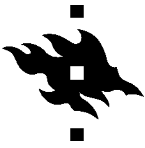

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Contract adaptation is to a considerable extent different kind of decision-making than settling a traditional dispute. When a party requests adaptation of the contract, the tribunal is asked to reshape the parties' future contractual relationship, which may include creating new obligations for the parties upon the tribunal's discretion. Thus, the decision-making includes a creative or innovative element thereby denoting wider discretion and requiring high competence from the arbitrators. For these reasons, it is not self-evident that parties want arbitrators to possess the powers to adapt their contract even if they wished them to solve their disputes through traditional dispute settlement. In that light, this study evaluates the possible grounds on which a party could contest a claim requesting adaptation of the parties' contract in arbitration. In particular, the study aims at determining how a preliminary objection to the arbitral tribunal's procedural powers to adapt the contract ought to be classified in the obscure division between jurisdiction and admissibility. In legal literature and case law the issue has so far been by default understood as an issue pertaining to the arbitrators' jurisdiction. This study critically considers whether such view is actually the most accurate and well-grounded perception.

The first research question examines the separation between challenges to jurisdiction and challenges to admissibility. There is unfortunate inconsistency in the use of the concepts among courts and tribunals as well as legal commentators, and issues of admissibility have often been wrongly treated as jurisdictional. However, there is a substantial difference between classifying an issue as of jurisdiction or admissibility. Firstly, whereas challenging the arbitral tribunal's jurisdiction intends to send the particular dispute to a court instead of arbitration, an admissibility challenge seeks to cease the legal processing of the case altogether. Thus, while a jurisdictional challenge attacks the tribunal, an admissibility challenge is aimed at the particular claim. The second main difference between jurisdiction and admissibility concerns the finality of the decision. While arbitrators' decisions on jurisdiction are necessarily reviewable by courts, issues concerning admissibility fall within the scope of arbitrators' exclusive adjudicatory powers and are thus non-reviewable. Thereby, the classification has direct effect on the length of the proceedings. In addition, arbitrators may not regard the claim's admissibility by their own initiative, but such arguments need to be raised by the parties. Therefore, the parties should be particularly mindful of how to formulate and classify their preliminary objections.

The second research question considers the appropriate nature of a preliminary objection against a claim on contract adaptation. If the question of the arbitrators' powers to adapt the parties' contract was regarded as jurisdictional, the tribunal's decision could be reviewed by a court on the ground that the claim requesting adaptation was outside the scope of the arbitration agreement. Yet, what is problematic in characterizing the issue as jurisdictional is the uncertainty in the existence of the state courts' jurisdiction to adapt the contract in case the arbitrators would be found to lack such jurisdiction. While jurisdictional issues constitute an either-or situation between litigation and arbitration, such substituting jurisdiction of the courts is indeed a necessity in order to avoid a situation where nobody would have the jurisdiction in the case. Furthermore, characterizing the issue as jurisdictional would in case of a negative decision on the tribunal's jurisdiction cause decentralization of different claims to different forums. However, when the parties have agreed on arbitration through a general arbitration clause, they can be presumed to have intended that different disputes would not be fragmented between arbitration and litigation. Thus, such characterization would presumably contradict the parties' intentions.

The ultimate conclusion of the study is that the question of the arbitrators' procedural powers to adapt the parties' contract would be better characterized (as a default rule) as an issue of admissibility. Such default rule is considered to best reflect the intentions of the parties. Hence, a new plausible ground for inadmissibility of claims, i.e. inadequacy of the decision-maker's powers, is proposed to be recognized. Indeed, it is suggested that the pro-arbitration principle and the need for promoting minimal judicial interference in arbitration to avoid multiple proceedings do not require only that the available court review is limited to jurisdictional issues but also that the users of international arbitration rethink what actually constitutes a jurisdictional issue. First and foremost, the characterization of the particular issue should be evaluated individually in each case and not labelled automatically as concerning the tribunal's jurisdiction when the ultimate consequence is that the issue is always in the end finally decided by a court.

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Abbreviations

AAA Rules	American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (2013)
Art./Arts.	Article/Articles
Cf.	Compare
CISG	United Nations Convention on Contracts for the International Sale of Goods
ECHR	European Convention on Human Rights (1950)
ECtHR	European Court of Human Rights
Ed./Eds.	Editor/editors
et seq./et seqq.	And the following one/s (et sequens/et sequentes)
FAI Rules	Arbitration Rules of the Finland Chamber of Commerce (2020)
fn.	Footnote
HKIAC Rules	2018 Hong Kong International Arbitration Centre Administered Arbitration Rules
ICC Rules	International Chamber of Commerce Arbitration Rules (2017)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes (Washington, D.C., United States of America)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICSID Rules	ICSID Convention Arbitration Rules
LCIA Rules	The London Court of International Arbitration (LCIA) Arbitration Rules (2014)
Model Law	UNCITRAL Model Law on International Commercial Arbitration with amendments (2006)

New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
para./paras.	Paragraph/paragraphs
PECL	Principles of European Contract Law
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017)
SIAC Rules	Arbitration Rules of the Singapore International Arbitration Centre (2016)
UNCITRAL Rules	UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts (2016)
Vis Moot	The Annual Willem C. Vis International Commercial Arbitration Moot

1 Introduction

1.1 Selection of the Topic

In the Annual Willem C. Vis International Commercial Arbitration Moot (Vis Moot) problem of the year 2018–2019 one of the issues was set out as "does the tribunal have the jurisdiction and/or the powers under the arbitration agreement to adapt the contract". It appeared in the oral hearings of the moot court competition (at least in those rooms where I was present) that the majority of the competitors had not – either by a conscious and well-reasoned, maybe strategic choice or by a lack of attention – really separated the issues of jurisdiction and powers in this context. Instead, the discussion focused mainly on the question of whether the tribunal had the jurisdiction, and if it would be found that it did, it was then considered as an automatic consequence that the tribunal could decide the case and give a final award on the merits.

Some judges acting as arbitrators asked the competitors representing the respondent and making the argument against the tribunal's jurisdiction what would happen if the tribunal found that it did not have the jurisdiction; could the claimant then take its claim to a state court? Saying yes to this query did not really favour the respondent's case as it then had to answer a bunch of awkward follow-up questions: why would you want some of your disagreements (more precisely disputes regarding contract adaptation) to be decided by a court when you have specifically agreed on arbitration? Are you saying that you intended to separate different claims to different forums causing possible parallel proceedings and doubled costs? Do you have doubts about this tribunal's competency to consider this dispute and adapt your contract correctly, and for that reason want the task to be rather entrusted to a court? This examination would not of course happen in real life in front of a panel that wants to maintain its neutrality, but the point could very well be utilized by the claimant in its counter argumentation thereby leaving the tribunal to question the credibility of the respondent's argumentation.

Was there another option the respondent could have argued? Could it have credibly said that even if the tribunal had the jurisdiction to solve all disputes between the parties, it still did not have the powers to adapt the contract? And that therefore if the tribunal refused to hear the case on the merits the claimant had to settle with that decision without a chance to take its claim to a court? Having tested this argumentation a couple times in the pre-moots, it seemed that the idea

of such possibility was a bit strange even to the lawyers practising international arbitration and acting as arbitrators in the moot. It did not necessarily get rejected altogether but surely was not the easiest-to-sell argument, which led it to be left out from the pleadings before the finals (where, again, at least I had to stumble my way through the aforesaid questions not that convincingly). After all, the question did not emerge as a very central issue in the Vis Moot but was rather a smaller offshoot.

However, the Vis Moot problem left me pondering the possible distinction that could be drawn between jurisdiction and powers which in turn led me to the separation of the concepts of jurisdiction and admissibility. Could "powers" as a more general word comprise issues of admissibility? As proved out in the Vis Moot, the way we understand the concepts of jurisdiction and admissibility has a direct impact on how the parties in arbitration should reason and build their cases. It should be defined whether at the particular time it is the jurisdiction or admissibility that is challenged. Hereby, it is important that a party has it clear in its mind and is able to explain what kind of award it is seeking the arbitral tribunal to give. Does it want the tribunal to render an award where it is said (a) that the tribunal is fully authorized to decide the case (and thus the tribunal may go on to make a decision on the merits of the case), (b) that it does not have the jurisdiction in the matter and thus the case should be heard in a court room instead or (c) that the tribunal has the jurisdiction in the dispute but that the claim at hand is inadmissible (i.e. not acceptable) and thus cannot be heard at all? The issue subject to this study is set out more specifically in the following chapter.

1.2 Subject of the Study, Structure and Methodology

The subject of this study is the separation between the concepts of jurisdiction and admissibility in international arbitration. Whereas the issues concerning arbitral tribunals' jurisdiction are in the very core of the teachings on arbitration, the possible situations of a claim's inadmissibility are less discussed.[1] However, in addition to determining who has the jurisdiction to decide disputes between the parties, it is also relevant to understand what the decision-making body is

[1] For example, the leading studies on international arbitration including *Redfern and Hunter on International Arbitration* and *Fouchard Gaillard Goldman on International Commercial Arbitration* do not refer to admissibility as a distinct concept or principle in international arbitration. Also, Gary Born in his study *International Commercial Arbitration* discusses admissibility only in a very limited scope regarding noncompliance with the procedural requirements of an arbitration agreement. About admissibility in the legal literature see later Chapter 3.2.3.

entitled to do within its jurisdiction. This means finding limits to the arbitral tribunal's authority still in the event that the dispute itself formally falls within the scope of the arbitration agreement. In particular, this study aims at solving how claims on contract adaptation should be addressed regarding the division of jurisdiction and admissibility. In the light of the above, the research questions of this study are the following:

i. What is the difference between challenges to jurisdiction and challenges to admissibility and what is the relevance of their separation?
ii. Could a claim on contract adaptation be considered inadmissible due to the inadequacy of the arbitrators' powers (or does the issue always pertain to the arbitrators' jurisdiction)?

This study combines legalistic and theoretical examination. The second chapter first focuses, from a largely legalistic perspective, on determining what is contract adaptation and how adaptation differs from a more traditional dispute resolution undertaken by arbitral tribunals. Secondly, it specifies the possible stands a party may take against a claim on adaptation at the different phases of the procedure. The third chapter introduces the concepts of jurisdiction and admissibility, with the approach being predominantly legalistic. It adduces the unclarity in the use of the concepts in case law and legal literature and clarifies the essential differences between challenges to jurisdiction and challenges to admissibility. In the fourth chapter, it is analysed from a theoretical standpoint how claims on contract adaptation should be addressed regarding their preliminary contestation; whether a claim on adaptation could be dismissed on the grounds of inadmissibility or whether the issue pertains exclusively to jurisdiction. The fifth chapter concludes.

1.3 Terminology, Limitations and Materials

When talking about international arbitration, one is dealing with a wide range of legal rules, doctrines and principles that cover different areas of the conduct of the arbitral procedure. As is typical with language, sometimes the same words are used to mean different things, and the meaning of the term largely depends on the particular context. This is capable of causing confusion and misunderstanding. Therefore, some clarifications as to the vocabulary used in this study is necessary.

Within international arbitration, the word *admissibility* is perhaps more frequently connected to the admissibility of evidence. However, in the context of this study, admissibility refers to the admissibility (as in acceptability) of a claim that is brought in a dispute resolution procedure. Furthermore, it is important to separate the issue of admissibility from *arbitrability*, which refers to situations where the nature of the subject matter is uncapable of being settled by arbitration usually due to public policy limitations.[2] It should be noted however that the classification between admissibility and arbitrability is not universally accepted. For example, the US Supreme court has not followed the separation of the terms arbitrability, admissibility and jurisdiction but has used them interchangeably. Such international disharmony indicates even greater need for further promotion of linguistic accuracy in this matter. The American use of the terminology and the relationship between arbitrability and admissibility are discussed in more detail in Chapter 3.2.2.

Regarding limitations, this study focuses the first and foremost on *international* arbitration. Therefore, it is not concerned with the national arbitration or contract laws of any particular state but focuses primarily on international instruments and legal sources. However, the provisions of some national laws as well as domestic case law may be observed for comparative and illustrative purposes. Additionally, it is outside the scope of this study to analyse under which circumstances an arbitral tribunal is empowered to adapt the parties' contract i.e. what suffices for an authorization for adaptation (which is entirely its own issue that has been subject to considerable discussion in legal literature for decades). Thus, this study is not concerned with what factors determine whether the tribunal has the authority adapt the contract, but the focus is on the possible objections that may be raised against the claim requiring adaptation. In that regard, it is analyzed whether the resisting party should focus on proving that the tribunal does not have jurisdiction in the dispute or whether it could also reason that the claim is inadmissible.

There are no sources that would discuss admissibility and arbitrators' power to adapt contracts jointly. Therefore, this study combines sources on jurisdiction and admissibility with sources on contract adaptation and aims at creating some relationship between them. The literary materials used in this study include firstly the basic studies on international arbitration such as the works

[2] What is "arbitrable" differs between countries, but non-arbitrable disputes often include for example questions of insolvency, personal status, and certain types of intellectual property disputes, that are not considered suitable for confidential procedure. See Redfern – Hunter 2015, 586.

of Alan Redfern and Martin Hunter, W. Laurence Craig, William W. Park and Jan Paulsson, Gary B. Born as well as Julian Lew, Loukas A. Mistelis and Stefan Kröll. They have been valuable sources especially with regard to the general concepts and principles of international arbitration and have hence provided the basis for the comparison between the concepts of jurisdiction and admissibility.

Regarding the more specific consideration on admissibility the major source has been Jan Paulsson's article *Jurisdiction and Admissibility*. It can be said to be a pioneer writing on the separation between jurisdiction and admissibility and has virtually initiated the discussion about the topic among other commentators. In addition, with regard to the dimension of contract adaptation in this study Klaus Peter Berger's articles *Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense and Renegotiation* and *Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators*, as well as Lisa Beisteiner's writing *The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective* have been of great use.

Furthermore, in addition to legal literature, both international and domestic case law have provided important insight into how courts and arbitral tribunals have recognized the separation between jurisdiction and admissibility and regarded the grounds for inadmissibility in practice. Notably, however, the case law does not provide that much for the discussion on contract adaptation as while there is considerable discussion in the literature, the published case law on the topic is sparse.[3] The court judgments utilized in this study include decisions from different jurisdictions, such as Austria, France, Hongkong, Switzerland, Singapore, the UK and the US, as well as from the International Court of Justice.

The referenced arbitral awards in turn have been given mainly in institutional arbitrations, principally in ICC and ICSID proceedings. The reasons for the wide use of ICSID awards are that ICSID tribunals have dealt with admissibility issues relatively many times and the awards are more often publicly available. Notably, as Berger states, despite the basic differences between private arbitration and the investment arbitration system, based on international law and largely isolated from the national procedural law, the same question on the jurisdiction of

[3] See Brunner 2009, 452.

the arbitral tribunal to adapt the parties' contract arises in both areas.[4] Therefore, there is no reason why they should not be regarded as equally valid sources for the purposes of this study.

[4] Berger 2003, 1371.

2 Claims on Contract Adaptation

2.1 What Is Contract Adaptation?

Especially when agreeing on long-term contracts it is possible and even presumable that the circumstances prevailing at the time the contract is concluded will change during the contract period.[5] The changes in external conditions outside the control of the parties may truly affect the performances under the contract and even render the whole deal unbearable for the aggrieved party. For example, development of new technology can make the production of the product remarkably cheaper or imposition of new state regulation create unpredicted requirements for the manufacturer leading to significant additional expenses. As a result, the price stipulated in the contract may not at all correspond to the current market price level of the product or service subject to the sale. In such occasion, the party suffering from the change in circumstances might completely forfeit the commercial basis of the contract but still be bound to perform it for years.

In order to prevent the costs caused by such unforeseen events from falling entirely on one of the parties and thus to avoid the risk of losing their benefits under the contract, the parties may agree that in case of a change in circumstances the contract could be adapted. Contract clauses of this type are often found especially in long-term supply contracts as well as in investment contracts.[6] There are variety of different clauses that can provide for adaptation such as hardship clauses or specifically adaptation/revision clauses.[7] In addition to including a specific clause in the contract, the parties can opt for adaptation also by subjecting their agreement to a contract law that provides for adaptation.[8] For example, the UNIDROIT Principles of International Commercial Contracts, which have the purpose of harmonizing international commercial contract law and which the parties can agree to apply to their contract, provide that in case of hardship if the parties fail to reach an agreement, the court can adapt the contract with a view to restoring its equilibrium.[9] Similarly, the Principles of European Contract Law (PECL) stipulate

[5] Fox 2013, 250; Beisteiner 2014a; Berger 2001, 2; Berger 2003, 1348–1349; Ferrario 2017, 71–72; Bordacahar 2018; Schmitthoff 1980, 415.

[6] Schwenzer – Muñoz 2019, 167; Kröll 2004, 437, 440; Fouchard – Gaillard – Goldman 1999, 24; Frick 2017, 190; Fox 2013, 74, 250; Ferrario 2017, 72; Schmitthoff 1980, 417.

[7] Craig – Park – Paulsson 2000, 710. About different types of contract clauses enabling adaptation such as automatic adaptation clauses, hardship clauses and gap-filling clauses see Kröll 2004, 437–444; see also Fox 2013, 256–257.

[8] Fox 2013, 252.

[9] See Art. 6.2.3(4) of the UNIDROIT Principles. Note that according to Art. 1.11 the word "court" includes also an arbitral tribunal.

that if the parties fail to reach agreement, the court may adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.[10] Some commentators are also of the opinion that the CISG regulates hardship and provides for the remedy of contract adaptation.[11] However, in its complexity the issue is unsettled.

The contract can be adapted in a number of ways. For example, the tribunal may increase or decrease the contract price or the extent of a performance obligation, adjust the means or method of performance (e.g. by changing the place of performance or the due date) or order a compensatory payment or appropriate monetary adjustment.[12] The purpose of adaptation is to rebalance the parties' interests in the changed conditions. Adaptation represents the notion of *clausula rebus sic stantibus* which reflects the idea of creating a certain flexibility of the initial agreement over its duration in order to maintain the economic balance.[13] By adaptation it is ensured that the extra costs incurred do not unfairly prejudice one of the parties but that the risk is shared.[14] However, the objective is not to restore the original equilibrium of the contract but to adapt the contract only to the extent that is necessary to make performance bearable for the aggrieved party.[15] Therefore, the adaptation does not necessarily reflect in full the loss entailed by the change in circumstances, but the parties' mutual risk assumption is to be considered.[16] Neither can the tribunal rewrite the whole contract or oblige the parties to enter into a new agreement.[17]

Adaptation by a third party is often regarded as a last resort.[18] Thus, as a primary or preliminary stage the hardship/adaptation clause or the applicable regulation often includes an obligation to renegotiate with the other party to find an amicable solution to the situation.[19] Through

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[10] See Art. 6:111(3) of the PECL. Like under the UNIDROIT Principles, also under PECL the word "court" includes also an arbitral tribunal (Art. 1:301).
[11] See e.g. CISG-AC Opinion No. 7; Schwenzer 2008, 713; Ishida 2018, 372; Brunner 2009, 418–419. Cf. Lookofsky 2011, 161–162.
[12] Brunner 2009, 501; Beisteiner 2014b, 90; Lando – Beale 2000, 327.
[13] Berger 2001, 2.
[14] Lando – Beale 2000, 326–327.
[15] Brunner 2009, 499–500.
[16] Comment No. 7 on Art. 6.2.3 of the UNIDROIT Principles; Brunner 2009, 392, 499–500.
[17] Brunner 2009, 501; Lando – Beale 2000, 327.
[18] See Lando – Beale 2000, 324; Frick 2017, 192.
[19] Fouchard – Gaillard – Goldman 1999, 24; Schmitthoff 1980, 419. For example, the ICC Hardship Clause 2003 provides that "[…] the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event". Similarly, according to

negotiations the parties can modify the contract independently if they consider that the aggrieved party is entitled to adaptation. However, parties are generally not inclined to agree on how the contract should be adapted or whether to adapt it at all.[20] They may have strong disagreements regarding whether the requirements for adaptation[21] are fulfilled in the particular event or how much, for example, the price should be increased or decreased. Consequently, a third party intervention becomes necessary.[22] The third party is generally either a court or an arbitral tribunal.[23] Of course, the parties can also prefer that their contract cannot be adapted by a third party in case the renegotiations fail but instead agree on a different remedy such as termination of the contract.[24] However, by agreeing on adaptation as the available remedy, the parties give up their autonomy to fix the hardship situation by themselves and allow a court or an arbitral tribunal to rewrite their contract for them.

2.2 Contract Adaptation vs. Traditional Dispute Resolution

Dispute resolution is traditionally understood as the act of adjudicating pre-existing rights.[25] Therefore, it has been argued that interfering with the contract by creating new obligations

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Art. 6:111(2) of the PECL "the parties are bound to enter into negotiations with a view to adapting the contract or terminating it". Also, the UNIDROIT Principles stipulate under Art. 6.3.2(1) that "[i]n case of hardship the disadvantaged party is entitled to request renegotiations".

[20] Beisteiner 2014a.

[21] The requirements for adaptation can be for example linked to the existence of hardship. The hardship criteria include a certain threshold of onerousness, unforeseeability and the requirement that the event was beyond the party's control. See e.g. ICC Hardship Clause 2003. More about the hardship requirements see e.g. Schwenzer – Muñoz 2019, 154–160; Lando – Beale 2000, 324–326; Brunner 2009, 399.

[22] Stalev 1983, 200; Fouchard – Gaillard – Goldman 1999, 24.

[23] Schwenzer – Muñoz 2019, 167–168.

[24] See Schmitthoff 1980, 421. This is the position taken e.g. in the ICC Hardship Clause 2003 which stipulates that "[…] where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, the party invoking this Clause is entitled to termination of the contract".

However, at the time of concluding the contract the parties are often planning long-standing, mutually beneficial and flexible relationship and thus want their contract to be rather modified than completely terminated in case the circumstances change. Indeed, termination of the contract is not always the suitable solution. According to Stalev, "To terminate the contract, as it no longer corresponds to the new circumstances, is not the right solution for long-term contracts. The well understood interests of both parties require that the disturbed contractual relations be stabilized and the contract be saved. In order to save the contract the initial contractual balance must be reestablished. It may be reestablished by amending the contract so that it fits the changed circumstances better." Stalev 1983, 199–200.

Nevertheless, despite of the constructive idea, it ought to be noted that enforcing an adaptation on disputing parties may not solve the parties' conflict but instead just force them to remain in a continuing hostile relationship. Schwenzer – Muñoz 2019, 168.

[25] Beisteiner 2014a; Brunner 2009, 494; Ferrario 2017, 145; see Schmitthoff 1980, 415–416.

through adaptation would not at all fall under the perception of arbitration.[26] The reasoning is that arbitrators can only resolve "*legal disputes*", and as a request for adaptation does not allege a breach or non-performance of a contractual or legal duty, is not a dispute in that sense.[27] For example, the Austrian Supreme Court held in its ruling of 1985 that the adaptation of a long-term contract to changed circumstances on the basis of the respective contractual clause would not be arbitration, but rather expert determination.[28] This "dispute oriented" understanding of arbitration, as Berger calls it, has been visible also in the context of investment arbitration.[29]

During the drafting of the UNCITRAL Model Law[30], it was suggested that regarding matters sufficient to arbitration a more lenient formulation would be adopted, according to which the existence of "difference" of opinion would suffice for an arbitration agreement,[31] which would allow arbitrators also to decide cases on adaptation. Conversely, it was also adduced that arbitrators' tasks would be limited to the interpretation and application of contracts and legal provisions.[32] Lastly the suggestion of the broader wording of "difference" was rejected by the UNCITRAL Working Group, and the Art. 7(1) of the Model Law now defines arbitration agreement as an agreement by the parties to submit to arbitration all or certain *disputes* which have arisen or which may arise between them in respect of a defined legal relationship.

Already in 1985 René David argued that the strict distinction between the two kinds of decision-making should be given up. He pursued the idea of oneness of arbitration i.e. a uniform concept of arbitration which would comprise both traditional dispute settlement and contract adaptation. In his view, in both cases the same technique is resorted to, the same result is aimed at, and the application of same rules is desirable.[33] Indeed, the approach according to which a disagreement about whether a contract should be adapted is not a "dispute" and thereby not sufficient to

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[26] Berger 2003, 1373–1376; Fouchard – Gaillard – Goldman 1999, 25; Brunner 2009, 493–494; Beisteiner 2014b, 84–85; Bernardini 1998, 421–422; Kröll 2004, 450.

[27] Fouchard – Gaillard – Goldman 1999, 25; Beisteiner 2014b, 84–85; Kröll 2004, 450.

[28] OGH, docket number 1 Ob 504/85 (1985), cited in Beisteiner 2014b, 85.

[29] See Berger 2003, 1374–1375. During the drafting of the ICSID Convention, the chairman of the Legal Committee was of the opinion that that differences of opinion of the parties on contractual adjustment could not be regarded as "disputes". See ICSID Doc. SID/LC/SR/4 (1964), 3.

[30] UNCITRAL Model Law on International Commercial Arbitration with amendments (2006).

[31] UN Doc.AICN.9/WG.IIIWP.37.

[32] By the German delegation. See the statement of die German delegation during the drafting of the Model Law in UN Doc. A/CN.9/26*3, para. 15: "the activity of die arbitral tribunal is concentrated on die interpretation and application of contractual agreements and legal provisions".

[33] David 1985, 411.

arbitration, is very conceptual and artificial. Firstly, if the parties disagree on, for example, whether one of the parties is entitled to price increase under the hardship clause or how much the price should be increased, it sounds strange to claim that there would not be a dispute and consequently the parties could not have the matter solved by the arbitrators.[34] It is another question, of course, whether the parties in that particular case have granted the tribunal the authority to adapt their agreement. However, the point here is that they should have been at least able to do so if they wished.

Secondly, the separation between adaptation and interpretation of a contract is not always clear or even feasible.[35] Thus, it would be practically impossible to classify and divide the matters that do or do not suffice to arbitration. For example, if the parties have drafted a price revision clause, it is not uncomplicated to define whether increasing the price on the basis of that clause is adaptation of the contract or simply enforcement of the price revision clause. The situations vary regarding to what degree the result is up to the tribunal's discretion and to what extent it is determined by the parties' contract which the tribunal is "only" interpreting and applying.[36] Therefore, quibbling over which difference or conflict between the parties is or is not a dispute, and drawing lines between situations that are or are not adaptation would only lead to growing unclarity.

It seems that today this notion has been generally accepted, and arbitration and the role of arbitrators are considered relatively broadly.[37] It has been considered that the narrow interpretation does not reflect the practice or the needs of modern international commerce[38] and

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[34] Similarly, according to Szurski "[i]t may be assumed that in the case the parties to a contract, acting in virtue of contractual provisions, cannot come to an agreement as to the adaptation of the contract to substantially changed circumstances or as to the filling the "gap" in it, there exists between them a dispute on this matter. If the parties have agreed between themselves that disputes of such kind are subject to decision by means of arbitration, the competence of the arbitral tribunal to give a decision in the form of award on the disputed subject matter cannot be questioned." Szurski 1984, 67–68.

[35] Berger 2001, 6; Horn 1985, 184; Beisteiner 2014b, 88 ("any distinction between interpreting and creating the law can be only fiction"); see Mann 1990, 259; see also *Aminoil v. Kuwait* (1982), para. 75.

[36] About different types of contract clauses enabling adaptation such as automatic adaptation clauses, hardship clauses and gap-filling clauses see Kröll 2004, 437–444; see also Fox 2013, 256–257.

[37] Berger 2001, 15; Brunner 2009, 496; Beisteiner 2014b, 105–106; Fouchard – Gaillard – Goldman 1999, 28; Bernardini 1998, 422; Frick 2001, 194. Some jurisdictions have even adopted statutes that expressly recognize that the parties are entitled to agree to empower the arbitral tribunal to fill gaps or to adapt the contract. See e.g. Art. 1(2) of the Bulgarian Law on International Commercial Arbitration (1993); Art. 1020(4)(c) of the Dutch Arbitration Act (1986); Section 1 of the Swedish Arbitration Act (1999).

[38] Fouchard – Gaillard – Goldman 1999, 25; Berger 2003, 1375 *et seqq.*; Brower 2016, 17; see Brunner 2009, 496.

that arbitration proceedings in which arbitrators may not only compensate or excuse parties but also to modify contracts are much more capable of solving problems early and in a manner which facilitates further cooperation of the parties.[39] The factors that have been said to have promoted the recognition of contract adaptation within the authority of arbitrators include the significantly greater arbitration-friendliness of national arbitration acts, increased equal treatment of adjudication by arbitral tribunals and by national courts, and the comprehensive recognition of party-autonomy as the leading principle of arbitration.[40] It should be pointed out that neither the drafters of the Model Law, regardless of the choice in favour of the word "dispute" in Art. 7(2), opted for excluding the possibility of contract adaptation by arbitral tribunals. Instead, it was considered during the negotiations that due to the complexity of problems relating to adaptation of contracts, the matter should be left to be governed by the national laws, which were encouraged to adopt rules on adjustment of contracts.[41]

However, although the modern developments have rightly led to the acceptance of adaptation as arbitration, the observation that should be made herein is that contract adaptation still is to a considerable extent different kind of decision-making than settling a traditional dispute.[42] Indeed, the power to adapt a contract is of a distinct nature from the more conventional, merely declarative powers of the tribunal (or a court) which involve interpreting the contract in an exact manner, determining its existence or inexistence, or deciding whether it was properly performed or avoided.[43] When a party requests adaptation of the contract, the tribunal is no longer being asked to make a "yes or no" decision on the basis of that contract but rather to shape the

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Empowering arbitrators to adapt a contract has been considered possible also in the context of investment arbitration. However, a clear and explicit wording for that is required. In *Aminoil v. Kuwait* (1982) the tribunal submitted that "[a] tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract – unless that right is conferred upon it by law, or by the express consent of parties" (para. 74).

[39] Frick 2017, 190.

[40] Berger 2003, 1375–1376.

[41] It was considered that national legislators should first adopt rules on adaptation of contracts or improve the already existing rules considering the needs of modern international trade. Once the rules in this field and the practice on the basis of such rules would be more developed, a harmonization could be more easily achieved. UN Doc. A/CN.9/245, para. 23.

[42] Berger 2003, 1379; Beisteiner 2014b, 116–117; Kröll 2004, 451. Cf. Brunner 2009, 496–497, where Brunner submits that as the request for modification needs to be reasonably substantiated by the parties, the outcome of the adaptation process by the tribunal is not so open that it would not be suited to classical arbitral adjudication in the sense of a "yes or no" decision. Thus, Brunner's argument in support of the possibility of contract adaptation in arbitration is based on the apprehension that in fact adaptation is not so different from the traditional "yes or no" decision-making.

[43] Kos – Durbas 2014, 135.

contractual relationship for the parties.[44] By adapting the contract, the tribunal may indeed modify the parties' rights and obligations as well as create new obligations upon its discretion, and therefore the decision-making includes a creative or innovative element in substitution of determining the parties' rights and obligations through mere interpretation and application of the contract.[45]

By letting the tribunal to adapt their agreement, the parties give up their autonomy to control and regulate the contractual relationship and agree to be bound by the decision the tribunal finds most suitable in the situation. Although the tribunal's discretion is not unlimited, it is however wider than when determining the parties' rights and obligations through a traditional dispute settlement.[46] Thus, it is often also more difficult to predict the outcome of the procedure.[47] As a consequence of the tribunal's greater discretion, there is also an obvious difference in the degree of competence required from the arbitrators.[48] When adapting a contract, the tribunal often needs to, in addition to the expertise in the legal area, have competence also in for example the economic, financial or technical field in order to reach a sensible solution.[49] Therefore, it is not self-evident that the parties always want the tribunal to possess such powers even though they would want it to solve their disputes through traditional dispute settlement i.e. interpretation and application of the agreement.[50]

2.3 The Possible Stands Against a Claim on Contract Adaptation

After the circumstances have changed, the parties may disagree on whether the contract can be adapted to reflect those changes. The disagreement may concern whether the contract can be adapted by the arbitral tribunal and thus whether the tribunal possesses such authority and/or whether the aggrieved party is entitled to the requested adaptation on the basis of the applicable

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[44] Berger 2003, 1373.

[45] Berger 2003, 1372, 1379; Beisteiner 2014b, 78, 84; Redfern – Hunter 2004, 363; see Fouchard – Gaillard – Goldman 1999, 27.

[46] See Stalev 1983, 206.

[47] When applying a contract clause or regulation that allows also termination of the contract, it is also left to the tribunal's consideration whether to adapt the contract at all or whether it is more suitable to terminate it entirely. See Lando – Beale 2000, 326–327.

[48] Berger 2001, 12.

[49] Berger 2001, 12.

[50] Similarly, Stalev 1983, 200 ("To empower a third person to write a contract – especially a long-term contract for international economic cooperation – is a risky undertaking. No wonder the parties would be very reluctant to give such a power.").

substantive law and the facts of the particular case.[51] Due to the above-discussed singular nature of contract adaptation and to protect its own interests, the party whose performance is not affected by the changed circumstances may have good reasons to resist the adaptation. At this point, it is important to recognize what type of challenges the party can raise i.e. what are the conceivable positions against the claim requesting contract adaptation.

First, a separation is to be made between an objection on the procedural grounds and again on the merits of the case. When determining whether the contract can be adapted by the tribunal, the aspects of substantive and procedural law are closely intertwined.[52] This problem was realized during the drafting of the Model Law when insertion of a provision on contract adaptation was considered. The provision was ultimately omitted as it was considered that "it was difficult to separate questions pertaining to procedural law and questions pertaining to substantive law and that, therefore, the Model Law, as a system of procedural rules, should not contain rules which might touch upon substantive rights of the parties".[53] The entanglement of the procedural and substantive aspects is reflected, for example, in the fact that the inclusion of a contract clause in the substantive agreement that may require adaptation during the contract term or submitting the agreement to a substantive law that permits adaptation may entail that the tribunal is granted also with the procedural powers to adapt the agreement.[54] However, even if the sources of substantive law have to be referred to when determining whether the tribunal has the authority to adapt the agreement, the question of the existence of such mandate still is of procedural nature.[55]

The objection on the merits is typically considered after the tribunal has already found that it is procedurally competent in the case.[56] By objecting the adaptation only on the level of the

[51] See Beisteiner 2014b, 79.
[52] Beisteiner 2014b, 78–79; Berger 2001, 7; Brunner 2009, 494; see Frick 2017, 194.
[53] UN Doc. A/CN.9/245, para. 21. It was also considered that contract adaptation would not be acceptable for many countries, and therefore a specific provision was left out from the Model Law.
[54] Beisteiner 2014b, 110; Berger 2001, 8; see Brunner 2009, 495, 497; ICC Award No. 5754 (unpublished) cited in Craig – Park – Paulsson 2000, 90. In ICC case 5754 (1988) the tribunal held that the traditional ICC arbitration clause may be interpreted as covering the adaptation of contracts if the clause is contained in a long-term contract that contains "a number of provisions which may require adjustment over the period of that contract".
[55] Indeed, as Berger puts it, "[e]ven if […] the applicable substantive law permits an adjustment by third parties, the question remains whether arbitral tribunals are procedurally authorized to make such decisions". Berger 2003, 1373. Also, Brunner submits that "[c]onceptually, the procedural issue as to whether the *lex arbitri* allows arbitral tribunals to adapt a contract must be distinguished from the question as to whether the applicable substantive law (*lex causae*) allows for such a remedy". Brunner 2009, 494. Similarly, Frick 2017, 194.
[56] Beisteiner 2014b, 79.

substantive law the party implies that it recognizes the tribunal's procedural authority to decide the claim and consequently also adapt it if it considers adaptation appropriate. On the merits the party's contestation can be based on, for example, an allegation that the parties have not provided for adaptation as the available remedy or that the requirements for adaptation are not fulfilled in the particular case. The questions the tribunal needs to deal with at this point navigate around the two competing principles of the sanctity of contracts (*pacta sunt servanda*) and change of circumstances (*clausula rebus sic stantibus*).[57] Finally, at the end of the arbitral procedure the tribunal renders a final award which cannot be subsequently reviewed by courts.

Whereas resisting the claim on a substantive ground challenges the opposing party's right to the requested adaptation, raising an objection on a procedural ground questions whether the tribunal is in the first place entitled to decide the case. Thus, the tribunal is asked to render a decision where it finds that it does not have the competence to adapt the contract or to even examine whether the contract should be adapted or not. At this stage, depending on the objecting party's arguments, the tribunal may have to determine whether contract adaptation still (subject to the applicable laws) qualifies as arbitration (a question of arbitrability), and if so, whether under the individual arbitration agreement the tribunal is authorized to adapt the contract (a question of procedural powers in the particular case).[58] In this regard, the tribunal's procedural powers could be objected, for example, on the basis that the applicable arbitration law (the *lex arbitri*) does not allow arbitrators to adapt contracts or that the *lex arbitri* requires an express authorization for that regard which the parties have not given.[59]

Second, in addition to the division between the aspects of substantive law and procedural law, attention should be drawn to the character of the preliminary contestation. As explained above,

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[57] Beisteiner 2014b, 79; for a comparative analysis of the application of these principles see Frick 2017, 205 *et seqq*.
[58] Beisteiner 2014b, 79.
[59] Arguments could be developed for and against these positions. For example, Berger submits that "[u]sually, the traditional terminology that 'all disputes arising out of or in connection with this dispute' are referred to arbitration suffices to invest an international arbitral tribunal with a decision-making power that covers all aspects of possible disputes. The situation is different with respect to the adaptation and supplementation of contracts. Here, the perceived contractual and creative nature of the arbitrator's decision is said to require a specific contract clause that contains an express authorization by the parties *in addition* to the usual arbitration agreement". Berger 2001, 8. Conversely, the Swiss Supreme Court has held that as long as the arbitration agreement does not contain any express *restrictions*, it must be assumed that the parties intended to confer upon the tribunal an all-embracing jurisdiction, including the power to fill gaps and amend the contract. *NV Belgische v. NV Distrigas* (2001), referenced in Nessi 2017 and Brunner 2009, 357, fn. 82.

this study focuses, from the facet of contract adaptation, on the separation of the issues of jurisdiction and admissibility. Traditionally all procedural/preliminary challenges to the tribunal's powers to adapt a contract has been presumed to be concerned with the tribunal's jurisdiction.[60] However, this study challenges that view and examines whether the preliminary contestation in cases of contract adaptation by arbitrators could also (or should rather) be regarded as an issue pertaining to admissibility.

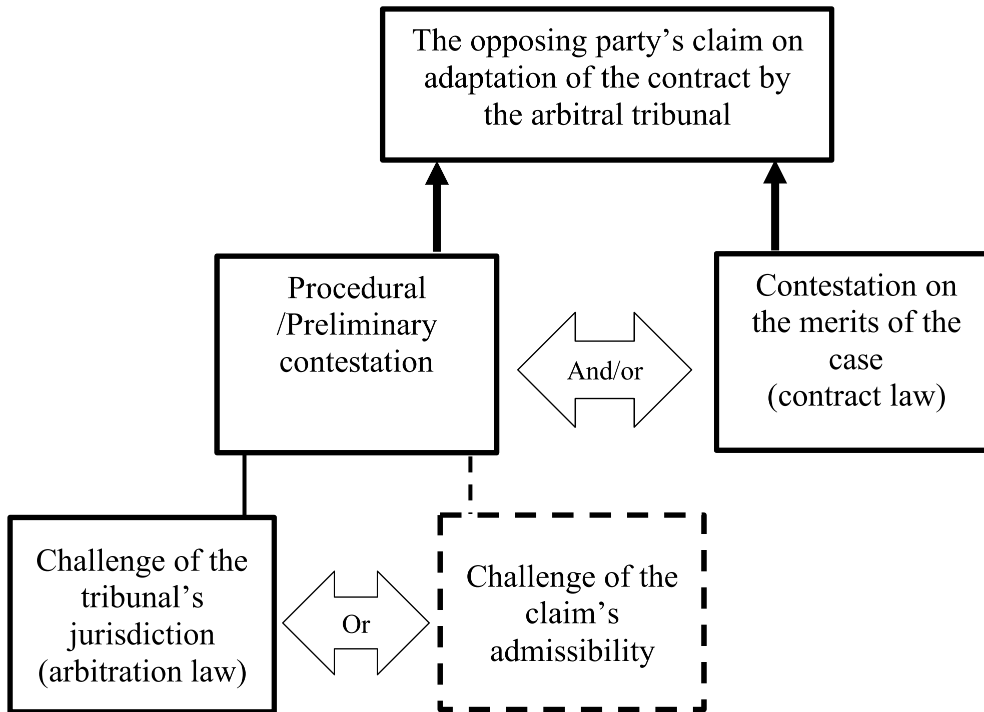

Figure 1 – The different positions available for the party resisting adaptation of the contract.

Here (see *Figure 1*) the challenges to admissibility of claims are located under procedural matters together with jurisdictional challenges. This is because they both are preliminary objections and if they succeed the tribunal is prevented from making a finding on the merits of the case.[61] One could argue that the nature of admissibility questions is substantive rather than procedural because the claim's admissibility is decided after the tribunal has already found that it has the jurisdiction to decide the case, and thus the tribunal has the procedural mandate to proceed further in the case and give a final decision on admissibility and/or on the merits. In

[60] See later Chapter 4.2.2.
[61] Lim – Ho – Paparinskis 2018, 121; Waibel 2014, 7; Walters 2012, 661; Fitzmaurice 1986, 438.

addition, admissibility is often closely related to the substantive side of the dispute. Then again, as was demonstrated above, neither can the legal aspects that are generally understood as procedural be wholly distinguished from the substantive matters, at least in cases of contract adaptation. Whether the admissibility questions pertain to procedural or substantive field of the arbitral procedure will be discussed in more detail later in Chapter 3.4.3. At this stage, it is safe to settle for characterising the challenges of admissibility as preliminary objections rather than either procedural or substantive.

Determining the difference between jurisdiction and admissibility and placing preliminary challenges against claims on contract adaptation into that division is probably even more complex than making a separation between the aspects of substantive and procedural law. This is because the division between jurisdiction and admissibility is not even itself very clear and widely taken notice of but instead situations of admissibility are often mixed with jurisdictional issues. Furthermore, the availability of the arbitrators' powers to adapt a contract has presumably never been considered in relation to admissibility and thus explicitly regarded as an issue pertaining to the admissibility of the particular claim. However, the question is of considerable practical relevance. The nature of the preliminary contestation affects, for example, what kind of award the tribunal is practically supposed to render, the possibility of a subsequent review of the award by state courts and the possibilities for referring the claim to litigation if the arbitral proceedings are ceased. Before examining in detail the appropriate classification of the preliminary challenges against claims on adaptation, I will first analyse in general the difference between the concepts of jurisdiction and admissibility.

3 Challenges to Jurisdiction vs. Challenges to Admissibility

3.1 Introduction

Understanding the separation between the concepts of jurisdiction and admissibility is not only of theoretical relevance but serves a significant practical purpose.[62] The essentiality of the separation is well summarized by Jan Paulsson who explains that if the arbitral tribunal's decision exceeds the limits of its jurisdiction, the decision can be invalidated by a controlling authority, whereas if the parties have consented to the tribunal's jurisdiction, any decision of that tribunal regarding admissibility of the claim is final.[63] Hence, if an issue of jurisdiction is inaccurately treated as a one of admissibility, the parties are derived from the possibility to get the decision reviewed by a court. The other way around, i.e. if an issue of admissibility is mistaken for jurisdictional, the faulty classification may result in "an unjustified extension of the scope for challenging awards and frustrate the parties' expectation that their dispute be decided by the chosen neutral tribunal".[64]

However, regardless of the direct consequences following the classification of the issues, many courts and tribunals have repeatedly mixed the concepts with each other. Particularly, admissibility situations are, perhaps due to their obscurity, often treated as jurisdictional issues. From the outset it may indeed seem that the difference between the concepts is not that vital or that it should not be made at all. After all, in both situations the arbitral tribunal refrains from dealing with the merits on the basis of a preliminary impediment to hear the case. However, if we take a closer look at the consequences of the tribunal's decision depending on whether the resolved issue is classified as a matter of jurisdiction or admissibility, the difference is integral.

Therefore, the need for increasing clarity to the distinction between jurisdiction and admissibility is evident. Recognizing the differing characteristics of both issues and incorporating them stronger to the teachings of international arbitration would develop a more coherent practice among courts and tribunals and thus promote clarity and predictability in the decision making. It would also help parties to target their defence precisely to that particular

[62] Paulsson 2005, 601; Douglas 2009, 141; Shany 2013, 786; Gouiffès – Ordonez 2015, 108; *Swissbourgh v. Lesotho* (2018), para. 208.
[63] Paulsson 2005, 601.
[64] Paulsson 2005, 601; similarly, see Gouiffès – Ordonez 2015, 108.

legal matter they attempt to evoke, and therefore benefit them when making strategic choices and reasoning their positions during the arbitral proceedings.

3.2 Unclarity in the Use of Concepts

3.2.1 Lack of Regulatory Recognition of Admissibility

Admissibility is not expressly recognised in most regulations in the area of international arbitration. The terms admissibility and inadmissibility do not appear, for example, in the provisions of national arbitration laws, most institutional arbitration rules[65], the ICSID Convention[66] or ICSID Arbitration Rules.[67] The lack of an express term has caused especially some ICSID tribunals to wholly question the meaning and usefulness of a separate notion of admissibility. For example, the tribunals in *CMS v. Argentina* and in *Enron v. Argentina* held that the distinction between admissibility and jurisdiction does not appear necessary or appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence.[68] Thus, the lack of express recognition in the regulatory framework explains at least to some extent the unfamiliarity with or indifference to admissibility also in the practical life.[69]

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[65] Such as the UNCITRAL Rules, the LIAC Rules, the SIAC Rules, the AAA Rules and the FAI Rules.

[66] It can, however, be argued that Art. 41(2) of the ICSID Convention introduces the distinction between jurisdiction and admissibility. The article provides that any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, *or for other reasons is not within the competence of the tribunal*, shall be considered by the tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute. See Waibel 2014, 6. Heiskanen suggests that the term "compentence" in Art. 41 would comprehend also admissibility and that no strict conceptual distinction can be drawn between the concepts and thus decisions on competence are decisions on admissibility and *vice versa*. Heiskanen 2014, 245.

Also, Paulsson submits that as Art. 52 of the ICSID Convention mandates annulment of awards for excess of power, it becomes necessary to understand the difference between objections that are finally decided by the arbitrators and objections subject to review. Paulsson 2005, 608.

[67] Nota 2010, 31; Newcombe 2010; Waibel 2014, 8; Gouiffès – Ordonez 2015, 111. See *BAZ v. BBA* (2018), para. 128, where it was noted that "[i]n international law, the term "admissibility" is expressly mentioned in the Art 79(1) of the Rules of the International Court of Justice (1978)" leading to the impression that the ICJ rules are the only regulation expressly recognizing admissibility.

[68] *CMS v. Argentina* (2003), para. 41; *Enron v. Argentina* (2004), para. 33. Similarly, in *Methanex v. USA* (2002) the tribunal rejected the USA's admissibility challenges because it found that due to the absence of an equivalent rule on admissibility it had no express or implied power to reject claims based on inadmissibility (paras. 123–126).

Nevertheless, the distinction between jurisdiction and admissibility has still been recognized also by ICSID tribunals. For example, in *SGS Société Générale v. Philippines* the tribunal held that "[t]his impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction" (para. 154). Consequently, the tribunal ceased the proceedings on the basis of the claim's inadmissibility.

[69] See Gouiffès – Ordonez 2015, 110.

However, as an exemption from what seems to be the more conventional approach, some institutional arbitration rules do mention admissibility, which implies awareness and recognition of the concept in international commercial arbitration. For example, Art. 6(4) of the ICC Rules states that the Court's decision pursuant to Art. 6(4) is without prejudice to the *admissibility* or merits of any party's plea or pleas. Similarly, the HKIAC Rules provide in Art. 19.6 that HKIAC's decision pursuant to Art. 19.5 is without prejudice to the *admissibility* or merits of any party's claim or defence. Additionally, also the SCC Rules submit under Art. 39(2) that a request for summary procedure may concern issues of jurisdiction, *admissibility* or the merits.

The distinction between jurisdiction and admissibility is noted also in Art. 79 of the ICJ's Rules of Court. The article enables the court to determine the questions of its jurisdiction and the admissibility of the application separately. However, since decisions made by the ICJ are not subject to any kind of review but the ICJ is a forum of first and last resort, any distinction it draws between jurisdiction and admissibility does not have the same significance as in arbitration where decisions regarding the tribunal's jurisdiction are subject to review by national courts.[70] Therefore, although the ICJ's determinations of admissibility may be helpful and work as guidance, invoking arguments in arbitral proceedings based on the jurisprudence of the ICJ should be made with caution.[71]

3.2.2 Inaccuracy in Case Law

The positions taken in case law have been relatively inconsistent regarding the recognition of the separation between jurisdiction and admissibility. The line between the concepts does not seem to be clear for many tribunals and courts, and in particular issues of admissibility have often been mistakenly considered as jurisdictional. Within arbitration the concepts have been used inaccurately in both commercial and investment arbitration. However, the difficulty to recognise and establish the line between jurisdiction and admissibility becomes even more apparent in national courts where distinction is not ordinarily made between the concepts. This is because a review is commonly available regardless of whether the decision of the lower court is deemed to have related to a matter of jurisdiction or one of admissibility.[72]

[70] Paulsson 2005, 603; Newcombe 2010.
[71] Paulsson 2005, 603; Newcombe 2010.
[72] Synková 2012, 39; Paulsson 2005, 603.

In many cases admissibility has not been addressed at all either by the court/tribunal or by the parties, but the issue has been by default considered to concern jurisdiction. For example, in *International Research v. Lufthansa,* the Singaporean court had to determine whether a multi-tiered dispute resolution clause including condition precedents to arbitration was enforceable, and thus whether the arbitral tribunal had correctly found that it had jurisdiction as it had held the preconditions to be unenforceable. The court disagreed with the tribunal's conclusion as it stated that "until the condition precedent to the commencement of arbitration is fulfilled, neither party to the arbitration agreement is obliged to participate in the arbitration. In the same vein, an arbitral tribunal would not have *jurisdiction* before the condition precedent is fulfilled".[73] Thus, the court and previously also the tribunal treated the issue as jurisdictional without even considering whether it would in fact be about admissibility. Indeed, a correct approach in the case would have been that the party resisting jurisdiction would have rather/also objected the claim's admissibility and that the tribunal would have determined the issue to concern admissibility.[74] Consequently, the tribunal should have made a decision on whether the non-fulfillment of the condition precedents rendered the claim inadmissible. That decision would not have been then reviewable by the court.

In turn, in ICC case 12739 the tribunal held that prior to the completion of the pre-arbitral phase as foreseen in the arbitration agreement the request for arbitration was inadmissible. However, even though the tribunal correctly defined the request inadmissible, it anyway concluded that there was no *jurisdiction* to hear the case as the request was filed prematurely.[75] Thereby, the tribunal regrettably mixed the two concepts and did not consider them as two separate issues with different consequences. This demonstrates that the choice of words used in arbitral awards cannot be taken as very intentional but rather even incidental or random.

In *Consorzio Groupement v. Algeria*, the ICSID tribunal first correctly noted that "it emerges that the Tribunal must first rule on questions affecting its jurisdiction […], and subsequently on those relating to admissibility […]. The two types of objections must be dealt with separately and successively, because they deal with different questions".[76] Nevertheless, confusingly the

[73] Emphasis added. *International Research v. Lufthansa*, para. 101 et seq.
[74] About why non-compliance with procedural preconditions to arbitration should be regarded as an issue of admissibility see Chapter 3.4.1.
[75] ICC case 12739 of 2004 (unreported) in Webster – Buhler 2014, 89.
[76] Consorzio Groupement v. Algeria (2005), para. 2.

tribunal still ended up concluding that because the claimant was not the holder of the rights and obligations of the contract under which the investment was made and thus was not an investor within the meaning of the ICSID Convention it followed that the request for arbitration was inadmissible, but that also (for the same reason) the tribunal had no jurisdiction to consider the claim.[77] However, in order to correctly follow the distinction between the jurisdiction and admissibility challenges the tribunal should have first considered the question of its jurisdiction through and consequently, as it would have found to lack jurisdiction, refrained from considering the admissibility question at all. Indeed, if the tribunal lacked jurisdiction, it would not have been competent to consider the admissibility either.

A good example of a situation where arbitrators and a court did not understand the nature of the preliminary objection similarly is provided by *BG Group v. Argentina*. In that case the tribunal had made a decision as to the admissibility of the claimant's claims.[78] In the award the issue was discussed under the heading "Are BG's Claims Admissible?" and the tribunal concluded expressly that it "finds admissible the claims brought by BG in this arbitration".[79] However, when Argentina brought the case to the US Court of Appeals, the Court held that the pre-arbitration litigation requirement was a jurisdictional requirement and that compliance with that requirement was reviewable on a de novobasis in a vacatur proceeding. The Court accepted the appeal and vacated the award on the basis that the tribunal was without power to hear the case. Subsequently, the matter was brought before the US Supreme Court which also considered that the matter concerned jurisdiction. The Supreme Court held that the arbitrators' jurisdictional determinations were lawful and thereby the judgement of Court of Appeals to the contrary is to be reversed.[80] However, regardless of arriving at different conclusions, both courts ignored that the tribunal had in fact made a decision to admissibility but regarded without any problematization that the decision was about jurisdiction thus subject to their review.[81]

Similarly, in *Vekoma v. Maran Coal* the parties' arbitration clause required that any arbitration must be initiated within thirty days after it was agreed that the difference or dispute cannot be

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[77] *Consorzio Groupement v. Algeria*, paras. 40–41.
[78] The issue was whether the claimant's noncompliance with the requirement under the bilateral investment treaty between the UK and Argentina to have prior recourse to local courts for a period of 18 months before arbitration could be commenced rendered the claims inadmissible.
[79] *BG Group v. Argentina* (arbitral award, 2007), para. 157, see also paras. 140 *et seqq*.
[80] *BG Group v. Argentina* (Supreme Court judgement, 2014), 19.
[81] Similarly, see Born 2014, 939–941; see also Rau 2014, 12 *et seqq*.

resolved by negotiation. A dispute arose, and arbitration was initiated. The parties disagreed on whether the thirty-day limitation was exceeded and thus whether the claimant's right to arbitrate the claim had lapsed. The ICC tribunal held that the claim was timely and consequently rendered an award on the merits in favor of the claimant. Afterwards the respondent sought annulment of the award in the Swiss Federal Supreme Court which upheld the challenge on the grounds that the arbitral tribunal had "erroneously held that it had jurisdiction" by ruling that the claim has been brought within the agreed time limit.[82] The error of the court's annulment was that the court misunderstood the nature of the challenged arbitral decision; it treated the decision as jurisdictional whereas the arbitrators had in fact made a decision as to the admissibility of the claim.[83] Thus, the court would not have been entitled to review the decision.[84]

In addition to the difficulty to separate jurisdiction and admissibility, another stumbling block for at least one court has been confusing issues of admissibility with the merits of the case. In *Methanex v. USA* the USA raised a series of objections to both jurisdiction and admissibility. Regarding its admissibility challenges, the USA submitted that "taking all of the allegations of fact made to be true, including uncontested facts, that as a matter of law, there can be no claim, and that the claim is ripe for dismissal at this stage for that reason".[85] The ICSID tribunal correctly took the view that the challenge raised by the USA was not jurisdictional. However, it has been argued that the tribunal should have also declared that the challenge was not an objection of inadmissibility either as it required consideration of the matter of law which would preclude the claim.[86] Indeed, the defences that the case is *unhearable* (i.e. inadmissible) should be separated from the defences claiming that the case is legally *hopeless*.[87]

Finally, another unfortunate misuse of terminology has been adopted by the US Supreme Court which has addressed issues of jurisdiction and admissibility by exercising the term *arbitrability*.

According to the prevailing international understanding, arbitrability involves determining which types of subjects or disputes are under a particular national law capable of being resolved

[82] Synková 2012, 39–40.
[83] Paulsson 2005, 602.
[84] Paulsson 2005, 602.
[85] *Methanex v. USA* (2002), para. 109.
[86] See Paulsson 2005, 607. Ultimately, the tribunal rejected the USA's admissibility challenges because it found that it had no express or implied power to reject claims based on inadmissibility. It submitted that thus it is unnecessary to develop these materials further. See *Methanex v. USA*, para. 126.
[87] Paulsson 2005, 607.

in arbitration.[88] Thus, it has a very specific meaning and purpose in addressing situations that may not be arbitrated regardless of whether the parties have validly agreed to arbitrate such matters.[89] However, the US courts have adversely confused the term with admissibility and jurisdiction thus blurring the lines between the three essentially different concepts.[90] For example, in *First Options v. Kaplan* there was a question regarding whether First Options could pursue the Kaplans as private persons as well as their firm when the Kaplans were not itself signatories to the document containing the arbitration clause. The Court regrettably characterized the issue as of arbitrability and held that the dispute was not arbitrable, when it in fact was about jurisdiction.[91]

In turn, in *Glass v. Kidder Peabody* the US Court of Appeals mixed arbitrability with admissibility as it considered that "questions of mere delay, laches, statute of limitations, and untimeliness raised to defeat the compelled arbitration are issues of *procedural arbitrability* exclusively reserved for resolution by the arbitrator".[92] This conclusion was confirmed by the US Supreme Court in *Howsam v. Dean Witter Reynolds*. In that case the issue concerned whether Howsam could arbitrate the dispute when the applicable arbitration provision stated that the dispute would have to be submitted to arbitration within the time limit of six years after the dispute had arisen, and also who should decide such question of "arbitrability". The Court held that the arbitrability issue should be decided by the arbitrators rather than the courts. However, the court should have arrived at its conclusion by submitting that the issue was about admissibility and for that reason exclusively subject to arbitral determination.[93]

3.2.3 Inaccuracy in Literature Contributions

In addition to the lack of comprehensive regulatory recognition and inaccuracies in case law, also the legal literature sometimes seems to further hinder the recognition of admissibility as a separate issue from jurisdiction. As an indication of the limited weight and recognition given to admissibility, the leading studies on international commercial arbitration (such as *Redfern and Hunter on International Arbitration* and *Fouchard Gaillard Goldman on International*

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[88] Born 2014, 944; Redfern – Hunter 2015, 110; Lew – Mistelis – Kröll 2003, 187–188.
[89] Both the New York Convention (Arts. II(1) and V(2)(a)) and the Model Law (Arts. 34(2)(b)(i) and 36(1)(b)(i)) deal with non-arbitrable matters and are limited to disputes that are "capable of settlement by arbitration".
[90] About the analysis and critique of the American use of the word "arbitrability" see Paulsson 2005, 609 *et seqq*.
[91] Paulsson 2005, 612.
[92] Emphasis added. *Glass v. Kidder Peabody* (1997), para. 456, cited also in Born 2014, 941, fn. 1604.
[93] Paulsson 2005, 612.

Commercial Arbitration) do not seem to refer to admissibility as a distinct concept or principle in international arbitration.[94] Indeed, usually when scholars address arbitrators' authority to do something within the limits of the powers conferred upon them, the issue is discussed merely in the context of jurisdiction. Thus, situations properly classified as matters of admissibility are mistakenly equated to jurisdictional. This is capable of hampering the recognition of admissibility as an independent concept in arbitration and further confusing the line between situations of admissibility and jurisdiction.

For example, in *Redfern and Hunter on International Commercial Arbitration* it is stated under the title "Jurisdiction" that the grounds for a challenge to jurisdiction may include the reason that the claim is time-barred.[95] Furthermore, it is considered that situations where the claimant has failed to follow the contractual requirement that all claims for varied or additional work to be first decided by an engineer before being referred to arbitration fall outside the tribunal's jurisdiction.[96] However, as will be explained below, both of these defects, i.e. untimeliness and incompliance with a condition precedent to arbitration, ought to be correctly regarded as rendering the claims inadmissible.[97] Also Christopher Brunner uses the concepts of jurisdiction and admissibility interchangeably by submitting, suitably in the context of contract adaptation, that "it may still be arguable whether an arbitral tribunal has the procedural power, i.e., the *jurisdiction*, to adapt a contract when the substantive law requirements of the hardship test are met. The discussion of the procedural *admissibility* of contract adaptation by an arbitral tribunal stems from the debate as to whether a 'dispute' exists […]".[98]

Gary Born in his study *International Commercial Arbitration* discusses admissibility regarding noncompliance with procedural requirements of arbitration agreement (but unfortunately not in any other possible relations). He does not characterize the issue as pertaining exclusively to admissibility but says that it can be viewed as either jurisdictional, admissibility or procedural and that the characterization depends on the parties' intentions.[99] Nevertheless, he does

[94] See Newcombe 2010.
[95] Redfern – Hunter 2015, 338.
[96] Redfern – Hunter 2015, 336.
[97] See later Chapter 3.4.1.
[98] Brunner 2009, 493.
[99] See Born 2014, 935 *et seqq*.

satisfactorily submit that it is appropriate to presume, absent contrary evidence, that pre-arbitration procedural requirements are not "jurisdictional".[100]

3.3 Issues of Jurisdiction

3.3.1 Dealing with the Relationship between Arbitration and Courts

The jurisdictional issues in arbitration relate to the relationship between arbitration and courts. When jurisdiction is concerned, the question is *who* should decide the particular dispute i.e. whether the correct forum is arbitration or a court.[101] Arbitration is always an exemption from the mandate of the courts, and thus the arbitrators cannot validly solve the dispute unless the parties have consented to arbitration thereby waiving their right to a court hearing. Indeed, the jurisdiction of the arbitral tribunal is fundamental to the tribunal's authority and decision-making power, and awards rendered without jurisdiction have no legitimacy.[102] Therefore, due to the voluntary nature of arbitration, the arbitral tribunal's jurisdiction always depends essentially on the parties' agreement to arbitrate.[103] The arbitration agreement can, however, confer only powers that are permissible under the applicable laws, and thus the tribunal's jurisdiction is dependent also on the laws that make arbitration effective in the first place.[104]

How states by their national legislation limit the parties' freedom to diverge from the authority of the courts and agree on arbitration has varied over time due to introduction of different laws, sometimes favorable, sometimes hostile to arbitration.[105] These developments, discovered in different jurisdictions, have always dealt with the relationship between arbitration and courts. They have redefined over time to what extent the parties are allowed to confer the authority to solve their disputes to arbitrators instead of a court and how arbitration agreements and decisions

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[100] Born 2014, 937.
[101] Redfern – Hunter 2015, 338; Walters 2012, 661; Park 2007, 153; Santacrone 2017, 554.
[102] Lew – Mistelis – Kröll 2003, 329. On the other hand, the arbitration agreement also creates a duty for the tribunal to solve the disputes that fall within the scope of the arbitration agreement. Thus, jurisdiction can also be considered as a non-discretionary legal obligation to adjudicate. See Shany 2013, 787; Lew – Mistelis – Kröll 2003, 279.
[103] Redfern – Hunter 2015, 335; Walters 2012, 660; Santacrone 2017, 543; Jarvin 1987, 50.
[104] Redfern – Hunter 2004, 328. Therefore, the relationship between arbitration and litigation may differ country by country depending on how states by their national legislation limit the parties' freedom to diverge from the authority of the courts and agree on arbitration. In the end, arbitration is based on law and is subject to its conditions and limitations. At this point, we are dealing with arbitrability. Different countries may have differing public policy concerns that preclude certain disputes from being submitted to arbitration. For example, some states allow only matters that are defined commercial by its own legislation to be referred to arbitration whereas in other countries also non-commercial disputes are considered arbitrable. Redfern – Hunter 2004, 328.
[105] About the historical developments of arbitration see David 1985, 84–88.

made by tribunals are generally recognized.[106] Today modern international commercial arbitration has achieved a significant degree of independence from national courts and most commercial disputes are now arbitrable under the laws of most countries.[107] For example, parties are no longer required to wait until the dispute has already arisen to submit that dispute to arbitration, but instead in a majority of cases the duty to arbitrate is established in regard of disputes that may possibly arise in the future.[108] Moreover, the courts are not entitled to revise arbitrators' decisions even in a case of wrong application of law, but are left with the limited role of policing procedural due process.[109] Also, the recognition of the doctrines of separability and *competence–competence* indicate the deference of party autonomy in arbitration.[110] In addition, as discussed above, the broad understanding of arbitrators' powers and the recognition

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[106] For example, in 1609 the Vinyor's case established a common law doctrine regarding the recognition and enforcement of arbitral agreements, which was the starting point for the evolution of the arbitration law in the common law systems. In the case the Court established two rules. The first rule was that arbitrators are only representatives of the parties and can be revoked at any time. Therefore, the parties' agreement to arbitrate was not legally binding. According to the second rule, however, if a party had undertaken to a bond to pay a penalty if he did not comply with his promise to arbitrate, such undertaking was valid and enforceable in the courts. Also, if an award had been made, the parties were legally bound to honor it.

Later on, when the *Statute against Fines* was passed in England in 1687, arbitration was deprived of this vital element of the second rule that ensured that the commitment to arbitrate was respected. The statute allowed a party to revoke the arbitrator without having to pay the penalty which had been stipulated thus impeding the performance of the arbitration agreement. David 1985, 108–109. In the US, the Vynior's Case was the controlling decision until a federal arbitration statute was passed in 1925. Certilman 2010, 10. More closely about the historical developments of arbitration and its evolution also in other countries see El-Ahdab 1990; David 1985, 84 *et seqq*.; Fouchard – Gaillard – Goldman 1999, 131 *et seqq*.

[107] Redfern – Hunter 2015, 124, 586 ("The trend has been towards increasing the scope of arbitrable disputes."); Redfern – Hunter 2004, 329; Lew – Mistelis – Kröll 2003, 355–356; Moses 2008, 196.

In the strengthening of arbitration and its position in international framework the elaboration of the New York Convention in 1958 had the major significance. The Convention unifies the rules regarding international arbitration procedure by binding today a total of 162 states to undertake, give effect and enforce arbitration agreements and arbitral awards in their territories. About the elaboration, purpose and criticisms made of the New York Convention see David 1985, 145–148.

Later on, in 1985, an important instrument in harmonizing and modernizing the national arbitration laws, the UNCITRAL Model Law, was introduced. The Model Law has now been adopted by 80 states as their national arbitration law (for the up to date list of the Model Law states and jurisdictions see https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status). It embodied the primacy of the principle of party autonomy and the minimalist approach to the scope of courts' supervision and intervention in the arbitration process thereby further strengthening the position of arbitration as an alternative dispute resolution method. Following the introduction of the Model Law, these approaches have now been recognized in all modern arbitration laws. Lew – Mistelis – Kröll 2003, 28.

[108] David 1985, 30; Redfern – Hunter 2004, 7.

[109] Redfern – Hunter 2004, 329.

[110] However, despite of the relative independency of arbitration, the relationship between arbitration and courts continues to be in a change. Indeed, there have been signs of increasing opposition to unbounded party autonomy in favor of the strengthening role for the courts. For example, the question of interim measures has focused the discussion to the respective roles of arbitrators and the courts. Redfern – Hunter 2004, 329.

of contract adaptation within the authority of arbitral tribunals are illustrations of arbitration's remarkably increased independency.

The jurisdictional issues can be separated to three common categories which concern (i) whether the parties have validly agreed on arbitration, (ii) whether the particular dispute falls within the scope of the arbitration agreement and (iii) whether the agreement to arbitrate is in violation of public policy.[111] Following the relatively broad freedom to agree on arbitration (meaning the limited scope of non-arbitrable disputes), the most central limitations to the arbitral tribunal's jurisdiction often relate to the contours of the parties' arbitration agreement.[112] A challenge to the tribunal's jurisdiction forms a battle between arbitration and court proceedings. If the tribunal does not have jurisdiction the necessary corollary is that the competent body to settle the dispute is some alternative forum i.e. a court.[113] The other way around, if the arbitrators have the jurisdiction, the court must refrain from hearing the case.[114] In this light the arbitration agreement could perhaps be illustratively described as a strainer: matters that do not stay in its net will fall through and suffice for litigation. Thus, what is characteristic for jurisdictional issues is that if the arbitral tribunal's jurisdiction is challenged the intended effect is to send the dispute to a court.[115] In that regard, challenges to jurisdiction can be called "forum dependent".[116]

3.3.2 Possibility to a Court Review

A fundamental character in arbitration is that arbitral tribunals possess the capacity to rule on their own jurisdiction. This principle of *competence–competence* is generally accepted throughout different jurisdictions.[117] However, such rule can exist only because the courts are

[111] Park 2007, 148–149; Nota 2010, 33; Walters 2012, 661.
[112] See Moses 2008, 196.
[113] For example, if an award is vacated because the tribunal lacked jurisdiction, then, assuming there is no time bar, the prevailing party should be able to initiate a court action. Moses 2008, 199.
[114] Born 2014, 1276–1277. This requirement is of fundamental nature to arbitration and is recognized in the rules of international arbitration statutes and conventions. See Art. 8 of the UNCITRAL Model Law and Art. II(3) of the New York Convention.
[115] Rau 2014, 17; Paulsson 2013, 90; Park 2007, 153; Nota 2010, 33.
[116] Rau 2014, 17.
[117] Redfern – Hunter 2015, 339; Born 2014, 1051; Synková 2013, 60. Most national arbitration laws, including e.g. the English Arbitration Act 1996 (see Section 30) and the laws of the 80 countries that have adopted the Model Law (see Art. 16), comprise an express provision regarding the *competence–competence* principle. Also, the majority of institutional arbitration rules, such as the ICC Rules, the LCIA Rules and UNCITRAL Rules, spell out the principle. And even if such express provisions did not exist in the applicable regulation arbitral tribunals have traditionally assumed the right to rule on their own jurisdiction. Lew – Mistelis – Kröll 2003, 333. However, despite of the almost universal recognition of the *competence–competence* principle, especially the scope of the arbitrators'

able to subsequently review the tribunals' jurisdictional rulings.[118] Indeed, the reviewability of jurisdictional decisions is another fundamentality in arbitration and further reflects the continuous relationship between arbitration and courts. Any award given by an arbitral tribunal regarding its jurisdiction may be set aside or refused recognition and enforcement by a competent court.[119] Such complete review is necessary in order to avoid binding a party to a decision made in an arbitral proceeding to which it never agreed thus denying its access to national courts, which is a fundamental right in most legal systems.[120] Thus, whereas arbitrators' decisions on the merits of the parties' disputes are final and non-reviewable,[121] on jurisdictional matters the courts always have the final word. This principle has been adopted in the Model Law as well as in the New York Convention[122], which makes it applicable almost globally.[123]

Nevertheless, it should be noted that some jurisdictions regard only positive but not negative decisions on jurisdiction to be reviewable. For example, Art. 16(3) of the Model Law provides for review only in cases where the tribunal has ruled that is *has* jurisdiction meanwhile Art. 5 restricts court intervention only to matters provided in the Model Law. Thus, it has been considered that negative decisions on jurisdiction are not reviewable under the Model Law.[124] The reason for not providing recourse to the courts in case of a negative jurisdictional decision is that it would be inappropriate to compel arbitrators who have made such a ruling to continue with the proceedings.[125] The same approach has been expressly adopted for example in the

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powers to rule on their own jurisdiction is subject to considerable differences among legal orders. Synková 2013, 61; see Born 2014, 1052.

[118] Fouchard – Gaillard – Goldman 1999, 885.

[119] Redfern – Hunter 2015, 344; Lew – Mistelis – Kröll 2003, 337; Kajkowska 2017, 164. See Art. V(1)(a) and (c) of the New York Convention and Art. 34(2)(a)(i) and (iii) of the Model Law.

[120] Born 2014, 1226; Lew – Mistelis – Kröll 2003, 337. See e.g. *First Options. v. Kaplan* (1995), 942, where it was stated that a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute.

[121] With the exception of plausible public policy grounds that may permit challenging the award also on the merits. Lew – Mistelis – Kröll 2003, 337.

[122] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

[123] See Arts. 16(3), 34 and 36 of the Model Law (with regard to setting aside and refusal of recognition or enforcement) and Art. V of the New York Convention (with regard to the refusal of recognition and enforcement of awards).

[124] Kröll 2014, 61. *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA,* para. 68. The decision was rendered under Singaporean arbitration law, which is an adoption of the Model Law.

[125] UNCITRAL Report A740/17, para.163. *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*, para. 68. The court also held that the definition of an "award" does not include a negative determination on jurisdiction as it is not a decision on the substance of the dispute. On the contrary, it is a decision not to determine the substance of the dispute, and therefore cannot be an award for the purposes of Art 34 of the Model Law (para. 66). Consequently, the tribunal's negative decision on jurisdiction could not be reviewed either at a post-award stage.

arbitration laws of the Netherlands and Hong Kong.[126] However, some jurisdictions have taken the opposite position. For example, the Swiss and Swedish arbitration acts expressly provide for recourse against a tribunal's decision denying jurisdiction.[127] Also England and France seem to have adopted the same approach.[128] Thus, it can be remarked that the courts do not always hold the ultimate power to control the tribunals' decisions on jurisdiction. However, in cases where the tribunal makes a negative jurisdictional ruling the claim can still be brought to a court and be decided on the merits of the case.

Recourse to the courts regarding (positive) decisions on jurisdiction is possible at three different stages of the proceedings. First, the challenging party can defer the matter to the courts at the beginning of the arbitral process. It can seek an anti-arbitration injunction to restrain the tribunal from proceeding or a declaration to the effect that the tribunal lacks jurisdiction to deal with the claim in question.[129] The party can also initiate court proceedings in respect of the matters in dispute when the other party is likely to seek the court to stay the litigation and to enforce the arbitration agreement by referring the parties to arbitration on the basis of Art. II(3) of the New York Convention.[130] The latter option is however effective only if the courts of the jurisdiction where the arbitration is seated have the power to intervene concurrently in an international arbitration during the course of the proceedings,[131] and to make already at that stage a full and final determination of the tribunal's jurisdiction instead of referring the matter to be resolved by the arbitrators.[132]

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[126] The Dutch Arbitration Act provides in Art. 1052(5) that "[u]nless the parties have agreed otherwise, the court shall have jurisdiction to try the case if the arbitral tribunal declares that it lacks jurisdiction". Thus, the provision implies that the tribunal's decision is final and binding on the courts. Kröll 2014, 58. Art. 35(4) of the Hong Kong Arbitration Ordinance states that "[a] ruling of the arbitral tribunal that it does not have jurisdiction to decide a dispute is not subject to appeal". In addition, the same position, although not expressly provided for in the law, seems to have been accepted at least in Austria and Spain. Kröll 2014, 60.

[127] Art. 190(2)(b) of the Swiss Private International Law Act provides that "[p]roceedings for setting aside the award may only be initiated: […] (b) where the arbitral tribunal has wrongly declared itself to have or not to have jurisdiction". Section 27 of the Swedish Arbitration Act states that "[t]he issues referred to the arbitrators shall be decided in an award. If the arbitrators terminate the arbitral proceedings without deciding such issues, this shall also be done through an award". Furthermore, section 36 of the Act allows for recourse against such a decision.

[128] Kröll 2014, 59–60. See Art. 67(1) of the English Arbitration Act 1996. About France, see the rulings of the Paris Court of Appeals *Societe Nationale des Chemins de Fer Tunisiens.JM. Voith AG* (1995) and *Societe Swiss Oil v. Societe Petrogab and Republic of Gabon* (1988).

[129] Redfern – Hunter 2015, 346; Lew – Mistelis – Kröll 2003, 339.

[130] Redfern – Hunter 2015, 346; Lew – Mistelis – Kröll 2003, 330.

[131] Redfern – Hunter 2015, 346.

[132] It differs between countries which standard (prima facie or full review approach) the court employs when it determines the existence, validity and scope of the arbitration agreement in order to decide whether to stay the

Second, the party can resort to the courts during the arbitral process. If the arbitral tribunal's jurisdiction is contested the tribunal often makes an interim award regarding the jurisdictional issues before addressing the merits of the case.[133] Then the party may often challenge the award immediately in the local courts.[134] For example, the Model Law provides that if the arbitral tribunal rules as a preliminary question that it has jurisdiction, a party may request, within thirty days, the court to decide the matter.[135] Thus, a recourse to the court is permitted before an award on the merits of the case has been rendered, which enables reaching a final decision on the matter already at the early stage of the proceedings.[136]

Third, the reluctant party may seek the tribunal's decision on its jurisdiction to be reviewed by a court after the arbitration proceedings have finished and the final award has been issued. The party may challenge the award in the courts of the country where the arbitration was seated or, if the other party is seeking enforcement of the award, refuse the enforcement on the basis of lack of jurisdiction.[137] Moreover, although the grounds for setting aside and refusing recognition and enforcement of the award are virtually the same, the party could resist the award at both stages leading to duplicate court review.[138] Notably, the results reached in the two parallel proceedings are not necessarily the same.[139]

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litigation process and refer the parties to arbitration. In jurisdictions that apply the prima facie approach (such as Singapore, Hongkong and Australia), the court conducts a preliminary evaluation of the existence and scope of the arbitration agreement and, if it is prima facie satisfied that there is a valid arbitration agreement that covers the dispute in question, allows the issue to be resolved by the arbitral tribunal with respect to the *competence–competence* principle. Instead, in countries that have adopted the full review approach (such as England and the Nordic countries), the court examines and determines those matters itself and renders a final decision on the tribunal's jurisdiction. Thus, it depends on the approach exercised by the courts of the seat whether the party resisting the tribunal's jurisdiction benefits from commencing court proceedings i.e. whether the issue of the tribunal's jurisdiction will actually be properly decided by the court. More about this topic see e.g. Gaillard 2005; Lew – Mistelis – Kröll 2003, 345–350.

[133] Lew – Mistelis – Kröll 2003, 336; Craig – Park – Paulsson 2000, 363.

[134] Redfern – Hunter 2015, 343.

[135] See Art. 16(3) of the Model Law. The article also states that while such request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award on the merits.

[136] Redfern – Hunter 2015, 343. It should be noted that this option does not apply in investment arbitration where a court may review the issue of the tribunal's jurisdiction only in respect of final awards where all the questions submitted to the tribunal have been dealt with.

[137] These possibilities are provided for, for example, in Arts. 34 and 36 of the Model Law and Art. V of the New York Convention. However, in order to use this route, the party should expressly raise an objection to the tribunal's jurisdiction already at the early stage of the proceedings so that its inactivity in the matter during the proceedings cannot be considered as a waiver of the objection. Redfern – Hunter 2015, 346–347; Lew – Mistelis – Kröll 2003, 330–331; Born 2014, 1249. For example, Art. 16(2) of the Model law expressly provides that any objection to the jurisdiction of an arbitration tribunal has to be raised no later than the statement of defence.

[138] Šarčević 1989, 194.

[139] Šarčević 1989, 194.

As we see, the decisions concerning jurisdictional issues can be subjected to court review at several instances during the arbitral proceedings. The possibility to recourse to a court secures the parties' right to litigate (access to court) and prevents them from being forced to arbitration without their consent. However, it simultaneously enables the reluctant respondent to cause considerable delay in the dispute resolution process for simply tactical reasons.[140] Therefore, it proves to be of significant relevance whether a particular question is treated as jurisdictional or as something else (such as of admissibility) when the possibility to a review would not exist.

3.4 Issues of Admissibility

3.4.1 Questioning the Acceptability of the Claim

Whereas jurisdictional issues relate to determining the competent body to decide the claim, questions of admissibility concern whether the claim itself is capable of being adjudicated; in other words, whether the claim is defective in some way.[141] Thus, if a certain tribunal is found to have jurisdiction the question is what claims that tribunal is entitled to decide within its jurisdiction. Paulsson submits that in order to define whether a particular issue pertains to jurisdiction or admissibility, it should be asked whether the objecting party is taking aim at the tribunal or at the claim.[142] If the party's objection challenges the tribunal as the appropriate forum to resolve the dispute, the objection is jurisdictional. Instead, if the party objects the claim itself and claims that it should not be hear at all (at any forum), the issue is one of

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[140] Redfern – Hunter 2015, 343; Lew – Mistelis – Kröll 2003, 331; see Craig – Park – Paulsson 2000, 363–364.

[141] Paulsson 2005, 616; Walters 2012, 661; Santacroce 2017, 540, 546. Keith Highet accurately defined in his dissenting opinion in *Waste Management, Inc. v. United Mexican States* (para. 58) that "[j]urisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it". Similarly, the tribunal in *Abaclat v. Argentina* (2011) defined that "[w]hile 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" (para. 247). Another formulation for the same distinction is to say that jurisdiction raises a question of the existence of the tribunal's adjudicative power whereas admissibility concerns the exercise of such power, which may require dismissal of the claim on the grounds of a certain legal defect. See Douglas 2009, 141, 148.

Cf. Shany who a little questionably submits that the difference between jurisdiction and admissibility is that whereas jurisdiction forms a non-discretionary legal obligation for the tribunal to adjudicate, admissibility is a right but not a duty to adjudicate. See Shany 2013, 787.

[142] Paulsson 2005, 616. Similarly, already in 1986 Fitzmaurice defined that an objection to the substantive admissibility of a claim is a plea that the tribunal should rule the *claim* to be inadmissible on some ground other than its ultimate merits, while an objection to the jurisdiction of the tribunal is a plea that *the tribunal itself* is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim. Fitzmaurice 1986, 438–439.

admissibility.[143] This test seems to be widely accepted by other commentators and utilized also in case law.[144]

According to Lim, Ho and Paparinskis, the distinction between jurisdiction and admissibility can alternatively be defined also in a more "draftsmanlike" manner focusing on "the place that the issue occupies in the structure of international dispute settlement".[145] This means that the relevant question would be whether the challenge is related to the interpretation and application of the jurisdictional clause of the international tribunal (and hence jurisdictional) or to the interpretation and application of another rule or instrument (and is hence one of admissibility).[146] This view can be helpful when classifying a certain issue to be jurisdictional or to concern admissibility. Indeed, when establishing the tribunal's jurisdiction, the jurisdictional clause i.e. the arbitration agreement is the key element that surely needs to be applied and interpreted. Thus, if the arbitration agreement does not need to be observed, with high likelihood the nature of the issue is not jurisdictional. However, it is not necessarily so that the jurisdictional clause does not provide relevant material for interpretation in cases of admissibility. Instead, admissibility issues can be described as having a mixed or hybrid character which combines both procedural and substantive rules.[147] Thus, defining a claim's admissibility may require interpretation of the jurisdictional clause as well.

When making the division between jurisdiction and admissibility attention should be drawn to the feature that if the arbitral tribunal lacks jurisdiction, the jurisdiction would by default be on the courts. Thus, Paulsson's test seems meaningful as it focuses on determining whether it is the tribunal or the claim itself that is objected. In cases of admissibility, there will be no

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[143] Paulsson 2005, 617.

[144] See e.g. Nota 2010, 33; Walters 2012, 661; Douglas 2009, 148; Synková 2013, 41; Hugues Arthur 2014, 458; Gouiffès – Ordonez 2015, 110; Santacroce 2017, 554; *BAZ v. BBA* (2018), paras. 129, 131; *İçkale v. Turkmenistan* (2016), paras. 245–246; *Hochtief v. Argentina* (2011), para. 90.

For example, in *İçkale v. Turkmenistan* the majority of the ICSID tribunal followed the classification introduced by Paulsson and considered that the failure to exhaust local remedies may render the claim inadmissible as the claim could, and the tribunal cited Paulsson, "not be heard at all (or at least yet)", i.e., until the claimant has taken the necessary procedural steps and complied with the domestic litigation requirement (para. 246). Cf. Partially Dissenting Opinion of Professor Philippe Sands who understood Paulsson's argument regarding the nature of a claim in case of failure to exhaust local remedies differently and held that the issue concerns jurisdiction (para. 10). However, it does not seem that Professor Sands would contest the test introduced by Paulsson or object to its application in the way utilized by the majority of the tribunal in other admissibility situations but only in cases of failure to exhaust local remedies.

[145] Lim – Ho – Paparinskis 2018, 118.

[146] Lim – Ho – Paparinskis 2018, 118.

[147] ICC case 6474 (1992), para. 62, in van den Berg 2000, 291.

jurisdictional objection, but the issue falls entirely within the arbitrators' competence and the tribunal is required to decide the question in the course of fulfilling its underlying mandate.[148] Indeed, the party raising an admissibility challenge does not contest the particular tribunal as the correct forum to try the claim,[149] but in fact *wants* the arbitrators to have the jurisdiction so that they are competent to find that the claim is inadmissible and should not be heard.

Therefore, as jurisdiction is a necessary prerequisite for the tribunal's ability to rule a claim inadmissible, a party may not reasonably claim simultaneously that the tribunal lacks jurisdiction and that the claim should be found inadmissible (see *Figure 1* earlier in Chapter 2.3).[150] Nevertheless, it is of course still be possible to argue as a primary claim that the tribunal lacks jurisdiction and as a secondary and alternative claim that even if the tribunal would have the jurisdiction in any event the claim is inadmissible.[151] Respectively, Fitzmaurice determined the distinction between jurisdiction and admissibility as follows: "But an unsuccessful jurisdictional plea leaves open the possibility that a finding on the ultimate merits may still be excluded through a decision given against the substantive admissibility of the claim".[152]

Due to the inevitability of the existence of the tribunal's jurisdiction in order to make further decisions on the case, admissibility challenges may be dealt with only after the tribunal has found to have jurisdiction.[153] For example in ICC case 6474 the tribunal held that "[i]t is correct to state that a decision as to the admissibility of the claim […] presupposes that the Tribunal has first found it had jurisdiction".[154] Admissibility challenges need, however, to be addressed before the merits, because finding a claim inadmissible prevents the tribunal from making a decision on the material side of the dispute.[155] Indeed, if parties have set a certain limitation in their agreement and the purpose of such limitation was particularly to be a limitation on the claim and not on the tribunal, the tribunal should enforce that agreement by not accepting

[148] Born 2014, 1225–1226.
[149] Paulsson 2005, 616; Walters 2012, 661.
[150] Similarly, see Fontanelli 2018, 106.
[151] For example, in SCC case V079/2005 the respondent raised both jurisdiction and admissibility defenses and requested the tribunal to issue an award "(a) Determining that it lacks jurisdiction to entertain the claim brought by Claimant; (b) In the alternative, determining that the claim brought by Claimant is inadmissible" (para. 28).
[152] Fitzmaurice 1986, 439.
[153] Paulsson 2005, 604; Synková 2012, 38; Nota 2010, 32; Walters 2012, 661; Santacroce 2017, 543, 547.
[154] ICC case 6474 (1992), para. 46, in van den Berg 2000, 288.
[155] In the case of an inadmissible claim/counterclaim, the tribunal will dismiss it due to inadmissibility without entering into the merits (*Steinbruger* at p 680). Lim – Ho – Paparinskis 2018, 121; Waibel 2014, 7; Walters 2012, 661; Amerasinghe 2011, 95; Fitzmaurice 1986, 438.

inadequate or defective claims.[156] As a result, the tribunal should dismiss the claim and issue an award where it concludes that the claim is inadmissible due to its defectiveness and cannot be further examined. This upholds the parties' intention to not to arbitrate matters that were not meant to suffice for judicial dispute resolution.

A claim's inadmissibility may ensue from various different grounds. The most typical situations that seem to be generally recognized to pertain to admissibility include the claim's timeliness[157] and fulfillment of arbitral preconditions[158]. These grounds for inadmissibility may arise in situations where for example the parties' arbitration agreement defines that the claim needs to be raised within a particular time period or conversely that it may not be raised until a particular procedural precondition (such as a negotiation or mediation obligation) has been complied with. In the former event, the claim is stale and thereby irrevocably inadmissible. In the second scenario, the claim is premature and thus not yet ripe for arbitration. In either situation, it results from the inadmissibility that the arbitral tribunal should dismiss the claim and the claimant may not subsequently try the claim in a court. This is sensible as the purpose of setting such conditions to the arbitral proceedings was most likely not to prefer court as the proper forum when the limitations are not followed but to ensure for example that disputes would not linger or that the parties will be willing to try to solve the dispute amicably.[159]

Inadmissibility may result also from for example waiver of claims (if a claim is abandoned it could hardly suffice for any adjudication), failure of new claims to remain within the scope of the initial notice, mootness or absence of a legal dispute or a necessary third party.[160] In the context of investment arbitration, a claim may be inadmissible due to a failure to exhaust local remedies.[161] Other plausible grounds for inadmissibility that have been introduced include *res*

[156] See Paulsson 2005, 616.
[157] Paulsson 2005, 616; Synková 2012, 38; Park 2007, 153; Born 2014, 942; Lew – Mistelis – Kröll 2003, 508–509; *BAZ v. BBA*, para. 131 ("The commentators consider an objection based on time limitation to be an issue of admissibility of claim […] I agree. An objection based on time limitation targets the claim, and not the tribunal."); *Tommy C.P. v. Li & Fung* (2002); *Ambatielos* case (1953).
[158] Paulsson 2005, 616; Synková 2012, 38; Park 2007, 153; Jarrosson 2003, 367; see Born 2014, 937; see Rau 2014, 11–12; *Abaclat v. Argentina* (2011); *Nihon Plast v. Takata-Petri* (2004); *Société Polyclinique des Fleurs v. Peyrin* (2000); *Poiré v. Tripier* (2003); *Cable & Wireless v. IBM* (2002). About the positions of different national laws see Kajkowska 2017, 168–171.
[159] See Paulsson 2005, 616; Rau 2014, 16–17.
[160] Paulsson 2005, 609, 616; Synková 2012, 38; see Crawford 2019, 667 *et seqq*; Born 2014, 942.
[161] Waibel 2014, 75; Amerasinghe 2011, 95; Crawford 2019, 667; *Ambatielos* case (1953); *İçkale v. Turkmenistan* (2016); SCC case V079/2005.

judicata (a claim must be rejected because it has already been decided in prior proceedings)[162], a party's incapability to conclude an arbitration agreement (i.e. to be a party to the proceedings)[163] and situations regarding diplomatic protection[164]. Furthermore, in *SGS Société Générale v. Philippines* it was held that when a party attempts to rely on a contract as the basis of its claim without itself complying with such contract, there is an impediment to its reliance, and such impediment is to be considered rather as a matter of admissibility than jurisdiction.[165] Based on the same idea that an action may not be maintained by someone who has misbehaved in relation to the subject matter of the claim, inadmissibility may be caused by the claimant's involvement in unlawful activity (the "clean hands" doctrine).[166] It is well-grounded to treat these issues as of admissibility rather than jurisdictional as, again, it would not seem reasonable to leave room for the claim's adjudication in a court but rather to dismiss the claim altogether from judicial resolution due to its defectiveness.

3.4.2 Finality of the Decision and Parties' Burden of Raising the Objection

A dominant feature in arbitration is that only jurisdictional decisions are reviewable.[167] Once it is established that the arbitral tribunal has jurisdiction over the dispute, all other issues arising out of the dispute, including issues concerning the admissibility of the claim, fall within the scope of an arbitral tribunal's exclusive adjudicatory powers.[168] This means that the arbitral tribunal's decision on admissibility is not reviewable by courts (or in ICSID arbitrations by ICSID *ad hoc* committee).[169] Thus, if the challenge is not jurisdictional but goes to admissibility, the arbitrators' decision on the issue is final.[170] Following this reasoning, for example the court in *BAZ v. BBA* considered that when determining what constitutes a ground for challenging an award under Art. 34 of the Model Law, a decision on an issue that is characterised as of admissibility does not fall under any ground of Art. 34.[171] Respectively, neither does the New

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[162] Walters 2012, 671 *et seqq*; Hahn 2014, 337; *Mariott Hotels v. JNAH Deveopment SA* (2010); *Chiron Corp v. Ortho Diagnostics Systems* (2000) (where, however, the US court again operated with the concept of arbitrability).
[163] *Automobiles Peugeot v. Omega Plus* (2001), in Born 2014, 726.
[164] Amerasinghe 2011, 97.
[165] *SGS Société Générale v. Philippines*, para. 158.
[166] Crawford 2019, 675.
[167] In other words, decisions of arbitrators having jurisdiction are final. Paulsson 2005, 601, 603.
[168] Santacroce 2017, 553.
[169] Paulsson 2005, 601; Walters 2012, 662; Nota 2010, 31; *Swissbourgh v. Lesotho* (2018), para. 208.
[170] Paulsson 2005, 601, 617; Synková 2013, 39; referring to Paulsson see *BAZ v. BBA* (2018), para. 130.
[171] *BAZ v. BBA* (2018), paras. 128, 130, 132.

York Convention allow state courts to review such decisions.[172] Nevertheless, it must be clarified that state courts are not bound by an arbitral tribunal's characterization of the relevant issues but may make their own analysis of the nature of the relevant preliminary issue in order to determine the scope and extent to which they may review, if at all, the arbitral award.[173]

The same deference to determinations of admissibility should correspondingly be shown in situations where a court is making a prior determination of whether the case must be heard in arbitration. If the claim's admissibility is challenged at pre-award stage, the court must refrain from expressing a view concerning the admissibility but refer the issue to the arbitrators.[174] Therefore, in regard of non-reviewability, decisions on admissibility are treated similarly to arbitrators' decisions on merits.[175] As the possibility to appeal does not exist, the parties carry the risk that the tribunal they have chosen has the competence to consider and apply all the relevant facts and the applicable law correctly when making a decision on admissibility.

Moreover, classifying an issue as of admissibility may have an influence on whether the tribunal can or should consider admissibility upon its own initiative or only upon a party's request. In

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[172] Santacroce 2017, 567. Thus, a decision on an admissibility issue cannot fall under any ground under Art. V of the New York Convention.

[173] Santacroce 2017, 563.

[174] Paulsson 2005, 605; Synková 2013, 39. In *Ambatielos* case of 1953 (Greece vs. UK), decided by the ICJ, the Court was faced with a challenge to its jurisdiction to decide the dispute. The Court considered whether under a particular treaty the dispute should be referred to arbitration. The UK had claimed that the claim could not be heard because local remedies had not been exhausted and because the claim was presented after undue delay. The Court held that the objections raised by the UK were "arguments in defence directed to the admissibility of the Ambatielos claim […] the Court expresses no view concerning the validity or legal effect of these arguments". Consequently, the objections were left to be decided by the arbitrators.

Similarly, in *Great Western Mortgage Corporation v. Peacock* (1997) the Third Circuit of the US Court of Appeals held that as the question of whether an employee has validly waived his right to punitive damages resulting from unlawful discrimination is not *relevant to the nature of the forum* but is separate from the issue of consent to an arbitral forum, it is for the arbitrator to decide (para. 232). Although the Court did not expressly classify the issue as of admissibility, it accepted and enforced the division of tasks between the tribunal and itself according to which all matters other than those concerning the existence of the arbitrators' jurisdiction need to be finally determined by the tribunal.

Already in 1964 the US Supreme Court considered in *Wiley v. Livingston*, which involved a question of whether a mandatory two-step negotiating process had been accomplished as a precondition to arbitration, that "[o]nce it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator".

In a more recent case *Howsam v. Dean Witter Reynolds* (2002), 84, the US Supreme Court built its decision on the former precedent and held that the presumption is that allegations of waiver, delay or like defenses should be decided by the arbitrator. Although reaching the right conclusion in that matter, the Court incorrectly called the issue one of arbitrability instead of admissibility. About the analysis and critique of the American use of the word "arbitrability" see Paulsson 2005, 609 *et seqq*. as well as Chapter 3.2.2. of this study.

[175] Nota 2010, 31.

other words, it affects whether the parties have a burden of raising the admissibility objection.[176] Regarding jurisdictional issues the tribunal has an obligation to examine the possible lack of its jurisdiction at its own initiative although not raised by the parties.[177] By contrast, it seems that such obligation does not exist regarding issues of admissibility but the objection is for the parties to invoke.[178] It is not clear, however, whether the tribunal would be *prevented* from considering admissibility where the parties have not themselves raised the defence. In *Abaclat v. Argentina*, after the tribunal had found that it had jurisdiction to hear the case, it stated that even though "some of the issues addressed in this section may have been invoked by the Parties within the context of the Tribunal's jurisdiction […] the Tribunal considers that these issues are not matters of jurisdiction but of admissibility. Where this applies, any argument raised by the Parties with regard to these issues and aiming to establish a lack of jurisdiction is addressed below as an argument of lack of admissibility".[179] Thus, the tribunal considered it justified to correct the nature of the parties' objections by its own motion.

Tribunals' powers to raise admissibility issues on their own initiative can be considered problematic in the sense that generally even on the merits of the case tribunals are not entitled to grant remedies or impose duties that the parties themselves have not requested.[180] Following this rule, if the respondent has not chosen to object the claim's admissibility but for example only the tribunal's jurisdiction, it would not be for the tribunal to develop that defense for it.

[176] Walters 2012, 662.
[177] Lim – Ho – Paparinskis 2018, 142; Nota 2010, 32.
[178] Lim – Ho – Paparinskis 2018, 142; Nota 2010, 32; Fontanelli 2018, 107; Santacroce 2017, 551. Cf. *Larsen v. Hawaii* (2001) where it was considered that the tribunal was obliged to consider objections on admissibility by their own initiative (*proprio motu*). The case raised questions as to the existence of a real dispute between the parties and the absence of the United States as necessary third party. Waibel 2010, 68, fn. 288. However, the decision has been considered to be "seemingly unusual". See Fontanelli 2018, 107, fn. 553.
[179] *Abaclat v. Argentina* (2011), paras. 504–505. Also, in *Renée Rose Levy v. Peru* (2015) the tribunal noted (paras. 180–181) that the parties had not expressly discussed the nature of the abuse of process objection and whether it was a matter of jurisdiction, admissibility or something else. The respondent had grouped all its objections under the heading "Jurisdictonal Objections" or "Jurisdiction/Abuse of Process", and thereby did not expressly raise admissibility defense. Although the tribunal thereby raised the issue by its own initiative, it concluded that the characterization of the objection can be left open in the present case as it would not have any impact on the outcome of the case. The tribunal did not further reason why the characterization would not have any impact. However, the tribunal still seemed to consider that it would have been entitled to classify and treat the objection as an admissibility issue if it had considered it meaningful.
[180] This serves as a ground for refusing the enforcement and recognition of the award under Art. V(1)(c) of the New York Convention. For example, Born submits that "Article V(1)(c) can apply where a valid arbitration agreement existed, but the issues and claims decided by an award exceeded or differed from those presented to the tribunal by the parties in the arbitration (so-called *extra petita* or *ultra petita*); the same characterization applies where a tribunal grants relief that neither party has requested". Born 2014, 3545.

Therefore, the tribunal would lack jurisdiction to dismiss the claim due to its inadmissibility.[181] After all, finding a claim inadmissible is even more drastic consequence for the claimant (at least in cases of permanent inadmissibility) than rejecting the claim on the basis of lack of jurisdiction. If the tribunal is found to lack jurisdiction the claimant could at least have the claim tried in a court. Instead, in case of inadmissibility the dispute could not be decided by anyone. This consequence is not necessarily desired by the respondent either and thus it is a little controversial that the tribunal could define a claim inadmissible without the parties' request. On the other hand, in such situation the respondent could still declare that it waives its possibility to object the admissibility.

Also, it can be asked if tribunals should be bound by the parties' arguments even at the risk of reaching a decision that it does not consider to be legally correct, i.e. to treat jurisdictional issues as of admissibility following the parties' submissions.[182] This cannot by any means be considered to be the case but the distinction between the two concepts should be kept clear and consistent. However, the tribunal still should not have the right to raise admissibility objections on behalf of the parties.[183] Hence, I agree with the tribunal in *Hochtief v. Argentina* that stated that "[t]he disputing parties are entitled to raise objections based upon questions of admissibility, but they are not bound to do so; and if they do not raise those objections, they will have acquiesced in any breach of the requirements of admissibility and that acquiescence will 'cure' the breach. The tribunal, if it has jurisdiction, will proceed to hear the case".[184] Thus, if the parties have incorrectly objected the jurisdiction on the grounds that correctly pertain to admissibility, the tribunal should declare that on the basis of the party's arguments labelled as jurisdictional challenge the tribunal cannot find that it lacks jurisdiction. And as the party has

[181] For example, in *SA Prim'Nature v. SAS Top Pommes de Terre* (2008) the arbitral tribunal had declared a rejoinder filed in breach of the time limits inadmissible. The Paris Court of Appeal annulled the award on the basis that no request for inadmissibility had been made by the opposing party, and that the tribunal had taken its decision without giving the parties the opportunity to comment on it.

[182] In *İçkale v. Turkmenistan* (2016) the tribunal submitted that the parties had incorrectly taken the position that the objection that the claimant has failed to comply with the domestic litigation requirement is an objection to jurisdiction rather than to admissibility. The tribunal considered that it has the authority to decide independently, within its Kompetenz-Kompetenz, and without being bound by the parties' legal positions, as to whether the objection raised by the respondent constitutes an objection to jurisdiction or an objection to admissibility. It held that if this were not the case, and if the tribunal were to be considered bound by the legal argument of the parties, the tribunal might have to reach a decision that it does not consider to be legally correct. Consequently, the tribunal proceeded to address the objection as a matter of admissibility. See paras. 234 *et seqq.*

[183] Cf. Shany 2013, 788.

[184] *Hochtief v. Argentina* (2011), para. 94.

not raised objections to the admissibility, it is to be considered as waving its possibility to such objection.

3.4.3 A Procedural or Substantive Matter?

Another question worth to ponder (for which the basis for discussion was laid earlier in Chapter 2.3) is whether admissibility challenges pertain to procedural or substantive issues in arbitration. On the basis of the examined literature and case law (few of them taking a stand directly at the issue), the characterization is not at all clear. The relevance of the question is that classifying admissibility issues as procedural or substantive defines which laws should be applied to resolve the question.[185] In ICC case 6476 the tribunal expressly recognized that "[w]hether the claims are inadmissible […] raises, in an international situation like the present one, a preliminary question of some complexity, that of which law governs the question? The answer would seem to depend on the characterization of the question, i.e. on its nature as a procedural question or as a substantive question".[186] If the admissibility issue was characterized as procedural, it would be governed by the same laws as the questions of jurisdiction, i.e. the law applicable to the interpretation of the arbitration agreement and the arbitration law of the seat (*lex arbitri*) as well as the possible institutional arbitration rules.[187] Conversely, if the issue belonged to the substantive matters, it would be governed by the law of the underlying contract i.e. *lex causae* (which may be different from the law applicable to the arbitration agreement).[188]

It seems that several authors discussing admissibility presuppose that admissibility would be a substantive issue. For example, Paulsson stipulates that "Fitzmaurice did not go on to state explicitly that such issues of admissibility, *like other substantive matters*, are not subject to review once decided by a tribunal having jurisdiction".[189] Also, Walters states that labelling an objection as jurisdictional or admissibility determines whether the objection is of a procedural or substantive nature and that ”admissibility objections strike at the merits of the dispute”.[190] Furthermore, Born submits that "an arbitral tribunal's resolution of disputes over time limits, statutes of limitations and similar pre-arbitration requirements will not be subject to material

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[185] Waincymer 2012, 8–9; Walters 2012, 662, 664 (submitting that "understanding the distinction [between jurisdictional and admissibility challenges] allows the arbitrators to apply the proper law").
[186] ICC case 6474 (1992), para. 57, in van den Berg 2000, 290.
[187] See ICC case 6474, paras. 2–3, in van den Berg 2000, 281; see Waincymer 2012, 8–9.
[188] See Waincymer 2012, 8–9.
[189] Emphasis added. Paulsson 2005, 604.
[190] Walters 2012, 662–663.

judicial review (instead, being treated *like other substantive issues* in the arbitration)".[191] However, controversially, Born also incorporates an opposite formulation by stating that "these [pre-arbitration procedural] requirements […] are best suited for resolution by arbitral tribunals, subject to minimal judicial review, *like other procedural decisions*".[192]

The reasoning for considering admissibility as a substantive issue may be that material decisions are not reviewable by courts and thus, due to the non-reviewable nature of admissibility issues, admissibility would necessarily be a substantive matter.[193] However, one cannot completely equate the concepts of *procedural* and *jurisdictional* either. Procedural aspects of arbitration are considerably wider than only questions of the tribunal's jurisdiction. They comprise a number of different aspects of the arbitral proceedings such as deadlines, submission of evidence, appointment of arbitrators etc. Still, the possibility to a court review does not in principle (with the exemption of the possibility to challenge the award on the basis of the very limited procedural grounds such as violation of the party's right to be heard) concern other procedural decisions than those about the tribunal's jurisdiction.[194] Thus, procedural issues should be considered competent to include also issues that do not require the indispensable opportunity for a review.

Another possible reasoning behind presupposing admissibility issues as substantive may be that because admissibility is often closely connected to the merits of the case,[195] there would be a justified ground to consider it as belonging to the merits. Nevertheless, although closely connected, the grounds for inadmissibility are still independent of the substantive grounds upon which a claim is to be adjudicated on the merits.[196] Indeed, admissibility deals with the claim's

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[191] Emphasis added. Born 2014, 1190.
[192] Emphasis added. Born 2014, 939. Born also defines that admissibility defenses refer to situations where the arbitration agreement provides jurisdiction but does not permit assertion of substantive claims until after specified requirements have been satisfied. Born 2014, 936. Strictly following this definition, it would seem that a challenge to admissibility could not itself be substantive in nature.
[193] For example, Walters reasons that "[a]s embodied in the New York Convention and in many states' arbitration laws, state courts will refrain from conducting a substantive review of the merits of a dispute when a party seeks annulment, recognition, or enforcement of an arbitral award. Consequently, courts do not have the authority to review a tribunal's findings on issues related to a dispute's merits, such as admissibility challenges". Walters 2012, 663.
[194] Similarly, see Born 2014, 941.
[195] Walters 2012, 663; Douglas 2009, 148; see Fitzmaurice 1986, 438, fn. 6; see ICC case 6474, paras. 58, 62, in van den Berg 2000, 290–291. In *Enron v. Argentina* (2004) the ICSID tribunal stated that a successful admissibility objection would normally result in rejecting a claim for reasons connected with the merits (para. 33).
[196] Douglas 2009, 148; ICC case 6474, para. 62, in van den Berg 2000, 291 ("It cannot be denied that […] procedural status and substantive ownership of the claim may be difficult to distinguish […] contemporary legal doctrine

suitability for consideration on the merits,[197] and thus cannot pertain to the merits itself. Moreover, the typical situations of admissibility relate to matters that seem virtually to have a rather procedural nature, such as issues of timeliness and fulfillment of procedural pre-conditions.

Especially the US courts have incorporated a different use of words than the above-cited authors when discussing admissibility. In *Town Cove Jersey v. Procida* the court noted that "[w]hether or not a condition precedent to arbitration has been satisfied is a *procedural* matter for the arbitrator to decide".[198] Similarly, the court in *Langlais v. Pennmont* stated that "*procedural* questions, such as those concerning […] the procedural prerequisites to arbitration, are for the arbitrator to decide".[199] Furthermore, in *Wiley v. Livingston* the court held that "[o]nce it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "*procedural*" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator".[200]

The same position was adopted also in ICC case 6474. The ICC tribunal submitted that a distinction must be drawn between the field of "quality to act", which is connected to admissibility, and the "legitimacy to act" which relates to the merits.[201] By referring to Professor Habscheid, the tribunal concluded that the question of "quality to act" is a notion of procedural law, and that such a characterization would result in an application to the problem of the law of Switzerland, seat of the Arbitral Tribunal.[202] Interestingly, however, as the tribunal found that under Swiss law it had a wide discretion with regard to both the characterization of the question and of the choice of the applicable law, it ended up submitting that "[e]ven if the

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generally considers that the right to bring proceedings is a distinct and independent notion from the substantive right which it is supposed to defend or protect"). Similarly, Fitzmaurice stated that "an objection to the substantive admissibility of a claim […] is a plea that the tribunal should rule the claim to be inadmissible *on some ground other than its ultimate merits*" and that "[t]he term [ultimate merits] is used because often a preliminary objection […] is connected with, and not entirely without relevance to, the substantive merits, and it is often more closely related to these than purely jurisdictional issues" (emphasis added). Fitzmaurice 1986, 438 and fn. 6.

[197] Douglas 2009, 148.

[198] Emphasis added. *Town Cove Jersey v. Procida* (1996) in Born 2014, 939, fn. 1595.

[199] Emphasis added. *Langlais v. Pennmont* (2013) in Born 2014, 939, fn. 1596.

[200] Emphasis added. *Wiley v. Livingston* (1964), 557. Similarly, with reference to *Wiley v. Livingston*, see *Howsam v. Dean Witter Reynolds* (2002), 84.

[201] ICC case 6474, paras. 58–59, in van den Berg 2000, 290–291. The difference between these two was considered to be that the absence of the first element leads the judge to declare the claim inadmissible without further examination, while the absence of the second element will lead to a decision recognizing the claim as admissible but unfounded.

[202] ICC case 6474, para. 60, see also paras. 2–3.

question under examination must be characterized as procedural, it would appear advisable to take into consideration, if not to 'apply' in the strict sense of the term, *the law of the European country*".[203] Nevertheless, the tribunal seemed to accept that admissibility issues should be classified as procedural.

It can be concluded that admissibility issues have close connections to the merits of the case and their distinction is not always clear or easy to make. Indeed, admissibility seems to possess a mixed or hybrid character regarding its nature as a substantive or procedural matter.[204] Also, the treatment of admissibility issues differs considerably from the treatment of jurisdictional issues (in particular in the sense of reviewability) that are perhaps the most central procedural issues in arbitration. However, admissibility should still be considered pertain to procedural issues in arbitration. This seems meaningful because when making a decision on admissibility, the tribunal is not yet defining the parties' substantive rights and obligations but just determining what claims the parties have intended to be suitable for consideration. As a consequence, the same laws and rules should be applied to the admissibility question than to other procedural matters in the arbitral proceedings.[205]

3.5 Conclusions

International tribunals, national courts as well as highly valued legal commentaries sometimes fail to notice admissibility as a basis for a claim's dismissal. They have either confused admissibility with other legal concepts (most commonly jurisdiction) or rejected the relevance of the separation of different preliminary challenges altogether. Nevertheless, the notions of admissibility and jurisdiction are fundamentally different and understanding the difference between the concepts and maintaining their distinction as clear as possible is not only a technical issue but a matter of considerable concrete importance. Better recognizing the possible

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[203] ICC case 6474, para. 63. As a reasoning the tribunal submitted that: "not only or mainly because both Parties have referred to it at great length, but also because, to the extent that the objection of inadmissibility is based on the relationship between the claimant and the European country export insurance system, the provisions of the law of the European country are undoubtedly relevant".

[204] ICC case 6474, para. 62.

[205] This is supported by Heiskanen's submission that "[n]o substantive choice of law issues can arise, as a practical matter, before it has been determined that the particular dispute in question falls under the court's jurisdiction, and/or that the claim is admissible". Heiskanen 2010, 447. Following this apprehension, it would seem inevitable that, as the substantive law applicable to the underlying contract may be determined only after the preliminary issues including admissibility have been decided, the admissibility issue is governed by the same rules applicable to determination of jurisdiction.

applications of the concept of admissibility and providing parties, tribunals and courts with a clarified standard of how to classify different challenges would promote greater predictability in the resolution of international disputes.[206]

In order to establish whether a particular challenge pertains to jurisdiction or admissibility, a valuable premise test that should be applied is whether the ground for the challenge is targeted at the tribunal or the claim, i.e. whether it gives reasons to question the tribunal as the correct forum (jurisdictional issue) or the claim's ability to suffice for judicial determination (admissibility issue). When making a decision on admissibility the tribunal is already exercising its jurisdiction and therefore, in order to be competent to rule a claim (in)admissible, the tribunal needs to first be convinced that it has jurisdiction. Subsequently, should the claim be found inadmissible, the tribunal is prevented from proceeding to the merits. Thus, dismissing a claim on the basis of inadmissibility is a different type of decision than rejecting the claim either on the basis of lack of jurisdiction or later on the merits.

One of the most important consequences of classifying an issue as of admissibility is the finality of the tribunal's decision. It follows from the finality that the decision may not be reviewed by a court but is in this regard treated similarly to decisions on merits (see *Figure 2* below). Thus, if the tribunal makes an incorrect finding on whether the claim was admissible, it is not possible to appeal the decision. Instead, the parties carry the risk of the tribunal's competence to reach the right conclusion. This is something the parties should bear in mind when they formulate their preliminary objections and decide whether they want to reason that their objection goes against jurisdiction or admissibility.[207] Moreover, the arbitral tribunal should not by its own motion consider the claim's admissibility, but in case the party has not alleged that the claim is inadmissible it should rather consider that the party has waived the possibility to raise such objection.

[206] In the context of *res judicata*, see Walters 2012, 664–665.
[207] See Gouiffés – Ordonez 2015, 121.

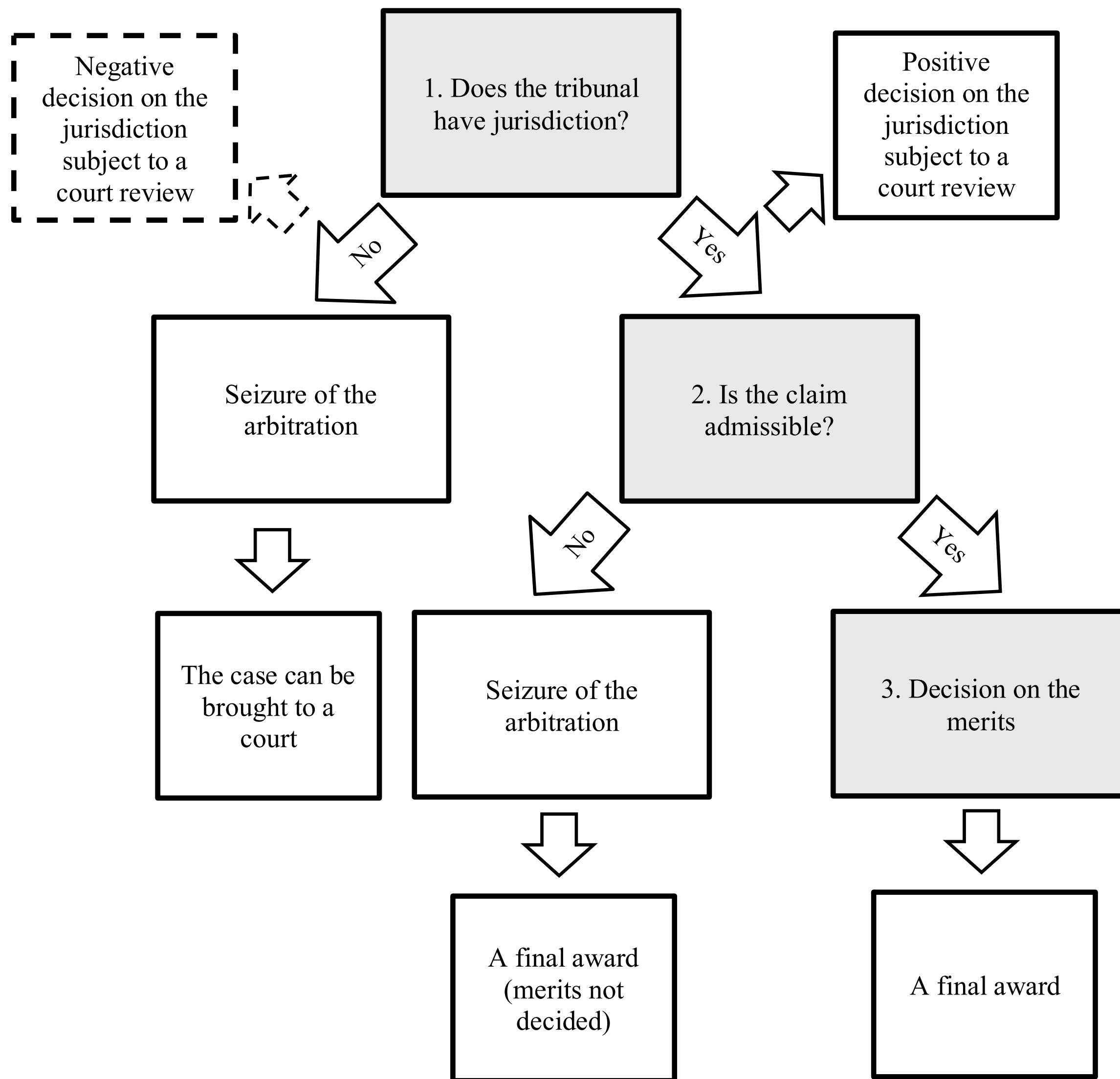

Figure 2 – An illustration of the differing legal consequences following the characterization of an issue either as jurisdictional and as of admissibility.

Perhaps the most typical situations of inadmissibility concern timeliness issues, noncompliance with procedural condition precedents and failure to exhaust local remedies. However, the grounds for inadmissibility recognized by several authors and decisions rendered by courts and tribunals should not by any means be considered as an exhaustive list of possible situations of inadmissibility. Determining such an exhaustive list would presumably not be even possible as

the grounds for inadmissibility and their availability may vary from case to case.[208] Indeed, also Paulsson submits that specific applications of the concept of admissibility may be subject to discussion.[209] In the following chapter we are opening the discussion in regards of preliminary objections against claims on contract adaptation.

[208] See Amerasinghe 2011, 97.
[209] Paulsson 2005, 617; similarly, Gouiffés – Ordonez 2015, 121.

4 Contract Adaptation by Arbitrators – A Question of Jurisdiction or Admissibility?

4.1 Introduction

As was discussed earlier in the second chapter, contract adaptation by arbitral tribunals includes two parallel dimensions, procedural and substantive, which both need to permit adaptation in order to the tribunal to be enabled to adapt the contract. The substantive side of the issue concerns whether the parties' agreement or the applicable contract law provides for adaptation and whether the requirements for the adaptation have been met in the particular situation. However, before the tribunal may proceed to the merits and decide whether the contract should be adapted (and how it should be adapted), the tribunal needs to possess the procedural authority to consider such claim in the first place. The various commentaries addressing the issue of contract adaptation in arbitration seek to establish whether and under which circumstances an arbitral tribunal may possess such powers. In this regard, they seem to treat the issue as of jurisdiction; whether the tribunal has the jurisdiction to adapt the parties' contract. However, in light of the above-discussed characteristics of jurisdictional issues (especially the possibility to try the claim in a court if the tribunal is found to lack jurisdiction), it seems to me that characterizing the available preliminary objections exclusively as jurisdictional is made too easily.

Could a claim that requires the tribunal to exceed the powers that are conferred upon it by the parties be instead found inadmissible? This type of sub-category (demand for excess of powers) of inadmissibility grounds perhaps differs quite a bit from the traditional admissibility situations discussed in the previous chapter, but in any case, the possibility of invoking an admissibility challenge against a claim on contract adaptation should be at least noticed and after a careful examination either accepted or abandoned. In such scenario that a claim on adaptation would be found inadmissible, the jurisdiction of the arbitral tribunal would be confirmed and that would move the issue of the tribunal's procedural authority away from the battle between courts and arbitrators. Then, when the tribunal's powers to adapt the contract would be contested, the aim would instead be at finding the claim defective altogether.

The arbitrating parties should have it clear it their mind what is the consequence they are seeking the arbitral tribunal to render at the end of the proceedings. They should carefully examine what the intended effect is (whether they are objecting the tribunal or the claim) and reason their cases accordingly. Thus, they need to be aware of the different positions available for them and make a conscious choice of how to build their arguments before the tribunal.[210] Should excess of the arbitrators' powers be accepted as a cause for inadmissibility, the respondent would be granted with an additional ground for resisting the claimant's claim on adaptation. Indeed, classifying the challenge as of admissibility may, depending on the particular case, leave less gaps in the respondent's argumentation thus potentially supporting its case better than arguing that the tribunal does not at all have jurisdiction in the case.[211] Moreover, as a negative decision on admissibility does not permit the claimant to try the claim in a court but the matter is resolved finally, generally it would be more efficient for the respondent who is seeking to resist the adaptation at any grounds to argue that the claim was inadmissible rather than that the tribunal lacks jurisdiction.[212] Hence, the recognition of the admissibility as an alternative nature of the objection to the claim on adaptation could affect the parties' argumentation when reasoning their positions.

4.2 Adaptation as a Jurisdictional Issue

4.2.1 Objections to Arbitrability of the Claim on Adaptation

The question of whether a contract can be adapted by the arbitrators can be viewed at two different levels: (i) arbitrability level since it has to be established whether the adaptation of contract is a dispute that can be submitted to arbitration and (ii) determination of the arbitrators' procedural powers in the individual case.[213] Therefore, a jurisdictional challenge may be based either on an allegation that under the applicable laws adaptation of the contract does not qualify

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[210] Similarly, see Gouiffés – Ordonez 2015, 121.
[211] See the illustration of the Vis Moot problem in Chapter 1.1.
[212] This could be the case for example in a situation where the party is resisting the tribunal's procedural authority to adapt the contract although the contract includes an express arbitration clause.

On the other hand, of course, the respondent will not have the opportunity to appeal the tribunal's decision in case the tribunal concluded that the claim is admissible. However, the finality of the tribunal's decision is one of the reasons why parties resort to arbitration in the first place, and thus the respondent should not be unwilling to propose the argument due to the fear of non-reviewability of the decision. Moreover, the respondent could also opt for a strategy where it first objects the tribunal's jurisdiction and, if the tribunal would not accept the objection, argue as an alternative ground that the claim is inadmissible.
[213] Ferrario 2017, 75; Beisteiner 2014b, 79.

as arbitration i.e. it is not arbitrable or that *in casu* under the particular arbitration agreement the tribunal does not have the power to adapt the contract (i.e. the parties' have not authorized it to do so).[214] This chapter focuses on the first level whereas the second level is discussed in the following chapter.

Where the challenge is based on non-arbitrability of the adaptation claim (bearing in mind the above-discussed limited area of non-arbitrable matters and tendency to permit adaptation by arbitration among states[215]) it seems that the issue necessary concerns the arbitrators' jurisdiction. Thus, the nature of such objection is always jurisdictional and there is no room for alternative speculation of whether the issue could pertain to admissibility. This results firstly from the feature that arbitrability issues deal with the relationship between arbitrators and courts. Indeed, arbitrability involves determining which types of disputes may be resolved by arbitration and which belong exclusively to the domain of the courts.[216] A matter is determined non-arbitrable if the state wants to keep the monopoly of adjudication in that area.[217] Therefore, if an issue is non-arbitrable the automatic consequence is that the courts may resolve the matter. On the other hand, one could argue that arbitrability objections target the challenge in particular at the claim and not at the arbitral tribunal. Consequently, applying Paulsson's test there could be grounds for considering the challenge to in fact concern admissibility. However, this does not seem meaningful but arbitrability needs to be distinguished from non-adjudicability. Therefore, accepting that claims on adaptation can be challenged on the basis of arbitrability inevitably assumes that national courts are competent to adapt contracts.[218] This is another unsettled issue which deserves to be discussed separately (see Chapter 4.2.4).

The second ground for considering arbitrability challenges necessarily pertaining to jurisdictional issues (and not to admissibility) is the rule according to which a recourse against

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[214] Beisteiner 2014b, 79; generally about different grounds for challenging jurisdiction see Redfern – Hunter 2015, 338 ("The grounds for a challenge to jurisdiction are often related to the basic elements of arbitration clauses, […] it may be argued […] that the whole dispute in issue is outside the scope of the arbitration agreement, or not arbitrable under the applicable law.").
[215] See Chapters 2.2 and 3.3.1.
[216] Redfern – Hunter 2015, 110.
[217] See Beisteiner 2014b, 97.
[218] According to Beisteiner "[t]he traditional view, posited not least by the Austrian Supreme Court, is that only (but – arguably – at least) such dispute resolution which would in the absence of an arbitration agreement fall within the competence of the state courts can qualify as arbitration. The "legal dispute" which is to be "decided" by the arbitrator must potentially (*i.e.* in the absence of an arbitration agreement) lead to a state court decision", emphasis partially ommitted. Beisteiner 2014b, 87.

the award in court is permissible if the dispute is not arbitrable. According to Art. 34(2)(b) of the Model Law an arbitral award may be set aside by the court if the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State. These two grounds cannot be totally separated but the arbitrability of a dispute is usually linked to the underlying public policy of the state in which the arbitration takes place.[219] The New York Convention contains a similar provision in Art. V(2) which provides that non-arbitrability and violation of public policy form a basis for refusing the recognition and enforcement of the award.[220] As was discussed before, such recourse to courts would not be available in cases of admissibility and a decision on an issue that is characterised as of admissibility does not fall under any ground of Art. 34 of the Model Law or Art. V of the New York Convention.[221]

4.2.2 Arbitrators' "Power" to Adapt a Contract

Now we turn to the second level of the issue. Whether in an individual case the arbitrators are procedurally authorized to decide a claim on contract adaptation is often considered to be concerned with the arbitral tribunal's "power" to adapt the contract. Indeed, many commentators do not address the question of the tribunal's authority to adapt a contract by expressly talking about the arbitrators' jurisdiction but rather tend to adopt the word "power".[222] However, due to its generality the word is quite uninformative. It may be used to describe what someone is entitled or authorized to do but its usage is not limited to any particular legal issue (unlike when applying the term jurisdiction when one is automatically discussing the tribunal's fundamental legitimacy to act that forms a basis of the whole arbitral proceedings). Indeed, it seems that

[219] Redfern – Hunter 2015, 586.

[220] However, it should be noted that under the New York Convention the law according to which the adaptation would have to be non-arbitrable is the law of the enforcing country. See Born 2014, 3702–3703. Thus, the law is different than under the Model Law which refers to the law of the place of arbitration.

Cf. Stalev who purports that the New York Convention does not apply to awards adapting contracts. He submits that this does not mean, however, that those awards cannot be recognized abroad but instead it means their broader recognition. This is because they form an integral part of the contract and thereby they are to be recognized abroad as the contract itself (and thus also in countries not party to the New York Convention). Hence, only in a state, which not only forbids the adaptation of contract by arbitration but also regards such a prohibition as a provision of its public policy would the recognition of awards adapting contracts be refused. Stalev 1983, 208.

[221] See Chapter 3.4.2.

[222] See e.g. Beisteiner 2014b, 107 *et seqq.*; Berger 2001, 7 *et seqq.*; Ferrario 2017, 74 *et seqq.*; Brunner 2009, 490 *et seqq*; Kröll 2004, 456 *et seqq.*; Frick 2001, 190 *et seqq.*; Bordacahar 2018; Lew – Mistelis – Kröll 2003, 652; Craig – Park – Paulsson 2000, 114–115.

"power" may be used either interchangeably with jurisdiction[223] or as referring to some powers that already presuppose the tribunal's jurisdiction in the case. For example, the term is generally applied when referring to the powers that enable the arbitral tribunal to carry out its task properly and effectively such as the powers to order production of documents, to appoint experts, to hold hearings and to require the presence of witnesses.[224] These powers do not affect what kind of decisions the tribunal is competent to render but merely provide it with tools for conducting the proceedings. Thus, the term is relatively broad and does not possess a certain specific legal meaning or consequences.[225] In the same vein, it does not in itself reveal, for example, whether the discussed issue relates to jurisdiction or admissibility but may be arguably used to address them both (and for this reason the word is found useful to be utilized occasionally also in this study.)

Nevertheless, although several authors choose to utilize the word "power" when discussing the issue of whether a tribunal is procedurally entitled to adapt a contract, it seems that they still treat the question as a matter of jurisdiction. Thus, they consider the words to be interchangeable. For example, while Beisteiner deals with the issue by incorporating the word "power", she still reveals to be talking about the tribunal's jurisdiction by submitting that "if interpretation of the arbitration clause demonstrates that the arbitrator *in casu* was not conferred the power to revise the contract, an arbitral award revising the contract will be challengeable even if it keeps within the confines of substantive law".[226] Also Brunner equates the terms by submitting that "it may still be arguable whether an arbitral tribunal has the procedural *power, i.e., the jurisdiction*, to

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[223] See e.g. Brunner 2009, 493 ("it may still be arguable whether an arbitral tribunal has the procedural *power, i.e., the jurisdiction*, to adapt a contract", emphasis added); Park 2007, 153 ("The labels applied to excess of authority may vary from country to country, with related terms ("jurisdiction," "authority," "powers," and "mission") often pressed into service almost interchangeably"); Redfern – Hunter 2015, 306 ("The powers […] of an arbitral tribunal are also closely linked to the question of its jurisdiction (particularly in defining the extent of that jurisdiction) and the difficult question of determining the validity of the arbitration agreement").

[224] See Redfern – Hunter 2015, 306 *et seqq*; see Jarvin 1987, 55–58. This is the meaning in which also the Model Law operates with the term "power". See Arts. 17 (power to order interim measures) and 19(2) (power to conduct the arbitration in a manner the tribunal considers appropriate and power to determine the admissibility, relevance, materiality and weight of any evidence). Cf. Art. 16 (Competence of arbitral tribunal to rule on its jurisdiction) located under Chapter IV that is titled "Jurisdiction of the Arbitral Tribunal". On the other hand, the ground for a challenge under Art. 34 has been considered to be concerned with the excess of the tribunal's *powers*, which again implies that the word is understood interchangeably with jurisdiction. See e.g. Redfern – Hunter 2015, 584–585.

[225] Notably, for example, the New York Convention does not contain the word "power" even once.

[226] Emphasis partially omitted. Beisteiner 2014b, 113.

adapt a contract when the substantive law requirements of the hardship test are met”.[227] Furthermore, similarly to Beisteiner, he also purports that “[a]n award providing for adaptation rendered by an arbitral tribunal that lacks *jurisdiction* to do so could be challenged and set aside under the lex arbitri, and may not be enforceable under the New York Convention”.[228]

Also Berger talks about tribunals’ powers to adapt contracts in the context of jurisdiction as he stipulates that “[…] the question remains whether arbitral tribunals are procedurally authorized to make such decisions. Some arbitration acts, such as the Dutch Act, Bulgarian Act, or the new Swedish Arbitration Act provide for such a *jurisdiction* of the arbitral tribunal where the parties have expressly authorized it to do so”.[229] Berger does not separate clearly the issues of the first and second level i.e. the arbitrability level and, shall we call it, the *ad hoc* level. Nevertheless, what he seems to mean is that under those laws the tribunal’s factual jurisdiction as a matter of the second level (right to act *in casu*) follows from the combined effect of the arbitration agreement and the *lex arbitri*.[230]

Arbitrators’ power to adapt contracts has been considered to be an issue of jurisdiction also in case law.[231] For example, in *Aminoil v. Kuwait* the arbitral tribunal considered that the question of whether it had the power to complete an imcomplete contract required “considering whether it has jurisdiction to go into the matter”.[232] Also, in *NV Belgische v. NV Distrigas* the Swiss Supreme Court held that the power to fill gaps or amend a contract is a matter of jurisdiction and that as such, an arbitral tribunal’s decision to amend the parties’ agreement can be challenged on the basis that the tribunal wrongly assumed jurisdiction.[233]

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[227] Emphasis added. Brunner 2009, 493. Similarly, in the context of arbitrators’ power to fill gaps, Debevoise considered in 1976 that “[o]nce it is decided that the underlying agreement is valid, the focus shifts to the scope of the arbitrator’s *power*. […] when one party objects that a particular gap sought to be filled exceeds the bounds of the submission agreement, the arbitrator will consider that *jurisdictional question* itself”, emphasis added. Debevoise 1976, 127.
[228] Emphasis added. Brunner 2009, 493.
[229] Emphasis added. Berger 2003, 1373.
[230] See Berger 2001, 10.
Similarly, Redfern – Hunter 2015, 342 (“jurisdiction itself is derived […] from the arbitration agreement – and the arbitration agreement can confer only powers that are permissible under the law applicable to the arbitration agreement and under the *lex arbitri*”).
[231] However, the published case law on this topic is sparse. Brunner 2009, 452.
[232] *Aminoil v. Kuwait* (1982), paras. 71, 73.
[233] *NV Belgische v. NV Distrigas* (2001), referenced in Nessi 2017; see also *Intrafor Cofor v. Gagnant* (1985), referenced in Ferrario 2017, 140.

4.2.3 Possibility to Challenge the Award on the Ground of Excess of Jurisdiction

If the question of the tribunal's power to adapt a contract is classified as a matter of jurisdiction, the respondent refusing the adaptation could seek the award to be set aside or refused recognition and enforcement on the basis that the tribunal exceeded its jurisdiction. In such situation the available ground for the challenge or refusal is provided for by Art. V(1)(c) of the New York Convention (and respectively Arts. 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law). According to Art. V(1)(c) recognition and enforcement of the award may be refused if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. The article thus envisages a situation in which the arbitral tribunal is alleged to have acted in excess of its authority and to have dealt with a dispute that was not submitted to it.[234] To be exact, in this regard the excess of authority (or respectively excess of power) means specifically excess of jurisdiction.[235]

Notably, a challenge under the ground that the tribunal exceeded its jurisdiction does not entail that the resisting party contests that the parties had validly agreed on arbitration.[236] Indeed, it has been submitted that this ground contemplates a situation in which an award has been made by a tribunal that *did* have jurisdiction to deal with the dispute, but which exceeded its powers by dealing with matters that had not been submitted to it and rendered an award it was not entitled to make.[237] Thus, it recognizes that the parties did in principle agree on arbitration as the correct forum for the dispute resolution; the tribunal indeed possesses the general jurisdiction to solve the disputes arising out of the parties' agreement – but not to do what it has in the particular case done, such as changed the contract.

An allegation under Art. V(1)(c) that the tribunal has exceeded its jurisdiction may be of two kinds: either that a decision is taken on remedies not requested by a party or that a claim is

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[234] Redfern – Hunter 2015, 630.
[235] See Redfern – Hunter 2015, 629; see Born 2014, 110; see Santacroce 2017, 567.
[236] If the party wished to resist the tribunal's jurisdiction altogether it would need to rely on Art. V(1)(a), which concerns incapacity of the parties and invalidity of the arbitration agreement. Van den Berg 1981, 312.
[237] Redfern – Hunter 2015, 584; van den Berg 1981, 312; Moses 2008, 195.
However, it can be pointed out that if the whole dispute concerns whether the contract should be adapted or not and the tribunal was not granted with the jurisdiction to decide claims on adaptation, it is hard to imagine that the tribunal would have any jurisdiction to deal with that dispute.

outside the scope of the arbitration agreement.[238] The first type of allegation is based on the mandate given by the parties in the course of the proceedings whereas the second type is based on the arbitration agreement itself.[239] The relevance of this separation is that the mandate may comprise less than the arbitration agreement.[240] An example of a situation where the tribunal went beyond the mandate given by the parties is provided by *Paris Lapeyre v. Sauvage* where the Paris Court of Appeals found that the tribunal exceeded its jurisdiction by awarding a party damages in an amount that significantly exceeded the damages claimed.[241] Regarding claims on contract adaptation the claimant has, however, likely initiated the arbitration precisely in order to have the contract adapted by the tribunal on the basis of a hardship clause or a relevant regulatory provision. Therefore, the allegation that the tribunal exceeded its jurisdiction because it adapted the contract without a party's request hardly comes into play.[242]

A challenge against an award adapting a contract would thus rather be based on an allegation of the second type i.e. that the claim requesting adaptation was outside the scope of the arbitration agreement.[243] As was discussed before, jurisdictional issues deal with the relationship between arbitration and courts meaning that if the tribunal is found to have exceeded its jurisdiction by adapting the contract, the power to adapt the contract falls on the courts. In other words, if the

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[238] Van den Berg 1981, 314; Liebscher 2003, 305; Born 2014, 3545.
[239] Van den Berg 1981, 314.
[240] Van den Berg 1981, 314.
[241] *Paris Lapeyre v. Sauvage* (2001), referenced in Redfern – Hunter 2015, 584.
[242] Such allegation could be successful in a situation where the tribunal adapted the parties' contract even though the aggrieved party had requested termination of the contract and the other party merely requested the tribunal to dismiss the claim. Alternatively, it could be valid if the adaptation rendered by the tribunal goes in extent or monetary amount beyond what was requested by the party. For this reason, the party requesting the adaptation should be required to reasonably substantiate the contents of the requested modification. A generic request pursuant to which a party simply asks the court to determine an adequate adaptation may not be sufficient. Brunner 2009, 503.
[243] Should the parties have included a standard arbitration clause in their agreement (which stipulates something like "all disputes arising out of or relating to this agreement shall be resolved in arbitration"), the unclear issue is whether such traditional arbitration clause can be interpreted in such a wide manner that it covers the adaptation of contracts. See Berger 2001, 8. In such situation a party could contest the tribunal's jurisdiction by alleging that an express authorization in the arbitration agreement or in the hardship clause would have been required in order to authorize the tribunal to adapt the contract. For example, in ICC case 7544 (1999) the parties had authorized the tribunal to decide on "all disputes arising out of the contract *including a change of the contract itself*". By contrast, in ICC case 5754 (1988) the tribunal held that the traditional ICC arbitration clause may be interpreted as covering the adaptation of contracts if the clause is contained in a long-term contract that contains "a number of provisions which may require adjustment over the period of that contract". Therefore, a specific authorization was not required for adaptation. However, the tribunal emphasized that in other contexts the standard ICC arbitration agreement might be given a narrower scope.

challenge is successful, the consequence is that the dispute on the adaptation may be subsequently brought before a court.[244]

4.2.4 Relation to Courts' Jurisdiction to Adapt Contracts

As just discussed, one of the characteristics of jurisdictional issues is that they deal with the relationship between arbitration and courts. This means that if the tribunal lacks jurisdiction, the automatic consequence is that then the state courts are authorized to resolve the case. Respectively, in order to classify the challenge to the tribunal's power to adapt a contract as jurisdictional, it would be inevitable that the courts were entitled to adapt contracts. However, it should be critically reviewed whether the courts would be entitled to adapt the contact either.

State courts' powers to adapt contracts are not undisputed but there is a strong sentiment that judges do not make contracts.[245] Notably, what used to be the primary concern of the working group on the Model Law against arbitrators adapting contracts, was namely "the position of many legal systems according to which the courts are not allowed to adapt or supplement contracts".[246] However, Beisteiner submits that since then this concern has been dispelled and that scholars increasingly speak out in favor of a more progressive stance on contract adaptation and the resistance appears to be gradually subsiding.[247] Nevertheless, she recognizes that there may still be some way to go until contract adaptation will be openly accepted as a state court competence.[248] Thus, it depends on the particular judicial system whether courts are authorized to adapt contracts.[249] In some countries the courts have such power either by virtue of a statute

[244] Redfern – Hunter 2015, 606; Moses 2008, 199.

[245] Beisteiner 2014a; see Brunner 2009, 494 ("It is also suggested that the creation (or adaptation) of contractual rights should be reserved for the parties themselves, while *courts and* arbitral tribunals should be limited to adjudicate pre-existing rights", emphasis added), 509 ("This position is particularly based on the argument that the courts should in general not be allowed to intervene in the contract (primacy of the principle of party autonomy), and that the adaptation of the terms of the contract by the court has the inherent danger that courts might make excessive use of their powers and inappropriately 'rewrite' the contract."); see Schmitthoff 1980, 415 *et seqq*.; see Szurski 1984, 67 ("[…] exceed the limits of the competence of ordinary courts, *which, as a rule, cannot create contractual relations between the disputing parties*", emphasis added); see Wolfgang 1995, 251 ("Regarding the situation in France, courts are not allowed to adapt contract terms").

[246] UN Doc. A/CN.9/WG.II/AP.44, Art. 7, para. 14, cited in Beisteiner 2014b, 94.

[247] Beisteiner 2014b, 93–94, see references in fn. 73.

[248] Beisteiner 2014b, 94.

[249] For example, in 1980 Schmitthoff submitted that "[w]e have seen that, in the present state of authorities, the English courts have no power to adapt a contract to uncontemplated fundamental changes, even if the parties so desire". Thus, if the parties wished to have their contract adapted they would have had to opt for a foreign legal system which admits the adaptation of contracts. Schmitthoff 1980, 420–421.

or by virtue of their inherent jurisdiction.[250] For example, it has been submitted that state courts are necessarily given the procedural power to adapt a contract in those legal systems where the adaptation of the contract as a possible legal consequence is recognized as a matter of substantive law.[251]

Let us first consider a situation where in a particular country courts generally possess jurisdiction to adapt contracts. Then, if the applicable arbitration law is silent on whether arbitrators may adapt contracts, one could be guided by the principle of synchronized competencies according to which the jurisdiction of the arbitrator is (with the exception of non-arbitrable subject matters) considered to be aligned to the jurisdiction of the state courts.[252] Following this principle, if the courts are empowered to adapt contracts arbitral tribunals should have the same authority.[253] In turn, if the applicable arbitration law would require an express authorization by the parties in order to authorize arbitrators to adapt the contract and no such authorization was given, the tribunal would lack the authority and the claim on adaptation would allegedly fall upon the jurisdiction of the courts. In that case, it would be assumed that the parties' intention was that potential adaptation claims were to be resolved by a court and other claims by the tribunal.[254] In such scenario, characterizing the challenge as jurisdictional would be correct. However, the characterization becomes more problematic in situations where the particular legal order does not grant state courts with the power to adapt contracts.

The principle of synchronized competencies has been expressed also in the negative so that if the courts are not provided with the power to adapt contracts, an arbitrator applying the law of that jurisdiction does not possess that power either.[255] Indeed, historically neither courts nor arbitrators had the authority to fill gaps or adapt contracts because it did not constitute a judicial, or justiciable, act.[256] However, there seems to be strong support to the contrary in favor of the

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[250] Schmitthoff 1980, 416.
[251] Brunner 2009, 495. Noteworthy, the UNIDROIT Principles and the PECL provide for adaptation by a court. See Art. 6.2.3(4)(b) of the UNIDROIT Principles and Art. 6:111(3)(b) of the PECL.
[252] Beisteiner 2014b, 87; Brunner 2009, 495; Berger 2001, 10; Brower 2016, 18.
[253] Bernardini 1983, 214; Berger 2001, 10; Brunner 2009, 495; Fouchard – Gaillard – Goldman 1999, 29; Ferrario 2017, 75–76.
[254] Whether such conclusion is reasonable and justified is discussed later in Chapter 4.3.2.
[255] Schmitthoff 1980, 420–421; Ferrario 2017, 76.
[256] Brower 2016, 18; see Beisteiner 2014b, 54 ("The judicial act is being contrasted with the (exclusively) creative act. Under this view […] [*j*]*ust as a state court judge*, the arbitrator just interprets but does not create or shape contracts", emphasis added).

position that arbitrators may have wider powers than courts. For example, Beisteiner argues that "even if and when the state court's powers to revise a contract would and do end, an arbitral tribunal may validly and enforceably revise the contract. The proposition is that an arbitrator's powers, in general, and an arbitrator's power to revise contracts, in particular, may go beyond that of a state court judge".[257] Thus, the parties could, with the exclusion of non-arbitrable matters, empower the arbitrators to decide and to grant remedies even if such are not available to the state court judge.[258]

Similarly, already in 1985 René David submitted that "[a]rbitration is not only resorted to for the settlement of a legal dispute, but it may also be used in order to settle questions which are outside the jurisdiction of the courts, or which the courts are not well equipped to answer. The arbitrator is not always called to interpret the contract […] he may be asked to perfect an agreement which is incomplete or called to vary the contractual terms".[259] Also during the drafting of the Model Law it was recognized that "the mere fact that arbitration is to the exclusion of court competence does necessarily mean that the competence of the arbitral tribunal cannot be wider than the (excluded) competence of the court".[260] One indication of this is the power of the arbitrator to decide *ex aequo et bono* or as *amiables compositeur* (expressly recognized in Art. 28(3) of the Model Law) if so conferred by the parties. Such power can be bestowed only to arbitrators but not state court judges.[261]

Additionally, it has been frankly argued that state courts are inappropriate for the task of adapting contracts to new circumstances and that thus arbitration based on the parties' agreement is the only practical means to adapt long-term international economic contracts when

[257] Beisteiner 2014b, 96. She further reasons that "[m]oreover, whereas arguably the parties should not engage the courts as public resources for the purpose of regulating their private (contractual) relationship, the parties may well entrust a privately funded arbitrator with this task of contract revision. Wider arbitral powers do not, basically, give rise to an increased spending of public financial resources". Beisteiner 2014b, 98.

[258] Beisteiner 2014b, 97.

[259] David 1985, 30. Similarly, also Szurski argued in 1984 that "[e]ven if a state court be treated as not being called upon to create agreements for and instead of the parties, such position should not by itself prejudice the lack of competence of the arbitral tribunal to adapt a contract or to fill its gaps in the case the parties so request. There is a substantial difference between the legal ground of the competence of an ordinary court and the competence of the arbitral tribunal, the former performing its judicial functions on a statutory basis, while the latter acts exclusively on the basis of the agreement of the parties and their mandate. Hence, even in the case the statutory law of a country does not foresee the competence of the ordinary court to adapt a contract or to fill gaps in it, on the request of the parties, this should not automatically exclude the possibility to perform such function by the arbitral tribunal acting within the framework of the will of the parties expressed in the arbitration agreement." Szurski 1984, 67.

[260] UN Doc. A/CN.9/WG.II/WP.44, Art. 7, para. 17, cited in Berger 2001, 16.

[261] Beisteiner 2014b, 98.

the parties are unable to reach an agreed solution.[262] In the same vein, precisely if and because state courts are not considered appropriate to adapt contracts, the parties must have the possibility to entrust arbitrators (that are specifically selected according to their particular expertise in special economic fields) with this exercise.[263] This conclusion is compatible with the fundamental principle of access to justice as despite of the courts' lack of jurisdiction to decide a claim on adaptation the parties would still have the possibility to resort their dispute to a third party that is capable of rendering an enforceable decision on the matter.

Returning to our initial problem, if under the prevailing legal conditions state courts do not have jurisdiction to adapt contracts, characterizing a challenge to the tribunal's power to adapt the contract as jurisdictional becomes doubtful. Indeed, if under such circumstances the tribunal would find that it did not have the jurisdiction to hear the case (for example on the basis that it was not expressly authorized to adapt the contract as required by the *lex arbitri*), the matter could not then fall upon the jurisdiction of the courts either. Instead, it would be left to hang in the air without any legal forum that would possess the jurisdiction for its resolution. For this reason, it needs to be considered whether in such situation the challenge should rather be considered to pertain admissibility.

4.3 Adaptation as an Admissibility Issue

4.3.1 Comparing the Power to Adapt a Contract and the Power to Decide *Ex Aequo et Bono* or as *Amiable Compositeur*

Adapting the parties' contract to changed circumstances resembles a situation where the tribunal is empowered to decide *ex aequo et bono* or as *amiable compositeur*. As mentioned above, arbitrators' power to decide a case *ex aequo et bono* or as *amiable compositeur* is recognized in Art. 28(3) of the Model Law. An express authorization by the parties is however required. The same has been provided for by the national arbitration laws of many countries[264], most

[262] Stalev 1983, 201. Cf. Brower 2016, 18, discussing gap-filling ("as a generalization, one may say that both courts and arbitrators have the capacity for gap-filling, and they appear comparably well-suited for the task, subject to a pair of qualifications").
[263] Beisteiner 2014b, 99.
[264] Such as France, Italy, Switzerland, the Netherlands, Belgium, Denmark, Finland, Japan, Korea and the New Zealand. See Born 2014, 2772, fn. 837; Craig – Park – Paulsson 2000, 348.

institutional arbitration rules[265] as well as the ICSID Convention[266]. It is a controverted issue among scholars whether there is difference between giving the arbitrators power to decide *ex aequo et bono* ("in equity") and as acting as *amiable compositeur*.[267] The issue may also depend on the law in effect at the place of arbitration.[268] In the light of the purposes of this review, however, the potential difference between the two concepts is not analyzed but they are generally regarded as meaning the same.[269]

Empowering an arbitral tribunal to act *ex aequo et bono* or as *amiable compositeur* means that the tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law.[270] It means that the arbitrators are not obliged to follow strict rules of law but may decide according to the interest of fairness and common sense.[271] Thus, it is a departure from the ordinary rule and a waiver of the right that the arbitrator decides according to the law.[272] Consequently, granting the arbitral tribunal with the power to decide *ex aequo et bono* or as *amiable compositeur* gives the tribunal the maximum freedom to fashion its decision according to its personal judgment.[273] Pursuant to Art. 28(4) of the Model Law, even in these cases the tribunal must however decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.[274] Nonetheless, it has been submitted that the better view, adopted by a majority of commentators and other authorities, is that arbitrators may depart from the terms of the parties' contract in

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[265] See e.g. Art. 27(3) of the SCC Rules; Art. 29.3 of the FAI Rules; Art. 22.4 of the LCIA Rules; Art. 35(2) of the UNCITRAL Rules; Art. 31.2 of the SIAC Rules; Art. 36.2 of the HKIAC Rules; Art. 21(3) of the ICC Rules. However, the ICC Rules do not require that the authorization must be express.
[266] See Art. 42(3), which states that "[t]he provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree." Notably, the article does not however require that the agreement is express.
[267] Craig – Park – Paulsson 2000, 112, see references in fn. 14; see Born 2014, 2771.
[268] Craig – Park – Paulsson 2000, 348. For example, in Switzerland *ex aequo et bono* is understood as meaning the application of principles other than legal rules, while the concept of *amiable compositeur* requires the application of legal rules but allows arbitrators to moderate the effect of such rules. Again, in France the two concepts are given a similar meaning. Redfern – Hunter 2015, 216–217.
[269] The concepts have been equated also e.g. by Berger ("or having the arbitrators decide as "*amiable compositeurs*" (*ex aequo et bono*)"). Berger 2003, 1379. In addition, according to Redfern and Hunter, "[a]lthough a historical distinction has been drawn between them, the increasing practice of international arbitral tribunals appears to be to view both concepts as granting a discretion to arbitral tribunals to put aside strict legal rules and to decide a dispute by reference to general principles of fairness". Redfern – Hunter 2015, 218.
[270] Explanatory Note by the Uncitral Secretariat on the Model Law, 34.
[271] Craig – Park – Paulsson 2000, 110; Lew – Mistelis – Kröll 2003, 471; Born 2014, 2771; Jarvin 1987, 70.
[272] Craig – Park – Paulsson 2000, 348; Lew – Mistelis – Kröll 2003, 470; Hilgard – Bruder 2014, 54.
[273] Craig – Park – Paulsson 2000, 113.
[274] Explanatory Note by the Uncitral Secretariat on the Model Law, 34.

fashioning a fair and equitable result, provided that they do not rewrite the structure of the agreement.[275] This view was promoted also during the drafting of the Model Law.[276] Thus, it seems that empowering the arbitral tribunal to decide the dispute with a mere promise of "fairness" grants the tribunal with similar (or arguably even wider) discretion than authorizing it to adapt the contract on the basis of a hardship clause or the provisions of the *lex causae*.[277] Hence, it may be helpful to compare these similar types of "authorizations" in order to define whether the power to adapt a contract is necessarily an issue of the tribunal's jurisdiction.

Indeed, it can be asked if the issue of whether the arbitral tribunal has the power to decide *ex aequo et bono* or as *amiable compositeur* is a question of the tribunal's jurisdiction. The answer seems on the face of it to be negative as the issue appears to concern "merely" which rules or principles the tribunal should adhere to when making its decision (and thus it seems to be a choice-of-law matter in a sense). Nevertheless, the question ought to be viewed again from the perspectives of (i) the residual jurisdiction of the state courts (available if the tribunal is found to lack jurisdiction) and (ii) reviewability of the tribunal's decision to make a judgment without following strict rules of law. The first aspect was already addressed above as it was noted that state courts cannot have powers to decide *ex aequo et bono* or as *amiable compositeur* but arbitrators may in this regard be granted with greater authority.[278] This notice would support the conclusion that the issue cannot concern jurisdiction.

Relating to the second aspect, Born submits that if an arbitral tribunal decides *ex aequo et bono* without the parties' agreement granting it such authority, it exposes its award to annulment and non-recognition on grounds of excess of authority.[279] This denotes the ground under Art. V(1)(c)

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[275] Born 2014, 2775–2776, see references in fn. 858; see ICC case 4206, referenced in Jarvin 1987, 71–72 (where the arbitrator reduced the percentage of an agent's commission although it had been expressly defined in the disputed contract). Moreover, it has been specifically submitted that, at least, for example, under the Austrian law which does not implement Art. 28(4) of the Model Law, an arbitrator deciding *ex aequo et bono* or as *amiable compositeur* can deviate from the contract. Beisteiner 2014b, 115–116, see fn. 168.
[276] See the Ninth Session (1976), paras. 179–180.
[277] However, an arbitrator acting as *amiable compositeur* still may not adapt the terms of the contract without the parties' express authorization. Jarvin 1987, 71, 72. In that regard, the power to decide without adherence to law is more limited than the power to adapt the contract.

Notably, it has been submitted that the parties should consider whether the promise of "fairness" will in fact produce a satisfactory solution, and that virtually all practitioners and businessmen are more skeptical as to the ultimate efficiency and fairness of a system that may encourage compromise verdicts or permit entirely arbitrary awards. Born 2014, 2776.
[278] See Chapter 4.2.4.
[279] Born 2014, 2773–2774; similarly, Fouchard – Gaillard – Goldman 1999, 988.

of the New York Convention (and Art. 36(1)(a)(iii) of the Model Law) concerning excess of jurisdiction.[280] Born differentiates the arbitrators' false choice-of-law decision (which he considers as pertaining to the merits and thus to be excluded from review) from their wrongful decision to act *ex aequo et bono* or as *amiable compositeurs*. He submits that "an arbitration *ex aequo et bono* and *amiable composition* is a different form of proceeding, involving a different type of authority, than other types of arbitration; it is not merely an error in application of relevant substantive legal rules or interpretation of the parties' contract or choice-of-law clause. An arbitral tribunal's exercise of such authority, without the parties' agreement, is an excess of authority under Article V(1)(c)".[281]

Therefore, according to Born's reasoning the question of whether the tribunal has the power to decide *ex aequo et bono* or as *amiable compositeur* would be a question of its jurisdiction. If we were to accept this reasoning, the same could analogously be applied also to the tribunal's improper determination that it was authorized it to adapt the contract. Indeed, adaptation and rendering a decision *ex aequo et bono* or as *amiable compositeur* can both be said to be a different form of proceeding, involving a different type of authority (typically requiring express authorization by the parties) and wider discretion than traditional arbitration where the tribunal decides the case based on the law and interpretation of the contract.[282]

Hilgard and Bruder in turn submit that if the tribunal decides *ex aequo et bono* or as *amiable compositeur* without the parties' authorization the award may be challenged on the basis that the arbitral procedure was not in accordance with the agreement of the parties (Art. V(1)(d) of the New York Convention and Art. 36(1)(a)(iv) of the Model Law).[283] Notably, a challenge under Art. V(1)(d) does not constitute a challenge against the tribunal's jurisdiction but is rather a procedural challenge.[284] It does not allege that the arbitral tribunal was not the correct forum

[280] See Born 2014, 3542. Born clarifies that Art. V(1)(c) only authorizes non-recognition where the arbitrators exceeded their jurisdiction, not where they made errors, including serious errors, in the exercise of that jurisdiction.
[281] Born 2014, 3555.
[282] See Chapter 2.2.
[283] Hilgard – Bruder 2014, 59; similarly, see Fouchard – Gaillard – Goldman 1999, 989. Notably, in order to this ground to become applicable the tribunal's wrongful assumption of the powers to act *ex aequo et bono* or as *amiable compositeur* must have had a meaningful effect on the arbitral process and have materially affected the party's rights. Generally discussing Art. V(1)(d) of the New York Convention, see Born 2014, 3565.
[284] Moses 2008, 195–196. Moses submits that challenges against an award may be divided into two categories, jurisdictional and procedural, and the ground for a challenge under Art. V(1)(d) falls within the latter category. Similarly, see Born 2014, 110, where it is submitted that whereas Art. V(1)(a) and (c) concern issues of jurisdiction,

for the resolution of the dispute but that the tribunal did not follow the rules the parties agreed to be applicable and thus acted incorrectly in the course of the proceedings. For this reason, when the tribunal has allegedly acted *ex aequo et bono* or as *amiable compositeur* without authorization, accepting that the award could be challenged under Art. V(1)(d) seems more reasonable than the possibility to challenge the award on the basis of excess of jurisdiction.

Furthermore, some authorities seem to be of the opinion that none of the grounds for review other than violation of public policy are available when the tribunal has unjustifiably exercised the power of *ex aequo et bono* or *amiable compositeur*. For example, Beisteiner submits that (at least under Austrian law) the lack of express consent for a decision *ex aequo et bono* may not as such give rise to an annulment.[285] Instead, the award could be set aside only in exceptional cases of arbitrary adaptation which amount to a violation of procedural public policy.[286] Similarly, also Craig, Park and Paulsson perceive that the only available grounds to seek annulment of the award decided as *amiable compositeur* are violations of fundamental procedural fairness or public policy.[287] Thus, giving such powers to the arbitral tribunal would serve to greatly reduce any possibility to attack the award.[288] Hence, the authors even wonder why parties, who often criticize the ”judicialization” of international arbitration procedures and the possibility of judicial interference, do not more frequently give the arbitrators the power of *amiable compositeur*.[289] According to this perception, the power to decide *ex aequo et bono* or as *amiable compositeur* cannot therefore be a matter of jurisdiction.

In the light of the above, an award which the tribunal has rendered *ex aequo et bono* or as *amiable compositeur* could be challenged either on the ground that the arbitral procedure was not in accordance with the agreement of the parties (Art. V(1)(d)) or alternatively on none of the grounds of Art. V(1). However, in my view the award could not be annulled on the ground

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Art. V(1)(d) relates to compliance with the procedural terms of the parties' arbitration agreement or, absent such agreement, the procedural requirements of the arbitral seat.

[285] Beisteiner 2014b, 118, 120.

[286] Beisteiner 2014b, 119.

[287] See Craig – Park – Paulsson 2000, 354.

[288] Craig – Park – Paulsson 2000, 354.

[289] Craig – Park – Paulsson 2000, 354. According to Born, generally parties agree to arbitration *ex aequo et bono* or to *amiable composition* only in very rare cases: at most, on the order of 2 or 3 % of all arbitration agreements. Born 2014, 2770.

of excess of jurisdiction.[290] This is again because the challenge would not attack the tribunal as the correct forum but instead question "merely" the proper conduct of the dispute resolution process.[291] Additionally, this position is supported by the supposition that courts cannot exercise the power to decide without adherence to law. Indeed, if the power to decide *ex aequo et bono* or as *amiable compositeur* was regarded as a jurisdictional issue and neither the tribunal nor the court would possess such authority, the consequence would be that no one would have jurisdiction on the matter. Such conclusion certainly cannot be accepted primarily due to the considerations of the fundamental right of access to justice.[292]

This same conclusion can be viewed in the context of contract adaptation. If the award adapting the parties' contract was challenged on the basis of lack of sufficient jurisdiction, it would be alleged that adaptation as the required "method" of deciding the dispute does not fall into the scope of arbitration but could instead be implemented in litigation. This does not mean that it could not in any event be *possible* that the question of the existence of the arbitrators' adaptation powers concerned its jurisdiction (as long as the state courts are allowed to adapt contracts), but it does raise a question of whether that was effectively intended by the parties.[293]

Nevertheless, the conclusion that is by no means sought to be made here is that the matter of the tribunal's power to decide *ex aequo et bono* or as *amiable compositeur* would pertain to admissibility any more than it does to jurisdiction. Certainly not, as the challenge against a wrongful exercise of such power would not attack the claim but instead the manner exercised by the tribunal during the decision-making process. Does this then analogously mean that neither the question of the tribunal's power to adapt the contract can be an issue of admissibility? I would not draw such conclusion because despite of the similar characteristics of these two "methods" of decision-making, they still do differ from each other to a visible extent. Indeed, even though the tribunal would upon a party's request decide the dispute *ex aequo et bono* or as

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[290] An opposite conclusion could be reached if the tribunal was alleged to have decided *ex aequo et bono* or as *amiable compositeur* even though that was not requested by either of the parties.
[291] Thirlway defines that the "jurisdiction" of a court or tribunal is essentially the power to decide *according to law* a dispute of a particular nature between specific parties. Thirlway 2016, 35. Thus, granting the tribunal with additional powers to decide without adherence to law would not be a matter of its jurisdiction but of its procedural powers in the particular case.
[292] For a more detailed analysis on the fulfillment of the rights of access to court and access to justice see Chapter 4.3.3.
[293] The issue of the parties' intention is addressed in the following chapter (Chapter 4.3.2).

amiable compositeur, that probably was not, however, itself the primary request of the claimant's claim. Instead, the issue presumably appears rather as an intermediate procedural question similarly to a choice-of-law issue (decided after the tribunal has confirmed its jurisdiction as well as admissibility of the claims). In turn, when the tribunal is requested to adapt the contract the request for adaptation would constitute the substantive claim itself. In other words, whereas the power to decide *ex aequo et bono* or as *amiable compositeur* concerns which rules the tribunal needs to follow when it renders the decision, contract adaptation itself is the legal effect sought in arbitration.

4.3.2 Presumed Intention of the Parties

Whether or not to raise a preliminary objection, and whether to classify that objection as a jurisdictional or admissibility challenge is a matter for the sole decision of the respondent.[294] Thus, the respondent may formulate its objection in a way that it appears to be aimed at the tribunal's jurisdiction.[295] The tribunal should not, however, be guided solely by the position taken by the objecting party but to have a thorough examination of the parties' agreement and the circumstances of the case in order to determine whether the matter would be better considered as to pertain to admissibility.[296] Therefore, when faced with doubts as to the correct nature of a preliminary objection the arbitral tribunal ought to inquire into the intentions of the parties.[297] In that regard, the tribunal should question in particular whether the parties intended to resolve the dispute in another forum or not at all.[298]

The determination of the parties' factual intention is not however always straightforward. A valid point is that at the time the contract was concluded the parties unlikely intended anything regarding the characterization of any plausible objection raised in a potential future dispute resolution process.[299] Indeed, given the unfamiliarity with the separation between jurisdiction

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[294] Thirlway 2016, 170.
[295] Synková 2013, 42.
[296] See Synková 2013, 42.
[297] Paulsson 2005, 616; Synková 2013, 42; in the context of characterizing procedural pre-conditions, Born 2014, 937; see Park 2007, 154 ("In deciding challenges to arbitral authority, the parties' intent should serve as the touchstone and the lodestar").

Notably, also the issue of whether a tribunal is procedurally empowered to adapt the contract is itself a question of the parties' intention. Fouchard – Gaillard – Goldman 1999, 28; Beisteiner 2014b, 108.
[298] Paulsson 2005, 616; Synková 2013, 42.
[299] See Paulsson 2005, 612 ("Instead of purporting to read the minds of parties *who assuredly had not been thinking about this matter at all*, it would have been better to say that this was about admissibility, and therefore exclusively a matter for arbitral determination", emphasis added).

and admissibility even in the legal field,[300] it is safe to assume that the negotiating commercial parties had never even heard of such concepts. Respectively, they most likely did not give any thought to the characterization of a possible dispute over the arbitrators' procedural power to adapt their contract (especially if the parties in fact did not even agree on adaptation as a substantive remedy but nevertheless one of them later requires the tribunal do decide over such claim). However, another question is whether they did virtually have an idea of the desired consequences of not granting the tribunal with the adaptation power. It is not hard to imagine that they might have by default understood or assumed that as the tribunal was not granted the power to alter the contract, naturally the contract could not be adapted by any other body either. Nevertheless, such intention would need to be common between the parties in order to result in an agreement, and as the parties presumably did not realize to expressly discuss and agree on the matter, such common intention would be hard to verify.

For that reason, a default rule of the parties' presumed intention needs to be established.[301] According to Rau, choosing the proper default rule requires us to attribute to the parties, in the absence of evidence to the contrary, the intention to act efficiently in the interest of maximizing mutual gains. He submits that these same considerations ought to inform our choice whether to characterize a particular objection to arbitration as one of jurisdiction or alternatively as of admissibility.[302] Similarly, in his analysis on the characterization of noncompliance with pre-arbitration requirements, Born proposes an approach according to which the characterization of an issue as of "admissibility" or "jurisdiction" would be found unhelpful, and instead the proper inquiry be considered to be whether parties' expectations are for arbitral or judicial determination.[303] Thus, the parties' presumed intention would be decisive.

Regarding an applicable presumption rule, Born himself is of the opinion that, in general, the presumption should be for arbitral resolution with minimal judicial review.[304] That would favor admissibility over jurisdiction. The reason for Born's presumption is that the parties can be

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[300] See Chapter 3.2.
[301] Rau submits that "[i]n the inevitable absence of any direct evidence going to the intent of the parties, we are as usual forced back on default rules". Rau 2003, 202.
[302] Rau 2014, 4.
[303] Born 2014, 937, fn. 1587. However, although we were to refrain from operating with the concepts of admissibility and jurisdiction, the very same problem of which is the correct forum to rule on the matter still remains.
[304] Born 2014, 937, fn. 1587.

expected to desire a single, centralized forum for resolution of their disputes.[305] That means that by agreeing on arbitration the parties wished to have all their disputes resolved in the same and final procedure. If we were to hold otherwise, the consequence would be fragmentation of resolution of different types of issues between national courts and the arbitral tribunal. That would again produce the risk of multiple proceedings, inconsistent decisions and judicial interference in the arbitral proceedings.[306] Furthermore, this approach in favor of classifying issues as of admissibility rather than jurisdiction has been said to best serve the objectives and the ultimate purpose of the New York Convention as it would limit the scope for review of arbitral awards and thus enhance their finality and enforceability.[307]

Respectively in the context of contract adaptation, if the parties wished somebody to have the authority to revise their contract to changed circumstances, they can be expected to have wanted such adaptation to be decided by the same decision-making body that would decide any other claim arising out of their contract. Contrariwise, if they agreed on arbitration but did not want the arbitral tribunal to be authorized to adapt their agreement, they likely did not want to grant such power to the courts either.[308] Therefore, in absence of any evidence to the contrary,[309] a procedural challenge against a claim on adaptation should be regarded as concerning the claim's admissibility. Hence, the claim would belong to the arbitral tribunal's jurisdiction but be dismissed due to the inadequacy of the arbitrators' powers to interfere with the contract. Accepting this interpretation would reduce the possibility of parallel proceedings, enhance efficiency in the dispute resolution process and promote the profound principle of pro-arbitration.

[305] Born 2014, 937.
[306] See Born 2014, 937.
[307] Santacroce 2017, 569.
[308] Stalev reasons that if the state courts are regarded as inappropriate for the resolution even of the ordinary legal disputes about rights claimed as arising from international commercial contracts (as they are when the parties by drafting an arbitration clause decide to entrust their disputes to arbitrators instead of the courts), the same is *a fortiori* valid for the resolution of disputes as to how such a contract is to be rewritten in order to be adapted to new circumstances. Stalev 1983, 200–201.
[309] As Rau reasons, "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". Rau 2014, 22.

4.3.3 Risks of Accepting the Possibility of Finding a Claim on Contract Adaptation Inadmissible

Before accepting the conclusion set forth in the previous chapter, the risks connected to the possibility of finding a claim on contract adaptation inadmissible need to be evaluated. First, we will generally consider the risk of arbitrators too lightly classifying issues before them as of admissibility instead of jurisdiction thereby eliminating the possibility to subsequent court review even in cases where it would be justified. Secondly, the potential inadmissibility of a claim on contract adaptation (causing the case to be ceased and thus preventing its resolution on the merits) is evaluated from the perspective of the fundamental rights of access to court and access to justice.

Regarding the first issue, the decision to classify an issue as of admissibility (and not jurisdictional) is, in the first instance, for the arbitrators to make. Indeed, if an adaptation claim is brought to arbitration and consequently the other party raises a procedural contestation against the arbitrators' powers to conduct any modification to the agreement, it is up to the arbitral tribunal to determine whether to treat the issue as of jurisdiction or admissibility. Admittedly, due to the tribunal's possible unfamiliarity with the differences between jurisdiction and admissibility and in particular if the parties have not specifically invoked the inadmissibility argument, the characterization may not always be a result of a conscious choice. Nevertheless, the tribunal's action determines the nature of the decision regarding the contestation targeting its adaptation powers and simultaneously defines the associated legal consequences including the availability for court review. Of course, in order to the tribunal's determination to have any bearing, the court subsequently requested to set aside the award would have to recognise the determination and refrain from conducting the review. (And for that reason, the tribunal ought to ensure that it is clear from the award when it has actually made a decision on admissibility and not on jurisdiction.)

An exception to the arbitrators' primacy to decide the nature of the particular issue is made by the jurisdictions where, if a dispute is brought to a court and the court is sought to stay the proceedings on the basis of an existing arbitration agreement, the court makes a final determination of the arbitrators' jurisdiction.[310] In that situation, the court is in the position to

[310] See Chapter 3.3.2, fn. 132.

make a judgment on whether the ground under which the arbitrators' jurisdiction is contested actually pertains to admissibility of the claim. If the court treats the issue as jurisdictional, it makes a final determination on it to which the tribunal is bound. Should the court find that the tribunal does not have the jurisdiction, the dispute never reaches arbitration despite of whether the matter would have correctly been regarded as concerning admissibility and thereby had to be decided by the arbitrators. However, if the court instead holds that the tribunal has the jurisdiction, the tribunal that then proceeds with the case could arguably still study the admissibility of the claim on the same ground on which the jurisdiction was decided if it considers it affects the admissibility. Indeed, in my opinion there should not be anything to prevent the tribunal from doing so as long as it follows the court's ruling on jurisdiction and the inadmissibility argument has been invoked by a party.[311]

What needs to be pointed out from this is that due to the significant consequences of the classification, the arbitral tribunal is left with a power of substantial decision. Indeed, as the classification depends on the arbitrators' decision, it is practically in their discretion whether the award may be subsequently reviewed by a court.[312] That in turn opens up the possibility to classify especially some borderline issues that might otherwise rather be regarded as jurisdictional more easily as pertaining to admissibility. Consequently, there would be a risk of unjustifiably further narrowing down the possibility to court review and increasing the exclusivity of the arbitrators' adjudicatory powers. It would be unreasonable that simply by labelling an issue as of admissibility, the courts would be prevented from conducting control over jurisdictional decisions. Notably, following the conclusions set forth in the previous chapter, the tribunal could consider a particular question (such as a question of its adaptation powers) as pertaining to admissibility and thus limit the possibilities for challenging the award even when the parties' actual intent cannot be established.[313]

On the other hand, the probability of the described risk can validly be doubted as, in the light of the preceding case law discussed earlier in this study,[314] it seems more likely that the courts keep

[311] The parties' burden of raising the objection to admissibility was discussed earlier in Chapter 3.4.2.
[312] Pursuant to Gouiffès and Ordonez, "[a]n extensive interpretation of the grounds for inadmissibility would therefore provide arbitral tribunals with wide discretion as to which claims they should or should not hear, while a broad interpretation of the grounds leading to a lack of jurisdiction would extend the scope of review of their findings". Gouiffes – Ordonez 2015, 108.
[313] See Chapter 4.3.2.
[314] See Chapter 3.2.2.

intervening the arbitrators' decisions regardless of whether the tribunal had in fact made a decision on admissibility and at least by reviewing whether the made classification was correct.[315] In fact, it is a relevant question at this point whether courts' review over the classification made by arbitrators should be actually openly admitted. In other words, when decisions on admissibility are not subject to review, should the *classification* made by the tribunal be reviewable? If we were to say yes, the availability of such review would act as a safeguard for maintaining jurisdictional issues in the courts' reach and allowing arbitrators to rule solely on matters they were empowered to have jurisdiction on. Simultaneously the admissibility decision itself would not – as it should not – be exposed to court determination.

Such conclusion seems to be eventually indispensable because the court may set aside the award if it contains decisions beyond the arbitrators' jurisdiction.[316] That requires that the court is entitled to take a stand on whether the tribunal has in fact made a decision on jurisdiction irrespective of how the tribunal itself perceived and labelled the issue. Furthermore, if the identification of admissibility situations would be left solely to individual arbitral tribunals giving their rulings in confidential proceedings, no consistent criteria and practice on the separation between jurisdiction and admissibility issues would be established. Instead, the lack of clarity and foreseeability in the application of the concepts would be further increased.

The second risk connected to the possibility of finding a claim on adaptation inadmissible relates to the consequences of such finding for the dispute itself. As has been noted before, when a claim is found inadmissible the legal processing of the particular case ceases there. Thus, the inadmissibility ruling has virtually the same effects than a tribunal's decision on the merits. Yet, the noteworthy difference is that the dispute will not at all be decided on its substance (at any forum). Such consequence is not that drastic in a situation where the ground for inadmissibility may be subsequently repaired. For example, in case of non-fulfilment of a pre-arbitration negotiation obligation the dispute will be heard and resolved by the tribunal once the procedural pre-condition has been complied with. But the case is different when the inadmissibility is

[315] Cf. Santacroce who submits that "at the transnational level, the trend is for state courts to construe the category of jurisdictional issues narrowly, thereby reducing the scope for review of arbitral awards. By applying transnational standards as drawn from a comparative analysis of scholarly works, arbitral awards and court decisions under the New York Convention, state courts would foster the pro-enforcement policy of the New York Convention." Santacroce 2017, 568.
[316] See Art. 34(2)(a)(iii) of the Model Law.

permanent. This includes a situation where the claim is dismissed due to inadequacy of the arbitrators' procedural powers to decide an adaptation dispute. Such inadmissibility could not be repaired unless the parties mutually agree to subsequently grant the tribunal with such powers.

Consequently, if a claim on contract adaptation is found inadmissible, the dispute over the adaptation is, so to speak, left in the air without any available forum for its substantive resolution. This was what seemed to bother also the moot court judges in the Vis Moot the most. It appeared as going against their logic and sense of justice to admit that an arisen dispute between the parties could be left without a conclusion on its the merits. Therefore, it is necessary to consider whether such outcome can indeed be accepted especially from the perspective of the fundamental rights of access to court and access to justice.[317]

Art. 6 of the European Convention on Human Rights (ECHR) provides that in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[318] The article embodies the fundamental principle of access to court, one of the corner stones of the rule of law. Regarding the application of Art. 6, the European Court of Human Rights (ECtHR) has specifically stated that the right of access to a court includes not only the right to institute proceedings but also the right to obtain a "determination" of the dispute by a court. According to the ECtHR, it would be inconceivable for Art. 6(1) to describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without guaranteeing the parties that their civil disputes will be finally determined.[319]

It may be pondered whether the set requirement for a final determination of the dispute may be fulfilled by a tribunal's inadmissibility ruling, which *is* practically a final decision on the case, or whether it presumes a final determination on the merits. It seems, however, reasonable to

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[317] Also Born remarks the access to court standpoint when analyzing the status of pre-arbitration requirements by submitting that "it is also important that pre-arbitration negotiation and litigation requirements not limit the parties' access to justice. These provisions create the risk that parties will be prevented from pursuing presumptively meritorious claims, and obtaining presumptively justified relief, in the parties' agreed forum for dispute resolution." Born 2014, 932.

[318] This right is proclaimed also e.g. by Art. 10 of the Universal Declaration of Human Rights, Art. 14 of the International Covenant on Civil and Political Rights as well as the Sixth Amendment to the United States Constitution.

[319] *Kutić v. Croatia* (2001), para. 25, cited in Sladič 2017, 210.

understand that finally determining a dispute means a thorough resolution of the actual dispute i.e. the merits of the case. This view is taken also for example by Sladič who suggests that access to justice shall be understood as meaning a right to get a decision on the merits of a civil action, be it, for example, a declaration on the existence or non-existence of a right or a creation, termination or *modification* of a right, obligation or legal relation.[320]

However, access to court is not an absolute right but may be limited.[321] In that regard, the ECtHR has specifically found that the right of access to court can be legitimately limited at the stage of admissibility.[322] Thus, admissibility considerations may create a justified limitation to access to court. Notably, also the ECHR itself explicitly provides for certain admissibility criteria in Art. 35, which need to be fulfilled in order to the Court to be able to deal with the matter. But is a situation where no judicial body can decide if the contract should be adapted an acceptable limitation to access to court? It has been submitted that access to court could not be limited unless strict conditions are met. For example, Sladič purports that any condition of admissibility is required to be defined by law, must pursue a legitimate aim and must comply with the principle of proportionality.[323] Yet, in the light of the general non-recognition of admissibility in regulations, the possible grounds for inadmissibility are rarely explicitly provided for by the legislation applicable in the arbitration proceedings.[324] And even more certainly the law does not specifically define the inadequacy of the exercisable powers granted to the arbitrators as an available condition of admissibility. Does it then automatically follow that such ground cannot be a valid ground for finding the claim inadmissible?

Sladič talks about admissibility in the context of court proceedings. However, when it comes to arbitration, the principle of party autonomy forms a fundamentality. Due to the party autonomy and the parties' wide discretion to agree on their procedure, it is to be recognized that the ground

[320] Sladič 2017, 212. Sladič also makes a reference to the Constitutional Court of the Republic of Slovenia that has explicitly submitted that the right to judicial protection does not mean solely a right to proceedings and to a judicial decision, but also a right to a decision on the merits. Case no. Up-107/99, cited in Sladič 2017, 210.
[321] See e.g. Sladič 2017, 210; see the ECtHR's decision *Markovic and Others v. Italy* (2006), para. 99 ("The right is not absolute, however. It may be subject to legitimate restrictions such as statutory limitation periods, security for costs orders, regulations concerning minors and persons of unsound mind.").
[322] See *Obermeier v. Austria* (1990), where the ECtHR submitted that the mere fact that the party's action for a declaration was held to be inadmissible on the ground that he lacked a legal interest does not mean that he was denied access to a court, always provided that his submissions in the revocation proceedings were the subject of a genuine examination (para. 68). Cited in Sladič 2017, 210.
[323] Sladič 2017, 211–212, 235.
[324] See Chapter 3.2.1.

for inadmissibility of a claim may result from the parties' agreement. And when classifying an issue of the arbitrators' procedural powers to adapt a contract either as of admissibility or jurisdiction, not only the four corners of the contract but also the parties' presumed intentions may need to be relied upon.[325] Of course, in order to avoid violating the right of access to court, such presumed intention supporting the classification of the issue as of admissibility needs to be justified in the light of the factual circumstances of the particular case.

In addition, as was noted earlier, if the courts of the particular jurisdiction would not have the powers to adapt the contract either, the possibility to define a claim on adaptation inadmissible in arbitration is even more justified.[326] In my view, when considering the acceptability of a situation where a particular dispute is left without determination on its merits it is essential that there exists a forum where the dispute may be referred to and which recognizes the case within its jurisdiction. It would be untenable that no such forum existed, and the parties would be completely left without a judicial body they could resort to – regardless of whether the claim is actually justified or even in any way rational. Nevertheless, as long as there exists a forum that possesses jurisdiction and is able to define at least the admissibility of the claim, considering a claim unable to be settled by a third party would not in principle violate access to court. In other words, somebody always needs to have the jurisdiction but not all claims have to be admissible.

Furthermore, one argument that could be raised in relation to the requirement of final determination of the parties' dispute is that the party requesting the arbitral tribunal to modify the contract could possibly seek the same outcome also on some alternative ground that is assuredly included in the tribunal's mandate already on the basis of the arbitration agreement. For example, instead of asking the tribunal to increase the price by changing the contract, the party could argue that the contract ought to be interpreted in the way that the price was actually agreed higher.[327] In that situation, at least partly the same factual background could potentially be relied upon than when validating an adaptation claim.[328] Thus, the legal measure exercised

[325] See Chapter 4.3.2.
[326] See Chapter 4.2.4.
[327] Of course, such position could be more difficult to prove and thus less favorable for the party. Anyway, from the perspective of access to justice, the matter could at least be brought before the arbitral tribunal for determination.
[328] However, as was noted in Chapter 2.1, the ways parties may want their contracts to be adapted may be very different and relying on an alternative legal basis (such as an interpretation of the contract) in order to achieve the desired outcome is not an option. For example, when a party does not want to request a price increase (i.e. money) but instead an extension of a performance deadline or a clear alteration of the contractual obligations from what

by the tribunal would be different but materially the dispute between the parties would be factually the same. In that sense, the party would not definitely be deprived from the final determination of the dispute even if the adaptation claim was found inadmissible due to the inadequacy of the arbitrators' powers.

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was initially agreed on, the outcome may not be possible to achieve by any other mechanism than a fair adaptation of the contract terms. On the other hand, it could perhaps from one viewpoint be argued that still materially the matter would get a final determination when the other party subsequently initiates arbitration to claim e.g. damages due to an undue or non-conforming delivery and the opposing party has the opportunity to raise its arguments in defence that may be similar to what it would have put forward in the adaptation procedure. However, such argument would perhaps quite rightly receive critique of whether the dispute would in that case still in fact be the "same".

5 Conclusions

The purpose of this study was to evaluate the possible grounds on which a party could contest a claim requesting adaptation of the parties' contract in arbitration. It was first noted in Chapter 2 that contract adaptation is to a considerable extent different kind of decision-making than settling a traditional dispute. When a party requests adaptation of the contract, the tribunal is asked to reshape the parties' future contractual relationship, which may include creating new obligations for the parties upon the tribunal's discretion. Thus, the decision-making includes a creative or innovative element thereby denoting wider discretion and requiring high competence from the arbitrators not only in the legal area but also for example in the economic, financial or technical field. Furthermore, when the contract is changed and not merely interpreted and applied, the outcome of the decision becomes more unpredictable for the parties. For these reasons, it is not self-evident that parties want arbitrators to possess the powers to adapt their contract even if they wanted them to solve their disputes through traditional dispute settlement.

The focus of this study was on the available preliminary objections that a party could raise when its counter-party initiates arbitration and demands adaptation of the contract. In particular, the study aimed at determining how a preliminary objection opposing the arbitral tribunal's procedural powers to adapt the parties' contract ought to be classified in the obscure division between jurisdiction and admissibility. In legal literature and case law the issue has so far been by default understood as an issue pertaining to the arbitrators' jurisdiction. It was critically considered in this study whether such view is actually the most accurate and well-grounded perception. However, first, in order to create a base for such review and to demonstrate the relevance of the precise classification of the preliminary objections, the relevant differences between jurisdiction and admissibility were examined.

The key findings in Chapter 3 (that answer the first research question of this study about the difference between challenges to jurisdiction and challenges to admissibility) included firstly that whereas challenging the arbitral tribunal's jurisdiction intends is to send the particular dispute to a court instead of arbitration, an admissibility challenge seeks to cease the legal processing of the case altogether. Thus, while a jurisdictional challenge attacks the tribunal, an admissibility challenge is aimed at the particular claim. That notion is relevant when considering the parties' legitimate expectations: did the parties intend that (regardless of their general

agreement to arbitrate) the particular claim could not be heard in arbitration but should instead be brought to a court or did they intend that the claim could not be at all settled by a third party? The characterization of a particular preliminary issue either as of jurisdictional or admissibility should always be made carefully and by taking into account the following consequences and their compatibility with the (presumed) intentions of the parties.

The second main difference between jurisdiction and admissibility concerns the finality of the decision. While arbitrators' decisions on jurisdiction are necessarily reviewable by courts, issues concerning admissibility fall within the scope of arbitrators' exclusive adjudicatory powers and are thus non-reviewable. In addition, it was considered that arbitrators may not regard the claim's admissibility by their own initiative, but such arguments need to be raised by the parties. Thus, if the party has not alleged that the claim is inadmissible (but has for example only objected the jurisdiction) the tribunal should consider that the party has waived the possibility to raise such objection. Therefore, the parties should be particularly mindful of how to formulate and classify their preliminary objections.

Furthermore, arbitrators should indicate the characterization they have adopted clearly in the award in order to avoid unjustified court intervention in admissibility rulings. The need for such clarity and express statement in the award is emphasized when the ground for the (in)admissibility is perhaps less known and not generally acknowledged among the courts of the particular jurisdiction. Respectively at a pre-award stage when a particular claim is brought before a court, the existence of doubts as to the nature of a preliminary objection ought to be solved by referring the matter to the arbitrators' determination.[329] This provides a safe solution for the courts by which they avoid violating the principle of *competence–competence* and overstepping the arbitrators' jurisdiction to decide admissibility issues.

The second research question of this study (considered in Chapter 4) was whether a claim on contract adaptation could be found inadmissible due to the inadequacy of the arbitrators' powers (or whether the issue always pertains to the arbitrators' jurisdiction). First, the nature of the issue was examined as jurisdictional, which seems to be the characterization (more or less consciously) adopted by the legal commentators as well as the available case law. The challenges to arbitrators' jurisdiction are separated to two levels: challenges to arbitrability and

[329] Similarly, Synková 2013, 42.

to the arbitrators' procedural powers in the individual case. In the current review, due to the general permitting of adaptation in arbitration among states, the focus was on the second level. It was considered that if the question of the arbitrators' powers to adapt the contract was regarded as jurisdictional, the tribunal's decision could be reviewed on the ground that the claim requesting adaptation was outside the scope of the arbitration agreement. Yet, what is problematic in characterizing the issue as jurisdictional is the uncertainty in the existence of the state courts' jurisdiction to adapt the contract in case the arbitrators would be found to lack such jurisdiction. While jurisdictional issues constitute an either-or situation between litigation and arbitration, such substituting jurisdiction of the courts is indeed a necessity in order to avoid a situation where nobody would have the jurisdiction in the case.

Furthermore, characterizing the question of the arbitrators' powers to adapt the parties' contract as jurisdictional would in case of a negative decision on the tribunal's jurisdiction cause decentralization of different claims to different forums. However, when the parties have agreed on arbitration through a general arbitration clause, they can be presumed to have intended that different disputes would not be fragmented between arbitration and litigation. Thus, such characterization would presumably contradict the parties' intentions. In this regard, it is suggested that the pro-arbitration principle and the need for promoting minimal judicial interference in arbitration to avoid multiple proceedings do not require only that the available court review is limited to jurisdictional issues but also that the users of international arbitration rethink what actually constitutes a jurisdictional issue.[330] First and foremost, the characterization of the particular issue should be evaluated individually in each case and not labelled automatically as pertaining the tribunal's jurisdiction when the ultimate consequence is that the issue is always in the end finally decided by a court.

Consequently, the ultimate conclusion reached in Chapter 4 was that the question of the arbitrators' procedural powers to adapt the parties' contract would be better characterized (as a default rule) as an issue of admissibility. If the parties wished somebody to have the authority to revise their contract to changed circumstances, they can be expected to have wanted such adaptation to be decided by the same decision-making body that would decide any other claim

[330] See Rau, who accurately points out that "[f]or surely it is a familiar point that just about every conceivable objection to arbitration can be framed as implicating arbitral "jurisdiction," *in the sense that it potentially qualifies the nature and extent of party agreement*". Rau 2014, 13

arising out of their contract. Contrariwise, if they agreed on arbitration but did not want the arbitral tribunal to be authorized to adapt their agreement, they likely did not want to grant such power to the courts either. Hence, an additional possible ground for inadmissibility, i.e. inadequacy of the decision-maker's powers (in which context the word "power" is not regarded as a synonym for jurisdiction), was proposed to be recognized.

Bibliography

Literature

Amerasinghe, Chittharanjan Felix (2011). *International Arbitral Jurisdiction*. Martinus Nijhoff Publishers 2011.

Beisteiner, Lisa (2014a). *Adjusting contracts in arbitration?* Schonherr Roadmap14 2014. Available at: <http://roadmap2014.schoenherr.eu/adjusting-contracts-arbitration/>. Visited 7.10.2019.

Beisteiner, Lisa (2014b). Chapter I: The Arbitration Agreement and Arbitrability, The (Perceived) Power of the Arbitrator to Revise a Contract – The Austrian Perspective, 77–122, in Klausegger, Christian, Klein, Peter et al. (Eds.), *Austrian Yearbook on International Arbitration 2014*. Manz'sche Verlags- und Universitätsbuchhandlung 2014.

Berger, Klaus Peter (2001). Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense. *Arbitration International* 17(1) 2001: 1–17.

Berger, Klaus Peter (2003). Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators. *Vanderbilt Journal of Transnational Law* 36/2003: 1347–1380.

Bernardini, Piero (1983). Communications: Adaptation of contracts, 211–216, in Sanders, Pieter (Ed.), *New trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions*. ICCA Congress Series & Kluwer Law International 1983.

Bernardini, Piero (1998). The Renegotiation of the Investment Contract. *ICSID Review – Foreign Investment Law Journal* 13(2) 1998: 411–425.

Bordacahar, Julián (2018). *The Rule of Law As Created by Arbitrators – An Update on the Discussions At The Recent IBA Arbitration Day in Buenos Aires*. Kluwer Arbitration Blog 2018. Available at: <http://arbitrationblog.kluwerarbitration.com/2018/04/08/iba-buenos-aires-report/>. Visited 27.11.2019.

Born, Gary (2014). *International commercial arbitration*, 2nd edition. Kluwer 2014.

Brower, Charles H. (2016). Mind the Gap. *Brigham Young University Law Review* 1/2016: 1–53.

Brunner, Christoph (2009). *Force Majeure and Hardship under General Contract Principles: Exemption for Non- performance in International Arbitration*. Kluwer 2009.

Certilman, Steven A. (2010). This Is a Brief History of Arbitration in the United States. *New York Dispute Resolution Lawyer* 3(1) 2010: 10–13. Available at: <https://www.researchgate.net/publication/228160215_A_Brief_History_of_Arbitration_in_the_United_States>.

Craig, W. Laurence – Park, William W. – Paulsson, Jan (2000). *International Chamber of Commerce Arbitration*, 3rd edition. Oceana Publications 2000.

Crawford, James (2019). *Brownlie's Principles of Public International Law*, 9th edition, Oxford University Press 2019.

David, René (1985). *Arbitration in International Trade*. Kluwer 1985.

Debevoise, Whitney (1976). The Arbitrability of Gaps in Long-Term Scientific, Technical and Industrial Development Contracts. *Harvard International Law Journal* 17/1976: 122–130.

Douglas, Zachary (2009). *The International Law of Investment Claims*. Cambridge University Press 2009.

El-Ahdab, Abdul Hamid (1990). *Arbitration with the Arab countries*. Kluwer 1990.

Ferrario, Pietro (2017). *The Adaptation of Long-Term Gas Sale Agreements by Arbitrators*. Kluwer 2017.

Fitzmaurice, Sir Gerald (1986). *The Law and Procedure of the International Court of Justice*, Vol. II. Grotius Publications Limited 1986.

Fontanelli, Filippo (2018). *Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory*. Brill Research Perspectives 2018.

Fouchard, Philippe – Gaillard, Emmanuel – Goldman, Berthold (1999). Gaillard, Emmanuel, Savage, John (Eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*. Kluwer 1999.

Fox, William F. (2013). *International Commercial Agreements and Electronic Commerce*, 5th edition. Kluwer 2013.

Frick, Joachim G. (2001). *Arbitration and Complex International Contracts*. Kluwer Law International, Schulthess 2001.

Gaillard, Emmanuel (2005). Prima Facie Review of Existence, Validity of Arbitral Agreement. *New York Law Journal* 3, 2005: 3–8.

Gouiffès, Laurent – Ordonez, Melissa (2015). Jurisdiction and admissibility: are we any closer to a line in the sand? *Arbitration International* 31(1) 2015: 107–122.

Hahn, Anne-Catherine (2014). Chapter III: The Award and the Courts, Res Judicata as a Challenge for Arbitral Tribunals, 329–341, in Klausegger, Christian, Klein, Peter, et al. (Eds.), *Austrian Yearbook on International Arbitration 2014*. Manz'sche Verlags- und Universitätsbuchhandlung 2014.

Heiskanen, Veijo (2010). And/Or: The Problem of Qualification in International Arbitration. *Arbitration International* 26(4) 2010: 441–466.

Heiskanen, Veijo (2014). Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration. *ICSID Review* 29(1) 2014: 231–246.

Hilgard, Mark – Bruder, Ana Elisa (2014). Unauthorised Amiable Compositeur? *Dispute Resolution International* 8(1) 2014: 51–62.

Horn, Norbert (1985). *Adaptation and renegotiation of contracts in international trade and finance*. Kluwer 1985.

Hugues Arthur, Juan Pedro (2014). The Legal Value of Prior Steps to Arbitration in International Law of Foreign Investment: Two (Different?) Approaches, One Outcome. *Anuario Mexicano de Derecho Internacional* 15(1) 2015: 449–491.

Ishida, Yasutoshi (2018). CISG Article 79: Exemption of Performance, and Adaptation of Contract Through Interpretation of Reasonableness? Full of Sound and Fury, but Signifying Something. *Pace International Law Review* 30(2) 2018, 331–382.

Jarrosson, Charles (2003). Observations on *Poire* v. *Tripier*. *Arbitration International* 19(3) 2003: 363–369.

Jarvin, Sigvard (1987). The sources and limits of the arbitrator's powers, 50–72, in Lew, Julian D. M. (Ed.), *Contemporary Problems in International Arbitration*. Martinus Nijhoff Publishers 1987.

Kajkowska, Ewelina (2017). *Enforceability of Multi-Tiered Dispute Resolution Clauses*. Hart Publishing 2017.

Kos, Rafał – Durbas, Maciej (2014). The Arbitrators' (Perceived) Power to Revise a Contract vs. the Power of the Public Policy Clause. *The Austrian Yearbook on International Arbitration 2014*: 136–147.

Kröll, Stefan (2004). The Renegotiation and Adaptation of Investment Contracts, 425–470, in Horn, Nobert, Kröll, Stefan (Eds.), *Arbitrating Foreign Investment Disputes*. Kluwer 2004.

Kröll, Stefan (2014). Recourse against Negative Decisions on Jurisdiction. *Arbitration International* 20(1) 2014: 55–72.

Lando, Ole – Beale, Hugh (2000). *Principles of European Contract Law: Parts I and II*. Kluwer 2000.

Lew, Julian – Mistelis, Loukas A. – Kröll, Stefan (2003). *Comparative International Commercial Arbitration*. Kluwer 2003.

Liebscher, Christoph (2003). *The Healthy Award: Challenge in International Commercial Arbitration*. Kluwer 2003.

Lim, Chin Leng – Ho, Jean – Paparinskis, Mattins (2018). *International Investment Law and Arbitration: Commentary, Awards and other Materials.* Cambridge University Press 2018.

Lookofsky, Joseph (2011). Not Running Wild With the CISG. *Journal of Law and Commerce* 29(2) 2011: 141–169.

Mann, F. A. (1990). *Further Studies in International Law*. Clarendon Express 1990.

Moses, Margaret L. (2008). *The Principles and Practice of International Commercial Arbitration.* Cambridge University Press 2008.

Nessi, Sebastiano (2017). *Price review arbitration in long-term energy contracts: the power of arbitral tribunals to modify the terms of a contract under Swiss law*. Thomson Reuters Arbitration Blog 2017. Available at: <http://arbitrationblog.practicallaw.com/price-review-arbitration-in-long-term-energy-contracts-the-power-of-arbitral-tribunals-to-modify-the-terms-of-a-contract-under-swiss-law/>. Visited 2.12.2019.

Newcombe, Andrew (2010). *The Question of Admissibility of Claims in Investment Treaty Arbitration*. Kluwer Arbitration Blog 2010. Available at: <http://arbitrationblog.kluwerarbitration.com/2010/02/03/the-question-of-admissibility-of-claims-in-investment-treaty-arbitration/>. Visited 29.10.2019.

Nota, Nikita V. (2010). International Arbitration: Some Reflections on Jurisdiction and Admissibility. *Ukrainian Journal of Business Law* 2/2010: 31–33.

Park, William W. (2007). Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law. *Nevada Law Journal* 8(135), 2007: 135–168.

Paulsson, Jan (2005). Jurisdiction and Admissibility, 601–617, in Aksen, Gerald, Böckstiegel, Karl-Heinz, Patocchi, Paolo Michele and Whitesell, Anne Marie (Eds.), *Global Reflections on International Law, Commerce and Dispute Resolution*. ICC Publishing 2005.

Paulsson, Jan (2013). *The Idea of Arbitration*. Oxford University Press 2013.

Rau, Alan Scott (2003). Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions. *American Review of International Arbitration* 14(1) 2003: 182–274.

Rau, Alan Scott (2014). *Crossing the Threshold: Arbitral Jurisdiction after BG Group*. The Center for Global Energy, International Arbitration and Environmental Law, The University of Texas School of Law 2014.

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

Redfern, Alan – Hunter, Martin (2015). Chapter 10: Challenge of Arbitral Awards, 569–604, in Blackaby Nigel, Constantine Partasides, et al. (Eds.), *Redfern and Hunter on International Arbitration*, 6th edition. Oxford University Press 2015.

Santacroce, Fabio G. (2017). Navigating the troubled waters between jurisdiction and admissibility: an analysis of which law should govern characterization of preliminary issues in international arbitration. *Arbitration International* 33(4) 2017: 539–570.

Šarčević, Petar (1989). The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law, 177–199, in Šarčević, Petar (Ed.), *Essays on International Commercial Arbitration*. Graham & Trotman 1989.

Schmitthoff, Clive Maximilian (1980). Hardship and Intervener Clauses, 415–423, in Cheng, Chia-Jui (Ed.), *Clive M. Schmitthoff's Select Essays on International Trade Law.* Martinus Nijhoff Publishers 1988.

Schwenzer, Ingeborg (2008). Force Majeure and Hardship in International Sales Contracts. *Victoria University of Wellington Law Review*, 39(4) 2009: 709–725.

Schwenzer, Ingeborg – Muñoz, Edgardo (2019). Duty to renegotiate and contract adaptation in case of hardship. *Uniform Law Review*, 24/2019: 149–174.

Shany, Yuval (2013). Chapter 36: Jurisdiction and Admissibility, 779–805, in Romano, Cesare P. R., Alter, Karen J., Shany, Yuval (Eds.), *The Oxford Handbook of International Adjudication*. Oxford University Press 2013.

Stalev, Zhivko (1983). Arbitration to adapt long-term international economic contracts to changed circumstances, 199–209, in Sanders, Pieter (Ed.), *New trends in the Development of International Commercial Arbitration and the Role of Arbitral and Other Institutions*. ICCA Congress Series & Kluwer Law International 1983.

Sladič, J. (2017). Conditions of Admissibility and Access to Justice – A Slovenian Perspective, 209–240, in Uzelac, Alan, van Rhee, C.H. (Eds.), *Revisiting Procedural Human Rights*. Intersentia 2017.

Synková, Sandra (2013). *Courts' Inquiry into Arbitral Jurisdiction at the Pre-Award Stage: A Comparative Analysis of the English, German and Swiss Legal Order*. Springer 2013.

Szurski, Habil Tadeusz (1984). Arbitration Agreement and Competence of the Arbitral Tribunal, 53–77, in Sanders, Pieter (Ed.), *UNCITRAL's Project for a Model Law on International Commercial Arbitration*. ICCA & Kluwer Law International 1984.

Thirlway, Hugh (2016). *The International Court of Justice*. Oxford University Press 2016.

Van den Berg, Albert Jan (2000). Supplier v Republic of X, Partial Award on Jurisdiction and Admissibility, ICC Case No. 6474, 1992, 279–311, in Van den Berg, Albert Jan (Ed.), *Yearbook Commercial Arbitration 2000 – Volume XXV*. Kluwer 2000.

Van den Berg, Albert Jan (1981). *The New York Arbitration Convention of 1958*. Kluwer 1981.

Waibel, Michael (2014). *Investment Arbitration: Jurisdiction and Admissibility*. University of Cambridge Faculty of Law Legal Studies Research Paper Series 9/2014.

Waincymer, Jeff (2012). *Procedure and Evidence in International Arbitration*. Kluwer 2012.

Walters, Gretta L. (2012). Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems? *Journal of International Arbitration* 29(6) 2012: 651–680.

Webster, Thomas H. – Buhler, Michael W. (2014). *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 3rd edition. Sweet & Maxwell 2014

Wolfgang, Peter (1995). *Arbitration and Renegotiation of International Investment Agreements*, 2nd edition. Kluwer 1995.

Web sites

Https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (visited on March 25, 2020).

Arbitral awards

Ad hoc arbitration

BG Group Plc. v. The Republic of Argentina, December 24, 2007.

Methanex Corporation v. United States of America, Preliminary Award on Jurisdiction and Admissibility, August 7, 2002.

The American Independent Oil Company (Aminoil) v. The Government of the State of Kuwait, March 24, 1982.

ICC arbitration

ICC case 4206 (published in 1984).

ICC case 5754 (unpublished), 1988.

ICC case 6474, Partial Award on Jurisdiction and Admissibility, 1992.

ICC case 7544, Partial Award, 1999.

ICC case 12739 (unreported), 2004.

ICSID arbitration

Abaclat and Others v. The Republic of Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011.

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision on Jurisdiction, July 17, 2003.

Consortium Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/03/08, January 10, 2005.

Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. The Republic of Argentina, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004.

Hochtief AG v. The Republic of Argentina, ICSID Case No. ARB/07/31, Decision on Jurisdiction, October 24, 2011.

İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, March 8, 2016.

İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Partially Dissenting Opinion of Professor Philippe Sands QC, March 8, 2016.

Renée Rose Levy and Gremcitel S.A. ***v****. Republic of Peru*, ICSID Case No. ARB/11/17, January 9, 2015.

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004.

Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/98/2, Dissenting Opinion of Keith Highet, June 2, 2000.

Permanent Court of Arbitration (PCA)

Lance Paul Larsen v. Hawaiian Kingdom, PCA Case No. 1999-01, February 5, 2001.

SCC arbitration

SCC Case V079/2005 (*RosInvestCo UK Ltd. v. The Russian Federation*), Award on Jurisdiction, 2007.

Court decisions

Austria

OGH docket no. 1 Ob 504/85, February 27, 1985 (Supreme Court of Justice).

European Court of Human Rights

Kutić v. Croatia, No. 48778/99, ECHR 2002-II, Decision on Admissibility, October 4, 2001.

Markovic and Others v. Italy [GC], No. 1398/03, ECHR 2006-XIV, December 14, 2006.

Obermeier v. Austria, Series A No. 179, June 28, 1990.

France

Intrafor Cofor v. Gagnant, Revue de l'Arbitrage, March 12, 1985 (Paris Court of Appeals).

Marriott International Hotels Inc. v. JNAH Development S.A., September 9, 2010 (Paris Court of Appeal).

Paris Lapeyre v. Sauvage, 2001 (Paris Court of Appeals).

Poiré v. Tripier, February 14, 2003 (Court of Cassation of France).

SA Prim'Nature v. SAS Top Pommes de Terre, October 16, 2008 (Paris Court of Appeals).

Societe Nationale des Chemins de Fer Tunisiens.JM. Voith AG, October 26, 1995 (Paris Court of Appeals)

Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft, March 4, 2004 (Paris Court of Appeals).

Société Polyclinique des Fleurs v. Peyrin, July 6, 2000 (Court of Cassation of France).

Societe Swiss Oil v. Societe Petrogab and Republic of Gabon, June 16, 1988 (Paris Court of Appeals).

Hongkong

Tommy CP SZE and Company v. Li and Fung (Trading) Ltd and others, HCCT 29/2002, October 28, 2002 (Court of First Instance).

International Court of Justice (ICJ)

Ambatielos case (*Greece v. United Kingdom*), May 19, 1953.

Singapore

BAZ v. BBA and others and other matters [2018] SGHC 275 (Supreme Court of Singapore).

International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another [2012] SGHC 226 (Singapore High Court).

PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2006] SGCA 41 (Court of Appeal).

Swissbourgh Diamond Mines (Pty) Ltd and others v. Kingdom of Lesotho [2018] SGCA 81 (Court of Appeal).

Slovenia

Case Up-107/99, May 23, 2002 (Constitutional Court).

Switzerland

Automobiles Peugeot v. Omega Plus, October 16, 2001 (Federal Supreme Court).

NV Belgische Scheepvaartmaatschappij-Compagnie Maritime Belge v. NV Distrigas, December 19, 2001 (Supreme Court).

Transport en Handelsmaatschappij "Vekoma" B.V. v. Maran Coal Corporation, August 17, 1995 (Federal Supreme Court).

United Kingdom

Cable & Wireless Plc v. IBM United Kingdom Ltd. [2002] EWHC 2059, October 11, 2002 (High Court, Commercial Court).

Vimar v. Wilde (Vynior's Case), 77 Eng. Rep. 595 (KB), 1609.

United States of America

BG Group Plc v. Republic of Argentina, No. 12–138, March 5, 2014 (United States Supreme Court).

Chiron Corp v. Ortho Diagnostic Systems Inc, No. 99-15064, March 28, 2000 (Court of Appeals, Ninth Circuit).

First Options of Chicago, Inc. v. Kaplan et al., No. 94–560, May 22, 1995 (Court of Appeals, Third Circuit).

Glass v. Kidder Peabody Co., Inc., No. 91-1756, May 22, 1997 (Court of Appeals, Fourth Circuit).

Great Western Mortgage Corporation V. Michele Peacock, No. 96-5273, April 3, 1997 (Court of Appeals, Third Circuit).

Howsam, Individually and as trustee for the E. Richard Howsam, Jr., Irrevocable Life Insurance Trust Dated May 14, 1982 v. Dean Witter Reynolds, Inc., No. 01-800, December 10, 2002 (United States Supreme Court).

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, March 30, 1964 (United States Supreme Court).

Langlais v. Pennmont Benefit Servs., Inc., 2013 WL 2450752, 2013 (Court of Appeals, Third Circuit).

Town Cove Jersey City Urban Renewal, Inc. v. Procida Constr. Corp, No. 96 Civ. 2551, 1996 WL 337293, June 19, 1996 (United States District Court for the Southern District of New York).

Legal Sources and Materials

Conventions and Model Regulations

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958).

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, March 18, 1965).

Convention for the Protection of Human Rights and Fundamental Freedoms

European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) (Rome, November 4, 1950).

International Covenant on Civil and Political Rights (December 16, 1966).

Principles of European Contract Law (Parts I and II revised 1998, Part III 2002).

UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (Vienna, June 21, 1985).

UNIDROIT Principles on International Commercial Contracts (2016).

Universal Declaration of Human Rights (Paris, December 10, 1948).

National Legislation

Bulgarian Law on International Commercial Arbitration (1993).

Dutch Arbitration Act (1986).

English Arbitration Act 1996.

Hong Kong Arbitration Ordinance (2011).

Sixth Amendment to the United States Constitution (1791).

Swedish Arbitration Act (1999).

Swiss Private International Law Act (1989).

Institutional Arbitration Rules

American Arbitration Association Commercial Arbitration Rules and Mediation Procedures (2013).

Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017).

Arbitration Rules of the Finland Chamber of Commerce (2020).

Arbitration Rules of the Singapore International Arbitration Centre (2016).

Hong Kong International Arbitration Centre Administered Arbitration Rules (2018).

International Chamber of Commerce Arbitration Rules (2017).

ICSID Convention Arbitration Rules (2006).

The London Court of International Arbitration (LCIA) Arbitration Rules (2014).

UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013).

Other Legal Sources and Materials

CISG-AC Opinion No. 7. Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA (Wuhan, People's Republic of China, October 12, 2007).

ICSID Doc. SID/LC/SR/4 (December 21, 1964), Summary Proceedings of the Legal Committee meeting, November 25, afternoon.

UNCITRAL Report A740/17.

UN Doc. A/CN.9/26*3.

UN Doc. A/CN.9/245, Report of the Working Group on the work of its sixth session. Available at: <https://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/acn9-245-e.pdf>.

UN Doc.AICN.9/WG.IIIWP.37. General Assembly Official Records, UN Commission on International Trade Law on International Contract Practices.

UN Doc. A/CN.9/WG.II/AP.44.

UN Doc. A/CN.9/WG.II/WP.44.

Explanatory Note by the Uncitral Secretariat on the Model Law on International Commercial Arbitration.

The Ninth Session (1976). Report of the United Nations Commission on International Trade Law on the work of its ninth session (New York, April, 12 – May 7, 1976) (A/31/17).