



JURISDICTION OF THE ARBITRAL TRIBUNAL: CURRENT JURISPRUDENCE AND PROBLEM AREAS UNDER THE UNCITRAL MODEL LAW

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Introduction

Outline

The subject of this article is various issues connected to the jurisdiction of the arbitral tribunal, as defined in the cases collected from various countries that have adopted UNCITRAL Model Law on International Commercial Arbitration (MAL). Of course, the source of the jurisdiction is the arbitration agreement. Yet this text will not deal with the arbitration agreement in general, but primarily with the procedural issues of the determination of the jurisdiction (or lack of the jurisdiction) of the arbitral tribunal. To the extent that some substantive issues, such as the existence or scope of the arbitral jurisdiction, were invoked as a ground substantiating jurisdictional pleas, these issues will also be taken into account. Further on, the consequences of the arbitral jurisdiction, such as its impact on the court proceedings regarding the same claims, will also be assessed. Finally, within the general topic of the jurisdiction of the arbitral tribunal, a separate subset of question that relate to the topical subject of the authority of the arbitrators to issue interim measures of protection will also be presented.

These issues regard the following provisions of the MAL:

- Art.8 (Arbitration and substantive claim before court);
- Art.16 (Competence of arbitral tribunal to rule on its jurisdiction);
- Art.17 (Power of arbitral tribunal to order interim measures);
- Art.34(2)(a)(i) (Application for setting aside due to lack of jurisdiction—incapacity of the parties or invalidity of the agreement);
- Art.36(1)(a)(i) (Refusal of recognition and enforcement of the award due to lack of jurisdiction).

For the sake of clarity, the issues will be presented in a logical and not numerical order, thus starting with the competence of the tribunal to rule on jurisdictional issues (MAL 16); continuing with the jurisdictional objections made in court proceedings in which the same substantive claim is raised (MAL 8); presenting the jurisdictional issues that may occur while the court decides on jurisdictional objections and

reviews jurisdictional decisions made by the arbitrators in setting aside and recognition and enforcement proceedings (MAL 34 and 36); and ending with the arbitral and court jurisdiction to order interim measures of protection (MAL 17).

General remarks

As opposed to some other articles of the MAL where case law is scarce, a considerable number of cases have so far occurred on the issues of the arbitral jurisdiction and the other related issues. Just in the CLOUT database¹ there are 35 reported decisions on MAL 8(1)—by far the largest number of reported cases on any of the provisions of the MAL. However, the proportion of decisions from various jurisdictions is rather different, and a number of MAL jurisdictions have still to be covered.

Article 16: Competence of Arbitral Tribunal

Jurisdiction of the tribunal—Kompetenz Kompetenz

Today, the right of the arbitrators to rule on their own jurisdiction is an almost fully uncontroversial part of the well-established doctrine and practice in international arbitration. The provision of Art.16 MAL in its basic idea now really reflects the globally harmonised approach to the issue universally called *Kompetenz Kompetenz*. Practically all countries recognise the right of the tribunal to decide on their jurisdiction, subject to the subsequent court control. This is also demonstrated by some 20 cases collected in CLOUT, which all, without exception, assert the right of arbitrators to rule on their own jurisdiction.² Yet, in certain details, the law is still different, even in the countries that have adopted the MAL.³

1. Case law on UNCITRAL texts (CLOUT) is available *inter alia* on the UNCITRAL website, www.uncitral.org.

2. CLOUT cases 13; 18; 20; 27; 101; 114; 127; 147; 148; 182; 357; 367; 369; 373; 382; 392; 403; 441 (from various jurisdictions: see the UNCITRAL website, www.uncitral.org for full details).

3. See further below.

There is now a “wide consensus that the arbitral tribunal has the power to rule on all aspects of its own jurisdiction”.⁴ Reported decisions have showed that the courts recognise the right of the arbitral tribunal to determine:

- whether arbitration agreement exists between the parties⁵;
- whether the matter in dispute comes within the scope of the arbitration agreement⁶;
- what is the proper interpretation of the arbitration agreement⁷;
- whether the arbitration agreement is valid or was terminated.⁸

Separability of the arbitration agreement from the main contract

The doctrine of separability (or severability), reflected in the last two sentences of Art.16(1), is now also a part of the universal consensus among arbitration practitioners, accepted by most legal systems of the world. This is also reflected by the court decisions from the CLOUT collection.⁹ Courts have widely recognised that arbitral agreements have a fate independent of the main contract, so that invalidity or termination of the

main contract does not necessarily affect validity and binding force of the arbitration clause. For example it was recognised that arbitrators may find that the main contract is null and void *ab initio*, even owing to fraudulent behaviour of a party or the parties, but that arbitral clause contained in the contract continues to be operative, providing arbitrators with authority to decide on the consequences of the nullity of the main contract.¹⁰

Procedure for determination of the arbitrators’ jurisdiction

Time-limit for the pleas as to the lack of jurisdiction

Although arbitrators have authority to rule on their jurisdiction, they cannot do it on their own initiative. A plea as to the lack of jurisdiction has to be submitted by the respondent in due time—under Art.16(2) not later than the statement of defence. Belated objections regularly cannot be taken into account, as the lack of objection has to be construed as the waiver of the right to object and conclusion of a valid arbitration agreement. Still, the arbitrators have the right to admit the plea if the delay in their submission is considered justified.

Under one reported case, it seems that the court held that the plea has to be sufficiently substantiated: an allegation that arbitration agreement does not exist because the party was not successor to the main contract was held to be a substantive defence that precluded later procedural objections as to the jurisdiction.¹¹

Effect of the lack of objection in the arbitral proceedings

The courts had an opportunity to evaluate the effect of lack of objections as to the jurisdiction of the tribunal in the arbitral proceedings on subsequent setting aside proceedings. A German court held that a party regularly loses its right to raise the lack or invalidity of the arbitration agreement in the setting aside proceedings if there was no objection to jurisdiction in the arbitral proceedings.¹² As stated by the same court, failure to raise this objection amounts to conclusion of the new arbitration agreement by passive behaviour of the party. This seems to be a generally accepted position, both under MAL Rules and under some national arbitration laws.¹³

4. Statement from the Draft Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration, Pre-publication presented at Cologne RIZ/DIS Conference on March 3–4, 2005, para.99 (“Draft Digest”).

5. e.g. Supreme Court (Bermuda), January 21, 1994, *Skandia International Insurance Co v Mercantile & General Reinsurance Co* (CLOUT case 127); Court of Appeal (Hong Kong), July 7, 1995 (CLOUT case 109).

6. Ontario Court of Justice, General Division (Canada), March 1, 1991, *Rio Algom Ltd v Sammi Steel Co* (CLOUT case 18); Ontario Court (Canada), April 30, 1992, *Mind Star Toys Inc v Samsung Co Ltd* (CLOUT case 32); British Columbia Supreme Court (Canada), November 17, 1995, *Continental Commercial Systems Corp v Davies Telecheck International Inc* (CLOUT case 357); *Skandia International Insurance*, n.5 above.

7. *Continental Commercial Systems Corp*, n.6 above.

8. e.g. *Skandia International Insurance*, n.5 above; Ontario Court (Canada), January 30, 1992, *Kanto Yakin Kogyo Kabushiki-Kaisha v Can-Eng Manufacturing Ltd* (CLOUT case 369).

9. See British Columbia Supreme Court (Canada), November 22, 1991, *Krutov v Vancouver Hockey Club Ltd* (CLOUT case 19); High Court of Hong Kong (Hong Kong), October 29, 1991, *Fung Sang Trading Ltd v Kai Sun Sea Products and Food Company Ltd* (CLOUT case 20); Cámara Nacional de Apelaciones en lo Comercial (Argentina), September 26, 1988, *Enrique C. Wellbers SAIC AG v Extraktionstechnik Gesellschaft für Anlagenbau MBM* (CLOUT case 27); *Mind Star Toys Inc v Samsung Co Ltd*, n.6 above; British Columbia Supreme Court (Canada), November 18, 1994, *Globe Union Industrial Corp v G.A.P. Marketing Corp* (CLOUT case 114); British Columbia Supreme Court (Canada), September 13, 1991, *Harper v Kvaerner Fjellstrand Shipping AS* (CLOUT case 349); Ontario Superior Court of Justice (Canada), July 29, 1999, *NetSys Technology Group AB v Open Text Corp* (CLOUT case 367); Ontario Court (Canada), August 9, 1993, *Campbell v Murphy* (CLOUT case 368).

10. Supreme Court NSW, Australia, August 17, 1994, *Ferris v Plaister and Stap v Plaister*.

11. Moscow City Court (Russia), February 10, 1995 (CLOUT Case 148).

12. Highest Regional Court—Oberlandesgericht Stuttgart (Germany), 1 Sch 16/01, December 20, 2001.

13. See expressly Croatian Law on Arbitration, Art.6(8): “A valid arbitration agreement shall be deemed to exist if the plaintiff files the claim to arbitration and that the defendant fails to object to jurisdiction of the arbitral tribunal in his statement of defense in which he raised issues related to the substance of the dispute”. In MAL, Art.7(2) may lead to similar conclusion, although its wording refers, somewhat misleading, to (written) form of the agreement (and the request of allegation by one party that the agreement exists).

However, the courts in various jurisdictions had expressed diverging views as to the consequences of cases in which objection to jurisdiction was raised in the arbitral proceedings, but the preliminary decision of arbitrators was not attacked under MAL 16(3) before the competent court. In one Singapore case, the court held that a party was not prevented from submitting an application for the setting aside of the award on the basis of lack of jurisdiction simply because the party did not challenge arbitral decision on jurisdiction under para.(3) before a competent court.¹⁴ German courts, on the contrary, held that this was a necessary prerequisite for the successful raising of this ground in setting aside proceedings.¹⁵

Ruling on the jurisdiction by arbitrators: preliminary decision or part of the final award

It seems that there were no controversies regarding the recognition of arbitrators' discretionary powers to decide whether they would rule on jurisdiction in a separate ruling, or in the final award. As to the consequences of such decision, one court held that decision to postpone the ruling on jurisdiction until the final award cannot be attacked, but that in such a case only setting aside proceedings could review whether the arbitrators erred in finding that they are competent to decide.¹⁶

If the arbitral tribunal decides on the issue of jurisdiction as a preliminary question, and concludes that it has jurisdiction, this ruling may be subject to challenge under MAL 16(3). Regularly, the competent authority will be a state court. However, in some jurisdictions that is not necessarily so. For example in Croatia—whose Law on Arbitration departs slightly from the text of the MAL in respect of designation of authority from MAL 6—parties may by their agreement transfer the authority to control separate decisions on jurisdiction to some other authority. Thus Croatian courts have already confirmed that the arbitration rules of an institutional arbitration institution may replace court control with some other controlling mechanism (e.g. with the decision of the president of the arbitral institution).

The time-limit for the application to the court is 30 days from the date when the party has received notice of the ruling of the arbitral tribunal. As to this time-limit, a German court held that an application was launched in due time if it was submitted to a court within the 30-day period, notwithstanding the fact that the court to which the application was filed was not competent.¹⁷

One potentially controversial decision dealt with the consequences of the form of the preliminary ruling by which arbitrators assert their jurisdiction. The MAL

does not determine in which form the arbitrators should decide on jurisdiction as a preliminary issue.¹⁸ In procedural theory, it should be taken for granted that such a decision is of a procedural and not a substantive nature. From that, it would follow that the arbitrators may issue it only in the form of a procedural order. However, in some jurisdictions, such decisions are being taken in the form of arbitral awards as well.

Diverging judicial opinions as to the effect of designation of the decision on jurisdiction as “arbitral award on jurisdiction” are noted. High German juridical authorities, while noting strong and influential voices in the doctrine that such decisions cannot be regarded as arbitral awards, since there are no procedural arbitral awards (*Prozeßschiedssprüche*), have finally decided that such decisions can take the form of arbitral award, and even be attacked in setting aside proceedings.¹⁹ In these cases, however, the German courts dealt only with the preliminary decision in which the arbitrators have declined their jurisdiction.²⁰

The view that a decision made under MAL 16(3) can take form of the award was also taken by a Bermuda court,²¹ yet with even more far-reaching consequences. That court found that, if the preliminary decision on jurisdiction was issued in the form of an award, it might be challenged in separate setting-aside proceedings, even if the party successfully challenged the ruling in accordance with the procedure set out in Art.16(3). This particular decision opens a number of issues, including those relating to duplication of work, possible diverging decisions, applicability of the grounds from Art.34 MAL, etc.

Another interesting opinion on the possibility of reviewing arbitral decisions on jurisdiction was expressed in a recent Croatian case, where the Constitutional Court, changing its previous case law, held that it can control the arbitral ruling that declined jurisdiction on the basis of an alleged breach of the right to access to an efficient dispute-resolution mechanism.²² Again, the decision was controversial: it was issued with several dissenting opinions and criticised in the doctrine.²³

14. High Court (Singapore), November 30, 2000, *Tan Poh Leng Stanely v Tang Boon Jek Jeffrey*.

15. Federal Supreme Court—Bundesgerichtshof (Germany), III ZB 83/02, March 27, 2003.

16. Highest Regional Court—Oberlandesgericht Köln (Germany); 9 Sch 6/00, July 20, 2000 (CLOUT case 441).

17. Highest Regional Court—Oberlandesgericht Frankfurt (Germany), 3 Sch 02/00, September 6, 2001.

18. This issue may, however, be settled by national legislators; e.g. in Croatia (which widely accepted MAL solutions in its legislation) a provision defining “award” as a “decision of the arbitral tribunal on the merits of the dispute” is inserted (see Law on Arbitration, Art.2.1.8).

19. Highest Regional Court—Oberlandesgericht Hamburg, 11 Sch 02/00; Federal Supreme Court—Bundesgerichtshof (Germany) III ZB 44/01, June 6, 2002.

20. See below.

21. Court of Appeal (Bermuda), December 6, 2002, *Christian Mutual Insurance Co, Central United Life Insurance Co, Connecticut Reassurance Corp v Ace Bermuda Insurance Ltd*, www.lexis.com.

22. Constitutional Court of Croatia, U-III-669-2003, October 27, 2004.

23. See also below.

Article 8: submitting the substantive claim to the court and objections that arbitration was agreed upon

Court procedure if a dispute in which arbitration was agreed was submitted to the court

Objections in the court procedure: time-limit for requests for referral to arbitration

Just the same as the arbitrators regularly cannot rule on their jurisdiction unless an objection was raised by the respondent in the arbitral proceedings, the court to which a substantive claim for which arbitration was agreed upon cannot consider this fact on its own initiative.²⁴ A plea as to the lack of jurisdiction in the court proceedings has to be submitted by the respondent in due time—under Art 8(1) MAL, which corresponds to 16(2) in arbitral proceedings—not later than when submitting the first statement on substance of the dispute. Belated objections regularly cannot be taken into account, as the lack of objection has to be construed as the waiver of the right to request referral to arbitration.²⁵ Moreover, the lack of timely objections in the court proceedings may be construed as termination of the arbitration agreement: regularly, by submitting the statement of claim to the court the plaintiff expresses his wish to abandon the arbitration agreement; by submitting his statement of defence, the defendant accepts the offer to amend their dispute resolution mechanism by agreeing on court litigation instead of arbitration.²⁶

Who rules on their own jurisdiction? Courts or arbitrators?

Situation 1: Leaving the issue of jurisdiction to be resolved by arbitrators

When one party submits a claim to the court, and the other party opposes on the ground that an arbitration agreement was concluded (and, eventually, commences arbitral proceedings regarding the same claim), there are two possible scenarios. Under MAL 8, the court is bound to refer the case to arbitration, “unless the agreement is null and void, inoperative or incapable of being performed”. Under MAL 16, the tribunal may rule on its own jurisdiction, including any objections regarding the existence or validity of the agreement. Thereby, the same objection (of the validity of the arbitration agreement) can be resolved either as a preliminary issue in court proceedings, upon motion to refer the dispute to arbitration, or in the arbitral proceedings in a separate decision or in the award on the merits.

Recognising the right of the arbitrators to rule on their own jurisdiction, in some cases the courts were reluctant

24. High Commercial Court, Croatia, Pž-5168/01, April 29, 2001; Pž-7481/03, April 27, 2004.

25. High Commercial Court, Croatia, Pž-7481/03, April 27, 2004.

26. High Commercial Court, Croatia, Pž-5168/01, April 29, 2001.

to enter into an examination of the existence and validity of the arbitration agreement. They held that the arbitral tribunal alone was competent to decide on its jurisdiction.²⁷ In the same case, it was held that the arbitrators have jurisdiction to decide whether a party enjoys absolute immunity from judicial process (and/or arbitration) of any kind. The courts also left to the arbitrators the issues regarding alleged invalidation of the arbitration agreement due to public law reasons (UN embargo, national legislations).²⁸ Moreover, in other cases the superior courts found that a court has no discretion, but is obliged to refer the matter to arbitration if an objection was raised.²⁹ As stated in one case, “once a reference to arbitration had been made, there was no residual discretion in the court to refuse to stay the proceedings between the parties to arbitration even though there may be particular issues that are not subject to arbitration”.³⁰ The language of this decision would even imply the duty of the court to stay the proceedings on matters that are clearly outside the scope of the arbitration agreement, if the arbitral jurisdiction in other connected issues was asserted. This, however, may be a mistaken conclusion, since an inference can be drawn from the line of other cases that, at best, the court has inherent discretionary authority to stay or not to stay the proceedings,³¹ which can also be only partially granted, in respect to some of the parties.³² Yet, in order to refuse to grant a stay, “strong reasons are required”.³³

Situation 2: Independent preliminary decision by the court on the issue of the existence, validity and/or practicability of the agreement

As MAL 8 authorises the court to refuse the motion to refer the dispute to arbitration if it finds that the

27. Superior Court of Quebec (Canada), September 9, 1994, *International Civil Aviation Organization (ICAO) v Tripal Systems Pty Ltd* (CLOUT case 182).

28. See Cour supérieure du Québec (Canada), February 15, 2000, *Compagnie Nationale Air France v Libyan Arab Airlines* (CLOUT case 392).

29. Federal Court of Appeal (Canada), February 10, 1994, *Nanisivik Mines Ltd and Zinc Corp of America v Canarctic Shipping Co Ltd* (CLOUT case 70); British Columbia Court of Appeal (Canada), July 4, 1995 *The City of Prince George v A. L. Sims & Sons Ltd* (CLOUT case 179).

30. *Nanisivik Mines Ltd and Zinc Corporation of America v Canarctic Shipping Co Ltd*, n.29 above.

31. Federal Court of Canada (Canada), January 17, 1989, *Navionics Inc v Flota Maritima Mexicana SA* (CLOUT case 15); British Columbia Court of Appeal (Canada), March 10, 1992, *Gulf Canada Resources Ltd v Arochem International Ltd* (CLOUT case 31); and Federal Court of Appeal (Canada), May 29, 1992, *Ruhrkohle Handel Inter GmbH and National Steel Corp v Fednav Ltd and Federal Pacific (Liberia) Ltd* (CLOUT case 33).

32. British Columbia Court of Appeal (Canada), February 26, 1990, *Stancroft Trust Ltd, Berry and Klausnerv Can-Asia Capital Co Ltd, Mandarin Capital Corp and Asiamerica Capital Ltd* (CLOUT case 17); Federal Court of Canada (Canada), January 19, 1993, *Nanisivik Mines Ltd and Zinc Corp of America v FCRS Shipping Ltd and Carnatic Shipping Co Ltd* (CLOUT case 36).

33. Federal Court of Canada (Canada), September 30, 1992 and October 9, 1992, *Miramichi Pulp and Paper Inc v Canadian Pacific Bulk Ship Services Ltd* (identical decisions) (CLOUT case 34).

agreement is null and void, inoperative or incapable of being performed, in a number of cases the courts have decided to go the other way: they did, in a preliminary fashion, deal with the issues of existence, validity and practicality of the agreement.³⁴ These cases are much more numerous than the cases in which the court decided to stay the proceedings and refer the issue of the existence, validity or operability of the agreement to the arbitrators. The imperative language of MAL 8(1) ("shall refer . . . unless it finds . . .") may also speak in favour of independent court decision on these matters. But, in many jurisdictions courts have discretionary authorities regarding preliminary issues (German: *Vorfragen*). They may decide whether to stay or not to stay proceedings pending the decision on a preliminary issue (and, consequently, discretionary authorities to decide whether to decide such issue alone, or to leave it to be decided finally by another tribunal). Thus, both Situation 1 and Situation 2 may be legitimate, subject to prudent exercise of the courts' discretion.³⁵

To refer or not to refer: arguments as to the arbitration agreement

Interpretation

In a number of cases, wording of the arbitration clauses was broadly interpreted, so that the courts preferred arbitration and referred parties to it if a substantive claim was made before court even in cases of some clauses when the other party invoked an arbitration clause that could have been, under circumstances, viewed as "pathological". For example, a court interpreted words "may be submitted to arbitration" as "shall be submitted to arbitration", and the words "incompleteness of the contract" as "a failure to perform the contract".³⁶ Reference to "arbitration in 3rd country", under the rules of the International Commercial Arbitration Association was also saved by interpretation—the court held that the arbitration clause sufficiently indicated the parties' intention to arbitrate.³⁷ Yet there are cases in which, e.g., ambiguity of the clause with regard to the competent

arbitral institution was held to be sufficient to make this clause null and void.³⁸

Faced with the motions to refer disputes to arbitration under Art.8, in a number of reported cases the courts openly showed their tendency towards favouring arbitration, sometimes expressly quoting the legislative policy to foster arbitration.³⁹ If in the parties' negotiations the option of changing the dispute resolution mechanism was deliberated in favour of court proceedings, clear and unambiguous proof of the intention to renounce arbitration was required. One court has characteristically stated that "whilst it was true that parties to an arbitration agreement could abandon it and proceed to Court, the decision to do so must be clearly evidenced".⁴⁰

Whether arbitration clause was null and void

Arbitrability and existence of the agreement *ratione causae*

When arguing for court jurisdiction and disputing validity and existence of the agreement, one possible line of argument relates to the non-arbitrability of the dispute. This argument was, however, not always successful. The case law on the Arts 8 and 16 demonstrates that the courts held that arbitration is not precluded in a wide area of matters. For example, it was found that the fact that a claim is grounded in tort does not preclude arbitration.⁴¹ It was also found that construction lien legislation did not prohibit arbitration but, on the contrary, contemplates it.⁴² It has also been found that shareholders' disputes and disputes regarding management of commercial companies are arbitrable, if the law does not expressly require court litigation.⁴³

38. Germany, 4 Z SchH 13/99, February 28, 2000, www.dis-arb.de.

39. e.g. Ontario Court of Appeal (Canada), April 25, 1994, *Automatic Systems Inc v Bracknell Corp (Canal Contractors) and Chrysler Canada Ltd* (CLOUT case 73); Harare High Court (Zimbabwe), Judgment No.HH-19-2000, January 18 and 26, 2000, *The Eastern and Southern African Trade and Development Bank (PTA Bank) v Elanne (Pvt) Ltd* (CLOUT case 324); Federal Court (Canada), January 9, 1998, *Methanex New Zealand Ltd v Fontaine Navigation SA, Tokyo Marine Co Ltd The Owners and all Others Interested in the Ship Kinugawa* (CLOUT case 382); Ontario Court of Justice (Canada), February 20, 1996, *Duferco International Investment Holding (Guernsey) Ltd v Pan Financial Insurance Co* (CLOUT case 387).

40. *The Eastern and Southern African Trade and Development Bank (PTA Bank) v Elanne (Pvt) Ltd*, n.39 above.

41. Ontario Court (Canada), October 1, 1992, *Canada Packers Inc v Terra Nova Tankers Inc* (CLOUT case 35).

42. Ontario Court of Appeal (Canada), April 25, 1994, *Automatic Systems Inc v Bracknell Corp* (CLOUT case 183); see also *Automatic Systems Inc v Bracknell Corp (Canal Contractors) and Chrysler Canada Ltd*, n.39 above, and Ontario Court of Appeal (Canada), April 25, 1994, *Automatic Systems Inc v E. S. Fox Ltd and Chrysler Canada Ltd* (CLOUT case 74).

43. High Commercial Court, Croatia, Pž-195/04, February 10, 2003.

34. See e.g. *Krutov v Vancouver Hockey Club Ltd*, n.9 above; *Mind Star Toys Inc v Samsung Co Ltd*, n.6 above; High Court of Hong Kong, September 24, 1992, *Guangdong Agriculture Co Ltd v Conagra International (Far East) Ltd* (CLOUT case 41); High Court (Hong Kong), May 5, 1993, *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd* (CLOUT case 57); Superior Court of Quebec (Canada), March 14, 1989, *Jean Charbonneau v Les Industries A. C. Davie Inc* (CLOUT case 66); *Globe Union Industrial Corp v G.A.P. Marketing Corp*, n.9 above (CLOUT case 114); *Campbell v Murphy*, n.9 above, and many others.

35. See in more detail below.

36. High Court (Hong Kong), March 2, 1991, *China State Construction Engineering Corp, Guangdong Branch v Madiford Ltd* (CLOUT case 38).

37. *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd*, n.34 above; see also Kammergericht Berlin (Germany); 28 Sch 17/99, October 15, 1999 (CLOUT case 373)—the latter decided in setting aside proceedings.

Diverging opinions were, however, expressed by the court regarding the claims grounded on the allegations of fraud. In one, potentially controversial, case, it was found that “conspiracy, deceit and fraud were not matters arising out of ‘this agreement’”.⁴⁴ Similar arguments were reflected in a few other cases. In one of them,⁴⁵ the judge refused to stay the proceedings even though an ICC tribunal was already seised of the jurisdictional issue, because the issues such as “damages for misrepresentation (fraudulent or otherwise), breach of contract, inherently defective equipment and negligent performance of contract were not covered by an arbitration clause”. In another case it was also held that “the fraud claim was not subject to arbitration as it was not contractual in nature”.⁴⁶

In contrast with these decisions, a plea that a UN embargo deprives the arbitral tribunal of the power to decide and resolve upon the dispute was rejected by the courts.⁴⁷ In such a case, the court affirmed the right of the arbitrators to decide such an issue, subject to a later review within the context of the recourse for recognition or avoidance of a final award.

Parties to the agreement: agreement *ratione personae*

Another possible objection relates to the parties to the arbitration agreement. There are a number of cases in which some or all of the parties in a multi-party setting initiated court proceedings arguing that they were not parties to the arbitration agreement. Such an assertion under one decision had to be clearly designated as the plea regarding the jurisdiction of the arbitral tribunal, because the mere statement that a party is not a legal successor regarding the main contract could not be taken into account.⁴⁸

Whether the arbitration clause was “inoperative or incapable of being performed”

As to the obligation of the court to refer parties to arbitration, one may even argue that some courts were even overly generous in interpreting the arbitration clauses *in favorem arbitratii*. In one case, the court referred parties to arbitration, stating that a clause that gave one party the right to opt for either litigation or arbitration should be construed as valid and binding, notwithstanding the fact that the party that had right to opt had opted for litigation (“it would unduly stretch the wording of MAL 8(1) to deem such an agreement inoperative for the reason that the party with the right to

elect to settle its dispute through arbitration chose not to exercise that right” [!?!]).⁴⁹

Yet, in other cases, courts were more sensitive to the fact that the parties had agreed on multiple dispute-resolution mechanisms, so that a court had refused to refer parties to arbitration because it found that a particular dispute was not covered by the arbitration agreement, since the clause allowed “court proceedings for specifically listed default events” (such as the one submitted to the court), “while retaining arbitration for all other disputes”.⁵⁰ A similar conclusion was reached in another case, in which arbitration was agreed for all disputes, except of differences “involving a question of law”.⁵¹ In all such cases courts found that arbitration agreement was in the particular case either inoperative or—for the particular dispute—non-existent.

In some reported cases, the courts have rejected the motions for referral to arbitration under MAL 8 because the arbitration agreement was found to be inoperative. One clause was, *e.g.*, found to be inoperative on the ground that under the signed clause one of the parties to a dispute had to act in the role of arbitrator. The court held that a party cannot act as neutral and impartial arbitrator and thus held this clause to be “inoperative”⁵² (interestingly, the clause as such was not pronounced “null and void”).

A relatively recent case invoked lively debates about the meaning of “inoperative agreements”. A very senior German court found that an arbitration agreement may become inoperative due to the lack of funds on behalf of one party to pay costs of arbitration proceedings.⁵³ The court invoked the right of the party to due process of law, and argued that such a right cannot be excluded merely because a party caused its own inability to pay the arbitration expenses, unless the inability to pay was caused in bad faith.

Procedural arguments

Whether objection was made in a timely fashion

Under MAL 8, the objection that an action is brought in a matter which is the subject of an arbitration agreement shall be raised “not later than when submitting . . . first statement on the substance of the dispute”.

Consistently with this requirement, the courts have often dealt with the issue whether a party has requested

44. British Columbia Supreme Court (Canada), November 28, 1988, *ODC Exhibit Systems Ltd v Lee and Expand International* (CLOUT case 65).

45. Ontario District Court (Canada), October 27, 1989, *Deco Automotive Inc v GPA Gesellschaft für Pressenautomatization MbH* (CLOUT case 383)—criticised in doctrine, see Branson (2000) 1 Arb. Int'l 37–38; Patterson (1993) 10 J. Int'l Arb. 29–43.

46. British Columbia Court of Appeal (Canada), October 18, 1995, *Traff v Evancic* (CLOUT case 350).

47. *Compagnie Nationale Air France v Libyan Arab Airlines*, n.28 above.

48. Moscow City Court (Russia), February 10, 1995 (CLOUT case 148).

49. Court of Appeal (Hong Kong), July 4, 2001, *China Merchant Heavy Industry Co Ltd v JGC Corp* (CLOUT case 449).

50. Ontario Court of Justice (Canada), March 31, 1998, *Temiskaming Hospital v Integrated Medical Networks Inc* (CLOUT case 388).

51. Ontario Court of Justice (Canada), November 10, 1994, *T1T2 Limited Partnership v Canada* (CLOUT case 113).

52. *Jean Charbonneau v Les Industries A. C. Davie Inc*, n.34 above.

53. Federal Supreme Court—Bundesgerichtshof (Germany); III ZR 33/00, September 14, 2000 (CLOUT case 404).

referral to arbitration in due time.⁵⁴ The same rules that apply to requests to refer claims to arbitration were found to be applicable to counterclaims.⁵⁵

A party that invoked arbitration agreement was regularly “defendant” (or counter-defendant) in court proceedings⁵⁶; however, in one case, the plaintiffs in court proceedings asked for the stay of the proceedings they had themselves instituted.⁵⁷ This move, described by the court as “a very unusual step”, was considered to be untimely (the court observed that “by no stretch of the imagination can such request be considered as having been made in a timely fashion”). This case, as also another one, has also confirmed that “statement on the substance of the dispute” referred to in MAL 8 means pleadings in courts and not statements made to the arbitral tribunal.⁵⁸

It seems that there may be some disagreements by the courts regarding what exactly is meant by the phrase “not later than . . .”. Two issues arose in this connection.

First, it had to be decided whether the “not later” phrase is applicable when the defendant failed to challenge the court jurisdiction and ask for referral to arbitration within the time-limit set by the court for the defence, if no statement of defence was launched. In one case, only upon appeal to the highest judicial authority was it found that reliance on the arbitration clause was timely, irrespective of the fact that it was made after expiry of the time-limit for the statement of defence, since the existence of the arbitration agreement was invoked before the oral hearing on the substance.⁵⁹

The second issue that arose was the interpretation of the requests that were made simultaneously with the pleadings on the merits. In some jurisdictions, procedural objections made in the same pleading in which defence on the merits is made are not regarded as untimely, since they are not made “later” than such a statement. The contrary position was, however, outlined in one reported case in which a request that was filed with the parties’ first statement on the substance of the

dispute was regarded to be untimely.⁶⁰ The court stated that the correct procedure would be “to apply for a stay of court proceedings, after receiving the statement of claim but before submitting a statement of defence”.

In a crisp contrast to the preceding case, one court found that an objection to court jurisdiction was made in a timely fashion although the defendant invoked arbitration clause almost four years after initiation of the proceedings, after a series of procedural steps that included joint motions for particulars, a demand for a security for costs and discovery.⁶¹ In such a case the court has specifically argued that “given the general policy favouring arbitration . . . the delay in invoking the arbitration clause and the steps undertaken in the judicial proceedings did not amount to renunciation of the arbitral procedure”.⁶²

An interesting case is reported in which the court referred the parties to arbitration irrespective of the fact that it was indisputable that the defendant failed to raise the objection in due time.⁶³ In this case, both parties initiated court actions in the courts of two different countries, while they had arbitration agreement referring to arbitration in the third country. In the second court proceedings, the plaintiff successfully invoked the arbitration clause, yet continued to pursue his own court action. In these other court proceedings, the court found that the entire matter has to be referred to arbitration irrespective of the belated objection, since the plaintiff “was acting unfairly in both forcing [defendant] to arbitrate its claim while [he] pursued its court action”.⁶⁴ Dealing with the timeliness of the defendant’s objection, the court took into account that the arbitration clause had been invoked in a timely fashion in prior proceedings by a party in these proceedings.

Whether there was a dispute

In several cases, faced with the request to refer the matter to arbitration, the courts had to deal with the issue whether there is at all a “dispute” that can be referred to any dispute resolution mechanism. It was generally regarded that MAL 8 procedure can be used only if there was an existing dispute between the parties.

The reported cases demonstrate divergent approaches to the issue of the existence of the dispute. On one hand, we have cases in which the courts refrained from entering into deeper examination.

One court held that it was not necessary to have evidence of a dispute initially, but that it suffices that this becomes evident in subsequent process.⁶⁵ In another

54. *e.g. Stancroft Trust Ltd, Berry and Klausner v Can-Asia Capital Co Ltd, Mandarin Capital Corp and Asiamerica Capital Ltd*, n.32 above; *Gulf Canada Resources Ltd v Arochem International Ltd*, n.31 above; British Columbia Supreme Court (Canada), March 24, 1995, *Queensland Sugar Corp v “Hanjin Jemma” (The)* (CLOUT case 181); British Columbia Court of Appeal (Canada), February 23, 1998, *Nutrasweet Kelco Co v Royal-Sweet International Technologies Ltd Partnership* (CLOUT case 352).

55. British Columbia Supreme Court, January 15, 1999, *Restore International Corp v K.I.P. Kuester International Products Corp* (CLOUT case 355).

56. See *e.g. Stancroft Trust Ltd, Berry and Klausner v Can-Asia Capital Co Ltd, Mandarin Capital Corp and Asiamerica Capital Ltd*, n.32 above.

57. *Ruhrkohle Handel Inter GmbH and National Steel Corp v Fednav Ltd and Federal Pacific (Liberia) Ltd*, n.31 above.

58. Ontario Court of Justice (Canada) December 21, 1994, *Bab Systems Inc v McLurg* (CLOUT case 118), reversed on appeal.

59. Federal Supreme Court—Bundesgerichtshof (Germany); III ZR 262/00, May 10, 2001 (CLOUT case 435).

60. Ontario Court of Justice (Canada), December 23, 1994, *ABN Amro Bank Canada v Krupp Mak Maschinenbau GmbH* (CLOUT case 119).

61. Superior Court of Quebec (Canada), May 18, 1990, *A. Bianchi Srl v Bilumen Lighting Ltd* (CLOUT case 186).

62. *ibid.*

63. British Columbia Supreme Court (Canada), June 15, 1999, *Seine River Resources Inc v Pensa Inc* (CLOUT case 356).

64. *ibid.*

65. Harare High Court (Zimbabwe); Judgment No.HH-249-99, December 15, 1999, *Zimbabwe Broadcasting*

case,⁶⁶ the court found that it “is not concerned with investigating whether the Defendant has an arguable basis for disputing the claim”. For the purposes of MAL 8, it was held sufficient that defendant did not admit the claim. It was also held that a letter in which the defendant offered compensation to the plaintiff cannot be taken as an admission that would end the dispute.⁶⁷ Only unequivocal settlement of the claim in its entirety may, under circumstances, be taken into account.⁶⁸

Some cases demonstrate different approach, setting higher thresholds for the existence of the dispute. In one of them,⁶⁹ the court accepted the plaintiff’s argument that the defendant had no defence to a particular claim—it was held that there should be “a genuine dispute” between the parties. It was also held that, in a dispute about bank loan, the defendant’s objections to the interest payments and the right of the bank to charge interest on interest and commission were not sufficient to establish the existence of a dispute.⁷⁰

Premature requests

In one case,⁷¹ the court found that under MAL 8 a decision referring the parties to arbitration cannot be made unless the same claim was made in court proceedings. In this case, the claimant asked the court to grant interim measures of protection under MAL 9, and requested the court to refer the parties to arbitration. The court dismissed the application as premature, because there was no action pending (and not even a notice of the wish to arbitrate). There is no right to ask for a declaration that a certain dispute would be covered by the arbitration agreement and that such arbitration agreement was valid, operative and capable of being performed.

Articles 34 and 36: Court Review of the Decisions on the Jurisdiction of the Tribunal

Can court review the arbitral decisions declining jurisdiction?

MAL 16(3) provides for a separate procedure of reviewing positive decisions of the arbitral tribunal that were issued on the issue of jurisdiction as a preliminary

Corp v Flame Lily Broadcasting (Pvt) Ltd (CLOUT case 322).

66. Court of Appeal (Hong Kong), November 24, 1995, *Tai Hing Cotton Mill Ltd v Glencore Grain Rotterdam BV* (CLOUT case 128).

67. High Court (Hong Kong), January 21, 1994, *Zhan Jiang E & T Dev Area Service Head Co v An Hau Co Ltd* (CLOUT case 61).

68. Court of First Instance (Hong Kong), November 25, 1999, www.lexis.com.

69. *Deco Automotive Inc v GPA Gesellschaft für Pressenautomation MbH*, n.45 above.

70. *The Eastern and Southern African Trade and Development Bank (PTA Bank) v Elanne (Pvt) Ltd*, n.39 above.

71. Ontario Court of Justice (Canada), June 8, 1995, *ATM Compute GmbH v DY 4 Systems Inc* (CLOUT case 386).

question (see above). If the arbitral tribunal decides to rule on the plea as to the jurisdiction only in an award on the merits, such a decision may be challenged within the setting aside procedure (MAL 34(2)(a)(i)) or within the procedure of recognition and enforcement (36(1)(a)(i)).

In the collected case law, the question was posed whether a decision of the arbitral tribunal declining its jurisdiction can be challenged. The highest German court authority gave an interesting and somehow Pythian answer⁷² that such a decision may be subject to setting aside procedure if it is made in the form of an award, but that none of the reasons for setting aside could be used to set aside an incorrect decision declining jurisdiction. The court held that the impossibility of attacking successfully the arbitral decision does not deprive parties of their right to legal protection (*Rechtsschutz*), as a negative decision by the arbitrators opens the way to legal action in court procedure.

A contrary conclusion was reached by one constitutional court that has recently annulled an arbitral decision declining jurisdiction on the ground of alleged violation of the right to access to justice.⁷³ The court reversed its previous case law under which no arbitral decisions could be challenged directly before the constitutional court. It held that, since there is no legal remedy available against such a negative procedural decision (including a setting aside application that was regarded as inadmissible) the constitutional court has to apply strict standards since such a decision may violate the constitutional right to fair proceedings before an independent tribunal. In this case, the court annulled arbitral decisions, pointing in particular to its insufficient explanation, and sent the case back to arbitrators.

Reviewing decisions affirming jurisdiction in setting aside proceedings

If the arbitrators decide that they have jurisdiction, there are two ways of attacking their decision—one in the setting aside proceedings, and the other in proceedings for recognition and enforcement of the award. As the reasons in this respect are the same, the courts have generally followed the same line of reasoning. In CLOUT, only one case refers directly to the jurisdictional arguments in recognition proceedings.⁷⁴ Therefore we deal here with jurisdictional arguments both in setting aside, and in the recognition and enforcement proceedings.

MAL 34(2)(a)(i) provides that a court should set aside an award if, *inter alia*, the arbitration agreement “is not valid under the law to which the parties have subjected it” or the *lex fori* of the setting aside court. The same reason is contained in MAL 36(1)(a)(i) in respect to

72. Federal Supreme Court—Bundesgerichtshof (Germany); ZB 44/01 June 6, 2002; see also Highest Regional Court—Hamburg (Germany); 11 Sch 02/00, August 30, 2002.

73. Constitutional Court (Croatia); U-III-669-2003, October 27, 2004.

74. Highest Regional Court—Oberlandesgericht Dresden (Germany); 11 Sch 06/98, January 13, 1999 (CLOUT case 443).

refusal of recognition of the award. Lack of valid and binding arbitration agreement obviously also covers the cases when no arbitration agreement was concluded at all. Lack of an appropriate agreement in respect of the subject-matter of the dispute partly overlaps with the reasons for setting aside from MAL 34(2)(a)(iii) or MAL 36(1)(a)(iii), *i.e.* with the situations in which the award deals with a dispute “not contemplated by or not falling within the terms of the submissions to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration”.

This is demonstrated by different approaches in several court decisions: faced with the objection that a particular party was not party to the arbitration agreement, some of them referred to subpara.(i) on lack of valid agreement,⁷⁵ and some of them to subpara.(iii) on decisions outside the scope of the agreement.⁷⁶

In the setting aside proceedings, the court had to deal with the timeliness of the jurisdictional objections made in the arbitral proceedings. If an objection to the existence and validity of the agreement was not raised at the latest in the first statement of the defence on the merits, the courts held that the applying party was precluded from raising this objection.⁷⁷ It was also held that failure to raise this objection means the conclusion of the new arbitration agreement by tacit consent of the party,⁷⁸ and that the defaulting party should be considered to have waived its right to object to jurisdiction.⁷⁹ However, this was recognised only in the cases in which the party has actually participated in the arbitral proceedings, and was invited to submit a statement of defence.⁸⁰

The collected case law reveals discrepancies in the courts' opinions as to whether the failure of a party to apply for court review of the arbitral tribunal's decisions under MAL 16(3) implies a waiver of the party's right to contest the jurisdiction. The opinion that a separate application is not necessary because the right to court application was optional was expressed by a Singapore court⁸¹; on the other hand, a German court⁸² held that application for a review is a prerequisite for successful raising of the same ground in the setting aside proceedings.

75. Highest Regional Court—Oberlandesgericht Hamburg (Germany), 6 Sch 04/01, November 8, 2001.

76. Federal Court of Canada, April 7, 1988, *D. Frampton & Co Ltd v Sylvio Thibeault and Navigation Harvey & Frères Inc* (CLOUT case 12).

77. Moscow City Court (Russia), February 10, 1995 (CLOUT case 148).

78. Highest Regional Court—Oberlandesgericht Stuttgart (Germany), 1 Sch 16/01, December 20, 2001.

79. High Commercial Court (Croatia); Pž-7481/03, April 27, 2004.

80. Highest Regional Court—Oberlandesgericht Hamburg (Germany), 6 Sch 04/01, November 8, 2001.

81. *Tan Poh Leng Stanely v Tang Boon Jek Jeffrey*, n.14 above.

82. Highest Regional Court—Oberlandesgericht Oldenburg (Germany), 9 SchH 09/02, November 15, 2002.

Article 17: Jurisdiction of the Tribunal to Issue Interim Measures of Protection

Scarcity of reported case law

While the MAL 8 and 16 are among the provision of the UNCITRAL Model Law covered with the most extensive jurisprudence (MAL 16 alone is the provision that has absolutely the widest coverage in CLOUT database), the provision of MAL 17 is among the least well-covered: precisely there is only one case in the CLOUT database that would point to MAL 17 in the search engine of the UNCITRAL.⁸³ Even this single case mentioned interim measures of protection ordered by the tribunal only *obiter dicta*, asserting that, once arbitration was commenced, the arbitral tribunal sitting in Switzerland could order interim measures that would be enforceable in Canada.

This lack of cases is apparently in a sharp contrast with the ongoing interest of the UNCITRAL on the revision of Art.17, and the work of its Working Group on Arbitration that was engaged in drafting of appropriate provisions in the past five years.

Interplay of MAL 9 and MAL 17: which has precedence?

In spite of the scarcity of reported cases, some ambiguities with regard to parallel jurisdiction of both the arbitrators and the court to order interim measures in the same matter have already surfaced. In one case connected with the application of MAL 9, a court had to resolve the issue whether interim measures of protection that could be taken by courts included the interim order granted in that case or whether such an order could be granted only by the arbitral tribunal dealing with the substance of the dispute. The court referred to *travaux préparatoires* regarding MAL 9 and quoted “dual principles that, first, a party does not waive its right to go to arbitration by requesting (or obtaining) interim measures of protection from a national court, and, second, that a national court is not prevented from granting such measures by the existence of an arbitration agreement”.⁸⁴ However, in another court decision,⁸⁵ without special reference to authorities and UNCITRAL documents, another court had seemingly come to the opposite conclusion, namely that, if arbitrators may order themselves interim measures that are enforceable in court, a direct application to the court for interim measures should be dismissed.

83. *ATM Compute GmbH v DY 4 Systems Inc*, n.71 above.

84. British Columbia Supreme Court (Canada), February 25, 1994, *Trade Fortune Inc. v Amalgamated Mill Supplies Ltd* (CLOUT case 71).

85. *ATM Compute case, cited above.*

Conclusions: Open Issues and Problem Areas

General remarks

After this general presentation of the court decisions on application of MAL provisions that deal with the jurisdiction of the arbitral tribunal, we will summarise the main problems that surfaced, directly or indirectly, from the collected case law. We will focus only on the most important issues that may affect the harmonisation of the international arbitral law. Minor matters, but also important questions in which the practice demonstrated a higher level of uniformity, are intentionally left out.

Individual problems

Dual jurisdiction regarding evaluation of validity of the arbitration agreement

The first problem area arises from the dual jurisdiction with respect to determining whether arbitration agreement is valid and binding. Although there is no doubt that arbitrators are empowered to rule in their own jurisdiction upon timely objections raised in the arbitral proceedings, virtually the same authority is also given to the court if the claim is raised in a court action, and the other party objects on the ground that this claim was covered by an arbitration agreement. This parallel regime raises a number of questions regarding the division of labour between arbitrators and the courts; regarding potential duplication of work; regarding the possibility of incompatible decisions; regarding the effects of the arbitral and/or court's final determination, etc.

In the reported case law (see above), the courts had differently interpreted their authority to refuse referring the case to arbitration if the agreement is null and void, inoperative or incapable of being performed. Some courts apparently tried to escape this issue, pointing out that the arbitrators have to determine it first; other courts were satisfied with *prima facie* evidence of the existence and validity of the arbitration agreement; some courts went into more details; and it seems that some might even be tempted to enter into substantive issues such as the validity of the main contract.

Under the current MAL rules, there are hardly any chances to escape these problems. In our view, the courts would have to exercise a prudent and reasonable approach, evaluating all circumstances of the case. Under MAL 8(1) the courts clearly have the right and duty to evaluate independently the validity and practicability of the arbitration agreement; however, it would be wise both for the courts and for the arbitrators to have an eye on the process conducted before the other tribunal, perhaps suspending the proceedings until the decision in the other process is being made—but only if this would not cause undue hardship to parties in the proceedings. If there are parallel proceedings in the court and before the arbitrators, it would also be wise to award certain precedence to the arbitrators' ruling (at least in the order of decision-making, if possible), and to await the outcome of the challenge of jurisdiction

there. A precondition would, however, be that the court is satisfied with the *prima facie* existence of the agreement: a party invoking the arbitration agreement before the court needs to have at least an arguable case. Otherwise, a way to abuses and undue delays would be wide open.

The form of the arbitral decision on jurisdiction as a preliminary question under MAL 16(3) and its effects

Another problem area deals with the form of the separate decision on jurisdiction in the arbitral process, if such a decision is made prior to the award on the merits, based on the discretionary right of arbitrators to resolve the jurisdictional challenge as a preliminary matter (see above). Here, the MAL does not provide clear guidance, and basically leaves the determination to national procedural laws and/or practices. Apparently, there is a trend in international arbitration to expand the circle of decisions that are entitled "arbitral awards" from decisions on the substance of the dispute to procedural matters, usually those that end the proceedings, but sometimes also to those that are regarded to be of any greater importance.

Proper or improper naming of decisions should, in our view, not affect the procedural fate of the decision—*falsa nominatio non nocet*. Yet, in reported cases from various part of the globe, the courts also went into a different directions, drawing from the name "award on jurisdiction" inferences as to the admissibility of setting aside of such "awards".⁸⁶ We think that this only contributes to confusion, as the original concept of the MAL 16(3) certainly did not envisage multiple (double or even triple) court proceedings controlling one and the same arbitral decision on jurisdiction as the main matter—one under Art.16(3); the other, independent setting aside of the award on jurisdiction; and, eventually, another setting aside of the award on the merits for the reasons stated in Art.34(2)(i). If such practice would develop, it could have a discouraging effect on the arbitrators that would like to resolve jurisdictional issues in their preliminary decisions.

Availability of the remedies against negative arbitral decisions on jurisdiction

Another area of ambiguities is concerned with the availability of remedies in cases in which the arbitrators have issued decisions rejecting their jurisdiction. One classic approach would consider these decisions as irrefutable, *inter alia* because no one can force the arbitrators to arbitrate if they are convinced that they have no jurisdiction. However, as this is a final decision, the pressure of dissatisfied parties led to emergence of court decisions that expressed the opposite view—once relying on the formal reasons (form of the award; see above), another time relying on alleged procedural rights to seek court review at least in respect of the procedural correctness of the arbitral decision-making. In our opinion, although one can well understand the dissatisfaction of the parties who were convinced that they had right to

86. See in particular the finding of the Court of Appeal of Bermuda in *Christian Mutual Insurance Co, Central United Life Insurance Co, Connecticut Reassurance Corp v Ace Bermuda Insurance Ltd*, n.21 above.

arbitrate their disputes, this additional controllability is not necessary, and may ultimately prolong and complicate the process, without bringing substantial benefits for the parties. If arbitrators pronounced that they are not competent to arbitrate, the most efficient and logical next step is to turn immediately to the second closest match—to another arbitration or to the competent state court. Arbitrators that were reluctant to rule on the substance of the dispute in the first round will, most likely, remain to be reluctant even if—for procedural reasons or otherwise—a court authority finds it necessary to strike down their decision.

Scope of arbitral authority: do allegations of fraud fall within the scope of submission to arbitration

When the courts had to evaluate, in a preliminary fashion, the validity and scope of the arbitral agreement, they were usually expressing favourable views about the use of arbitration, and interpreted broadly the authority of arbitrators. One eminent exception in some jurisdictions relates to the cases in which one party accused the other of fraudulent behaviour. Some courts alluded to the fact that conspiracy, deceit and fraud are not matters that can be covered by the arbitration agreement. Yet, in commercial reality, mutual allegations of immoral, illegal or fraudulent actions happen often, and excluding them from the scope of arbitral agreements may effectively cripple their effectiveness. Therefore, for the sake of harmonisation of the global practice, it would be good to take a uniform position on such objections, and in our view there are no valid reasons why would the broad interpretation that is normally applied to other issues not be applicable to these situations as well.

Meaning of "inoperative" agreements

Case law on MAL 8 demonstrates also certain divergences in the interpretation of the meaning of the "inoperative arbitration agreements". Differences go to both extremes. Some courts attempted to demonstrate such radical pro-arbitration agreement that they declared as operative agreements that were rightfully abandoned, e.g. by forcing a party to arbitrate, although that party had expressed the wish to use its right to opt for litigation provided in the dispute resolution clause. On the other hand, the position of the German BGH that lack of financial resources makes the arbitration agreement "inoperative" stretches this term in the opposite direction. In our opinion, if the position of the BGH became a general rule, it would lead to abuses, opening ample opportunities to evade the wilfully chosen dispute resolution mechanism on the sheer ground of financial weakness.

What does "not later than" mean?

The moment when a party loses its right to object to arbitral jurisdiction was differently understood by courts in different jurisdictions—and even in the same jurisdictions. The strictest rule was applied by a Canadian court that required a separate plea to the jurisdiction, prior to any statement on the substance. Other courts (also Canadian) were much more relaxed, accepting pleas raised several years after the initiation of

the proceedings. In our view, the clause "not later than when submitting . . . first statement on the substance" should be construed in the plain and simple meaning of these words: objection should be raised *before*, or *simultaneously* with the statement on substance of the dispute.

Should the court make substantive inquiries as to whether "a dispute" exists?

Requirement that only "disputes" can be referred to arbitration has also proven to be ambiguous. In our view, some courts have posed too high a threshold for the existence of disputes, especially taking into account that the evaluation of differences that exist between the parties should be left to arbitrators. The right approach is apparently taken by those courts that considered that a dispute should be presumed to exist in every case in which the claimant's claims were not clearly and unequivocally admitted.

Dual jurisdiction regarding interim measures

It may be indicative that already a very small statistical sample of court decisions discovered some opposing court views regarding the powers to order interim measures. At least one court held, in spite of the clear language of MAL 9, that the provisions of MAL 17 have precedence and enable the court to dismiss an application for interim measures. Such a position is, we believe, wrong: the original ideas behind the MAL clearly envisaged dual jurisdiction regarding interim measures. Recent work of UNCITRAL on the revision of provisions on interim measures may, once it is completed, contribute to resolution of such issues by additions and clarifications.

Residual procedural differences between common and civil law countries

Finally, some discrepancies in court reasoning can be attributed to the procedural differences and even different procedural cultures in common law and civil law countries. Only one such difference should be noted in the context of arbitral jurisdiction: in common law jurisdictions, if a plea as to the lack of jurisdiction (owing to the existence of the arbitration agreement in the same matter) is successfully raised, the court will stay the proceedings. In civil law, the court will not stay the proceedings, but dismiss the claims regarding which the arbitration was agreed upon as inadmissible. Such differences in approach may sometimes have far-reaching effects on the case law and even some substantive reasoning of the courts. As an illustration, a well-covered debate in Canadian courts regarding whether stay of proceedings should be mandatory, or whether it should be granted under a residual discretion that is enjoyed by the courts is imaginable only in a common law jurisdiction. Only gradually, by slow approximation of laws and practices, can we expect that these differences will become less marked, and only then can we fully expect that a sufficiently high level of harmonisation in the application of the basic rules of international commercial arbitration will be achieved.