

ARBITRAL JURISDICTION

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This article considers the respective roles conferred on courts and tribunals by the Arbitration Act 1996 for resolving disputes over arbitral jurisdiction. A challenge to the validity and scope of an alleged arbitration agreement is a standard choice for a nervous or obstructive disputant. The legal framework established under the Act for responding to such challenges should be interpreted so as to maintain the integrity and efficiency of arbitration, and to deter obstructive behaviour. Pursuit of these aims in turn requires giving priority to the role of the tribunal. To this end, this article argues that the court should adopt a prima facie review standard when dealing with an application to stay litigation proceedings brought in breach of an arbitration agreement. It further argues that in the ordinary course, a court dealing with a challenge to a tribunal's decision on jurisdiction should adopt a review, and not a rehearing, approach.

I. INTRODUCTION

The “competence-competence” principle empowers an arbitration tribunal to rule on its jurisdiction, and is affirmed in Article 16(1) of Schedule 1 to the Arbitration Act 1996 (the “Act”). It is supported by the separability principle, also found in Article 16(1), which treats an arbitration clause in an underlying contract as distinct from the contract, allowing the clause, and therefore jurisdiction, to survive invalidity or termination of the contract. Although they serve different functions, these principles are together intended to give primary responsibility to the tribunal with respect to determining whether it has jurisdiction.¹ Courts are not excluded however, and for tactical or genuine reasons parties often challenge the validity and scope of arbitration agreements in judicial proceedings. Intervention by the court on jurisdiction questions is necessary to protect the parties against participation in an arbitration which is founded upon a defective arbitration agreement. Nonetheless, the extent of the court's intervention can have important consequences on the efficiency of arbitration.

This article considers the respective roles of courts and tribunals when dealing with objections to arbitral jurisdiction. It begins in Part II by explaining the regulatory framework for resolving disputes over arbitral jurisdiction, and the question whether courts or tribunals should resolve such disputes. This question is developed further in Parts III and IV. Part III deals with the extent of the court's obligation to stay litigation brought in breach of an arbitration agreement, and the standard of review the court should adopt to determine the validity or scope of the arbitration agreement in stay proceedings. Part IV considers the court's powers to review tribunal rulings on jurisdiction. There is now a reasonable number of relevant New Zealand cases in which jurisdiction problems have been addressed. A broad comparative

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1 JDM Lew “Achieving the Dream: Autonomous Arbitration” (2006) 22(2) *Arb Int'l* 179, 193.

perspective to the Act and the cases decided under it is adopted. This is consistent with the harmonisation objective of the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) upon which the Act is based,² and the objective of encouraging the use of arbitration in New Zealand to resolve domestic and international disputes.³ It seeks to demonstrate that contrary to prevailing practice, the Act’s provisions that regulate jurisdiction disputes can and should be applied so as to maintain the priority of the tribunal’s role.

II. THE LEGAL FRAMEWORK FOR RESOLVING JURISDICTION ISSUES

A. Challenges to Arbitral Jurisdiction

A challenge to jurisdiction may arise over the validity of an arbitration agreement and attack the whole basis on which the tribunal purports to act. For example, a challenge may question the legality or proper execution of the agreement, or assert a waiver of the right to arbitrate or failure to observe requirements in the underlying contract with respect to assignment or time limits.⁴ Or, a challenge may only concern the tribunal’s jurisdiction over certain subject matter, and question whether some of the claims before the tribunal are included within the scope of the arbitration agreement, or whether the tribunal has gone beyond the particular questions submitted to it for resolution.

At a very applied level, resolution of doubt over arbitral jurisdiction is important, because it determines whether or not the arbitration can go ahead. The legal question can be simply put, “is there an agreement to arbitrate this dispute”, but answering the question in any given case may consume as much time and energy as resolution of the underlying dispute. An arbitration agreement usually takes the form of a clause in an underlying contract between the disputing parties, or less frequently, a separate submission entered into after a dispute has arisen. Limited forms of statutory arbitration aside,⁵ without an arbitration agreement, there can be no valid arbitration; neither the parties nor the courts can be expected to defer to a tribunal in respect of matters that were never submitted to it. Conversely, a valid agreement establishes the exclusive jurisdictional basis for the tribunal to give its ruling in a legally

2 See United Nations General Assembly Resolution 40/72 (11 December 1985, adopted without vote). “UNCITRAL” is the abbreviated name for the United Nations Commission on International Trade Law. The Model Law has been enacted, subject to varying levels of modification, in more than 50 jurisdictions. For a list, see www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

3 See Arbitration Act 1996, s 5(a); New Zealand Law Commission *Improving the Arbitration Act 1996* (NZLC R83, Wellington, 2003) x.

4 For further examples, see W Park, “The Arbitrator’s Jurisdiction to Determine Jurisdiction” in ICCA Congress Series No. 13, *International Arbitration 2006: Back to Basics?* (2008), 96-111.

5 Various statutes prescribe arbitration to resolve disputes concerning their subject matter, for example, Biosecurity Act 1993, s 162A. Because a statutory arbitration lacks consent, it is questionable whether it really is an arbitration in the true sense (see A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (2004) 295). This article does not concern statutory arbitrations.

binding award with *res judicata* effect.⁶ The award may invoke the coercive powers of the judiciary for enforcement purposes in the face of non-compliance by the losing party, which distinguishes arbitration from other modes of non-judicial dispute resolution and further explains why the courts have a legitimate interest in ensuring that the tribunal proceeds with a valid mandate.⁷

In international commercial transactions, the importance of responding to jurisdiction challenges correctly is amplified by virtue of the fact that arbitral awards enjoy much wider international recognition and enforcement than judgments of national courts, as a result of the Convention on the Recognition and Enforcement of Arbitral Awards 1958 (more commonly known as the “New York Convention”).⁸ A “bad” decision against jurisdiction may deny a claimant in an international dispute of its only effective remedy, and more broadly, may impact negatively on the forum’s reputation as a venue for international arbitration.

B. The Tribunal’s Powers

Two principles provide a platform for the tribunal to deal with disputes over arbitral jurisdiction. The first is “competence-competence”,⁹ which confers on the tribunal jurisdiction to rule on its jurisdiction when the validity or scope of the agreement to arbitrate is in doubt. The power is necessarily derived from the applicable national law, rather than the disputed arbitration agreement, as it provides a basis for the tribunal to rule the agreement is invalid without contradicting itself. Competence-competence is widely codified into national arbitration laws¹⁰ and institutional rules,¹¹ although, as discussed below, the extent of its application under different laws varies. As a consequence of the tribunal having power to rule on its jurisdiction, neither the parties nor the tribunal is required to ask a court to resolve jurisdiction questions.

The second principle is separability, which treats the arbitration clause as an autonomous agreement that survives the invalidity or termination of the main underlying contract, and requires argument in jurisdiction challenges to be addressed to facts and law relevant only to the validity of the clause. The independent existence of the arbitration agreement maintains the tribunal’s jurisdiction to render a valid award even if that award finds the underlying contract to be invalid for some reason. Separability is also widely adopted, in

6 Arbitration Act 1996, Schedule 1, Article 35, subject to Arbitration Act 1996, Schedule 1, Articles 34 and 36, and Schedule 2, Clause 5.

7 The courts may also be required to give effect to statutory limitations on substantive arbitral jurisdiction that cover categories of disputes deemed unsuitable, for public policy reasons, for settlement by private arbitration (Arbitration Act 1996, s 10).

8 United Nations Convention on the Recognition and Enforcement of Arbitral Awards, (10 June 1958) 330 UNTS 38.

9 The English “competence-competence” derives from the German “Kompetenz-Kompetenz”, known in French jurisprudence as “compétence de la compétence”. In each case the phrase refers to the tribunal’s jurisdiction to decide its jurisdiction.

10 The competence-competence principle and its codification under national laws is discussed further in Part III below. On the development of the principle under English law, see P Gross QC, “Competence of Competence” (1992) 8(2) *Arb Int’l* 205.

11 For example ICC Rules of Arbitration, Article 6(2).

some form, in national arbitration laws¹² and institutional rules.¹³ It has its common law origins in *Heyman v Darwins Ltd*, in which Lord MacMillan accepted that repudiation of a contract would not affect the effectiveness of the arbitration clause contained within it.¹⁴ The prevailing view after *Heyman* was that separability did not empower arbitrators to decide whether a contract was void, since nothing could come from nothing.¹⁵ However, such logic gave way to pragmatism in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*, in which the English Court of Appeal held that separability does enable a tribunal to decide whether a contract is void ab initio for reasons including initial illegality.¹⁶

The separability principle is now codified in England in section 7 of the Arbitration Act 1996,¹⁷ and was recently considered by the House of Lords in *Fiona Trust & Holding Corp v Privalov*.¹⁸ According to Lord Hoffmann, section 7 “shows a recognition by Parliament that, ... businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way”.¹⁹ It is unlikely that commercial expectations of arbitration have changed that much over recent decades, but the law now recognises the need to give greater deference to those expectations, to further the prevailing policy objectives in favour of promoting arbitration. Thus litigation on jurisdictional grounds is discouraged, by the strong endorsement of separability, to further those objectives. The culmination of *Harbour v Kansa* and *Fiona Trust* is that an arbitration clause can be void or voidable only on grounds that relate directly to the clause. There may be instances where the ground on which the contract is invalid also extends to directly impeach the arbitration clause, but these seem to be limited to grounds that deny the contract’s initial existence for total absence of any “meeting of the minds”, such as forgery, or non est factum.²⁰

12 For example Model Law, Article 16(1) (discussed below).

13 For example ICC Rules of Arbitration, Article 6(4).

14 *Heyman v Darwins Ltd* [1942] AC 346, 374.

15 For example *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd’s Rep 63; *Ashville Investments Ltd v Elmer Contractors* [1989] QB 488.

16 *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701. The Court observed that the public policy giving rise to an illegality rule may require the arbitration clause to be struck down together with the underlying contract (at 724, per Hoffmann LJ). See further S Gee, “The Autonomy of Arbitrators, and Fraud Unravels All” (2006) 22(3) *Arb Int’l* 337, 352; A Mourre, “Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator” (2006) 22(1) *Arb Int’l* 95, 99.

17 The Act applies in England and Wales. For convenience, it is referred to as English legislation here.

18 *Fiona Trust & Holding Corp v Privalov* [2007] 4 All ER 951. Lord Steyn described separability as “part of the very alphabet of arbitration law”: *Lesotho Highlands Development Authority v Impregilo SpA* [2005] 3 All ER 789, para 21.

19 *Fiona Trust & Holding Corp v Privalov* [2007] 4 All ER 951, para 10.

20 *Ibid*, paras 17-18, per Lord Hoffmann and paras 32-35, per Lord Hope. For critical commentary, see A Rushworth, “The Scope and Validity of Arbitration Agreements” (2008) 124 *LQR* 195. The arbitration clause in *Albon v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124 was inseparable due to alleged forgery.

In the New Zealand Arbitration Act, the separability principle appears in Article 16(1) of Schedule 1, to support the exercise of the tribunal's power to rule on its jurisdiction (also contained in Article 16(1)). As codified in the Act, the device is available to the tribunal and not the court. Despite this apparent limitation, the only sensible approach to separability must be that it applies to the validity of an arbitration clause regardless whether a court or tribunal is asked to rule on jurisdiction.²¹ The location of the principle in Article 16 does however support the general contention developed below that the tribunal should ordinarily have primary responsibility to respond to jurisdiction challenges.

C. The Court's Powers

The "who decides" question asks whether a court or tribunal should decide if arbitral jurisdiction is established or not. Under the Act, if a court is seised of a dispute, a party may seek a stay of the litigation under Article 8(1) on the ground that the parties agreed to arbitrate, and the court must decide whether to send them to arbitration. A tribunal, for its part, may respond to a jurisdiction challenge in a preliminary ruling, or in its final award (Article 16(3)). Both preliminary rulings and awards are reviewable by the court.²² Since both the courts and tribunals have roles to play under the Act's regime, the short answer to the "who decides" question is both courts and tribunals, with the courts having the last word to satisfy the requirements of logic and justice. Beyond this remain important unresolved issues, such as who should decide first, and how much deference should be given by a court to a ruling on jurisdiction made by a tribunal. This article deals with these two specific issues in turn, focusing on the first in Part II, and on the second in Part III.

There is now a strong policy internationally to encourage and facilitate arbitration as an autonomous dispute settlement mechanism. There is also a strong policy in favour of retaining the residual supportive role of the courts in the arbitration process. These policies can easily come into conflict – an expansive judicial sphere of influence in arbitrations will typically have unhelpful practical consequences on the cost, duration and privacy of dispute resolution, and on party autonomy, while a confined one risks a loss of confidence in arbitration and the court system. Lord Mustill once described the relationship between national courts and arbitral tribunals as being mutually supportive, as giving rise to a "relay race" in which one passes the baton to the other according to the nature of the task.²³ He also conceded however, that in practice, "the position is not so clear-cut".²⁴

21 See H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 305. In *Yawata Ltd v Powell* [2000] DCR 334, Judge Willy rejected the plaintiff's contention that the Contractual Remedies Act 1979 limited the application of separability, and confirmed the survival of the arbitration clause in proceedings for a stay under Arbitration Act 1996, Schedule 1, Article 8(1).

22 Arbitration Act 1996, Schedule 1, Articles 16(3), 34(2)(a)(i), (iii), (iv) and 36(1)(a)(i), (iii), (iv),.

23 A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (2004) 295, 391.

24 *Ibid.*

III. WHO DECIDES FIRST? THE COURT'S ROLE UNDER ARTICLE 8(1)

Article 8(1) is central to the effectiveness of arbitration because it establishes the rule that a court shall not decide on the merits of a dispute covered by an arbitration agreement, and sets out the grounds upon which a court may review the agreement's validity for the purpose of a stay application. This Part first addresses the level of review that a court should adopt when dealing with a stay application under Article 8(1). This includes a discussion of the different options, a comparative analysis of the concerns given priority under French, Swiss and English laws, and an examination of the relevant Model Law drafting history. Next, it considers the substantive scope of review permitted by Article 8(1). An examination of practice under Article 8(1) of the Model Law, including in New Zealand law, and some conclusions, then follow.

A. *Judicial Options Concerning the Level of Review under Article 8(1)*

When faced with a stay application under Article 8(1), a court can conceivably approach its task in one of three ways. It can adopt a full review approach and rule on the jurisdiction challenge, or refer the issue to the tribunal for determination under Article 16 in all cases, or refer the issue to the tribunal if a valid arbitration agreement *prima facie* exists. If a party seeks a stay of litigation proceedings, then applying the first option, the court will decide first (and finally) on jurisdiction. Under the second option, the tribunal will decide first. Under the third option, the tribunal may decide first, if the court exercises a discretion to refer the jurisdiction challenge. There is nothing in the literal text of Article 8(1) that dictates to the court which of these options must be followed. The challenge for courts in deciding which option to adopt is to balance promoting arbitration, preventing tactical obstruction of arbitration, and avoiding the duplication of proceedings.

1. *The "negative effect" of competence-competence*

The who decides first question can be analysed in terms of the so-called "negative effect" of competence-competence, which advances the third option above. The positive effect of competence-competence refers to the tribunal's power to rule on its jurisdiction, which has already been described. The negative effect, more controversially, takes the competence-competence principle a step further than its positive effect by establishing a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions. It has a negative or restraining effect on the court, whose role is generally deferred to subsequent review of the tribunal's decision.²⁵ When applied to stay applications, negative effect obliges the court to conduct a provisional and high level review of the arbitration agreement, and refer the parties to arbitration if satisfied of the agreement's *prima facie* effectiveness. Applying negative effect, in most cases, the tribunal will have the first opportunity to hear full substantive argument as to its jurisdiction.

At first, negative effect might seem excessive, or too zealous, in its pro-arbitration inclination. However, the reasons for negative effect are largely driven by efficiency considerations, and the commercial imperative for an

25 See generally E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 401.

efficient dispute settlement mechanism is highly relevant to shaping arbitration law. Rules and procedures should minimise, as much as possible, the extent to which time and energy is consumed with jurisdiction questions. The leading proponent of negative effect, Emmanuel Gaillard, has focused on the prevention of obstruction as justification for embracing the concept.²⁶ His argument recognises that it is well known that litigating parties seek tactical advantages,²⁷ and that challenging jurisdiction is an effective way to delay an arbitration for tactical reasons.²⁸ Once a dispute has arisen, a party who is bound by an arbitration agreement will often contest the tribunal's jurisdiction because it now finds arbitration inconvenient for some reason,²⁹ or because it simply wants to interfere with the progress of the proceedings. If the party objecting to jurisdiction is able to fully argue the matter in court, and the court rules in favour of jurisdiction, the arbitration may well be delayed for months or even longer.

Closing-off opportunities for recalcitrant respondents to exploit judicial proceedings should increase the overall effectiveness of arbitration, and minimise the abuse of legal rights. The notion of one-stop dispute settlement is based on an assumption that commercial parties (when entering into their contracts) are unlikely to want some disputes between them arbitrated and others litigated. Whether a challenge is obstructive or genuine, one-stop dispute settlement may be encouraged, not only through separability and a liberal interpretation of arbitration agreements,³⁰ but also through a restrained judicial approach to stay applications that allows tribunals to rule on jurisdiction issues.

Other reasons in favour of negative effect reflect the specialised nature of arbitration law, which is often overlooked. First, most arbitrators ought to have expertise in arbitration law principles relevant to interpretation of arbitration agreements,³¹ including, in appropriate cases, the international context of

26 E Gaillard, "The Negative Effect of Competence-Competence" (2002) 17(1) Mealy's International Arbitration Report 27. (Gaillard has written extensively on the subject in French.)

27 On obstructionism in arbitration generally, see W Park, "Arbitration's Discontents: Of Elephants & Pornography" (2001) 17(2) Arb Int'l 363.

28 J D M Lew, L Mistelis and S M Kröll, *Comparative International Commercial Arbitration* (2003) 331.

29 Once a dispute has arisen, parties' attitudes to arbitration may change. For example, a party that finds itself in the position of respondent may consider the relative speed of arbitration inconvenient, or may prefer the legal certainty provided by judicial appeals. A claimant may find the effort involved in appointing the tribunal a frustrating impediment to recovering its losses.

30 See n 31 below.

31 The liberal interpretation of arbitration clauses was admittedly given a judicial boost by the House of Lords in *Fiona Trust & Holding Corp v Privalov* [2007] 4 All ER 951, para 13, per Lord Hoffmann, and para 26, per Lord Hope, affirming the judgment of the Court of Appeal *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] 2 Lloyd's Rep. 267; [2007] 1 All ER (Comm) 891, para 34, per Longmore LJ. These rulings depart from earlier authorities in which a more technical approach had been taken to interpreting the particular wording used in arbitration clauses, an approach that the Court of Appeal frankly dismissed as "sterile" (para 18, per Longmore LJ). A liberal interpretation advances one-stop dispute settlement.

arbitrating transnational disputes.³² In contrast, when courts rule on jurisdiction, domestic contractual law analysis often follows,³³ although principles relevant to determining consent to arbitration are not necessarily the same as general principles of contract formation. Domestic contractual law analysis also detracts from the harmonising objective being forged through international initiatives like the Model Law. As Shackleton notes, “arbitration provisions sometimes risk legal assessment conducted from a judicial perspective with reference to norms and imperatives that are not relevant to arbitral jurisdiction. This confusion of domestic judicial technique and arbitration is detrimental to support for arbitration”.³⁴ An approach to Article 8 that facilitates tribunal rulings on jurisdiction should also develop the skill base of the arbitration profession, which advances the objectives of the Act to encourage arbitration and limit judicial intervention.³⁵ Finally, if and when a court reviews the tribunal’s ruling, it may do so with the benefit of the tribunal’s reasoning, perhaps conserving judicial resources.

The counter-argument to negative effect would appreciate that, even in a litigious world, not every objection to jurisdiction will be motivated by an intention to sabotage the arbitration. If the challenge is hopeless and purely obstructive, it should be dealt with through costs sanctions. If a court seised of the dispute fully and finally rules on jurisdiction applying the first option outlined above, then the parties will not have to risk wasting time and money in arbitration proceedings which are ultimately found to be based on an invalid arbitration agreement. The respondent who genuinely resists arbitration is not forced to go through with the arbitration only to have confirmed at the end of the process that the tribunal lacked jurisdiction, most likely leading to re-litigation of the dispute in court and wasteful duplication of effort. This problem of duplication is also a key flaw of the second option outlined above, under which the court would always remit jurisdiction challenges to tribunals for a preliminary ruling even when it is clear that the arbitration agreement is defective.

On the downside of the full review option, if the reviewing court rules in favour of jurisdiction, a full judicial hearing on threshold jurisdiction issues will add considerable expense to dispute resolution.³⁶ There is also a real

32 The New York Convention’s favourable rules on enforceability of arbitration agreements and awards may support an intention to arbitrate, rather than litigate, transnational commercial disputes.

33 For example, contract law principles were applied to determine the scope of the arbitration clause, while arbitration law principles were considered unnecessary, in *AG v Feary* 16/6/06, Clifford J, HC Wellington CIV-2006-485-610. A similar approach was taken in *McNaughton v Dobson* 4/5/06, AJ Faire, HC Hamilton CIV-2005-419-1629. In *Downing v Al Tameer Establishment* [2002] EWCA Civ 721; [2002] 2 All ER (Comm) 545 conventional contract principles were applied to analyse the disputed arbitration agreement, although the Court admitted such principles may not apply easily to secondary contracts such as separable arbitration clauses (see para 25, per Potter LJ).

34 S Shackleton, “Arbitration Without a Contract” (2002) 17(9) Mealy’s International Arbitration Report 25.

35 See above n 3.

36 See *Welex AG v Rosa Maritime Ltd* [2002] 2 Lloyd’s Rep 81. Steel J upheld arbitral jurisdiction after carrying out a full investigation into the validity of the documents, but was also highly critical of the costs of the proceeding as being “disproportionate to the sums at stake, let alone when incurred in the context of a threshold jurisdiction point” (at 85).

possibility that a court's final ruling on the effectiveness of the arbitration agreement will predetermine the merits of the dispute referred to the tribunal, or will at least have an influence on the outcome of the arbitration.³⁷ Application of the prima facie standard of review under the third option is less likely to lead to court rulings, and less likely therefore to result in this unintended consequence.

The weighting of the court's options involves a degree of guesswork about the final outcome, and working backwards from a position of hindsight. Some jurisdiction challenges will have merit so that a full and final review will be the most efficient option, whereas other challenges will not. This makes a general approach to Article 8(1) applications difficult, and has led some to assert a "first in time" compromise.³⁸ Under this approach, neither a tribunal nor a court determination is inherently preferable, it is simply that the first tribunal to be seised of the challenge ought to be the first to decide it. Yet a first in time approach may encourage undesirable behaviour and benefit the quick. It does not adequately take account of the problems with the first and second options either. The third option of prima facie review, as it involves a discretion, is more flexible. Its main disadvantage, the risk of duplication, is reasonably limited, since the reviewing court can still proceed to hear full argument on jurisdiction if the party resisting arbitration can show that the arbitration agreement is clearly ineffective.

2. Comparative positions

English law has tended to favour the first option, of full and final court review in stay applications, although recent case law indicates a shift towards the third. The second option of automatic remission to the tribunal exists, to a degree, uniquely in French law. French law also recognises the third option, and together with Swiss law, clearly prefers questions regarding the existence, validity or scope of the arbitration agreement to be determined initially by the tribunal. France, Switzerland and England are not Model Law jurisdictions (some consideration of Model Law jurisdictions is made below). That said, all three are leading centres for international commercial arbitration, and their laws are influential for this reason. Swiss and English rules on stay applications borrow language from the Model Law, and are relevant to framing a New Zealand approach for this reason also.³⁹

Under French law, if a tribunal has been established, then the court must refuse jurisdiction (ie its own) if the dispute is brought before it. If a tribunal

37 In *Coastal Tankers Ltd v Port Wellington Ltd* 18/2/99, HC Wellington CP32/99, an application for an interim injunction and an application for a stay of litigation were before the Court. Doogue J noted the importance in such cases of not expressing an opinion that might predetermine the arbitration. The risk of predetermination has been well recognised in cases dealing with applications for interim measures.

38 For example, A Briggs, "Construction of an Arbitration Agreement; Deconstruction of an Arbitration Clause" [2008] 1 LMCLQ 1, 4; see also P Green and B Hunt, *Green & Hunt on Arbitration Law & Practice* (2006) ARSch1.8.11C.

39 For an overview of other jurisdictions' approaches to the tribunal's competence-competence, see for example W Park, "The Arbitrator's Jurisdiction to Determine Jurisdiction" in ICCA Congress Series No. 13, *International Arbitration 2006: Back to Basics?* (2008) 70-89; E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 407-410.

has not been established, then the court must still decline jurisdiction to hear the dispute unless the arbitration agreement is manifestly void.⁴⁰ The distinction between situations in which the tribunal has or has not been established is based on the assumption that a party contesting jurisdiction in court after a tribunal has been established is more likely to be acting in bad faith, ie deliberately increasing costs and pressure to settle, and adding delay, by its jurisdiction challenge. The duty to refer the parties to arbitration in this situation, without any review of the arbitration agreement at all, is intended to address this risk. Typically for France, which is well known for its support of arbitration, the approach establishes a strong negative effect of competence-competence, requiring a minimised court role at the outset of proceedings to enable the tribunal to rule on its jurisdiction as an initial matter.

Both the Swiss Private International Law Act,⁴¹ and the English Arbitration Act,⁴² use the Model Law language in their provisions on stay applications: that is, judicial proceedings cannot proceed unless the arbitration agreement is “null and void, inoperative, or incapable of being performed”. Swiss courts have interpreted the Swiss provision as requiring a stay unless the agreement is *clearly* null and void, inoperative, or incapable of being performed, such that the court’s role is limited to verifying the prima facie effectiveness of the agreement.⁴³ Swiss law departs from French law in two important respects. First, Swiss courts review arbitration agreements regardless whether the tribunal has been established or not. Second, in international arbitrations where the seat of the arbitration is outside Switzerland, Swiss law requires a full examination of the arbitration agreement’s validity.⁴⁴

A full review of jurisdiction questions in stay applications has been the conventional approach in England, where there has been a notable sense of judicial reluctance to send the parties off to arbitration while any uncertainty remained over the tribunal’s jurisdiction.⁴⁵ More recently, the Court of Appeal has stressed the tribunal’s competence-competence, casting doubt on the earlier views as to the court’s role when dealing with stay applications under section 9 of the English Act. Longmore LJ in *Fiona Trust* (at the Court of Appeal stage) reviewed the Act’s provisions for resolving jurisdiction questions and concluded:⁴⁶

40 New Code of Civil Procedure (France), Article 1458. Unlike other parts of the French Code’s chapter on domestic arbitration, the *Cour de cassation* (the highest French court of original jurisdiction) has confirmed that Article 1458 applies to both domestic and international arbitrations: *Société Eurodif v République Islamique d’Iran* (1989) *Revue de l’Arbitrage* 653.

41 Private International Law Act (Switzerland), Article 7(b).

42 Arbitration Act 1996 (UK), s 9(4).

43 See E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 409 (citing *Fondation M v Banque X* (1996) *ASA Bulletin* 527).

44 *Compagnie de Navigation et de Transports SA v MSC Mediterranean Shipping Company SA* (1996) XXI YBCA 690. This approach has been questioned. See for example F Bachand, “Does Article 8 of the Model Law Call for a Full or Prima Facie Review of the Arbitral Tribunal’s Jurisdiction?” (2006) 22(3) *Arb Int’l* 463, 474-476.

45 For example, *Law Debenture Trust Corp Plc v Elektrim Finance BV* [2005] EWCH 1412; [2005] 2 All ER (Comm) 476, para 36; *Downing v Al Tameer Establishment* [2002] EWCA Civ 721; [2002] 2 All ER (Comm) 545, para 34, per Potter LJ.

46 *Fiona Trust (CA)*, above n31; affirmed by the House of Lords in *Fiona Trust*, above n18.

This combination of sections shows, together with the prescriptive section 9(4), that it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute.

Longmore LJ acknowledged the possibility raised in earlier cases that the court has a discretion to stay litigation without finally ruling on jurisdiction, on the basis that it could be left to the arbitrators to determine their jurisdiction in the first instance.⁴⁷ He then sought to explain that the discretion will arise if there is truly a question whether there is a valid arbitration agreement or not. No such question arose in *Fiona Trust*, because the disputed arbitration clause was clearly separable (under the Court's wide view of separability) and a stay under section 9 was therefore mandatory. However, if there were a doubt over the validity of the arbitration clause, then in that case the Court considered it would have a discretion to decide on jurisdiction.⁴⁸ In sum, reference to the tribunal in cases of doubt is in principle preferable to the exercise of the discretion. Certain factors may weigh in favour of the exercise of the discretion, although it was unnecessary for the Court to explore what these might be on the given facts. The House of Lords emphatically endorsed the Court's rulings regarding the existence and scope of the particular clause at issue in the case, but said nothing further regarding the relative priority of the court's and tribunal's roles with respect to resolving jurisdiction problems.

Outside of the context of stay applications, the English Act entitles a party to apply for a court ruling on jurisdiction under section 32 if the other party agrees to the application, or with the tribunal's permission.⁴⁹ The limitations on the availability of court review under section 32 support the negative effect of competence-competence,⁵⁰ while the possibility of court review enables an early and final decision on jurisdiction to be made with the parties' or tribunal's consent. If a party has never participated in the arbitration proceedings, then the English Act takes the view that the party's objection to jurisdiction is more likely to be genuine,⁵¹ and the objecting party has a direct right (that is, without the other party's or tribunal's consent) to apply to the court under section 72 for a declaration that there is no arbitration agreement.⁵² The Court of Appeal in *Fiona Trust* construed this action as having limited application, given the clear policy of limited judicial intervention expressed in

47 See *Birse Construction v St David* (1999) BLR 194; (1999) 70 ConLR 10 (reversed on different grounds (unreported, 5 November 1999)); endorsed by the Court of Appeal in *Ahmed Al Naimi v Islamic Press Agency* [2000] 1 Lloyds Rep 522. See also *Downing*, above n33 (para [32], Potter LJ); *Law Debenture Trust*, above n45 (para [36]).

48 *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] 2 Lloyd's Rep. 267; [2007] 1 All ER (Comm) 891, para 38, per Longmore LJ.

49 Arbitration Act 1996 (UK), s 32(2).

50 See E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 410.

51 F Bachand, "Does Article 8 of the Model Law Call for a Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22(3) Arb Int'l 463, 465.

52 Arbitration Act 1996 (UK), s 72(1). Similarly, s 1032(2) of Germany's Code of Civil Procedure entitles a party to bring a direct court action questioning the arbitration agreement, but only before constitution of the tribunal.

section 1 of the English Act.⁵³ Nonetheless, sections 32 and 72 provide additional routes for judicial intervention that do not exist under either the French or Swiss regimes.

3. Model Law drafting history

(a) Drafting debates

Given that Article 8(1) of the Act derives from the Model Law, the Model Law's drafting history is highly relevant to its interpretation.⁵⁴ Drafting took place within an international committee (called a "Working Group") comprised of representatives from a diverse range of legal traditions, tasked with agreeing upon a model legislative text for international commercial arbitration that was acceptable to all of them. Comments from delegates concerning the drafting of Article 8 reflect the divergence of opinion between them regarding the scope to be afforded to the tribunal's competence-competence. The view of the United Kingdom was that the court should be able to decide from the beginning whether the arbitration should go ahead, preferring to protect the respondent against defective arbitration proceedings than the claimant against the risk of delay.⁵⁵ The United States delegation favoured allowing the tribunal to assess the validity of the arbitration agreement as a preliminary matter, suggesting that it was not a matter of being partial to either party but of supporting the arbitration process.⁵⁶ As finally drafted, Article 8(1) of the Model Law provides:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Early on in the Working Group's deliberations, a suggestion was made to rephrase the text to read "*manifestly* null and void", in order to limit the extent to which a court could review the validity of the arbitration agreement.⁵⁷ The addition of the word "*manifestly*" would have clarified that in principle, a *prima facie* finding of validity was all that was necessary to justify a referral to arbitration, and clearly supported the view that the tribunal should have the first opportunity to rule on its jurisdiction except in cases of patent invalidity.⁵⁸ However, the suggestion was not adopted.

53 See *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20; [2007] 2 Lloyd's Rep. 267; [2007] 1 All ER (Comm) 891, paras 34-36, per Longmore LJ; affirmed *Fiona Trust & Holding Corp v Privalov* [2007] 4 All ER 951.

54 Section 3 of New Zealand's Arbitration Act 1996 expressly permits reference by the courts, for the purpose of interpreting the Act, to UNCITRAL documents relating to the preparation of the Model Law. Section 5(b) of the Arbitration Act states that among the Act's purposes is the promotion of international consistency of arbitral regimes based on the Model Law.

55 H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 329.

56 *Ibid.*

57 *UNCITRAL Third Working Group Report* (28 March 1983) A/CN.9/233, para 77.

58 H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 315: "In support of

The Working Group was also divided on the issue whether arbitral proceedings should be suspended pending the outcome of the court's decision on the stay application.⁵⁹ Some delegates considered it unrealistic to expect the tribunal to continue while the issue of its jurisdiction was being considered by a court, and wished to avoid the expense of concurrent proceedings; others argued in favour of allowing both the initiation and the continuation of concurrent arbitral proceedings to promote prompt dispute resolution, and to deter Article 8(1) applications for purely dilatory reasons. Proposals in favour of the court suspending its proceedings pending an initial tribunal determination on jurisdiction were rejected in favour of Article 8(1). Instead, the view which won through on this issue was to allow for the possibility of concurrent hearings.⁶⁰ Accordingly, Article 8(2) of the Model Law states:

Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

(b) Subsequent debates over the exclusion of “manifestly”

The Working Group's decision not to include “manifestly” before “null and void” is understood by many commentators to mean that the drafters rejected the prima facie level of review for Article 8(1) purposes.⁶¹ However, given the level of disagreement within the Working Group about how efficient arbitration should best be promoted, which is underscored by reading the drafting debates in their entirety, relying on the exclusion of “manifestly” to require courts carrying out a full review gives too much weight to just one aspect of the relevant legislative history.

Furthermore, the proposal to include the word “manifestly” took place in the context of discussions over the possibility of conferring on the parties a direct right to obtain a court ruling on the tribunal's jurisdiction at any stage of the arbitration proceedings. An early draft of Article 8 provided for such a direct right, and the proposal to add “manifestly” to that draft was an attempt to scale back the then wide scope of the court's ability to intervene. In the end, the direct right of action was abandoned in favour of the more limited ability of the court to rule on jurisdiction only when seised of the merits of a dispute. The decision to limit Article 8(1) to stay applications was based on respect for the tribunal's competence-competence, in Article 16 of the Model Law. In this light, Bachand contends for a strong application of negative effect to Article 8(1), so as not to undermine the tribunal's role in Article 16:⁶²

[T]he system ultimately adopted in Article 16 of the Model Law is founded on the general idea that the arbitral tribunal ought to have the opportunity to make the first

that idea it was pointed out that it would correspond with the principle to let the arbitral tribunal make the first ruling on its competence, subject to later control by a court.”

59 Ibid, 306.

60 Ibid, 306 and 331.

61 For example, P Binder, “International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions” (2005) 91; J D M Lew, L Mistelis and S M Kröll, *Comparative International Commercial Arbitration* (2003) 349.

62 F Bachand, “Does Article 8 of the Model Law Call for a Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?” (2006) 22(3) *Arb Int'l* 463, 473.

ruling on any objection to the arbitration agreement's validity or applicability. And this finding is of crucial importance, because it entails that Article 8(1) must be interpreted as calling for prima facie control of arbitral jurisdiction. Otherwise, the internal coherence of the Model Law would be seriously imperiled, as Article 16 would recognise to the arbitral tribunal a priority – insofar as jurisdictional rulings are concerned – that would be denied by Article 8(1).

In their commentary on the Model Law, Holtzmann and Neuhaus report that the prevailing view of the Working Group was for jurisdiction questions to be settled by the court before any referral to a tribunal whose jurisdiction was in doubt.⁶³ Nonetheless, the authors also note that the operative words in Article 8(1) are intended to have the same meaning as Article II of the New York Convention.⁶⁴ The foremost authority on the Convention has stated that, in relation to Article II, “[h]aving regard to the ‘pro-enforcement bias’ of the Convention, the words should be construed narrowly and the invalidity of the arbitration agreement should be accepted in manifest cases only”.⁶⁵ Sanders maintains that the same philosophy should apply when the issue of jurisdiction arises in the context of applications under Article 8 of the Model Law: “[w]ould it not be more in line with the priority generally given to arbitration, to refer this issue first of all to the arbitrators?”⁶⁶

(c) Making sense of the compromise in the Model Law framework

Opinion on the question whether prima facie review is required under Article 8(1) of the Model Law thus appears to be split. On the one hand, there are those who say it is not required and rely (too much, it is suggested) on the exclusion of “manifestly”. On the other, there are those in favour of prima facie review who argue on the basis of the Model Law’s pro-arbitration policy and its framework for dealing with challenges to jurisdiction, which includes Article 16. Neither the drafting history nor the literal text resolves the potential conflict between the power of the court to determine whether there is a valid arbitration agreement under Article 8 and the power of the tribunal to rule on its jurisdiction under Article 16. The extent to which the reasons for prima facie review and the reasons for full review are able to be given effect within the Model Law’s compromise framework is considered next to shed further light on the issue.

As outlined earlier, the key policy consideration behind courts adopting the full review standard is to avoid the risk of duplication. To implement the policy, at the very least the objecting party ought to be able to directly obtain a court ruling on jurisdiction. To implement to policy completely, the arbitral

63 H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 303 and 315. See also *UNCITRAL Third Working Group Report* (28 March 1983) A/CN.9/233, para 77.

64 H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 303. Article II of the New York Convention obliges contracting states to recognise and enforce an arbitration agreement covered by the Convention unless the agreement is null and void, inoperative, or incapable of being performed. Article 8(1) of the Model Law gives effect to this obligation.

65 A J van den Berg, *The New York Arbitration Convention of 1958* (1981) 155, and at 168: “cases of doubt are to be resolved by the arbitrator rather than the court”.

66 P Sanders, “UNCITRAL’s Model Law on International and Commercial Arbitration: Present Situation and Future” (2005) 21(4) *Arb Int’l* 443, 447.

proceedings should be suspended while the court makes its decision. The Model Law provides for neither of these things, so the adoption of the prima facie standard under Article 8(1) would at most frustrate a policy that is implemented only to a moderate degree. The English Arbitration Act, as noted, does provide an objecting party with rights to directly challenge the arbitration agreement, and takes into account the potential for tactical abuses by imposing conditions on the exercise of those rights. Under the Model Law, there is no provision for direct action. Instead, the objecting party must either initiate litigation to test the water under Article 8(1), or wait to challenge a ruling made by the tribunal under Article 16. The tribunal is not obliged to suspend its proceedings pending the outcome of a stay application since Article 8(2) provides for concurrent proceedings, although suspension will often be likely in practice – particularly if the claimant is reluctant for the tribunal to continue due to the high cost of concurrent proceedings,⁶⁷ or there is serious doubt about jurisdiction.⁶⁸

The risk of duplication could have been better managed by obliging the tribunal to rule on its jurisdiction in a preliminary decision, which is then immediately reviewable by a court. Under the English Act, although the default position is that the tribunal decides which form its ruling will take, the parties can by agreement between themselves require the tribunal to provide a preliminary award as to its jurisdiction which may then be reviewed by a court.⁶⁹ Under the Model Law, the tribunal has a discretion whether to rule in a preliminary decision or in its award on the merits, allowing the tribunal to defer its decision on jurisdiction if it considers the question to be intimately tied to the merits. If both parties request the tribunal to give a preliminary ruling, the tribunal should accede to the request, but the text of the Model Law does not insist that the tribunal do so.

The main efficiency consideration in favour of prima facie review, as outlined earlier, is the prevention of obstruction. The Model Law attempts to minimise the potential for obstructive behaviour by limiting Article 8(1) to stay applications, and by allowing concurrent proceedings. However, if an obstructive respondent has a counter-claim, then it may pursue the counter-claim in court to force a wasteful application under Article 8(1). Regarding concurrent proceedings, as just noted, they are neither efficient nor effective. Either the parties have to bear the added cost of the concurrent proceedings (which is inefficient), or the tribunal suspends its proceedings pending the outcome of the court proceedings (which is ineffective against obstructive behaviour). The alternative solution to discourage and minimise the impact of weak objections is for the reviewing court to adopt the third option of prima facie review in Article 8(1) cases. This attracts the benefits for the development and promotion of arbitration already described, while reserving

67 P Binder, "International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions" (2005) 92.

68 H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 331.

69 Arbitration Act 1996 (UK), ss 31(4) and 67. The Swiss Act implies the tribunal should give a preliminary decision on jurisdiction, but that decision is only reviewable once the final award has been rendered.

to the court the ability to refuse the stay whenever there is clearly no arbitration agreement.

B. The Substantive Grounds of Review under Article 8(1)

The options considered in the previous section concern the intensity and finality of review a court should adopt under Article 8(1). A further sub-issue that arises in relation to the extent of the court's role under Article 8(1) concerns the meaning of the words used in Article 8(1) to establish the grounds of review, "null and void, inoperative or incapable of being performed". Specifically, there is a question whether the court should, when dealing with a stay application, engage in an interpretation of the scope of the arbitration agreement to determine its coverage over the particular dispute between the parties.

1. Model Law drafting history

The Model Law drafting history says very little about the meaning of the grounds for refusing to grant a stay in Article 8(1).⁷⁰ Referring to the drafting history, the Law Commission's 1991 report "Arbitration" suggests that "null and void" would extend to disputes that are not arbitrable or where relief can only be provided by a court.⁷¹ The Commission went on to say that null and void would extend to cases where the arbitration agreement is void, discharged, frustrated, suspended, or practically ineffective.⁷² Especially after taking into account the *Fiona Trust* approach to separability, it is difficult to imagine many situations in which the arbitration agreement, specifically, could be regarded as void.⁷³ According to van den Berg, "inoperative" would cover situations in which the arbitration agreement has ceased to have effect. Examples include waiver of the right to arbitrate, and failure to meet time limits for commencing a claim.⁷⁴ Van den Berg also suggests that "incapable of being performed" would apply to situations in which the arbitration agreement is ineffective from the outset, and gives as an example an arbitration clause that is too vaguely worded.⁷⁵

It is unclear from these offerings whether any of the Article 8(1) grounds apply to disputes concerning the interpretation of the scope of an arbitration agreement, apart from the example of vague wording, which would raise a question as to the agreement's existence. However, other provisions in the Model Law may imply that the interpretation of the agreement is for the tribunal to assess in the first instance, not the court in an Article 8(1) application. Article 16(2) sets out the procedure for the tribunal to rule on a

70 H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 305.

71 New Zealand Law Commission, *Arbitration* (NZLC R20, Wellington, 1991), para 310.

72 *Ibid.*

73 See N Pengelly, "Separability Revisited: Arbitration Clauses and Bribery – *Fiona Trust & Holding Corp v Privalov*" (2007) 24(5) *J Int'l Arb* 445 (discussing the Court of Appeal decision in *Fiona Trust* and its effect in narrowing the range of issues capable of being raised to challenge the validity of an arbitration clause).

74 A J van den Berg, *The New York Arbitration Convention of 1958* (1981) 158.

75 *Ibid.*, 159.

plea that it is exceeding the scope of its authority. Articles 34 and 36 provide that an award may be set aside or refused enforcement if it includes decisions beyond the scope of the submission to arbitration. In other words, these provisions, unlike Article 8(1), expressly deal with issues regarding the scope of arbitral jurisdiction under an otherwise valid arbitration agreement.

2. *Application of negative effect to interpretation issues*

It is well within the tribunal's authority to deal with disputes over the interpretation of the arbitration agreement, including determining whether some or all disputes between the parties are within the agreement's scope. It follows that if in any case the validity of the separate arbitration agreement is accepted, then the tribunal's jurisdiction to rule on scope questions should also be accepted. However, it is questionable whether the tribunal's responsibility to interpret should be exclusive. A court presented with a stay application under Article 8(1) has the same dilemma, in terms of prioritising itself over the tribunal, when it assesses the validity of an arbitration agreement as it has when it construes the agreement's scope. Always interpreting the scope of an arbitration agreement undermines the tribunal's competence-competence,⁷⁶ while always remitting interpretive tasks to the tribunal carries with it the risk of duplicated proceedings. Applying the prima facie review standard to all jurisdiction challenges, including challenges requiring interpretation of an arbitration agreement's scope, would be preferable, for the reasons outlined already in the discussion concerning the negative effect of competence-competence. Interpretation questions should be referred to the tribunal unless a dispute is obviously not covered by the terms of the arbitration agreement. Applying a presumption of one-stop dispute settlement, absent express exclusions, it should be the exception for the court or tribunal to find that a dispute is not covered.⁷⁷

C. *Application of Article 8(1) in Practice*

1. *Application in Model Law jurisdictions other than New Zealand*

Reflecting the ambiguity in the text, judicial approaches to the standard of review required by Article 8(1) Model Law have varied, so that arbitral authority has been given greater deference in some Model Law jurisdictions as compared to others. Negative effect has been endorsed by courts in some Model Law jurisdictions,⁷⁸ and has received particular support in Canada,

76 See further C Branson, "The Enforcement of International Commercial Arbitration Agreements in Canada" (2000) 16(1) *Arb Int'l* 19, 29-30; J Beraudo, "Case Law on Articles 5, 8, and 16 of the UNCITRAL Model Law" (2006) 23(1) *Arb Int'l* 101, 103-108 (criticising decisions in which courts have interpreted the scope of arbitration agreements in Article 8 stay applications). English courts freely interpret arbitration agreements when dealing with stay applications under s 9 of the English Arbitration Act, although in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, the Court of Appeal underscored the tribunal's interpretive role (in proceedings concerning confidentiality, not a stay application).

77 See *Fiona Trust & Holding Corp v Privalov* [2007] 4 All ER 951.

78 See P Sanders, "UNCITRAL's Model Law on International and Commercial Arbitration: Present Situation and Future" (2005) 21(4) *Arb Int'l* 443, 448 (citing examples from Bermuda, Canada and Zimbabwe); F Bachand, "Does Article 8 of the Model Law Call for a Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22(3) *Arb Int'l*

although practice between different jurisdictions within Canada itself is inconsistent.⁷⁹

Two Canadian cases illustrate how courts dealing with applications under Article 8(1) of the Model Law can prioritise the tribunal's competence-competence. In the first case, *Rio Algom Ltd v Sammi Steel Co Ltd*,⁸⁰ the Ontario Court of Justice confined the Court's review to determining the validity of the arbitration agreement in terms of the grounds in Article 8(1). Questions relating to construction of the agreement were held not to fall within these grounds, and were instead matters for the tribunal to determine in the first instance, subject to later recourse to the court. On the facts, the question whether disputes between the parties over a closing balance sheet were within the scope of the arbitration clause was therefore referred to arbitration. In reaching its decision, the Ontario Court was influenced by the Model Law's emphasis in favour of arbitration.⁸¹

The second Canadian case deals more generally with the level of review applicable to the court's enquiry. In *Gulf Canada Resources Ltd v Arochem International Ltd*,⁸² the British Columbia Court of Appeal considered the effect of an arbitration clause in an oil supply contract. The plaintiff initiated litigation proceedings, which was met by the respondents' application for a stay. The Court of Appeal stayed the litigation on the basis that the dispute between them was arguably within the terms of the arbitration agreement. Hinkson JA explained the Court's role under Article 8(1) (which is given a section number under the relevant legislation) as follows:⁸³

Considering s. 8(1) in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to

463, 464 (citing a comprehensive list of decisions from Hong Kong and Canada). See also *Pacific Int'l Lines Ltd v Tsinlien Metals & Minerals Ltd* [1993] 2 HKLR 249; (1993) XVIII YBCA 180; *New Sound Industries Ltd v Meliga (HK) Ltd* 11/1/05, Woo VP & Cheung JA, Hong Kong Court of Appeal CA63/2004; *Kin Yat Industrial Co Ltd v MGA Entertainment (HK) Ltd* 8/3/07, Poon J, Court of First Instance CF1177/2006. Databases such as UNCITRAL's CLOUT tend to be dominated by cases reported from a limited number of Model Law countries, notably Canada and, to a lesser extent, Hong Kong.

79 See the review of Canadian case law by C Branson, "The Enforcement of International Commercial Arbitration Agreements in Canada" (2000) 16(1) *Arb Int'l* 19, 25-34.

80 *Rio Algom Ltd v Sammi Steel Co Ltd* (1991) 47 CPC (2d) 251.

81 *Ibid.*, at para 15.

82 *Gulf Canada Resources Ltd v Arochem International Ltd* (1992) 66 BCLR (2d) 11.

83 *Ibid.*, paras 43-44, per Hinkson JA.

the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

2. Application in New Zealand

There are also Model Law jurisdictions whose courts have approached Article 8(1) applications by undertaking a full and final review of arbitration agreements.⁸⁴ This has been the practice in New Zealand, where courts have not hesitated to finally determine questions relating to the validity and/or scope of arbitration clauses.⁸⁵ In several cases, the courts themselves have noted the length of time spent hearing argument and dealing with large amounts of material before them for the purpose of deciding whether to send the parties to arbitration.⁸⁶

The level of review issue was raised, briefly, in *The Property People Ltd v Housing New Zealand Ltd*.⁸⁷ The plaintiff initially sought an interim injunction to restrain the defendant from terminating the contract between them. The injunction was refused. The plaintiff then commenced proceedings in the High Court, pleading various causes of action against the defendant. Relying on the arbitration clause in the contract, the defendant sought a stay under Article 8(1). The two questions that arose for determination were (a) whether the stay application was filed within the time limit prescribed by Article 8(1), and (b) whether the disputes were within the scope of the arbitration clause. The Court held that the application was submitted out of time and disposed of the application on this ground.

In the course of its argument, counsel for the defendant referred the Court to *Gulf Canada*, including the passage quoted above in which the British Columbia Court of Appeal established the “arguable” standard for the purpose of deciding whether or not to grant a stay. Salmon J responded that the main issue was one of interpreting the time limit in Article 8(1), and that the role of the Court was to determine the meaning of the words used (“not later than when submitting the party’s first statement on the substance of the dispute”), so that on that issue, once the determination is made the issue will no longer be “arguable”.⁸⁸ From this response, if the time limit had been met, it is unclear whether the Court would have decided to rule on the scope question, or whether it would have applied an “arguable” or prima facie review test. There is no mention of the tribunal’s power to rule on scope questions in the judgment. Whether reasons in favour of a prima facie approach to stay applications are outweighed by the risk of duplication is not addressed in *The Property People*, and it has not been directly addressed in other New Zealand cases under Article 8(1) either.

84 See F Bachand, “Does Article 8 of the Model Law Call for a Full or Prima Facie Review of the Arbitral Tribunal’s Jurisdiction?” (2006) 22(3) *Arb Int’l* 463, 464 (listing examples from Canada, Hong Kong, New Zealand and Australia).

85 See the cases at n 89 below.

86 For example, *Yawata Ltd v Powell* 4/10/00, Penlington J, HC Wellington AP142/00; *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608.

87 *The Property People Ltd v Housing New Zealand Ltd* (1999) 14 PRNZ 66.

88 *Ibid*, para 19.

D. Conclusions on the Court's Role under Article 8(1)

New Zealand practice indicates that the full review approach to stay applications diminishes the efficiency of dispute resolution, without securing much protection for claimants against defective arbitrations. Very few stay applications have been denied on the ground that the arbitration agreement is invalid or because the dispute between the parties falls outside the agreement's scope.⁸⁹ The risk of duplication is therefore very minimal.⁹⁰ Meanwhile, the risk of predetermination is compounded by the comprehensiveness that is typical of judgments given under Article 8(1). On occasion, courts have also been tempted to consider matters that go beyond what is necessary for the purpose of determining whether to grant a stay. For example, in one decision, the Court gave a view as to the effect of an indemnity clause, in order to reassure the plaintiff that it would not be over-exposed to liability in a multi-party dispute that would only partly be resolved through arbitration.⁹¹

89 Thirty-five Article 8(1) applications were reviewed (the results of a search on Article 8(1) in the *Linx* and *Briefcase* electronic databases). The validity and/or scope of the arbitration clause was at issue in nineteen of these cases. Stays were issued in twelve of this group of nineteen (*Cosco (New Zealand) Ltd v Port of Napier Ltd* 31/3/99, Wild J, HC Napier CP7-99; *Coastal Tankers Ltd v Port Wellington Ltd* 18/2/99, Doogue J, HC Wellington CP32-99; *Forestry Corporation of New Zealand v AG* (1999) 16 PRNZ 262; *O'Connor v Thaicor Corporation Ltd* 11/11/99, Master Venning, HC Christchurch CP119-99; *Montgomery Watson NZ Ltd v Milburn NZ Ltd* 9/10/00, Young J, HC Christchurch CP86/00; *OnLine International Ltd v On Line Ltd* [2000] BCL 442; *Alstom NZ Ltd v Contact Energy Ltd* 12/11/01, Master Thomson, HC Wellington CP160/01; *Martin v Wills* (2002) 10 BCB 29; *Opus Int'l Consultants Ltd v Projenz Ltd* 17/3/04, Master Sargisson, HC Auckland CIV-2003-485-1387; *Hi-Tech Investments Ltd v World Aviation Systems (Australia) Pty Ltd* 13/10/06, AJ Abbott, HC Auckland CIV-2006-404-003579; *Scenic Circle (Rotorua) Ltd v Princes Gate Hotels Ltd* 19/12/06, Keane J, HC Rotorua CIV-2006-463-658; *Aitken v Ishimaru Ltd* 25/10/07, Venning J, HC Auckland CIV 2006-404-007953. Stays were refused in two cases on the alternate ground that the application was filed out of time (*The Property People Ltd v Housing New Zealand Ltd* (1999) 14 PRNZ 66 and *Fisken & Associates Ltd v Frew* 23/8/01, Master Venning, HC Dunedin CP33/01), while one was refused on the ground that a consumer was a party to the contract and s 11 of the Arbitration Act had not been complied with (*Bowport Ltd v Alloy Yachts International Ltd* [2004] 1 NZLR 361). There was no result in one case (*Raukura Moana Fisheries Ltd v Ship Irina Zharkikh* [2001] 2 NZLR 801). This leaves three stays granted on the basis that the arbitration agreement was ineffective (*Clarence Holdings Ltd v Prendos Ltd* [2000] DCR 404; *Worldsites International Inc v Robert Korving* 13/12/01, Gault, Tipping & Anderson JJ, CA220-01; *Alpine Infrastructure Management Ltd v Queenstown Lakes DC* 25/8/06, Chisholm J, HC Christchurch CIV-2006-425-433. In *Clarence*, the Court held that the arbitration clause in a lease could not be extended to cover a dispute arising under a heads of agreement. The facts, since they involved two separate agreements and an argument that an arbitration clause in one covered disputes under the other, would arguably not have passed the prima facie effectiveness test. In *Worldsites International*, the Court of Appeal noted factors such as the expense of establishing a tribunal in the United States to rule on jurisdiction, so the full review approach seems more reasonable in this case also (but should have been more explicitly confronted). In *Alpine Infrastructure*, the Court ruled against the stay on grounds including the likelihood that legal issues would arise in the dispute such that the reference to arbitration would probably end up in the Court of Appeal. This is irrelevant to Article 8(1) and the refusal to stay is highly questionable.

90 Stay applications have often been denied because the application was submitted out of time, the Act's provisions on arbitration agreements with consumers were not complied with, or because the facts disclosed no dispute. As to the non-existence of a dispute, more is said below.

91 *Montgomery Watson NZ Ltd v Milburn NZ Ltd* 9/10/00, Young J, HC Christchurch CP86/00.

The better approach would be for courts to give greater recognition to negative effect. When faced with an application under Article 8(1) for a stay, the court should first decide whether or not the arbitration clause is separable from the main contract. This requires the court to determine whether any allegation attacking the underlying contract is capable of affecting the arbitration clause. If it finds the arbitration clause to be clearly separable, the court should rule to that effect and stay the litigation. If the arbitration clause is clearly null and void, inoperative or incapable of performance, then again the court should rule to that effect and continue to hear the merits. In cases of doubt, where it is arguable on a prima facie review that there is a valid agreement to arbitrate, the litigation should be stayed on the basis that the tribunal can decide on its jurisdiction in a provisional ruling.

An alternative would be to establish the prima facie standard as a default, which is subject to various exceptions. It is possible to conceive of circumstances in which prima facie review ought to always give way to the full review option, following the considerations taken into account in the jurisdictions reviewed earlier. As under English and French law, the courts ought to be less suspicious of obstructive motives if the tribunal has not been established, or the respondent has never taken part in the arbitration proceedings. It may also be possible to justify the courts taking a greater interest in arbitrations that have a foreign seat, as under Swiss law, although this is more questionable. On the other hand, exceptions create complexity, and may provide an incentive to objecting parties not to raise their objections before the tribunal in the first instance. It is also questionable whether exceptions are necessary, once it is accepted that prima facie review is a flexible and more effective way of dealing with Article 8(1) applications.

1. *The complication of the “added words”*

A complication arises under New Zealand’s enactment of Article 8(1) because of wording added to the Model Law template, providing a further ground for refusing to grant a stay. The words “or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred” were added to the end of Article 8(1) to maintain the efficiency of the summary judgment procedure,⁹² and become relevant when a court is faced with concurrent applications for summary judgment and a stay. Reflecting this purpose, the High Court in *Fletcher Construction New Zealand Ltd v Kiwi Co-op Dairies Ltd* concluded that the test for determining whether there is a dispute is whether the party disputing liability has an arguable defence.⁹³ Applying this test, the summary judgment application is heard before the application for stay.

92 The Law Commission’s view was that the benefits of summary judgment “should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated”: New Zealand Law Commission, *Arbitration* (NZLC R20, Wellington, 1991) para 309.

93 *Fletcher Construction New Zealand Ltd v Kiwi Co-op Dairies Ltd* 27/5/98, Master Kennedy-Grant, HC New Plymouth CP7/98. See also for example *Yawata Ltd v Powell* 4/10/00, Penlington J, HC Wellington AP142/00; *Rawnsley v Ruck* 20/2/01, John Hansen J, HC Auckland AP159/00; *Rayonier MDF New Zealand Ltd v Metso Panelboard Ltd* 27/5/03, Master Faire, HC Auckland CIV-2002-404-1747 (all adopting the “arguable defence” approach).

In *Todd Energy Ltd v Kiwi Power (1995) Ltd & Ors*, Master Thomson identified a number of problems that flow from this approach.⁹⁴ These problems include the fact that at least two hearings will result if summary judgment is refused, the summary judgment application will take hours or days to hear, and the real danger that if the summary judgment application fails, the tribunal will be influenced by the court's findings on the summary judgment application.⁹⁵ The Master preferred the test developed under English law (after observing that the words were added to Article 8(1) in the New Zealand Act in the same year they were dropped from the English Act), whereby the courts would not entertain a summary judgment application if there was an arbitration clause unless:

- (a) the claim was admitted; or
- (b) if the issue was a point of law, the court could see at once the point was misconceived.⁹⁶

The effect of this approach would be to invite high level review of the question whether or not there is a dispute in a given case. It also goes some way towards addressing the problems identified by Master Thomson that are caused by the added words.

IV. DEFERENCE TO THE TRIBUNAL'S RULING ON JURISDICTION

Despite the increased priority suggested for the tribunal's power to rule on its jurisdiction, the courts have the final say, given the logical problems inherent in arbitrators pulling themselves up by their own bootstraps and the residuary control over arbitration that is vested in the courts. For these reasons, a tribunal's preliminary ruling on jurisdiction may be put before a court immediately under Article 16(3) of the Act. If the tribunal waits to give its view on jurisdiction in the final award, then its decision on jurisdiction may be challenged under Article 34 (in a setting aside proceeding),⁹⁷ or Article 36 (in an enforcement proceeding).⁹⁸ This Part considers the level of deference that a court should give to a tribunal's decision when acting under these provisions, beginning with a discussion of comparative positions (France, Switzerland and England), and the relevant Model Law drafting history. This is followed by an analysis of New Zealand practice and conclusions.

There has been relatively little consideration of the approach that the court should take when faced with a challenge to a tribunal's jurisdictional ruling, and in particular, whether the court should carry out a full rehearing, a lesser form of appellate review, or a rehearing under certain conditions only. No

94 *Todd Energy Ltd v Kiwi Power (1995) Ltd & Ors* 29/10/01, Master Thomson., HC Wellington CP46/01. See also *Alstom NZ Ltd v Contact Energy Ltd* 12/11/01, Master Thomson, HC Wellington CP160/01; *Martin v Wills* 8/11/01, Master Venning, HC Timaru, CP11/01 (in which the Court notes the different tests, and grants the stay being satisfied there is a dispute between the parties).

95 *Todd Energy Ltd v Kiwi Power (1995) Ltd & Ors* 29/10/01, Master Thomson., HC Wellington CP46/01, para 34.

96 *Ibid*, paras 48 and 58. The Law Commission declined to revisit the issue of the "added words" in its 2003 review of the Arbitration Act 1996.

97 Arbitration Act 1996, Schedule 1, Article 34(2)(a)(i), (iii), and (iv).

98 Arbitration Act 1996, Schedule 1, Article 36(1)(a)(i), (iii), and (iv).

doubt most litigation energy is taken up by Article 8(1) applications which come first, and many other jurisdiction quibbles are settled by the tribunal to the satisfaction of both parties. Nonetheless it may be useful to identify and highlight the issues and principles relevant to the exercise of the court's functions, to more completely understand the court's final decision making powers in relation to determining arbitral jurisdiction.

A. Comparative Positions

It is settled law in France⁹⁹ and Switzerland¹⁰⁰ that courts review tribunal rulings relating to jurisdiction *de novo*. Whether courts should engage in independent assessments of jurisdiction following a tribunal determination on the matter is less clear in England, where conflicting authorities have been given.

A full rehearing of the issues reflects the ultimate decision-making role regarding jurisdiction matters which is conferred on the courts. The theory goes that since the tribunal's decision is only preliminary, the court should be able to fully reconsider issues of both fact and law. Otherwise, the court would be less well informed than the tribunal for the purpose of making a final decision. On this basis, Gross J applied the rehearing approach in *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering*:¹⁰¹

As already recorded, there was ultimately no dispute that a court challenge under s. 67 [of the English Arbitration Act] to an arbitrator's ruling as to his own jurisdiction should involve a re-hearing rather than simply a review. The question for the Court is therefore not whether an arbitrator was entitled to reach the decision to which he came but whether he was correct to do so. As a matter of principle, it is not surprising that this should be so. The challenge is to a provisional ruling only.

English courts have also permitted new evidence to be introduced into the rehearing.¹⁰² This permission was subjected to some restriction in *The Ythan*, in which the Court held that fresh evidence would be refused if it would result in substantial prejudice that could not fairly be dealt with through a costs order or by an adjournment.¹⁰³ Nevertheless, the introduction of fresh evidence could be dilatory, and eleventh-hour submissions should be treated with some scepticism. Even without new evidence, the rehearing approach has its drawbacks. It diminishes the effectiveness of the competence-competence principle, because the tribunal's ruling is in principle not relevant. One-stop

99 E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 924-926; J Barceló, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective" (2003) 36 *Vanderbilt J Transnat'l Law* 1115, 1125.

100 E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999) 926-927; cf J D M Lew, L Mistelis and S M Kröll, *Comparative International Commercial Arbitration* (2003) 337 and 348.

101 *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering SDN BHD* [2003] 1 Lloyd's Rep 190. See also *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68; *Kalmneft JSC v Glencore International AG* [2001] 2 All ER (Comm); [2002] 1 Lloyd's Rep 128; and *Astra SA v Sphere Drake* [2000] 2 Lloyd's Rep 550.

102 *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering SDN BHD* [2003] 1 Lloyd's Rep 190, para 23.

103 *Primetrade AG v Ythan Ltd (The "Ythan")* [2006] 1 Lloyd's Rep 457, paras 62 and 63.

dispute settlement is dealt a blow, since the parties will face two full hearings before different adjudicators on the exact same matter. It could be argued that for economy reasons the reviewing court should finally decide on jurisdiction at the outset of the dispute (if this option is available through Article 8(1)), although this approach has its own drawbacks, as explained in Part II.

In contrast to *Electrosteel v Scan-Trans*, Morison J at first instance in *Fiona Trust* advocated a review approach that excluded any rehearing of the facts:¹⁰⁴

Regrettably, as I have already affirmed in another case, the view has been taken by a number of Judges in this Division that under section 67 there is a full re-hearing with evidence, rather than some more limited 'review' suitable for an appellate process. This means that if the arbitrator has carried out a detailed, albeit one-sided, review of the material put before him and made detailed findings of fact, the Owners could ask for the facts to be re-heard by the Court. This would be a considerable waste of resources.

A recent survey conducted as part of a review of the English Arbitration Act found that a majority of respondents favoured the courts having a more limited right of intervention in a challenge to a tribunal's ruling on jurisdiction than a full rehearing.¹⁰⁵ Forty per cent of respondents agreed with the view taken by Morison J in *Fiona Trust* that the decision of the tribunal regarding its jurisdiction should be final as to the facts, while a court could review a point of law, in all probability reflecting a concern with the cost and time involved in full rehearings.¹⁰⁶ The committee that conducted the survey concluded that while changes to the law were not presently required, further research ought to be conducted on the question whether the rehearing approach has a detrimental effect on arbitration.¹⁰⁷ Despite the committee's conclusion against proposing legislative reform, it does appear that in England there is growing acceptance of the idea that the court's role should be limited to review of the tribunal's legal analysis.

B. Drafting History of Articles 16(3), 34 and 36 Model Law

Under the Model Law system, how a party may request a court to consider jurisdiction following a tribunal's ruling depends on the form of the ruling.¹⁰⁸

104 *Fiona Trust* [2006] EWHC 2583 (Comm); [2007] 1 All ER (Comm) 81; para 26. See also *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83, para 19, in which the Court notes that it would have found the tribunal's ruling to be wrong whether it carried out a full rehearing or more limited review.

105 B Harris, *Report on the Arbitration Act 1996*, prepared for the Commercial Court Users' Committee, the British Maritime Law Association, the London Shipping Law Centre, and other bodies (November 2006), para 36.

106 *Ibid*, paras 34-36.

107 *Ibid*, para 41.

108 Neither Article 34 nor Article 36 explicitly precludes a court from reviewing jurisdiction for the first time in setting aside or enforcement proceedings. However, Article 16(2) states that a plea that the tribunal lacks jurisdiction shall be raised not later than submission of the statement of defence, and a plea that the tribunal is exceeding its jurisdiction is to be raised as soon as the matter alleged to be beyond jurisdiction is raised. A failure to raise a plea within these timeframes would normally be considered a waiver of the right to object in setting aside or enforcement proceedings (see Arbitration Act 1996, Schedule 1, Article 4).

If the tribunal elects to give a preliminary ruling, the court may immediately determine the jurisdiction question under Article 16(3). If the tribunal gives its ruling in the award, the award may be challenged in setting aside or enforcement proceedings under Articles 34 or 36 respectively. As noted earlier, Articles 16, 34 and 36 expressly distinguish between challenges to the validity of the arbitration agreement, and challenges based on the tribunal exceeding the scope of its authority (either by going beyond the scope of the arbitration clause, or where the parties have submitted questions to the tribunal, giving decisions on matters not raised by those questions). If the ground for challenge is the former type, a party may question whether it entered into any arbitration agreement at all, and significant questions of fact may be involved. In the case of a challenge based on the tribunal exceeding the scope of its authority, the challenge will raise questions of interpretation, and in this sense is more limited.

Article 16(3) provides that following a preliminary ruling by the tribunal a party may request a court to “decide the matter”, language that suggests the court should engage in an independent assessment of jurisdiction, and not simply a review of the tribunal’s ruling. However, the drafters appear to have envisaged that a review of the tribunal’s ruling is all that is required.¹⁰⁹ Holtzmann and Neuhaus, who record the relevant part of the debates leading to Article 16(3) as falling under the subject “court *review* of arbitral tribunal’s determination of jurisdiction” [emphasis added], also explain that Article 16(3) allows immediate court review of a tribunal’s preliminary ruling.¹¹⁰ There is nothing further in the Model Law drafting history explicitly concerning the nature and extent of the court’s role under Article 16(3).

Similarly, there is nothing in the Model Law drafting history to guide courts as to the approach they should take in assessing the grounds for setting aside and refusing enforcement of awards; apart from the general recognition that courts have a discretion not to set aside or refuse enforcement if the departure from the applicable standard is immaterial.¹¹¹ With respect to the jurisdiction grounds for setting aside and refusing enforcement, immateriality might arise if the award deals with an issue that was not included in the submission to arbitration, and that part of the award had no material bearing on the outcome. Apart from this, given the fundamental importance of jurisdiction, immateriality is unlikely to be relevant in jurisdiction challenges.

C. Application in New Zealand

Article 16(3) has been the subject of scant judicial attention in New Zealand (which is a good thing, if it means parties are entrusting jurisdiction disputes to the tribunal). The approach to an application under Article 16(3) was directly considered by the High Court in 2004, in *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd*.¹¹² In this case, the plaintiff argued that the

¹⁰⁹ H M Holtzmann and J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 484-486.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 921-922 and 1057-1058.

¹¹² *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* 26/10/04, Winkelmann J, HC Auckland CIV-2004-404-4488.

defendant's counterclaim fell outside the terms of the submission to arbitration. The tribunal ruled in a preliminary decision that it did have jurisdiction to determine the counterclaim, leading to the plaintiff's application under Article 16(3). The Court held that the correct approach is to reconsider the issue of jurisdiction de novo rather than by way of appeal from the tribunal's ruling, because the terms of Article 16(3) characterise the application as a request to the court to decide the matter, and because it deals with the threshold issue of jurisdiction. Although contrary to the thrust of the rule's drafting history, the point was not argued since counsel also accepted that a de novo hearing was required. The Court went on to interpret the scope of the submission to arbitration afresh, without any reference to the tribunal's decision.

Similarly, there has been little explicit judicial consideration of the approach to reviewing tribunal decisions on jurisdiction under the relevant parts of Articles 34 or 36, although there have been many decisions under these articles in challenges to awards based on non-jurisdiction grounds. For instance, in *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd*,¹¹³ the Court of Appeal advanced a limited review standard in the context of a challenge to an award for substantive breach of New Zealand public policy under Article 34(2)(b). The Court stated that, in principle, any conflict with public policy should be "obvious" in order for a challenge to succeed.¹¹⁴ The qualifications of the tribunal, and the comprehensiveness of its assessment of the relevant issues, were relevant to the Court's assessment of whether or not there were any obvious public policy concerns arising out of the award in question.¹¹⁵ The Court went on to say that absent any obvious concerns, "the limited nature of judicial review of arbitral awards will require that the arbitrator's findings of fact and law be respected",¹¹⁶ emphasising the value placed on the finality of awards.

D. Conclusions in Favour of a Qualified Review Approach

It is debateable whether or not a minimalist "obviousness" standard of judicial review on jurisdiction issues would be appropriate, as is the argument that the court should confine itself to reviewing points of law. As one commentator has put it, "arbitration is not the holy grail".¹¹⁷ A tribunal's ruling on its jurisdiction is unavoidably preliminary, and appellate review of the tribunal's legal findings only might be seen as an abdication of judicial responsibility. On the other hand, a rehearing of everything that has already been argued before the tribunal will not necessarily achieve practical justice either.

113 *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614.

114 *Ibid*, para 47, per Blanchard J. See also *A Thales Air Defence v GIE Euromissile* 18/11/04 Cd'A Paris 2002/19606 (in which the Paris Court of Appeal held that the potential conflict with competition law would have to be manifest in order for the court to consider the issue further).

115 The arbitrator in this case was a retired High Court judge: *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614, para 60.

116 *Ibid*, para 47.

117 J Barceló, "Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective" (2003) 36 *Vanderbilt J Transnat'l Law* 1115, 1119.

A review approach to applications under Articles 16(3), 34 and 36 should be preferred to full scale trials. However, there may be circumstances that manifest a particular concern and justify closer intervention. For instance, a question of interpretation may be at issue, and the arbitrator is not legally qualified. If proof of facts is required to answer a jurisdiction question, rehearing of the facts should not be precluded, but submission of any evidence should be by leave so that the court may decide for itself whether it would benefit from having evidence presented and tested before the court, and decide on the extent of the examination of the evidence that it requires. The English High Court adopted the rehearing approach in *Azov Shipping Co v Baltic Shipping Co*, but its reasons for doing so appear to be limited to the particular circumstances of the case.¹¹⁸ There were significant issues of fact as to whether a party had entered into the arbitration agreement, and the tribunal stated it reached its decision in favour of jurisdiction with uncertainty. Furthermore, the governing law of the agreement was a foreign law, so the Court could have been at a disadvantage deciding on the content of that law without oral evidence and cross-examination of it. Rix J concluded on the approach to take to the proceedings that “[u]ltimately a question of justice, where it conflicts with a modest prejudice to expedition or increase in cost, must be given greater weight”.¹¹⁹ Where there is a prospect of increased cost owing to a rehearing of the facts, the balance of justice may require that the party defending the challenge to jurisdiction be secured for them.

V. CONCLUSION

The default forum for legal resolution of commercial disputes absent a valid arbitration agreement is, of course, the court, flowing from the state’s responsibility to administer justice. The court’s responsibility is accordingly to ensure the existence and validity of any waiver of the right of access to the judicial system. This article has sought to make clearer that it is sufficient for the court, when carrying out its responsibility, to pass the baton more willingly under Article 8(1), and to act more like the team’s reserve in the final stages of dispute settlement. It has been common to speak of a tension between the courts and arbitration, but while some tension is the inevitable consequence of this judicial responsibility, the days of judicial jealousy have long since passed. The Arbitration Act unreservedly issues a clear directive to assure arbitration as an efficient dispute settlement mechanism. It confers broad powers on arbitral tribunals with respect to determining their jurisdiction, embedding legal pluralism. The Act also has the limitations of an international model law, so that fine tuning the points of intersection between the roles of the court and the tribunal has to take place outside of its literal text.

118 *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd’s Rep 68, 70.

119 *Ibid*, 71.