andrew Geary, Lisa Lamb and Davis Wright for valuable research assistance.

III.	MODEL APPROACH FOR DETERMINING ARBITRAL JURISDICTION .....	30
	A. <i>Arbitral Jurisdiction</i> .....	30
	B. <i>When the Agreement Addresses the Procedure for Resolving Jurisdictional Challenges</i> .....	30
	C. <i>When Arbitral Rules or National Laws Set Forth the Procedure for Resolving Jurisdictional Challenges</i> .....	32
	D. <i>Default Approach—Conducting a Cost-Benefit Analysis</i> .....	34
IV.	CONCLUSION .....	41

## I. INTRODUCTION

International arbitration has long enjoyed a reputation as the preferred method for resolving disputes between transnational contracting parties.<sup>1</sup> According to commentators, proceedings before an arbitral panel provide a better method of resolving disputes than litigation before national courts because they provide a more neutral forum and result in a more easily enforceable award, rendered in a quicker and more economical fashion.<sup>2</sup> While international arbitration has indeed become the method of choice for many parties when resolving international disputes, it has experienced growing pains. Many complain that arbitration is often expensive<sup>3</sup> and rarely

1. See L. Yves Fortier, *International Arbitration on the Eve of the New Millennium*, 1 INT'L ARB. L. REV. 1, 1–2 (1997); Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution's Role*, 49 DISP. RESOL. J. 12, 12 (1994); Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Award: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 868 (1996).

2. Margaret Wang, *Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?*, 16 ARB. INT'L 189, 199 (2000); John Kendall, *Role of the Expert/Adjudicator in Support of Arbitration in International Long-Term Contracts*, 27 INT'L BUS. LAW. 201, 202 (1999); James H. Carter, *Dispute Resolution and International Agreements*, 703 PRAC. L. INST./COM. L. PRAC. COURSE HANDBOOK 405 (Oct. 1994); Paul E. Mason, *The Corporate Counsel's View: International Commercial Arbitration*, 49 DISP. RESOL. J. 22, 22 (1994); Gerald Aksent, *The Need to Utilize International Arbitration*, 17 VAND. J. TRANSNAT'L L. 11, 15 (1984).

3. See Richard H. Kreindler, *Arbitration or Litigation: ADR Issues in Transnational Disputes*, 52 DISP. RESOL. J. 79, 80 (1997); Andrew I. Okekeifere, *Commercial Arbitration as the Most Effective Dispute Resolution Method—Still a Fact or Now a Myth?*, 15 J. INT'L ARB. 81, 86–88 (1998); see also John Y. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1, 2 (1999); John Yukio Gotanda, *Setting Arbitrators' Fees: An International Survey*, 33 VAND. J. TRANSNAT'L L. 779, 781 (2000).

results in a quick decision.<sup>4</sup> These problems are exacerbated when a party challenges the jurisdiction of the tribunal. In this article, I offer a new approach for determining the proper method to resolve questions of arbitral jurisdiction, which would make the arbitration process more efficient, both in monetary and temporal terms.

Today, parties commonly challenge a tribunal's jurisdiction to hear all or part of the dispute even when they previously signed a written agreement to arbitrate.<sup>5</sup> Resolving these claims is often crucial to the arbitration because an award made without jurisdiction may be unenforceable.<sup>6</sup> In addition, the method for resolving jurisdictional challenges is important because it affects the cost of arbitration as well as the length of time it will take to resolve the dispute.

In general, an arbitral tribunal has two options when faced with a jurisdictional challenge at the outset of the dispute. It can either hold separate hearings on the merits and the issues relating to jurisdiction and issue separate awards resolving these claims or it can resolve all of the issues in a single proceeding and award.<sup>7</sup>

---

4. See Gary B. Born, *Planning for International Dispute Resolution*, 17 J. INT'L ARB. 61, 66 (2000); Charles N. Brower & Abby Cohen Smutny, *Arbitration Agreements Versus Forum Selection Clauses: Legal and Practical Considerations*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION [Fourteenth Sokol Colloquium] 37, 41-43 (Jack L. Goldsmith ed., 1997). For further discussion of the downside of arbitration, see William W. Park, *When and Why Arbitration Matters*, in THE COMMERCIAL WAY TO JUSTICE, 73, 82-90 (G.M. Beresford Hartwell ed., 1997).

5. See Michael F. Hoellering, *AAA Administration of International Arbitration Proceedings*, 13 FOREIGN INV. L.J. 51, 53 (1998); see also ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 262 (3d ed. 1999) (stating, "[p]artial challenges to the jurisdiction of an arbitral tribunal have become relatively common"); Ibrahim F.I. Shihata & Antonio R. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 FOREIGN INV. L.J. 299, 321 (1999) (noting that "[p]arties have raised objections to jurisdiction relating to the dispute in close to half of the cases submitted to arbitration under the ICSID Convention").

6. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V.1(a), 17 U.S.T. 1270, 575 U.N.T.S. 159 (codified at 22 U.S.C. § 201 et seq. (1994)) [hereinafter New York Convention] (stating that the recognition and enforcement of an arbitral award may be refused if the arbitration agreement "is not valid under the laws to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made"); see also N.C.P.C. § 1502.1 (Fr.); United Nations Commission on International Trade Law Model Law, art. 36(1)(iv), reprinted in HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION* 1054 (1989) [hereinafter UNCITRAL MODEL LAW].

7. See International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings, art. 41(3)-41(5), available at <http://www.worldbank.org/icsid/basicdoc/80-81.htm> [hereinafter ICSID Rules]; Arbitration Act 1996, ch. 23, 31, 32 (1996) (Eng.).

Bifurcating the proceedings may result in savings to the parties if the tribunal rules that there is no jurisdiction to hear the dispute and, therefore, need not consider the merits. However, a single unitary proceeding may be more efficient when the jurisdiction of the tribunal is clear and the facts needed to decide the jurisdictional issue are also needed to resolve the merits.<sup>8</sup>

Currently, there exists no consensus as to whether the jurisdictional challenges should be separated from the merits. Some commentators have argued that, in principle, all issues should be decided in a single proceeding.<sup>9</sup> In contrast, others have advocated that, as a general rule, jurisdictional issues should be decided separately from the merits.<sup>10</sup> Furthermore, there is no agreement on the factors that a tribunal should consider when resolving this question, or on the weight to give those factors. Some advocate resolving this question by determining how closely the jurisdictional issues are intertwined with the merits; that is, the tribunal should use a unitary proceeding if jurisdictional questions are intimately linked to the merits.<sup>11</sup> Others argue that the arbitrator must take into account the delay that will ensue from bifurcating the issues.<sup>12</sup> However, commentators only rarely give any consideration to the likelihood that the respondent will succeed on the jurisdictional challenge.

The lack of uniformity in approaches for resolving jurisdictional objections results in the inability of the parties to predict, with any degree of certainty, the procedure that tribunals will use to resolve jurisdictional issues and, therefore, the resolution of those issues. Moreover, because tribunals do not consider the likelihood of success of the jurisdictional challenge, they resolve jurisdictional challenges without using the most efficient method.

---

8. See REDFERN & HUNTER, *supra* note 5, at 271.

9. See W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 359 (3d ed. 2000) ("Ordinarily, it is desirable to determine all issues and decide all claims in a single award.").

10. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 457 (2d ed. 2001) ("In general, the more sensible course is to conduct a preliminary proceeding on the question of jurisdiction."); RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 65 (2000) ("It is usually preferable to determine any challenge to jurisdiction as a preliminary issue so as to save time and money should the arbitral panel find that they do not have jurisdiction.").

11. See FOUCHARD, GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 743 (Emmanuel Gaillard & John Savage eds., 1999); REDFERN & HUNTER, *supra* note 5, at 270.

12. CRAIG ET AL., *supra* note 9, at 363-64.

This increases the cost of the arbitration and unduly delays the resolution of the dispute.

To remedy these problems, I propose that tribunals employ a new model, which seeks to use the procedure that will result in the most efficient method for resolving the dispute. The model includes three steps. The first step calls for the tribunal to determine whether the parties have agreed to let it resolve the jurisdictional issues and the merits in a unitary or in bifurcated proceedings. If they have, then the tribunal should honor their request, unless there exists a mandatory rule of law that overrides their private contractual arrangement. However, if the parties do not agree on a procedure, then the arbitrators would proceed to the second step. This step directs the tribunal to examine the relevant arbitral rules and national laws to see if they set forth a procedure for handling jurisdictional objections. If they do, then the tribunal should employ that approach. In the event that neither step provides sufficient guidance, then the tribunal would proceed to step three. Here, the tribunal compares the cost of a unitary proceeding to the cost of bifurcated proceedings, after having computed various factors and having weighed them by the tribunal's preliminary assessment of the likelihood of the claimant's success on the jurisdictional issue(s). The tribunal then selects the procedure that results in the lowest transactional cost to resolve the dispute.

This model provides a clear method for resolving jurisdictional challenges. It respects the parties' freedom to determine the procedures that they would prefer be used to resolve the dispute and conforms to applicable arbitral rules and national arbitration laws. As a default, it uses an approach that focuses on efficiency to determine whether the jurisdictional issues should be decided either as a preliminary matter or together with the merits. This approach ultimately should result in temporal and monetary savings to the parties.

## II. OVERVIEW

Whether a tribunal has jurisdiction is fundamental to the arbitration; an award issued without jurisdiction may be unenforceable.<sup>13</sup> There are a number of issues raised by jurisdictional

---

13. See *The Arab Republic of Egypt v. Southern Pac. Prop. Ltd. & S.P.P. (Middle East) Ltd.*, Cour d'Appel de Paris, July 5, 1984; New York Convention, *supra* note 6, art. V(1)(a),

challenges, including the timing of when such challenges must be raised, the grounds for challenging the jurisdiction of the tribunal, and the method used by the tribunal to resolve such challenges.<sup>14</sup>

#### A. *Time Period for Raising Jurisdictional Challenges*

Claims that the tribunal lacks jurisdiction may be raised by a party or by the arbitral tribunal.<sup>15</sup> When the claim may be raised is typically governed by arbitral rules or national laws.

Some arbitral rules, like the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (the "ICSID Rules"), allow the issue of jurisdiction to be raised at any time during the arbitral proceedings.<sup>16</sup> Other rules require that jurisdictional challenges be raised at the beginning of the arbitration. Examples of these rules include the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL Rules"), the London Court of International Arbitration

(c), (2); N.C.P.C. art. 1502.1 (Fr.); UNCITRAL MODEL LAW, *supra* note 6, art. 36.1(a)(i), (a)(iv), (b); Julian D.M. Lew, *Determinations of Arbitrators—Jurisdiction and the Public Policy Limitations on that Jurisdiction*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 73, 74 (Julian D.M. Lew ed., 1987).

14. Other issues may arise from two important principles of jurisdiction: (1) *Compétence-Compétence*, which is the power of the arbitral tribunal to decide on its own jurisdiction, and (2) the separability or autonomy principle, which provides that the validity of the arbitration clause is determined independently from the validity of the contract in which it is contained. For a detailed discussion of these principles, see FOUCHARD, GAILLARD & GOLDMAN, *supra* note 11, at 198–213, 395–401; TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION—TRANSNATIONAL PERSPECTIVE 109–40 (1999); CRAIG ET AL., *supra* note 9, at § 28.07.

15. See The 1998 Arbitration Rules of the International Chamber of Commerce, art. 6.2 (1998), reprinted in 22 Y.B. COM. ARB. 345, 351 (1997) [hereinafter ICC Rules] ("If the Respondent does not file an Answer . . . or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist."); ICSID Rules, *supra* note 7, art. 41(2) ("The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or ancillary claim before it is within the jurisdiction of the Centre and within its own competence."); see also Eric A. Schwartz, *The Domain of Arbitration and Issues of Arbitrability: The View from the ICC*, 9 FOREIGN INV. L.J. 17, 24–30 (1994) (noting that the ICC Rules allow the tribunal to raise issue of jurisdiction).

16. See ICSID Rules, *supra* note 7, art. 41; Christoph Schreuer, *Commentary on the ICSID Convention*, 12 FOREIGN INV. L.J. 365, 382–83 (1997); see also W. LAURENCE CRAIG, PARK & PAULSON'S ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES WITH COMMENTARY 60 (1998) (stating that the ICC Rules "do not contain any requirement that objections to the jurisdiction of the Arbitral Tribunal or the arbitrability of any claim be made at any particular time" and thus "such defenses may be raised throughout the proceedings").

Rules (the "LCIA Rules"), and the International Arbitration Rules of American Arbitration Association (the "AAA Int'l Rules").<sup>17</sup> The LCIA Rules further provide that "[a] plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim."<sup>18</sup>

The arbitration laws of some countries also specify the time periods for raising jurisdictional challenges. Like arbitral rules, the requirements vary among countries. For example, in Switzerland, objections to the jurisdiction of the tribunal must be raised prior to any defense on the merits.<sup>19</sup> By contrast, in Finland, jurisdictional challenges can, in principle, be raised at any time during the arbitration. In fact, a party may file a court action challenging the arbitral tribunal's authority to hear the dispute even before the tribunal has had an opportunity to rule on the jurisdictional issue.<sup>20</sup> In the United States, the Federal Arbitration Act contains no provisions

---

17. United Nations Commission on International Trade Law Arbitration Rules, art. 21.3, *reprinted in* 15 I.L.M. 701 (1976) [hereinafter UNCITRAL Rules] ("A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim."); London Court of International Arbitration Rules, art. 23.2 (1998), *available at* <http://dialspace.dial.pipex.com/town/square/xvc24/rulecost/arbitration.htm> [hereinafter LCIA Rules] ("A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim."); American Arbitration Association International Arbitration Rules, art. 15.3 (Sept. 1, 2000), *available at* <http://www.adr.org/rules/international/AAA175-0900.htm#Article15> [hereinafter AAA Int'l Rules] ("A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection."); *see also* Hans Smit, *Managing an International Arbitration: An Arbitrator's View*, 5 AM. REV. INTL ARB. 129 (1991).

18. LCIA Rules, *supra* note 17, art. 23.2.

19. Swiss Private International Law Act, ch. 12: International Arbitration, art. 186.2 (Dec. 18, 1987), *reprinted in* Robert Briner, *Switzerland* (Dec. 1998), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, annex II-4 (Jan Paulsson ed., 2000); *see also* Ch. IV, 1040(2) ZPO (Ger.) (German Institution of Arbitration and the German Federal Ministry of Justice trans.) *reprinted in* H. SMIT & V. PECHOTA, 1 SMIT'S GUIDES TO INTERNATIONAL ARBITRATION: NATIONAL ARBITRATION LAWS Ger B(2)-7 (2001) (a plea that the tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence).

20. Gustaf Möller, *Finland* (Oct. 1995), in 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, 17-18 (Jan Paulsson ed., 2000).



specifying when jurisdictional challenges are to be raised.<sup>21</sup> However, some states have enacted arbitration laws based on the UNCITRAL Model Law, which imposes a time limit for raising jurisdictional challenges, but permit a tribunal to consider such claims if the delay in raising the claims was "justified."<sup>22</sup>

### B. *Grounds for Challenging the Tribunal's Jurisdiction*

Parties may challenge the jurisdiction of the tribunal on a number of grounds.<sup>23</sup> These claims include, *inter alia*, that (1) there exists no agreement to arbitrate between the parties,<sup>24</sup> (2) the arbitration agreement is void or illegal,<sup>25</sup> (3) the scope of the agreement does not cover the respondent,<sup>26</sup> (4) the issues presented

21. See Federal Arbitration Act, 9 U.S.C. § 1 (1994).

22. See, e.g., CAL. CIV. PROC. CODE § 1297.164 (West Supp. 2000); OHIO REV. CODE ANN. § 2712.34 (West 2001); TEX. REV. CIV. PRAC. & REM. CODE § 172.082 (Vernon Supp. 2001); see also UNCITRAL MODEL LAW, *supra* note 6, art. 16(2).

23. In general, a respondent wishing to challenge the jurisdiction of the tribunal has a number of options, including: (1) boycotting the arbitration, (2) presenting its jurisdictional objections to the tribunal, (3) filing suit in national court to resolve the issue of jurisdiction, or (4) participating in the arbitration and challenging the award in the appropriate court or in a proceeding to enforce the award. See REDFERN & HUNTER, *supra* note 5, at 272-75.

24. See, e.g., Interim Award in Case No. 7929 (Fin. v. U.S.) of 1995 (ICC 1995), reprinted in 25 Y.B. COM. ARB. 312, 312-15 (2000) (challenging the jurisdiction of the tribunal on the grounds that no agreement to arbitrate existed because the contract between the parties that contained the arbitration clause was terminated prior to the arbitration); Decision of the Halogaland Court of Appeal, 16 Aug. 1999, reprinted in 2 STOCKHOLM ARB. REP. 121, 122 (1999) (challenging the jurisdiction of the tribunal on the grounds that no agreement to arbitrate existed because the contract had been entered into via e-mail and had not been signed by both parties to the dispute).

25. See, e.g., Final Award in Case No. 5294 (Den v. Egypt) of Feb. 22, 1988 (ICC 1988), reprinted in 14 Y.B. COM. ARB. 137, 139-40 (1989) (challenging the jurisdiction of the tribunal on the grounds that the arbitration clause was invalid because it violated the Egyptian "ordre public" by not providing for the appointing of the arbitrator itself); Partial Award on Jurisdiction and Admissibility in Case No. 6474 of 1992 (ICC 1992), reprinted in 25 Y.B. COM. ARB. 279, 280 (2000) (challenging the jurisdiction of the tribunal on the grounds that because it was not recognized as a state by the international community, international arbitration of commercial dealings with the republic would violate international public policy).

26. See, e.g., Tradex Hellas S.A. (Greece) v. Albania, Dec. 24, 1996, reprinted in 25 Y.B. COM. ARB. 221, 222-23 (2000) (challenging the jurisdiction of the tribunal on the grounds that Tradex was not a "foreign investor" and that Albania was not a party to the "dispute" at issue under Albania Foreign Investment Law No. 7764 of Nov. 2, 1993); Final Award in Case No. 1398 of Mar. 18, 1999 (Chamber of National & International Arbitration of Milan 1999), reprinted in 25 Y.B. COM. ARB. 382, 383 (2000) (challenging the jurisdiction of the tribunal on the grounds that the defendant was not a party to the dispute because it transferred all activities relating to the dispute to another party prior to the arbitration);

are non-arbitrable,<sup>27</sup> (5) the issues presented fall outside the scope of the arbitration agreement,<sup>28</sup> and (6) the claimant has failed to comply with procedural prerequisites to arbitration.<sup>29</sup>

---

Interim Award in Case No. 7337 (Japan v. Swed.) of 1996 (ICC 1996), *reprinted in* 24 Y.B. COM. ARB. 149, 151 (1999) (challenging the jurisdiction of the tribunal on the grounds that defendant was not a party to the exclusive distributorship contract containing the agreement to arbitrate).

27. *See, e.g.*, Partial Award on Jurisdiction and Admissibility in Case No. 6474 of 1992 (ICC 1992), *reprinted in* 25 Y.B. COM. ARB. 279, 309 (2000) (challenging the jurisdiction of the tribunal on the grounds that "questions pertaining to bills of exchange are not arbitrable under both the European country and the law of the territory"); *see also* Lew, *supra* note 13, at 78–85 (discussing claims that cannot be submitted to arbitration under the law of the place of arbitration or under the law governing the contract).

28. *See, e.g.*, Final Award in Case No. 1398 of Mar. 18, 1999 (Chamber of National & International Arbitration of Milan 1999), *reprinted in* 25 Y.B. COM. ARB. 382, 383 (2000) (challenging the jurisdiction of the tribunal on the grounds that the claimant's claim lead to extra-contractual liability not provided for in the agreement and was therefore outside the scope of the arbitration clause guidelines); Tradex Hellas S.A. (Greece) v. Albania, Dec. 24, 1996, *reprinted in* 25 Y.B. COM. ARB. 221, 223 (2000) (challenging the jurisdiction of the tribunal on the ground that the claimant's claims were outside the scope of the arbitration agreement, which covered only claims arising out of or relating to expropriation); Partial Award in Case No. 7319 (Fr v. Ir) (ICC 1992), *reprinted in* 24 Y.B. COM. ARB. 141, 147 (1999) (challenging the jurisdiction of the tribunal with respect to the unfair competition claims because the arbitration agreement was limited to claims relating to "the interpretation, the execution or the enforcement" of the contract between the parties); Ethyl Corp. v. Canada, Award of June 24, 1998, *reprinted in* 24 Y.B. COM. ARB. 211, 212 (1999) (challenging the jurisdiction of the tribunal on the grounds that the claim of breach was outside the scope of the arbitration agreement).

29. *See, e.g.*, Tradex Hellas S.A. (Greece) v. Albania, Dec. 24, 1996, *reprinted in* 25 Y.B. COM. ARB. 221, 223 (2000) (challenging the jurisdiction of the tribunal on the grounds that the claimant did not make a good faith effort to resolve the dispute amicably before resorting to arbitration as required by the arbitration agreement and general principles of international law); Ethyl Corp. v. Canada, Award of June 24, 1998, *reprinted in* 24 Y.B. COM. ARB. 211, 212 (1999) (challenging the jurisdiction of the tribunal on the grounds that the claimant failed to fulfill certain procedural requirements that must be met before a tribunal could consider the claim). This list is not exhaustive. One commentator noted that jurisdictional issues may involve the following:

Has the correct party been sued?

Does the successor of rights have *locus standi*?

Is the scope and reach of the arbitration clause extended to other entities of a group of companies?

Does the arbitration clause signed by a state-controlled company or organization also bind the state to arbitral jurisdiction?

Is a contract signed by one governmental official but without a council of ministers' approval valid and binding thus creating arbitral jurisdiction?

Does the claimant have *locus standi* to pursue the particular claim?

Has an arbitration clause been validly signed on behalf of a party?

*Quid ius* where signing formalities were not complied with?

Does a party have capacity to sue or be sued?

Additionally, arbitrations under specific rules may provide additional grounds for a jurisdictional challenge. For example, challenges to jurisdiction in ICSID arbitrations may include a discussion of whether a claim arises directly from an investment within the meaning of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,<sup>30</sup> and whether the dispute involves a signatory state or designated state entity and a national of another signatory state.<sup>31</sup>

### C. *Procedures for Resolving Jurisdictional Challenges*

When a party contests the jurisdiction of the tribunal, the arbitrators can resolve the challenge by entertaining the jurisdictional issues separate from those relating to the merits or by joining the issues together in a unitary proceeding.<sup>32</sup> In the first situation, the tribunal could issue an award on the matter of jurisdiction, either as an interim award if it finds that it has jurisdiction or as a final award, dismissing the case, in the event it concludes that there is no jurisdiction.<sup>33</sup> It could also incorporate its decision on jurisdiction

Is the subject matter arbitrable?

Is the subject matter covered by the scope and reach of the arbitration clause?

Can third parties be compelled to take part in an arbitration?

Can third parties intervene on their own motion?

Can arbitration be conducted as a multiparty arbitration?

Can a subcontractor be involved in a consolidated arbitration with the employer and the general contractor due to an arbitration clause incorporated by reference?

Has the arbitral tribunal been validly constituted?

Marc Blessing, *The ICC Arbitral Process, Part III: The Procedure Before the Arbitral Tribunal*, 3 ICC COURT ARB. BULL. 18, 27 (1992); see also Edward R. Leahy & Carlos J. Bianchi, *The Changing Face of International Arbitration*, 17 J. INT'L ARB. 19, 24-25 (2000).

30. 575 U.N.T.S. 160 (No. 8359) (1966).

31. See Schreuer, *supra* note 16, at 389.

32. See BORN, *supra* note 10, at 456; REDFERN & HUNTER, *supra* note 5, at 270.

33. See, e.g., Interim Award in Case No. 7929 (Fin. v. U.S.) of 1995 (ICC 1995), reprinted in 25 Y.B. COM. ARB. 312, 323 (2000) (ruling, in an interim award, that there was a binding arbitration agreement in force between the parties and that the tribunal had proper jurisdiction over certain claims); Partial Award in Case No. 7319 (Fr v. Ir) (ICC 1992), reprinted in 24 Y.B. COM. ARB. 141, 148 (1999) (deciding, in a partial award, that Irish law was the applicable law and that the arbitrator had proper jurisdiction over the claims in question); Interim Award in Case No. 7337 (Japan v. Swed.) of 1996 (ICC 1996), reprinted in 24 Y.B. COM. ARB. 149, 161 (1999) (ruling, in an interim award, that the arbitrator "ha[d] jurisdiction on defendant no. 1 with respect to claimant's claims relating to breach of the exclusive distributorship agreement and jurisdiction on defendant no. 2 with respect to

into the final award.<sup>34</sup> In some cases, tribunals have disposed of some jurisdictional challenges by an interim award and joined others with the merits.<sup>35</sup> The rationale for resolving the jurisdictional issues separately from the merits is ostensibly one of efficiency: unless the tribunal's jurisdiction is clear, there is no need to undertake lengthy and costly proceedings to resolve other issues. In addition, deciding the issue of jurisdiction as a preliminary matter allows the parties to address fully the issue of jurisdiction in a separate hearing and to know where they stand at an early stage of the proceedings.<sup>36</sup> The proffered rationale for a unitary proceeding is that resolving all issues in one proceeding is likely to be cheaper and more expedient.<sup>37</sup>

---

claimant's claims relating to guarantee liability for machines"); *Ceskoslovenska Obchodni Banka, A.S. (Czech Republic) v. The Slovak Republic*, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, *reprinted in* 24 Y.B. COM. ARB. 44, 70 (1999) (ruling, in an interim award, that the dispute was "within the jurisdiction of the Centre and the competence of the Tribunal"); *Waste Mgmt., Inc. v. United Mexican States*, June 2, 2000, *reprinted in* 15 FOREIGN INV. L.J. 214, 239 (2000) (deciding, in a final award, that the tribunal did not have jurisdiction because the claimant did not fulfill the waiver requirement set forth in NAFTA Article 1121).

34. See, e.g., *Letco v. Liberia*, Award (Mar. 31, 1986), 2 ICSID REP. 343, 349-54 (1994); Final Award in Case No. 1398 of Mar. 18, 1999 (Chamber of National & International Arbitration of Milan 1999), *reprinted in* 25 Y.B. COM. ARB. 382, 383 (2000). One commentator prefers, in cases where the tribunal concludes that it is competent to decide the merits of the dispute, not to render an interim award on jurisdiction, but instead to delay the issuance of that decision until it renders the final award. See Smit, *supra* note 17, at 135. He states that this will prevent the respondent from immediately challenging the jurisdictional decision in a court proceeding. *Id.*

35. See *Amco v. Indonesia*, Decision on Jurisdiction, Sept. 25, 1983, 1 ICSID REP. 389, 390 (1993) (deciding that "legal objections to jurisdiction raised by the Respondent" were to be dealt with as a preliminary matter, and that the objections to jurisdiction, which "involve examination of facts by means of testimonies", were to be joined to the further examination on the merits of the claims); *SOABI v. Senegal*, Decision on Jurisdiction, Aug. 1, 1984, 2 ICSID REP. 175, 189 (1994) (deciding as a preliminary question a jurisdictional challenge concerning nationality of claimant and joining to the merits a jurisdictional challenge concerning whether the parties agreed to submit the dispute to the jurisdiction of ICSID); *Ethyl Corp. v. Canada*, Award (June 24, 1998), *reprinted in* 24 Y.B. COM. ARB. 211, 235 (1999) (rejecting defendant's objections to jurisdiction based on Arts. 1101, 1116, 1119, 1120 and 1121 of NAFTA and joining to the merits the defendant's objections to jurisdiction based on Arts. 1110(1), 1101(b), 1112(1) and Chapter 3 of NAFTA); *Tradex Hellas S.A. (Greece) v. Albania*, Dec. 24, 1996, *reprinted in* 25 Y.B. COM. ARB. 221, 224-38 (2000) (issuing an interim award regarding five jurisdictional challenges and joining one jurisdictional challenge with the merits).

36. See GARNETT ET AL., *supra* note 10, at 65; REDFERN AND HUNTER, *supra* note 5, at 271; BORN, *supra* note 10, at 457.

37. See CRAIG ET AL., *supra* note 9, at 364; REDFERN AND HUNTER, *supra* note 5, at 271; FOUCHARD, GAILLARD & GOLDMAN, *supra* note 11, at 743; see also ROBERT COOTER AND THOMAS ULEN, *An Economic Theory of the Legal Process*, in LAW AND ECONOMICS 411 (3d ed. 2000).

# 1. National Laws and Arbitral Rules on Determining Arbitral Jurisdiction

Some countries, either by case law or statute, mandate the procedure for resolving challenges to the jurisdiction of the arbitral tribunal.<sup>38</sup> For example, in Israel and South Africa, arbitral tribunals have the power to decide jurisdictional issues only if the parties expressly empower them to do so.<sup>39</sup> By contrast, in England, the Arbitration Act of 1996 provides that, unless the parties agree otherwise, the tribunal has the discretion to decide jurisdictional issues either in a preliminary decision or in its award on the merits.<sup>40</sup> In addition, it provides that a party may immediately bring a judicial challenge to an interim award dealing with the substantive jurisdiction of the tribunal.<sup>41</sup>

In Switzerland, the Private International Law Act provides that objections to the jurisdiction of the tribunal "must be raised prior to

---

38. See Swiss Private International Law Act, ch. 12: International Arbitration, art. 186 (Dec. 18, 1987), reprinted in Robert Briner, *Switzerland* (Dec. 1998), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, annex II-4 (Jan Paulsson ed., 2000); Netherlands Arbitration Act 1986 art. 1052, reprinted in 12 Y.B. COM. ARB. 370, 379 (1987); Arbitration Act 1996, ch. 23, §§ 30-32 (1996) (Eng.); see also Yves Derains and Rosabel E. Goodman-Everard, *France* (Feb. 1998), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 18-19, 39-40 (Jan Paulsson ed., 2000).

39. See H. SMIT & V. PECHOTA, 2 SMIT'S GUIDES TO INTERNATIONAL ARBITRATION: NATIONAL ARBITRATION LAWS ISR-C 4 (2001); Patrick M.M. Lane, *South Africa* (Oct. 1995), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 14 (Jan Paulsson ed., 2000). In Indonesia, it appears that courts, not arbitral tribunals, should decide issues relating to the competence of arbitrators to hear a dispute. See Sudargo Gautama, *Indonesia*, in 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 19 (Jan Paulsson ed., 2000).

40. Arbitration Act 1996, ch. 23, §§ 31(4), (5) (1996) (Eng.). The English Arbitration Act additionally provides that a party can challenge the arbitral tribunal's authority to hear the dispute in court before the tribunal has had an opportunity to decide the jurisdictional question. See *id.* art. 32.

The UNCITRAL Model Law, which has been adopted by a number of countries including Canada, Mexico, New Zealand and the Russian Federation, also provides that a tribunal may rule on an objection to jurisdiction "either as a preliminary question or in an award on the merits." UNCITRAL MODEL LAW, *supra* note 6, art. 16.3. See Federal Commercial Arbitration Act, Stat. Can., 1986, ch. 22, art. 16(3) (1986); Cód. COM. art. 1432 (Mex.)B(2)-7, 8 (Alejandro M. Garro & José González trans.), reprinted in 2 NATIONAL ARBITRATIONAL LAWS MEX(B)(2); Arbitration Act 1996 ch. 4, § 16(3) (N.Z.), reprinted in H. SMIT & V. PECHOTA, 2 SMIT'S GUIDES TO INTERNATIONAL ARBITRATION: NATIONAL ARBITRATION LAWS NZ(B)-14; Law of the Russian Federation on International Commercial Arbitration, art. 16(3) (1993), reprinted in H. SMIT & V. PECHOTA, 2 SMIT'S GUIDES TO INTERNATIONAL ARBITRATION: NATIONAL ARBITRATION LAWS RUS(B)(2)-7.

41. ARBITRATION ACT, ch. 23, § 67 (1996) (Eng.). See, e.g., AOOT Kaumneft v. Glencore Int'l AG, Case No. 2001, Folio 285 at 3-4 (High Ct. of Justice, Queens Bench Div., July 27, 2001) (discussing the requirements for bringing a judicial challenge of an arbitrator's award as to jurisdiction under the Arbitration Act).

any defense on the merits" and that the "tribunal shall, as a rule, decide on its jurisdiction by preliminary decision."<sup>42</sup> As one commentator notes, by using the term "as a rule," the Act gives the tribunal the discretion to resolve jurisdictional issues along with the merits in appropriate circumstances. An example of appropriate circumstances might be when "from the outset a jurisdictional plea does not appear to be meritorious, or appears to have been introduced for dilatory purposes only, or where the jurisdictional issues are so closely linked to the substantive issues that it would be difficult or impractical to deal with them separately."<sup>43</sup> Switzerland agrees with the English procedures of permitting immediate judicial review when the tribunal resolves the jurisdictional issues in a preliminary award. If the tribunal decides to issue a preliminary award on jurisdiction, that decision is also subject to immediate judicial review.<sup>44</sup>

In Germany, the New Arbitration Act provides that jurisdictional objections "shall be raised not later than the submission of the statement of defence," but also provides that a tribunal may "admit a later plea if it considers that the party has justified the delay."<sup>45</sup> It further provides:

If the arbitral tribunal considers that it has jurisdiction, it rules on a plea . . . in general by means of a preliminary ruling. In this case, any party may request, within one month after having received written notice of that ruling, the court to decide the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.<sup>46</sup>

---

42. Swiss Private International Law Act, ch. 12: International Arbitration, art. 186(2), (3) (Dec. 18, 1987), reprinted in Robert Briner, *Switzerland* (Dec. 1998), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, annex II-4 (Jan Paulsson ed., 2000).

43. Marc Blessing, *The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism*, 5(2) J. INT'L ARB. 9, 53 (1988) (comparing Art. 186.3 to UNCITRAL Rule 21.4, which states, "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question[;] [h]owever, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award").

44. See Swiss Private International Law Act, ch. 12: International Arbitration, art. 190(1)–190(3) (Dec. 18, 1987), reprinted in Robert Briner, *Switzerland* (Dec. 1998), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, annex II-4 (Jan Paulsson ed., 2000).

45. Ch. IV, § 1040(2) ZPO (GER.), reprinted in H. SMIT & V. PECHOTA, 1 SMIT'S GUIDES TO INTERNATIONAL ARBITRATION: NATIONAL ARBITRATION LAWS Ger B(2)-7.

46. *Id.* ch. IV, § 1040(3).

The rules of some arbitral institutions also expressly provide the procedure for resolving jurisdictional challenges.<sup>47</sup> For example, article 41 of the ICSID Rules provides:

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall render an award to that effect.<sup>48</sup>

In addition, the LCIA Rules provide that the "Arbitral Tribunal may determine the plea to its jurisdiction or authority in an award as

---

47. See, e.g., ICSID Rules, *supra* note 7, art. 41; AAA Int'l Rules, *supra* note 17, art. 15.3; LCIA Rules, *supra* note 17, art. 23.3; see also UNCITRAL Rules, *supra* note 17, art. 21.4.

48. ICSID Rules, *supra* note 7, art. 41.

to jurisdiction or later in an award on the merits, as it considers appropriate in the circumstances."<sup>49</sup> Other sets of rules, like the ICC Rules, are silent on the procedure for handling jurisdictional challenges.<sup>50</sup> However, those rules, including the ICC Rules, typically give the tribunal the authority to issue interim awards.<sup>51</sup>

## 2. Commentators and Tribunal Decisions on Determining Arbitral Jurisdiction

Many commentators and tribunals disagree on the basic issues concerning the resolution of challenges to the jurisdiction of the arbitral tribunal. Should tribunals hear the jurisdictional issues apart from the merits? If so, what factors should they consider in making their decision?

There is no firm consensus among commentators on the bifurcation of issues concerning jurisdiction and the merits. Some commentators believe that, as a general rule, all issues should be decided in a single award.<sup>52</sup> Others prefer that the tribunal issue an interim award on jurisdiction.<sup>53</sup>

---

49. LCIA Rules, *supra* note 17, art. 23.3; *see also* UNCITRAL Rules, *supra* note 17, art. 21.4 ("In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question . . . [but that] the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."); AAA Int'l Rules, *supra* note 17, art. 15.3 (stating that the tribunal may rule on objections to jurisdiction "as a preliminary matter or as part of the final award"); Arbitration Rules of the World Intellectual Property Organization Arbitration and Mediation Center, art. 36(d), *available at* <http://www.arbitrator/wipo.int/arbitration/arbitration-rules/index.html> (stating that a tribunal may rule on a plea as to jurisdiction "as a preliminary question or, in its sole discretion, decide on such a plea in the final award").

50. *See* ICC Rules, *supra* note 15; Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Apr. 1, 1999), *available at* <http://www.chamber.se/arbitration/english/index.html>; International Arbitration Rules of the Chamber of National and International Arbitration of Milan, *available at* <http://www.mi.camcom.it/eng/arbitration.chamber/reging.htm#partial>; Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber (Sept. 1, 1991), *available at* <http://www.wk.or.at/arbitration/engl/>.

51. *See* ICC Rules, *supra* note 15, art. 2.3 (defining award to include "an interim partial award or final award"), and art. 23 (stating that the tribunal has the power to grant interim measures "in the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate."); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, *supra* note 50, art. 34(1); International Arbitration Rules of National and International Arbitration of Milan, *supra* note 50, art. 20; *see also* CRAIG ET AL., *supra* note 9, at § 19.03.

52. *See* CRAIG ET AL., *supra* note 9, at 359.

53. *See* REDFERN & HUNTER, *supra* note 5, at 271; GARNETT ET AL., *supra* note 10, at 65; Blessing, *supra* note 29, at 27.



Commentators also do not agree on the factors that tribunals should consider in deciding whether to bifurcate the proceedings. Many believe that the most important factor is whether the jurisdictional questions are so intimately linked to the merits of the case that it would be inefficient to dispose of them in a separate proceeding.<sup>54</sup> They explain:

The usefulness of partial awards on jurisdiction will mainly depend on whether the issues of jurisdiction will be determined by the same facts as those determining the merits. If that is the case, it will be preferable to make a single award covering both jurisdiction and, assuming the arbitrators' jurisdiction is confirmed, the merits. If, on the other hand, jurisdiction appears to be a separate issue and the substantive issues to be resolved by the tribunal if it retains jurisdiction are complex, it will generally be appropriate to decide by way of a separate award.<sup>55</sup>

Others have argued that the arbitrator must take into account the delay that will ensue from scrutiny of the jurisdictional award by any arbitral institution, or court, as well as "the expense and burden of further proceedings which would be wasted in the event the jurisdictional finding was not confirmed."<sup>56</sup> Commentators also would look to such additional factors as the desire of the parties, whether the jurisdictional challenge is frivolous, and whether the jurisdictional plea was introduced for dilatory purposes only.<sup>57</sup>

There is likewise no consensus among arbitral tribunals on the procedure for resolving these jurisdictional challenges. In fact, many tribunals fail to provide any reason for the decision either to bifurcate the proceedings or to conduct a unitary proceeding.<sup>58</sup>

---

54. See FOUCHARD, GAILLARD & GOLDMAN, *supra* note 11, at 743; REDFERN & HUNTER, *supra* note 5, at 270.

55. FOUCHARD, GAILLARD & GOLDMAN, *supra* note 11, at 743.

56. CRAIG ET AL., *supra* note 9, at 363-64.

57. BORN, *supra* note 10, at 457; Blessing, *supra* note 29, at 27, 53.

58. See, e.g., *Ceskoslovenska Obchodni Banka, A.S. (Czech Republic) v. The Slovak Republic*, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999, *reprinted in* 24 Y.B. COM. ARB. 44, 44 (1999); *Final Award in Case No. 1398 of Mar. 18, 1999* (Chamber of National & International Arbitration of Milan 1999), *reprinted in* 25 Y.B. COM. ARB. 382, 382 (2000); *Interim Award in case no. 7337 (Japan v. Swed.) of 1996* (ICC 1996), *reprinted in* 24 Y.B. COM. ARB. 149, 149 (1999).

It appears, from the limited number of decisions that have addressed this issue, that arbitral tribunals find four main reasons for bifurcating the proceedings. First, tribunals may decide the issue of jurisdiction as a preliminary matter because the parties have requested them to do so.<sup>59</sup> Second, some tribunals may choose to decide the issue as a preliminary matter because of some provision of the applicable national law.<sup>60</sup> Third, tribunals may bifurcate the proceedings if the applicable arbitration rules suggest bifurcation when jurisdictional objections arise.<sup>61</sup> Fourth, tribunals may decide the jurisdictional issues separately from other issues if it is more economical to do so.<sup>62</sup>

For example, in *Partial Award of March 17, 1983, ICC No. 4402*, the tribunal decided to bifurcate the issue of jurisdiction over the parent company of the first defendant from the merits of the arbitration.<sup>63</sup> The tribunal initially noted that the applicable procedural law, the Swiss Inter cantonal Arbitration Convention, provided it with the authority to render a partial award on jurisdiction, unless the parties had agreed otherwise. It further determined that the decision to render such an award is discretionary and based on the following factors: (1) whether the issue to be decided in the partial award was clearly separable from the other issues, (2) whether the issue to be decided in the partial award was "liquid, fully exposed by the parties and proved", (3) whether the partial award would help decide the remaining issues, and (4) whether there "is an urgency in deciding this special question."<sup>64</sup> Applying this test, the tribunal stated:

---

59. See, e.g., *Partial Award in case no. 7319 (Fr v. Ir) (ICC 1992)*, reprinted in 24 Y.B. COM. ARB. 141, 141 (1999) (following Terms of Reference that required sole arbitrator to first determine the applicable law and whether the arbitral clause conferred jurisdiction over the claims before proceeding with the arbitration).

60. See, e.g., *Interim Award in case no. 7929 (Fin. v. U.S.) of 1995 (ICC 1995)*, reprinted in 25 Y.B. COM. ARB. 312, 314 (2000) (following Article 186.3 of the Swiss Private International Law); *Partial Award on Jurisdiction and Admissibility in case no. 6474 of 1992 (ICC 1992)*, reprinted in 25 Y.B. COM. ARB. 279, 281 (2000) (following Article 186 of the Swiss Private International Law); *Final Award in case no. 5294 (Den v. Egypt) of 22 Feb. 1988 (ICC 1988)*, reprinted in 14 Y.B. COM. ARB. 137, 139 (1989) (following section 241 of Zurich Rules of Civil Procedure, which has since been changed).

61. See, e.g., *Ethyl Corp. v. Canada, Award (June 24, 1998)*, reprinted in 24 Y.B. COM. ARB. 211, 221 (1999) (following Art. 21(4) of the UNCITRAL Arbitration Rules).

62. See, e.g., *Partial Award of Mar. 17, 1983, ICC No. 4402*, reprinted in 9 Y.B. COM. ARB. 138, 139 (1984).

63. *Id.* at 138.

64. *Id.* at 139.

The issue of jurisdiction over a party to an Arbitration is a classical setting for a partial award. It can be clearly separated from the other issues in the actual case and easily disposed of by the Tribunal without going into the merits of the case. It is clear that a decision of the question of jurisdiction is helpful for all parties involved in the Arbitration. At last it is obvious that the economic advantages call for an early decision on the question who is a proper party to the case.<sup>65</sup>

Similarly, in *Interim Award No. 7929*, the tribunal issued an interim award on a jurisdictional challenge raised by the defendant.<sup>66</sup> In addressing the issue of whether to bifurcate the proceedings, the tribunal first concluded that the arbitration itself was governed by Swiss Private International Law, which provides that a jurisdictional challenge should generally be decided as a preliminary matter.<sup>67</sup> The tribunal further reasoned that disposing of the issue in a preliminary decision would accord with the desire of the respondent and would also help the parties decide whether to continue with the arbitration.<sup>68</sup>

The most common reason given for a tribunal to resolve both the jurisdictional issues and the merits in a unitary proceeding is that the issues are so closely connected that separate proceedings would be impracticable.<sup>69</sup> For example, in *Tradex v. Republic of Albania*, the tribunal determined that the issue of expropriation was relevant to the question of jurisdiction but was also the decisive issue regarding the merits of the claim.<sup>70</sup> Therefore, an examination of that jurisdictional issue would be so closely intertwined with the merits of the dispute that it should only be examined during a proceeding on the merits.<sup>71</sup> Similarly, in *SOABI v. Sengal*, the tribunal decided that the evidence put forth on the issue of jurisdiction included documents that formed

---

65. *Id.*

66. *Interim Award in case no. 7929 (Fin. v. U.S.) of 1995 (ICC 1995)*, reprinted in 25 Y.B. COM. ARB. 312, 323 (2000).

67. *Id.* at 313–14.

68. *Id.* (“In the present case . . . whilst recogni[s]ing the difficulties and the need to proceed with great caution, we believe that we are in a position to make an interim award which, we hope, will assist both parties in deciding how to proceed.”).

69. See, e.g., *Ethyl Corp. v. Canada*, Award (June 24, 1998), reprinted in 24 Y.B. COM. ARB. 211, 219 (1999); *Tradex Hellas S.A. (Greece) v. Albania*, Dec. 24, 1996, reprinted in 25 Y.B. COM. ARB. 221, 221 (2000).

70. *Id.* at 228–29.

71. *Id.*; see also *Amco v. Indonesia*, Decision on Jurisdiction, Sept. 25, 1983, 1 ICSID REP. 389, 390 (1993).

the subject matter of the dispute and could be appreciated only after a full consideration of the merits of the case.<sup>72</sup> In these cases, the objections to jurisdiction were not decided until full hearings were conducted and final awards issued.

As these cases illustrate, there currently exists no uniform procedure for resolving jurisdictional challenges. Most arbitration laws and rules provide little guidance on the procedure for resolving such challenges. Furthermore, there is no agreement on the factors that a tribunal should use in this circumstance. In fact, rarely is any consideration given to the likelihood of the respondent succeeding on the jurisdictional challenge. This is a fundamental error because the greater the likelihood that the respondent will prevail on the jurisdictional issue, the more likely it will be that the tribunal need not address the merits of the dispute. Moreover, to date, there has been no guidance on how the factors are to be applied. Weighing factors such as the complexity of the case and the extent to which jurisdictional issues are intertwined with the merits is, in effect, similar to mixing apples and oranges. Some general guidelines, at least, are necessary.

The lack of a coherent procedure for determining arbitral jurisdiction is problematic for the parties involved in the arbitration. The tribunals currently appear to be resolving jurisdictional challenges without using the most efficient procedural method. This increases the cost of the arbitration and unduly delays the resolution of the dispute.<sup>73</sup> It also results in similarly situated parties being treated differently and in parties being unable to predict, with any degree of certainty, the procedure that tribunals will use to resolve jurisdictional issues and, therefore, the resolution of those issues.<sup>74</sup>

---

72. *SOABI v. Sengal*, Decision on Jurisdiction, Aug. 1, 1984, 2 ICSID REP. 175, 189 (1994).

73. As one commentator notes:

The choice between a preliminary decision [on jurisdiction] and a joinder [of a jurisdictional challenge] to the merits is a matter of procedural economy. It does not make sense to go through lengthy and costly proceedings dealing with the merits of the case unless the tribunal's jurisdiction has been determined authoritatively.

Schreuer, *supra* note 16, at 394.

74. BORN, *supra* note 10, at 2-3 (discussing predictability as an essential aspect of arbitration); see also Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?* 3, 5-6 (Richard B. Lillich & Charles N. Brower eds., 1993).

### III. MODEL APPROACH FOR DETERMINING ARBITRAL JURISDICTION

#### A. *Arbitral Jurisdiction*

The problems associated with the current approaches to deciding issues relating to jurisdiction and merits in a unitary proceeding or bifurcated proceedings could be remedied by adopting the following three-step model.

*Step 1.* The first step calls for the tribunal to determine if there is agreement among the parties as to whether the issues relating to the jurisdiction and merits should be resolved in a unitary proceeding or in bifurcated proceedings. If there exists such an agreement, then the tribunal should honor it, unless doing so would violate a mandatory rule of law, which would take precedence. However, if no such rule exists and the parties do not agree on a procedure to be followed, then the tribunal should proceed to step two.

*Step 2.* The second step requires the tribunal to examine the relevant arbitral rules and/or the applicable procedural law to see if they set forth any procedures for handling jurisdictional objections. If they do, then that approach should be employed. In the event that neither provides sufficient guidance, then the tribunal should proceed to step three.

*Step 3.* The final step requires the tribunal to weigh the cost of a unitary proceeding and the cost of bifurcated proceedings in light of the tribunal's preliminary assessment of whether the claimant is likely to prevail on the jurisdictional issue (thereby necessitating that the tribunal consider the merits of the dispute). Using this approach, the tribunal should select the procedure that results in the most efficient resolution of the matter.

#### B. *When the Agreement Addresses the Procedure for Resolving Jurisdictional Challenges*

The model acknowledges that the primary source for determining the procedure for resolving jurisdictional challenges is the parties' agreement.<sup>75</sup> This approach protects party autonomy by

---

75. See Eric A. Schwartz, *International Court of Arbitration of the International Chamber of Commerce*, in *INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION* 207, 210 (Albert Jan Van Den Berg ed., 1996) (explaining that tribunals should "first give effect to

giving them the freedom to choose and be bound by procedures to which they mutually agree.<sup>76</sup>

While the tribunal should strive to give the agreement of the parties the greatest possible effect, this deference should not be absolute. The tribunal should not implement the parties' agreement if doing so would violate an applicable mandatory rule of law.<sup>77</sup> Failure to comply with these imperative rules could result in the award being set aside or being unenforceable.<sup>78</sup> Thus, if an applicable mandatory rule of law requires certain procedures for resolving jurisdictional challenges, then the tribunal should follow those procedures. An example of such a mandatory rule of law would be a statute providing that only courts can decide challenges to the jurisdiction of the arbitral tribunal.<sup>79</sup>

---

any agreements of the parties" because parties are sovereign in respect of matters of procedure under ICC Rules, other arbitration rules, and most arbitration laws); J. Gillis Wetter, *Procedures for Avoiding Unexpected Legal Issues*, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION 94, 94 (Albert Jan Van Den Berg ed., 1996) (explaining that "specific procedural provisions in the arbitration agreement must be implemented by the arbitrator").

76. See generally Holtzmann, *supra* note 74, at 3, 5; Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 177, 178 (Pieter Sanders ed., 1986); Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 268 (1985); Craig M. Gertz, Comment, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Deceit*, 12 NW. J. INT'L L. & BUS. 163 (1991).

77. See BORN, *supra* note 10, at 429 ("Regardless of the parties' agreement to 'foreign' procedural law, arbitral proceedings will almost always remain subject to at least some mandatorily-applicable rules of the nation in which the arbitration proceedings are physically conducted."); see also REDFERN & HUNTER, *supra* note 5, at 268 ("It is however doubtful that the parties to an arbitration agreement may validly agree on rules that are contrary to 'the law of the place . . . where the arbitration takes place, or the law which is applicable to the arbitration'").

78. Werner Melis, *Mandatory National Procedural Law and Auxiliary Powers of Courts*, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION 355, 355-56 (Albert Jan Van Den Berg ed., 1996) ("Non-compliance with such mandatory provisions will entail the possibility of an award being set aside by the courts of the country concerned"); Julian D.M. Lew, *Determination of Arbitrators' Jurisdiction and the Public Policy Limitations on that Jurisdiction*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 73, 78 (1987) ("An award made in contradiction to or merely ignoring a mandatory law or public policy could subsequently be set aside or be unenforceable").

79. See, e.g., Sudarga Gautama, *Indonesia* (Feb. 1998), in 2 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 19 (Jan Paulsson ed., 2000) ("Contrary to the Washington Convention of 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, the arbitrators do not decide on their own jurisdiction (Art. 41(1))."); see also Smadar Ottolenghi, *Israel* (Aug. 1984), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 16 (Jan Paulsson ed., 2000) ("The general rule is that the arbitrator cannot decide on his own jurisdiction where the parties have not specifically authorized him to do so."); Patrick M.M. Lanc SC, *South Africa* (Oct. 1995), in 3 INTERNATIONAL HANDBOOK ON

In reality, however, rarely are there mandatory rules of law applicable to the determination of jurisdictional questions by an arbitral tribunal, nor do the parties typically agree, on the procedure for resolving jurisdictional challenges.<sup>80</sup> As a result, in most cases, tribunals would need to proceed to step two of the model.

C. *When Arbitral Rules or National Laws Set Forth the Procedure for Resolving Jurisdictional Challenges*

The model provides that, in the absence of an agreement on the procedure for determining arbitral jurisdiction or a mandatory rule of law, the tribunal should examine the relevant arbitral rules and applicable (non-mandatory) national laws to determine whether they set forth a procedure for resolving jurisdictional challenges.<sup>81</sup>

Arbitral rules typically do not mandate a certain procedure for resolving jurisdictional challenges. As noted in Part II.C.1 of this article, some provide a preference for resolving jurisdictional issues before issues involving the merits.<sup>82</sup> Others simply give the tribunal

COMMERCIAL ARBITRATION 14 (Jan Paulsson ed., 2000) ("An arbitrator does not have the authority to determine his own jurisdiction unless such authority is expressly conferred on him by the parties [because] . . . [t]he determination of jurisdiction is a matter properly dealt with by a Court.").

80. See Schwartz, *supra* note 75, at 207 (explaining that it is uncommon in the ICC's experience for parties to make detailed procedural agreements).

81. See N.C.P.C. art. 1494 (Fr.) (stating that in the absence of any indication as to the parties' intentions "the arbitrator shall determine the procedure, if need be, either directly or by reference to a law or to arbitration rules"); Swiss Private International Law Act, ch. 12: International Arbitration, art. 182, reprinted in Robert Briner, *Switzerland* (Dec. 1998), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, annex II-4 (Jan Paulsson ed., 2000) ("Where the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules."); ICC Rules, *supra* note 15, art. 15(1) ("The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties, or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."); see also MARK HULEATT-JAMES & NICHOLAS GOULD, INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK 93 (1999) ("If the point is not covered in the arbitration agreement, or in any rules referred to in that agreement, the next place to look is the law applicable to the arbitration proceedings."). For a discussion of the norms that are applicable in international arbitrations, see VÁRADY ET AL., *supra* note 14, at 61-82 (1999).

82. See, e.g., ICSID Rules, *supra* note 7, art. 41 ("Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. . . . [The tribunal] may deal with the objection as a preliminary question or join it to the merits of the dispute."); LCIA Rules, *supra* note 17, art. 23.3 (providing that the tribunal "may determine the plea to its jurisdiction or authority in an award as to jurisdiction or later in an award on the merits, as it considers appropriate in the circumstances"); UNCITRAL Rules, *supra* note

broad authority to set the rules of procedure and provide it with the discretion whether to apply the rules of procedure of a national law.<sup>83</sup>

Similarly, the arbitration laws of some countries, like Switzerland and Malta, express a preference for the tribunal to resolve jurisdictional challenges separately from the merits.<sup>84</sup> Other countries, such as England and France, explicitly provide tribunals with the authority either to bifurcate jurisdictional issues from the merits or to resolve all issues in a unitary proceeding.<sup>85</sup>

In cases where the relevant arbitral rules or applicable national laws provide detailed procedures for resolving jurisdictional challenges, the tribunal ordinarily should follow them. As noted, however, the arbitral rules and arbitration laws that address the procedure for resolving jurisdictional challenges generally express only a preference for bifurcating the jurisdictional issues from the merits. In addition, they typically do not provide the circumstances under which the tribunal may deviate from this preference. This preference is understandable because it gives the tribunal broad discretion to conduct the proceedings as it sees fit in light of the circumstances. The most prudent course for the tribunal to follow

---

17, art. 21.4 ("In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."); AAA Int'l Rules, *supra* note 17, art. 15.3 (stating that the tribunal may rule on objections to jurisdiction "as a preliminary matter or as part of the final award").

83. See ICC Rules, *supra* note 15, art. 15(1); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, *supra* note 50, art. 24(1); International Arbitration Rules of National and International Arbitration of Milan, *supra* note 50, art. 15.1; see also CRAIG ET AL., *supra* note 9, at § 19.03.

84. See, e.g., Swiss Private International Law Act, ch. 12: International Arbitration, art. 186.2 (Dec. 18, 1987), reprinted in Robert Briner, *Switzerland* (Dec. 1998), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, annex II-4 (Jan Paulsson ed., 2000) ("The arbitral tribunal shall, as a rule, decide on its jurisdiction as a preliminary matter."); Arbitration Act, No. II of 1996, art. 21.4 (Feb. 13, 1996), reprinted in Jan Paulsson, *Malta* (Oct. 1997), in 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, annex-I-11 (Jan Paulsson ed., 2000) ("In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question: Provided that the arbitral tribunal may proceed with the arbitration and rule on such a plea in its final award.").

85. See, e.g., Arbitration Act, 1996, ch. 23, § 31(4) (Eng.) ("Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may (a) rule on the matter in an award as to jurisdiction, or (b) deal with the objection in its award on the merits. If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly."); Derains & Goodman-Everard, *supra* note 38, at 40 (stating that in France, "[i]n the absence of specific instructions to the contrary from the parties, the arbitrators are free to decide whether to decide on their competence in a separate award or to leave it to the final award"); UNCITRAL MODEL LAW, *supra* note 6, art. 16.3 (stating that a tribunal may rule on an objection to jurisdiction "either as a preliminary question or in an award on the merits"). See also *supra* notes 38-46 and accompanying text.



when the relevant arbitral rules or applicable national laws express a preference for the procedure for resolving jurisdictional challenges would be for the tribunal to implement that procedure unless there exists a legitimate reason for departing from it. For example, it may be legitimate for the tribunal to deviate from a preference for bifurcated proceedings when the respondent objects to the tribunal's jurisdiction but refuses to participate in the proceedings.<sup>86</sup> Similarly, the tribunal should be able to depart from any such preference if it is clearly more efficient to resolve the jurisdictional challenges together with the merits using the approach set forth in the third step of the model.

#### D. *Default Approach—Conducting a Cost-Benefit Analysis*

In the absence of an agreement between the parties on the procedure for resolving jurisdictional challenges, or a law or rule detailing how to resolve such challenges, the model provides that the tribunal should select the method that would be more efficient.<sup>87</sup>

Logically, a unitary proceeding should cost less than bifurcated proceedings because the former would avoid duplicate costs incurred in the latter, such as travel costs and presenting the same witnesses at two separate proceedings. This does not necessarily mean, however, that, from an economic standpoint, unitary proceedings are preferable to bifurcated proceedings as a general rule. Bifurcating the proceedings can result in net economies of scale if the savings from avoiding the costs of hearing the merits are greater than the added costs associated with the extra time and inconvenience of bifurcation.<sup>88</sup>

Here, the tribunal initially would need to estimate (1) the cost of a hearing and a decision on the jurisdictional issue, (2) the cost of a hearing and decision on the merits of the dispute, and (3) the cost of a hearing and decision if the tribunal held a unitary proceeding. Relevant costs may include the fees and expenses of the tribunal,

---

86. See, e.g., *British Petroleum v. Libya*, Award (Oct. 10, 1973), reprinted in 5 Y.B. Com. Arb. 143, 146–48 (1980); *Texaco Overseas Petroleum Co. v. Libya*, Award (Jan. 19, 1977), reprinted in 4 Y.B. COM. ARB. 177, 179 (1979).

87. See Schwartz, *supra* note 75, at 211 (explaining “arbitrators should always strive to conduct proceeding efficiently” while also allowing parties a “fair and reasonable opportunity to present or defend the claims that are the subject of the proceeding”).

88. Cf. William M. Landes, *Sequential Versus Unitary Trials: An Economic Analysis*, 22 J. LEGAL STUD. 119 (1993).

travel costs, administrative fees including costs for a secretary or registrar and incidental costs such as fees for meeting rooms, translators, interpreters, and reporters who prepare transcripts. It should also include the lawyers' fees and expenses, expenditures for preparing and presenting the case, and indirect costs of "executive overtime"—time spent by senior officials, directors, and employees of the parties that disrupts normal productivity within the parties' business.<sup>89</sup>

Many of the factors previously advocated for consideration when determining whether to bifurcate the jurisdictional issues from the merits would still be relevant to the tribunal's decision on the proper procedure to be used. Now, however, these factors would be expressed in monetary terms and carry weight depending on their economic effect on a unitary proceeding or bifurcated proceedings. For example, it has been asserted that in deciding whether to bifurcate the proceedings, the tribunal should consider the extent to which the jurisdictional issues are intertwined with the issues involving the merits. Under the model, when the same evidence needed to resolve the jurisdiction of the tribunal might also be needed to settle the merits, the cost of holding separate hearings on jurisdiction and merits may be substantially greater than the cost of a unitary hearing.<sup>90</sup>

The tribunal also would need to make a preliminary assessment about the likelihood of the claimant prevailing on the jurisdictional issue. The greater the likelihood that the claimant will prevail on the jurisdictional issue, the more likely it is that the tribunal would need to address the merits of the case.<sup>91</sup>

---

89. Cf. REDFERN & HUNTER, *supra* note 5, at 405–06.

90. See Blessing, *supra* note 29, at 27 ("Where the jurisdictional aspects can be sufficiently isolated and where pleas as to a lack of *locus standi* or jurisdiction do not appear to be of a dilatory nature only, ICC arbitrators normally prefer to adjudicate jurisdiction first."); see also Tradex Hellas S.A. (Greece) v. Albania, 24 Dec. 1996, reprinted in 25 Y.B. COM. ARB. 221, 229 (2000) (deciding to hold unitary proceeding because issue of expropriation was relevant to question of jurisdiction but was also decisive issue regarding merits of claim); *SOABI v. Senegal*, 2 ICSID REP. at 189 (deciding to hold unitary proceeding because evidence presented for jurisdictional issue included documents that could only be appreciated after full consideration of merits of case).

91. The process of assessing the probability that the claimant will prevail on the jurisdictional challenge is analogous to a process in American civil procedure. There, a judge considering in deciding a motion for a preliminary injunction must decide whether the applicant has made a strong showing that the applicant is likely to succeed on the merits. See generally *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 387 (1984).

Once the tribunal makes these determinations, it will need to weigh them in the following manner. The tribunal initially would determine the total expected cost of bifurcated proceedings by adding (1) the cost of a hearing and decision on the jurisdictional issue to (2) the cost of the hearing on the merits multiplied by the probability that the claimant will prevail on the jurisdictional issue. It would then need to determine the expected cost of a unitary proceeding. If the total expected cost of the bifurcated proceedings is less than a unitary proceeding, then the tribunal should hold separate hearings on the issues relating to jurisdiction and merits. Conversely, if the total expected cost of the bifurcated proceedings is greater than or equal to that of a unitary proceeding, then the tribunal should hear and decide all issues together.<sup>92</sup>

This approach can also be stated in terms of a mathematical formula:

$$C_J + P_J C_M \geq C_{JM}^{93}$$

Here,  $C_J$  represents the total cost to all parties of the hearing and decision on jurisdiction, held separately from the hearing and decision on the merits.  $C_M$  represents the total cost to all parties of the hearing and decision on the merits, held separately from the jurisdictional proceeding.  $C_{JM}$  is the total cost of a unitary proceeding, resolving both jurisdictional and merit-based issues.  $P_J$  is the probability that the claimant will win the jurisdictional issue, therefore necessitating a hearing on the merits.<sup>94</sup> Thus, if  $C_J + P_J C_M \geq C_{JM}$ , then the tribunal would hold a unitary proceeding, but if  $C_J + P_J C_M < C_{JM}$ , then the tribunal would bifurcate the proceedings. The following examples illustrate the application of the cost-benefit approach.<sup>95</sup>

*Illustration 1.* Assume that the respondent challenges the jurisdiction of the tribunal at the outset of the arbitration and requests that the tribunal hear and decide that question before proceeding to

92. If the total cost of bifurcated hearings is equal to the cost of a unitary hearing, the tribunal should hold the unitary hearing because this will save the costs associated with the additional time required for bifurcated hearings and the amount of any interest on the award.

93. Admittedly, this formula is over simplified. However, a more accurate formula would add complexity without greatly affecting its utility.

94. The sum of the probability of the claimant prevailing on the jurisdictional challenge ( $P_J$ ) and the probability of the respondent prevailing on the jurisdictional challenge ( $P_R$ ) is one, or  $P_J + P_R = 1$ .

95. For purposes of these illustrations, assume that the parties are risk neutral.

the merits. The claimant opposes this request.<sup>96</sup> Based on the parties' pleadings in connection with the arbitration, the tribunal estimates the following:

- the arbitrators' fees and costs for proceedings relating to jurisdiction is \$17,000;
- the arbitrators' fees and costs for the proceedings relating to the merits is \$68,000;
- the attorneys' fees and other costs for both parties for proceedings relating to jurisdiction is \$30,000;
- the attorneys' fees and other costs for both parties for proceedings relating to the merits is \$170,000; and
- the cost of a unitary proceeding equals the total costs of bifurcated proceedings, which amounts to \$285,000.

Also, assume that, after a preliminary examination of the jurisdictional issues, the tribunal believes that the probability that the claimant will win the jurisdictional challenge is less than 100% and, for purposes of this example, is at most 99%. In this situation, the tribunal should bifurcate the proceedings since the expected cost of the bifurcated proceedings, \$282,620, is less than the expected cost of a unitary proceeding, \$285,000. Here is the application of the cost-benefit approach using the mathematical formula. If

$$C_J = \$47,000;^{97}$$

$$C_M = \$238,000;^{98}$$

$$C_{JM} = \$285,000;^{99} \text{ and}$$

$$P_J = 99\%; \text{ then}$$

$$\begin{array}{rcl} \$47,000 + .99 (\$238,000) = \$282,620 & < & \$285,000 \\ \text{(expected cost of bifurcated proceedings)} & & \text{(expected cost of} \\ & & \text{unitary proceeding)} \end{array}$$

*Illustration 2.* As in illustration 1, assume that (1) the respondent challenges the jurisdiction of the tribunal at the outset of the arbitration and requests that the tribunal hear and decide that question before proceeding to the merits, and (2) the claimant opposes

96. For purposes of this illustration, assume that the arbitration agreement, applicable national law and arbitral rules are silent on this issue.

97.  $\$17,000 + \$30,000 = \$47,000$

98.  $\$68,000 + \$170,000 = \$238,000$

99.  $\$47,000 + \$238,000 = \$285,000$

this request. Based on the parties' pleadings in connection with the arbitration, the tribunal estimates the following:

- the arbitrators' fees and costs for proceedings relating to jurisdiction is \$17,000;
- the arbitrators' fees and costs for the proceedings relating to the merits is \$68,000;
- the attorneys' fees and other costs for both parties for proceedings relating to jurisdiction is \$30,000;
- the attorneys' fees and other costs for both parties for proceedings relating to the merits is \$170,000; and
- the cost of a unitary proceeding is \$270,000.<sup>100</sup>

Also, assume that, after a preliminary examination of the jurisdictional issues, the tribunal believes that the probability that the claimant will win the jurisdictional challenge is 99%. In this situation, the tribunal should hold a unitary proceeding since the expected cost of the bifurcated proceedings, \$282,620, is greater than the expected cost of a unitary proceeding, \$270,000. Here is the application of the cost-benefit approach using the mathematical formula. If

$$C_J = \$47,000;^{101}$$

$$C_M = \$238,000;^{102}$$

$$C_{JM} = \$270,000; \text{ and}$$

$$P_J = 99\%; \text{ then}$$

$$\begin{array}{ccc} \$47,000 + .99 (\$238,000) = \$282,620 & > & \$270,000 \\ \text{(expected cost of bifurcated proceedings)} & & \text{(expected cost of unitary proceeding)} \end{array}$$

However, if instead the probability of the claimant prevailing on the jurisdictional challenge is only 50%, then the tribunal should bifurcate the proceedings. This is because now the expected cost of the bifurcated proceedings, \$166,000, is less than the expected cost of a unitary proceeding, \$270,000. In other words, if  $P_J = 50\%$  instead of 99%, then

$$\begin{array}{ccc} \$47,000 + .50 (\$238,000) = \$166,000 & < & \$270,000 \\ \text{(expected cost of bifurcated proceedings)} & & \text{(expected cost of unitary proceeding)} \end{array}$$

---

100. For purposes of this illustration, assume that holding a unitary proceeding instead of bifurcated proceedings (when consideration of the merits is necessary) would save \$10,000 in travel expense and \$5,000 in other miscellaneous expenses.

101.  $\$17,000 + \$30,000 = \$47,000$

102.  $\$68,000 + \$170,000 = \$238,000$

More specifically, if in this situation the probability that the claimant will win the jurisdictional challenge is less than 93%, it would be more cost effective for the tribunal to hold a separate hearing on the jurisdictional issues ( $\$47,000 + .93 (\$238,000) = \$268,340 < \$270,000$ ).

*Illustration 3.* Assume that (1) the respondent challenges the jurisdiction of the tribunal at the outset of the arbitration and requests that the tribunal hear and decide that question before proceeding to the merits, and (2) the claimant opposes this request.<sup>103</sup> In addition, based on the parties' pleadings filed in connection with the arbitration, the tribunal believes that the jurisdictional issues are complicated and that the same evidence needed to resolve the jurisdictional issues would also be needed to decide the merits. Consequently, the tribunal estimates the following:

- the arbitrators' fees and costs for proceedings relating to jurisdiction is \$45,000;
- the arbitrators' fees and costs for the proceedings relating to the merits is \$68,000;
- the attorneys' fees and other costs for both parties for proceedings relating to jurisdiction is \$120,000;
- the attorneys' fees and other costs for both parties for proceedings relating to the merits is \$170,000; and
- the cost of a unitary proceeding is \$285,000.

Finally, assume that, after a preliminary examination of the jurisdictional issues, the tribunal believes that the probability that the claimant will win the jurisdictional challenge is 75%. In this situation, the tribunal should hold a unitary proceeding since the expected cost of the bifurcated proceedings, \$343,500, is greater than the expected cost of a unitary proceeding, \$285,000. Here is the application of the cost-benefit approach using the mathematical formula. If

$$C_J = \$165,000;^{104}$$

$$C_M = \$238,000;^{105}$$

$$C_{JM} = \$285,000; \text{ and}$$

$$P_J = 75\%; \text{ then}$$

---

103. For purposes of this illustration, assume that the arbitration agreement, applicable national law and arbitral rules are silent on this issue.

104.  $\$45,000 + \$120,000 = \$165,000$

105.  $\$68,000 + \$170,000 = \$238,000$

$$\begin{array}{rcl} \$165,000 + .75 (\$238,000) = \$343,500 & > & \$285,000 \\ \text{(expected cost of bifurcated proceedings)} & & \text{(expected cost of unitary proceeding)} \end{array}$$

It should be noted, however, that if instead the probability of the claimant prevailing on the jurisdictional challenge is 50% or less, then the tribunal should bifurcate the proceedings. This is because now the expected cost of the bifurcated proceedings would at most be \$284,000, which is less than the expected cost of a unitary proceeding, \$285,000. In other words, if  $P_j = 50\%$  instead of 75%, then

$$\begin{array}{rcl} \$165,000 + .50 (\$238,000) = \$284,000 & < & \$285,000 \\ \text{(expected cost of bifurcated proceedings)} & & \text{(expected cost of unitary proceeding)}^{106} \end{array}$$

Admittedly, it is unlikely that a tribunal will be able to estimate the costs and probability of a claimant prevailing on the jurisdictional issue with any degree of certainty. The model does not lose its value because of that difficulty. It remains conceptually valid and has a number of advantages over the current approaches. It recognizes the proper relationship among the various factors and the importance of the probability that resolving the jurisdictional issue in favor of respondent will eliminate the need for and costs associated with a hearing on the merits. Accordingly, the model is likely to be more efficient than the current approaches in determining the proper

---

106. It should be noted that some jurisdictions (like Switzerland) allow parties to immediately challenge in court an interim award on the issue of jurisdiction. In these jurisdictions, the formula should be:

$$CJ + PJACJA + PJCM + PMACMA \geq CJM + PJMACJMA$$

CJ = cost of the hearing on jurisdiction

PJA = probability that a party would challenge the interim order on jurisdiction

CJA = cost of court challenge of interim order

PJ = probability that claimant will prevail on claim of jurisdiction, therefore necessitating a hearing on the merits.

CM = cost of the second hearing on the merits.

PMA = probability that a party would seek judicial review of final order on merits.

CMA = cost of court challenge of final order on merits.

CJM = cost of a combined hearing on jurisdiction and merits.

PJMA = probability that losing party will seek judicial review of arbitral award on jurisdiction and merits.

CJMA = cost of court challenge of arbitral award on jurisdiction and merits.

If  $CJ + PJACJA + PJCM + PMACMA \geq CJM + PJMACJMA$ , the tribunal would hold one hearing.

procedure for resolving jurisdictional issues.<sup>107</sup> The model also provides a clear method for resolving how to treat jurisdictional challenges by respecting the parties' freedom to determine the procedures used to resolve the dispute while, at the same time, conforming to applicable arbitral rules and national arbitration laws. Overall, it provides tribunals with a workable method for determining the procedure for resolving jurisdictional challenges, and its application should result in a savings of time and money to the parties as well as lead to more predictable results.

#### IV. CONCLUSION

The promise of arbitration has been that it would provide a fair, inexpensive and quick means to resolve disputes among transnational parties. However, the methods currently being used to determine the procedures that will be used to resolve challenges to the jurisdiction of arbitral tribunals frustrate that promise.

I have proposed a new model for determining the most efficient procedure for resolving jurisdictional challenges. It allows the parties to select the procedure for resolving jurisdictional challenges, unless doing so would violate a mandatory rule of law. In the absence of either an agreement specifying, or a mandatory rule of law addressing, the appropriate procedure, the model provides that the tribunal follow any procedure for resolving jurisdictional challenges that is contained in applicable (non-mandatory) national laws or arbitral rules. If these laws or rules do not set forth procedures for resolving jurisdictional challenges or are ambiguous on the procedure to be followed, then the model directs the tribunal to compare the cost of a unitary proceeding to that of bifurcated proceedings, weighted for the tribunal's preliminary assessment of the likelihood of the claimant's success, and to select the procedure that would result in the lowest overall cost.

The model effectuates the intent of the parties and complies with applicable laws and rules, yet provides support for situations in

---

107. See Schwartz, *supra* note 75, at 211 (stating "arbitrators should always strive to conduct proceedings efficiently"); cf. Steven S. Gensler, *Bifurcation UnBound*, 75 WASH. L. REV. 705, 782 (2000) (noting that bifurcating issues of liability and damages pursuant to Federal Rule of Civil Procedure 42(b) would result in increased judicial efficiency); Meiring de Villiers, *A Legal and Policy Analysis of Bifurcated Litigation*, 2000 COLUM. BUS. L. REV. 153, 196 (stating that bifurcating issues of liability and damages "promotes judicial efficiency by saving trial time and reducing private and public expenditures").



which neither the parties' intent nor the jurisdiction's law is clear. When the tribunal has the discretion to determine the procedure for resolving jurisdictional challenges, the model provides the tribunal with a uniform approach for determining the most efficient procedure. Applying the model should also result in a more uniform procedure for determining arbitral jurisdiction and ultimately should decrease the amount of time and the cost to resolve the dispute.