"MAKING SENSE OF STANDARDS AND FORMATS OF REVIEW APPLICABLE TO THE JUDICIAL REVIEW OF AN ARBITRAL TRIBUNAL'S JURISDICTIONAL DECISIONS"

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Central to the outcome of an arbitration are the arbitral tribunal's jurisdictional decisions—what the tribunal rules that it can and cannot rule on. For this reason, parties may seek review of these decisions either at the pre- or post-award stages of the arbitration. Despite the ubiquity of such challenges, relatively limited attention has been given to the manner in which courts review jurisdictional decisions. However, upon an examination of case law from across the world, disparities in standards and formats of review adopted by courts become apparent. A standard of review determines the extent to which a court must defer to the conclusions of an arbitral tribunal, while a format of review encompasses the procedural rules that set out how a review is to be conducted. Standard and format of review significantly impact the way in which jurisdictional review is conducted. As such, it is important to understand the respective effects of each unit as well as be able to justify them theoretically. Hence, this paper offers a theory of jurisdictional review. After considering the variety of approaches to jurisdictional review adopted across jurisdictions as well as the general principles at play in the judicial supervision of an arbitration, it proposes flexible rules to guide the jurisdictional review process in the future.

I. INTRODUCTION

Most if not all arbitration laws allow a party to an arbitration to request a court at the seat of the arbitration to review an arbitral tribunal's decision on its jurisdiction either

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prior to the tribunal's decision on the merits[1] or at the post-award stages, by requesting the annulment of an arbitral award at the arbitral seat,[2] and in any New York Convention member-state at the recognition stage.[3]

The *UNCITRAL Model Law* names three types of jurisdictional objections. Both at the pre- and post-award stages,[4] (1) parties may object to the arbitral tribunal's jurisdictional decision on the basis that the arbitration agreement is invalid or entered into without the requisite capacity under the law applicable to it,[5] and (2) that the arbitration agreement does not encompass the dispute submitted to the arbitral tribunal.[6] At the post-award stage, (3) the parties may also challenge an award if it deals with a dispute that was not part of the submission to arbitration.[7] Within these grounds, a further type of jurisdictional objection could be mentioned, namely, that of non-signatories to arbitration agreements.[8]

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[1] *UNCITRAL Model Law on International Commercial Arbitration* UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006), art 16(3) [*Model Law*].

[2] *Ibid* at art 34(2)(a)(i).

[3] *Ibi*d at arts 36(2)(a)(i), 36(2)(a)(iii). See also *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958 (entered into force 7 June 1959, 24 signatories, 166 parties), 330 UNTS 3 at art V(1)(a) [*New York Convention*].

[4] As we discuss later on, depending on the structure of each applicable arbitration law and the interpretation they have received in their home courts, parties may be estopped from challenging an arbitral tribunal's jurisdictional ruling at the post-award stage in for the first two motives if they did not institute a challenge at the preliminary stage.

[5] *Model Law*, *supra* note 1 at arts 16(3), 34(2)(a)(i) and 36(2)(a)(i).

[6] *Ibid* at arts 16(3), 34(2)(a)(iii) and 36(2)(a)(iii).

[7] *Model Law*, *supra* note 1 at arts 34(2)(a)(iii) and 36(2)(a)(iii).

[8] For more on this, see Gerald W Ghikas, "Consent to Arbitration, Party Autonomy, and Non-Signatories: A Review of Procedural, Analytical, and

Recent Canadian arbitration decisions, most especially, the *Russian Federation v Luxtona* saga, have magnified the issue of jurisdictional review and how it is conducted. Reference to foreign case law has abounded in the many decisions that have been rendered on the subject in the past few years. Yet, arbitration literature, both Canadian and international, fails to offer a theoretical account of how judicial review of an arbitral tribunal's jurisdictional decisions should be performed by domestic courts. There is a large consensus across jurisdictions that a reviewing court must not inquire into the merits of a case decided by an arbitral tribunal.[9] However, how arbitral deference applies to jurisdictional challenges is not so clear. In theory, an arbitral tribunal's jurisdictional decision is a procedural step that usually precedes and is separate from a tribunal's hearing on the merits. If no party to the arbitration raises an objection to the tribunal's jurisdiction at the outset, presumably they consented to it. Of course, jurisdictional issues may arise later on as the legal issues in dispute get more precisely defined by the tribunal and the parties, or when the tribunal renders its award. Notwithstanding, given the competence-competence principle—that is, the arbitral tribunal's competence to rule on its own jurisdiction[10]—courts[11] and commentators[12] have raised arguments to the effect that an arbitral tribunal's jurisdictional decisions should receive some measure of deference.

We argue in this paper that a court tasked with reviewing an arbitral tribunal's jurisdictional decision, either at the pre-award or post-award stage should, as a preliminary matter,

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[9] See Gary B Born, *International Commercial Arbitration*, (Alphen aan den Rijn: Kluwer Law International 2020) at 3735 [Born].

[10] *Model Law*, *supra* note 1 at art 16(1).

[11] See e.g. *Dell Computer Corp v Union des Consommateurs*, 2007 SCC 34 [*Dell*].

[12] See e.g. Bachand, Article *8 of the Model Law, infra* note 102.

consider which *standard* of review applies to the arbitral tribunal's jurisdictional decision and what *format* this review should take.

The distinction between *standard* and *format* of review is critical to the argument of this paper and, as such, we adopt the following working definitions. A *standard* of review determines the extent to which a court must defer to the conclusions of an arbitral tribunal. Different standards of review can attach to different types of conclusions, similar to decisions rendered by a judicial court. For example, an arbitral tribunal's factual findings often attract deference from reviewing courts in national legal systems. Under such standards, they can only be overturned in limited circumstances. On the other hand, reviewing courts are more often free to set aside an arbitral tribunal's conclusions on purely legal questions and apply their own reasoning.

Meanwhile, the *format* of review consists in the ensemble of rules that set out how the review is to be conducted. It includes notably rules respecting which evidence is admissible (e.g. only the record before the arbitral tribunal, or any evidence), which arguments can be made (e.g. only those made before the arbitral tribunal, or any argument), and how the legal questions are framed on review (e.g. a rehearing in full of the case that was put before the arbitral tribunal, or reviewing the arbitral tribunal's decision for errors).

Standard and *format* of review are the central elements that determine how the judicial review of arbitral decisions is conducted. They are the irreducible units necessary to adequately explain variations in judicial review approaches across the world and effectively debate their merits. Moreover, since these two units often influence one another, the question of which standard of review applies should not be dissociated from the question of which format of review should be used correlatively. Indeed, finding the correct combination of standard and format of review is what national courts should ultimately strive for in order to secure the objectives of the

Model Law and the worldwide system of international arbitration. At any rate, even if they do not expressly consider which standard or format of review they apply, reviewing courts necessarily commit to a standard and format of review when performing their function.

Currently, there is no clear consensus across jurisdictions about what the appropriate standard of review should be for jurisdictional decisions made by arbitral tribunals. Moreover, almost no attention has been given to the format that judicial review should take. Courts rarely discuss this question explicitly, and few commentators have addressed it.[13] This paper therefore offers the first theoretical account of standards and formats of review from a theoretical point of view.

It begins by analyzing the way that courts across jurisdictions have tended to characterize judicial review of jurisdictional decisions made by an arbitral tribunal. We show the difficulties of this endeavour by highlighting false similarities and confusing language used to justify more and less deferential jurisdictional review decisions. Indeed, the key takeaway from our survey is that when courts *do* consider questions of standard and format of review, they use unclear labels (such as "deferential" or "*de novo*" to refer to standards of review or "review" or "appeal" to refer to both aspects of the applicable standard *and* format of review simultaneously) to compare similar but ultimately different approaches to

[13] See Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, (Alphen aan den Rijn: Kluwer Law International 1989) at 484–486; Born, *supra* note 9 at 1192; David Joseph and David Foton, *Singapore International Arbitration: Law & Practice* (New York: LexisNexis, 2014) at 234; David A. R. Williams and Amokura Kawharu, *Williams And Kawharu On Arbitration,* 2nd ed (New York: LexisNexis, 2017) at 216–218 [Williams and Kawharu]. See also Amokura Kawharu, "Rehearings of Jurisdiction Issues: A Fresh Look at the Judicial Task" (2016) 32:4 Arb Intl 687; UNCITRAL, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (Vienna: UNCITRAL, 2012) at 80–81.

jurisdictional review. This is due precisely to the lack of differentiation between *standard* and *format* of review.

To unravel these issues, the paper considers the goals, principles and policies animating the jurisdictional review inquiry in international arbitration. On their basis, it then proposes guiding principles that, while giving a clear orientation and structure to the jurisdictional review inquiry, leave room for domestic courts to address specific problems and situations that may come over time—the policies and goals outlined earlier clearly indicating how best to address new situations.

In so doing, we use the provisions of the *Model Law* as a starting point. Since many jurisdictions have adopted the *Model Law* and the *Law* currently constitutes the best effort at uniformizing international commercial arbitration law around the world, we find useful to refer to and substantially discuss its language and the interpretations it has received. This allows us to give special consideration to Canadian case law since the *Model Law* is considered persuasive if it is not a direct inspiration to its arbitration legislations. However, the scope of our inquiry, as will become evident, is not limited strictly to Model Law jurisdictions.

After having presented the categories of approaches to jurisdictional review outlined earlier (I), the paper progresses by considering obstacles to the elaboration of these approaches by domestic courts (II). It then synthesizes the policies that should govern the judicial review of jurisdictional decisions of arbitral tribunals (III). On that basis, it makes a number of proposals on how the standard of review analysis should proceed (IV). Ultimately, the paper argues that the better approach to jurisdictional review is to adopt a *de novo* standard of review for mixed factual and legal conclusions and deferential review for factual conclusions of the arbitral tribunal. At the same time, the presumptive format of review should be a review, as opposed to a new trial.

II. JURISDICTIONAL REVIEW ACROSS JURISDICTIONS: AN OVERVIEW

The purpose of this section is to offer a general portrait of how domestic courts have understood the process of jurisdictional review and—to the extent that they have addressed them—dealt with notions of *standard* and *format* of review when reviewing jurisdictional decisions of arbitral tribunals. The greatest obstacle to making sense of jurisdictional review is that most jurisdictional review decisions gloss over the legal framework applicable to their review. Sometimes, a court may offer basic reasons for preferring one standard of review over another. Rarely, however, will a court go into any substantive discussion of alternative approaches. It is also even rarer for courts to discuss the format of review, in addition to the standard of review.[14]

In some jurisdictions, this lack of discussion could be due to aspects of the review being prescribed by specific legal provisions.[15] However, in the absence of such provisions, sound arguments can be made to argue either that a reviewing court should defer to an arbitral tribunal's jurisdictional decision or that it should review it completely.

At the outset, it is useful to state that, in general, courts across jurisdictions tend to be more undeferential to an arbitral tribunal's jurisdictional decision.[16] Nevertheless, judges in

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[14] See, *Lin Tiger*, *infra* note 44 as a rare example.

[15] For example, the Russian Arbitrazh (Commercial) Procedure Code prohibits arbitral courts from reviewing the factual conclusions of the arbitral tribunal. See Art 232(6) Arbitrazh Procedural Code (Russian Federation) .

[16] See Born, *supra* note 9 at 1199; Simon Greenberg, "Direct Review of Arbitral Jurisdiction Under the UNCITRAL Model Law on International Commercial Arbitration: An Assessment of Article 16(3)" in *UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration*, Frédéric Bachand and Fabien Gélinas, eds (Huntington: Juris, 2013) 49 at 81.

different jurisdictions sometimes use the same words to refer to similar but ultimately different review methodologies. Indeed, as will become evident, methodological variations abound from one case to another and even jurisdictions that seem to adopt the same review methodology can usually be differentiated upon close reading of the cases. As such, a court that purports to adopt a "*de novo*" approach, as a result of how it discusses its applicable standard of review or how it performs the review itself, may in fact be *more deferential* than a court in another jurisdiction which also purports to adopt a "*de novo"* approach, but which effectively affords less opportunities for the arbitral tribunal's decision to stand.

1. Undeferential Approaches

Several jurisdictions adopt very undeferential approaches to jurisdictional review and consider that a domestic court can determine an arbitral tribunal's jurisdiction anew.[17] Typically, this means that a jurisdictional challenge will be heard completely anew by the reviewing court and will entail re-examination of all evidence and witnesses.[18] Consequently, this also empowers courts to consider new evidence and arguments from the parties.[19]

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[17] See e.g. *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 [*Dallah*]; *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24 (Sing) [*Insigma*]; Oberstes Landesgericht München, Dec 18 2014, 34 SchH 3/14 (Ger).

[18] See e.g. *ibid* in which the Supreme Court of the United Kingdom heard evidence of French law and refused enforcement of an arbitral award, finding that the arbitral tribunal had no jurisdiction to begin with.

[19] See e.g. *ibid* at para 30. See also *Bowen Construction Limited (in receivership) v Kelly's of Fantane (Concrete) Limited (in receivership)* [2019] IEHC 861 at para 81 (Ir) [*Bowen*]. But cf *Sanum Investments Ltd v Government of the Lao People's Republic*, [2016] SGCA 57 (Sing) (a curious exception to this rule, although Singapore case law prescribes *de novo* standard of review and a *full trial* format of review, it does not admit new evidence before judicial review proceedings) [*Sanum Investments*].

Such an approach is normally justified on several bases. First, courts justify their power to determine an arbitral tribunal's jurisdiction on the basis that if they were not fully empowered to decide the matter afresh, they would have no power to overturn the decision of an arbitral tribunal "that itself had no jurisdiction to make such a finding."[20] Second, in the case of jurisdictions having adopted the *UNCITRAL Model Law*, Article 16(3) of the *Model Law* states that "[i]f the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal" [emphasis added]. Courts usually rely on the words "decide the matter" to justify their ability to consider the arbitral tribunal's jurisdiction completely anew after an arbitral tribunal has ruled on the matter.[21] Finally, several courts have asserted that they are in no worse position than an arbitral tribunal to evaluate evidence and hear witnesses on the question of jurisdiction.[22]

In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*, the Supreme Court of the United Kingdom ruled that "the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question."[23] The Singapore Court of Appeal reached the same decision in *Sanum Investments Ltd v Government of the Lao People's Republic*. In the case, the Court applied the "*de novo*" standard of review, which entails "a reviewing court's decision of a matter anew, *giving no deference* to a lower court's findings" or "a new hearing or a matter

[20] See *Insigma*, *supra* note 17 at para 22.

[21] See Michael Polkinghorne et al, "Chapter 16" in Ilias Bantekas et al, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge: Cambridge University Press, 2020) 292 at 312.

[22] *Ibid*. See also David Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement,* 3rd ed (London: Sweet & Maxwell, 2015) at 495-496 [Joseph].

[23] *Dallah*, *supra* note 17 at para 30.

conducted as if the original hearing had not taken place." As such, the reviewing court is "not bound to accept or take into account the arbitral tribunal's findings on the matter."[24] Likewise, under Dutch law, "a claim for annulment of an arbitral award on the ground that a valid arbitration agreement was lacking—as provided for in Article 1065(1)(a) of the *Dutch Code of Civil Procedure*—is assessed fully and not with restraint, because of the fundamental nature of the right to access to the ordinary courts."[25]

In Canada, the most undeferential approach to jurisdictional review was expressed in *The Russian Federation v Luxtona*, which ruled that challenges under section 16 of the *Model Law* are subject to a "*de novo* hearing" similar to *Dallah*'s approach to jurisdictional determinations at the setting-aside and enforcement stages.[26] As we explain later in the paper, this case is relatively recent and but it has been adopted in other decisions already.[27] Nevertheless, the case aligns with *Dallah* in taking the least deferential approach to jurisdictional review.

2. Deferential approaches

Entirely deferential approaches are extremely rare.[28] As such, different courts have deferred to the arbitral tribunal's jurisdictional decision to different degrees. Some courts have gone as far as ordering deference to all aspects of an arbitral

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[24] *Sanum Investments*, *supra* note 19 at para 40 (adopting Black's Law Dictionary's definition of *"de novo"*) (emphasis added). See however, AQZ, *infra* note 48; *Jiangsu*, *infra* note 48 on the use of the evidence presented before the arbitral tribunal.

[25] See Niek Peters, *Fundamentals of International Commercial Arbitration* (Antwerpen: Maklu, 2017) at 75.

[26] *The Russian Federation v. Luxtona*, 2023 ONCA 393; *The Russian Federation v Luxtona*, 2021 ONSC 4604[*Luxtona 2021*].

[27] See *Ong v Fedoruk*, 2022 ABQB 557 [*Ong*].

[28] See Simon Greenberg, Christopher Kee & J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (New York: Cambridge University Press, 2010) at 242 [Greenberg].

tribunal's jurisdictional unless there is a clear error on the part of the arbitral tribunal while others have taken a more nuanced approach. Courts typically justify giving deference to an arbitral tribunal's decision by underscoring that arbitral tribunals are, first and foremost, creatures of party autonomy—if the parties chose to go to arbitration, they understood that this would significantly affect the ability of courts to intervene in their dispute resolution process.[29] Moreover, given that arbitral tribunals are created by the parties, they presumably guarantee fairness of process.[30] As a result, some judicial courts grant tremendous deference to arbitral tribunals on determining their own jurisdiction and will apply very lax standards of review.

In Pakistan, for example, a judicial court, in general, can only overturn an arbitral tribunal's decision if it finds an "error on the face of the award" or "discoverable from the award itself". This means, first, that any error must be manifest and, second, that the Court will only consider the award and the evidence on the arbitral record.[31] As such, the arbitral tribunal's decision is effectively presumed to be correct. This is well illustrated by the case of *A Meredith Janes Co Ltd v Crescent Board Ltd*.[32] In that case, an award debtor objected to the enforcement of an award rendered under the rules of the Liverpool Cotton Association on the basis that the arbitrators had exercised jurisdiction over a dispute without ever having been able to read the arbitration clause in the parties' contract. The reviewing court dismissed

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[29] See Giacomo Marchisio, "Jurisdictional Matters in International Arbitration: Why Arbitrators Stand on an Equal Footing with State Courts" (2014) 31:4 J Intl Arb 455 [Marchisio, *Jurisdictional Matters*].

[30] See Nana Japaridze, "Fair Enough? Reconciling the Pursuit of Fairness and Justice with Preserving the Nature of International Commercial Arbitration" (2008) 36:4 Hofstra L Rev 1415 at 1432.

[31] See Ikram Ullah, "Judicial Review of Arbitral Award in Pakistan" (2017) Asian Intl Arbitration J 53 at 63-64 [Ullah]. See e.g. Conticot on *SA Co v Farooq Corporation and others*, 1999 CLC 1018 (Pak).

[32] *A Meredith Janes Co Ltd v Crescent Board Ltd*, 1999 CLC 437 (Pak).

the debtor's objections to enforcement. It ruled that since the parties had both agreed before the arbitral tribunal that, under their contract, the subject-matter of their dispute fell within the scope of their arbitration clause, the tribunal could reasonably exercise jurisdiction, despite never having read the language of the clause.[33]

In the Canadian province of Québec, some decisions, including from the Court of Appeal have also taken a very deferential approach to the arbitrator's interpretation of their jurisdiction. In the words of one of them:

> [I]t goes without saying that the arbitrator cannot rewrite the contract anew or refuse to apply the parties' intentions. They are, however, solely competent to determine the scope of the dispute. A surprising, even legally questionable decision is not subject to review.[34] [our translation]

In short, some courts greatly limit their ability to review the jurisdictional decision of an arbitral tribunal. While such large deference to the arbitral tribunal on their determination of their jurisdiction is a rarity, it nonetheless represents how one end on a spectrum of approaches the issue.

In Alberta, the Court of Queen's Bench has historically advised deference. Notably in *Ace Bermuda Insurance Ltd v Allianz Insurance Company of Canada*,[35] while ruling that a deferential *reasonableness* standard applied, it ruled that:

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[33] See Ullah, *supra* note 31 at 64–65.

[34] See *Endorecherche inc c Endoceutics inc*, 2015 QCCA 1347 at para 85. More recent case law now adopts a *de novo* standard of review. See *Hypertec Real Estate Inc. c. Equinix Canada Ltd.*, 2023 QCCS 3061.

[35] *Ace Bermuda Insurance Ltd v Allianz Insurance Company of Canada*, 2005 ABQB 975 [*Ace Bermuda*]. See also *Kitt v Voco Development Inc*, 2005 ABQB

> [O]n the nature of the question before the tribunal, it appears to me to be one of mixed law and fact. The tribunal was required to determine the facts and then apply the law. Any application of the law must be reviewed to the standard of correctness. Their consideration of the facts must, in my view, be reviewed on the standard of reasonableness. The primary issue being one of mixed law and fact would require a standard of reasonableness.[36]

However, many decisions across jurisdictions adopt some level of deference only on certain aspects. Hence, some may presumptively adopt the arbitral tribunal's factual conclusions[37] and use the tribunal's decision as a starting point, requiring the parties to show errors with the arbitral tribunal's decision rather than putting it aside completely and rehearing the entire case afresh.[38]

A few cases can help illustrate possible variations. In *Recofi v Vietnam*, the Swiss Federal Supreme Court ruled that:

> [S]eized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues, including preliminary issues, which determine the jurisdiction of the arbitral tribunal or the lack thereof. Yet, this does not turn it into a court of appeal. Thus, it is not for this Court to go looking for the legal arguments in the award under

743, also adopting a deferential approach to jurisdictional review. *See* however Ong, *supra* note 27.

[36] *Ibid* at para 45.

[37] See e.g. *Recofi v Vietnam*, Fed Sup Ct, Sept 20, 2016 (Switz) at para 3.1.1 [*Recofi*].

[38] See e.g. *The Russia Federation v Luxtona*, 2019 ONSC 7558 [*Luxtona 2019*].

> appeal that may justify upholding the grievance based on Art. 190(2)(b) PILA. Rather, it behooves the Appellant instead to draw the Court's attention to them, in order to comply with the requirements of Art. 77(3) LTF."[39]

As such, Switzerland will defer to factual conclusions of the arbitral tribunal. Furthermore, the format that its review takes is more akin to an appeal than a full-fledged rehearing.

Moreover, in *M/s Emkay Global Financial Services Ltd v Girdhar Sondhi*,[40] the Supreme Court of India ruled that when reviewing an award, a court should not normally have to consider anything beyond the arbitral award and the record of the arbitration proceedings. Whatever is lacking from the record may be included in the annulment proceedings through affidavits. "Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary".[41] As such, India does not rehear evidence, although it allows additional evidence to be submitted before a reviewing court. The court, however, does not have to defer to the arbitral tribunal's decision.[42]

III. CONFUSIONS SURROUNDING APPROACHES TO JURISDICTIONAL REVIEW

The foregoing overview shows that each jurisdiction's approach to jurisdictional review may differ as a result of different, not clearly stated fundamental premises. Building on the case law overview in the previous section, we highlight four factors that heighten the complexity of the standard of review

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[39] *Recofi*, *supra* note 37 at para 3.1.1.

[40] 2018 SCC Online SC 1019 (Ind Sup Ct) [*Emkay*].

[41] *Ibid.*

[42] See Gracious Timothy Dunna, "Standard of Review in Set-Aside and Enforcement Proceedings Relating to Arbitral Awards in India" (2019) 14 Natl L Sch J 252 at 253–254.

question: (1) the lack of clarity with respect to the individual effects of *standard* and *format* of review, (2) the influence of legal concepts external to the *Model Law* in *Model Law* jurisdictions, notably domestic legal concepts, on jurisdictional review, (3) the positive or negative nature of the challenged jurisdictional decision, and (4) the stage of proceedings during which the jurisdictional challenge is initiated.

1. *Lack of Clarity with Respect to the Individual Effects of Standard and Format of Review*

As we have said, domestic courts usually do not discuss the justifications for their review methodology or offer discussion that typically limits itself to the applicable standard of review. This, in particular, causes murkiness on the nature and impact of the applicable *format* of review. In turn, the development of an effective jurisprudential debate on how to review jurisdictional decisions of arbitral tribunals is stifled. Incidentally, the question of the weight that the reviewing court should give to the challenged decision of the arbitral tribunal—ultimately a central question to jurisdictional review—is never fully addressed.

Indeed, whether domestic courts realize it or not, reviewing an arbitral tribunal's jurisdictional decision necessarily entails a commitment to a specific review *format* in addition to a commitment to a *standard* of review.[43] This has significant implications. Even if a domestic court can fully substitute the arbitral tribunal's decision for its own, the format of the review can nevertheless constrain this competence. Thus, as our overview shows, domestic courts take either one of two formats to review the arbitral tribunal's jurisdictional decision: either they conduct (1) an entirely new trial on the jurisdictional

[43] See *Luxtona 2019*, *supra* note 38 at para 38 ("[s]tandard of review is a separate question from the format of the review itself. One does not necessarily dictate the other").

question, or (2) or an appeal-like procedure.[44] The first format completely disregards the arbitral tribunal's jurisdictional decision or sees it as just one element of the record before it. As such, the court will hear the parties' arguments, evidence, and witnesses anew.[45] Unsurprisingly, this format is thus typically associated with undeferential approaches. The second format, on the other hand, puts great importance on the content of the arbitral tribunal's decision since it helps to frame the court's analysis when asked to decide a jurisdictional objection to an arbitration. Thus, it is associated with deferential approaches.

Additionally, the weight that a domestic court accords the arbitral tribunal's jurisdictional decision directly influences the way by which the court will approach the jurisdictional question. As such, the binding force of the arbitral tribunal's decision on domestic courts should presumably have received a significant amount of attention from judges. Yet, this is rarely the case. In fact, illustrative of the fact that different jurisdictions adopt similar labels to refer to different things, courts adopting what they refer to as a *de novo* approaches sometimes—seemingly unwittingly—offer contradictory *dictum* when addressing the role and normative value of an arbitral tribunal's jurisdictional decision. For example, in *Sanum Investments Ltd v Government of the Lao People's Republic*, the Singapore Court of Appeal[46] endorsed the *dictum* of the Supreme Court of the United Kingdom in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* to the effect that "the [arbitral]

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[44] Cases have referred to a procedure of this sort as a "review", although here also, different jurisdictions use the term to refer to different formats. This phenomenon was noticed by the judge notably in *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd* [2018] VSC 221 and somewhat to the same extent in *Luxtona 2019, supra* note 38.

[45] See e.g. *Bowen Construction*, *supra* note 19.

[46] See *Sanum Investments Ltd*, *supra* note 19 at paras 40–44. This was subsequently confirmed in *Sanum Investments Ltd v ST Group Company Ltd* [2018] SGHC 141 at para 39 ("[i]n so far as the objections are jurisdictional in nature, the review is *de novo*") [*Sanum Investments v ST Group*].

tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question".[47] However, in that same decision, it also adopted the *dictum* of the Singapore High Court in *AQZ v ARA* to the effect that reviewing an arbitral tribunal's jurisdictional decision under the *de novo* standard, "does not mean that all that transpired before the Tribunal should be disregarded, necessitating a full re-hearing of all the evidence."[48] As a result, Singaporean courts cannot be said in reality to adopt the absolute re-hearing approach propounded by *Dallah*.[49] Their approach is ultimately much more nuanced and attempts to balance economy of process with the actual usefulness of submitting new evidence or re-examining witnesses.[50]

Another example of confusing *dictum* can be found in the Australian case of *Lin Tiger Plastering Pty Ltd v Platinum Construction (Vic) Pty Ltd*, cited earlier.[51] In this case, the Court stated that the *de novo* standard of review applies when a court is reviewing an arbitral tribunal's jurisdictional decision, yet added in *dictum* that "[d]eference should duly be given to the cogent reasoning of the arbitral tribunal but the Court is the final "arbiter" on the question of jurisdiction."[52] How much

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[47] *Dallah*, *supra* note 27.

[48] *AQZ v ARA*, [2015] 2 SLR 972 (Sing High Ct), 57 [*AQZ*]. See also *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd*, [2016] SGHC 153 [*Jiangsu*].

[49] Although Singaporean law would allow it in theory, which motivated our classification of *Sanum Investments* as a decision adopting *de novo* approach.

[50] Whether or not to admit new evidence on a jurisdictional challenge has given rise to several complexities. As a result, Singaporean case law generally agrees that reviewing courts can impose limits on the admission of new evidence on a jurisdictional challenge. However, the proper legal test to determine the admissibility of such evidence is unsettled as of writing. See *Jiangsu*, *supra* note 48, at para 53 ("[t]he cases above illustrate that in the context of a setting-aside application, there appears to be no *absolute* rule to exclude the admission of fresh evidence").

[51] [2018] VSC 221.

[52] *Ibid* at para 40.

deference this implies is unclear. While it is possible to read this as simply saying that a judge can *look* at the arbitration tribunal's decision but does not have to respond to it, it could also be read as suggesting that the arbitral tribunal's decision on jurisdiction is the analytical starting point for the judge.

In short, while it would seem clear that the *de novo* standard should instinctively be associated with holding a new trial, as these cases—and several of those mentioned in the next sections—show, courts have sometimes been unscrupulous with their use of language and references to *dicta* from previous cases. This weakens their adoption of the *de novo* standard of review[53] and creates uncertainty as to the normative weight to be given to the arbitral tribunal's jurisdictional decision. Both of these questions are of paramount importance for arbitral practice: making sense both of the applicable standard of review and judicial review process applicable in each circumstance is crucial to bring greater consistency and theoretical grounding to international arbitration across the world.

2. Influences Outside of the Model Law

In addition to being unclear about their normative and processual choices, domestic courts are sometimes influenced by sources outside of the *Model Law* and its *travaux préparatoires*. The use of outside notions affects the framing of jurisdictional questions, which can have a significant impact on how domestic courts discuss the tribunal's jurisdiction—the questions that they ask, the categories and words that they use—which ultimately affects the characterization of *standard* and *format* of review. At worst, a court will obfuscate more than clarify the law through its use of outside sources. At best, this allows domestic courts to reach a decision that is even more theoretically robust. Achieving this, however, requires being aware of the pitfalls of using outside sources. We delineate two

[53] Singapore offers the best example of this. See e.g. *Insigma*, *supra* note 17; *Sanum Investments*, *supra* note 19; *AQZ*, *supra* note 48.

situations that may prove troublesome: first, a court may follow case law from jurisdictions that have not adopted the *Model Law* and whose legislations differ. Second, a domestic court may analyse the standard of review question using notions found originally in domestic law.

a. Cross-Citations Among Domestic Courts

Courts in several jurisdictions cross-cite each other's decisions in particular when they are members of the same legal families and write decisions in the same language.[54] Several courts across common law jurisdictions have prominently cited the Supreme Court of the United Kingdom's decision *Dallah Real Estate Holdings v Pakistan* on standard of review in their reasons; these include the Singapore Court of Appeal, the Hong Kong Court of First Instance, the Malaysian Malaya High Court and the Supreme Court of Ireland.[55] Here is the catch: the citing courts, which were largely *Model Law* jurisdictions, sometimes cited exclusively *Dallah* as authority on standard and format of review. Moreover, none of the decisions surveyed cited doctrinal authorities on the *Model Law* or the *Model Law*'s *travaux préparatoires*.

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[54] In Europe, this dialogue can be seen notably between the English and Irish courts and German, Austrian and Swiss courts, see Martin Gelter and Mathias M Siems, "Citations to Foreign Courts—Illegitimate and Superfluous, or Unavoidable? Evidence from Europe" (2014) 62:1 Am J Comp L 35; Martin Gelter and Mathias Siems, "Language, Legal Origins and Culture Before the Courts. Cross-Citations Between Supreme Courts in Europe" (2013) 21:1 Sup Ct Econ Rev 215.

[55] See e.g. *Sanum Investments, supra* note 19; *X v Jemmy Chien* [2020] HKCFI 286 (HK); *Z v A* [2015] HKCFI 228 (HK); *S Co v B Co* [2014] HKCFI 1436 (HK); *Usahasama SPNB-LTAT Sdn Bhd v Abi Construction Sdn Bhd* [2016] MLJU 1596 (Malay.); *Bowen Construction Limited*, *supra* note 19 (Ir) (citing English authorities, notably, *Dallah v Pakistan*, with no reference to case law applying the *Model Law* or Model Law commentaries). Cf *Luxtona 2019*, *supra* note 38 (citing *Dallah* approvingly, but distinguishing it from the more *middle-of-the-road* approach the Court considered applicable under the *Model Law*).

This is problematic insofar that countries having adopted the *Model Law* in full depart from the text of the Law as well as its *travaux préparatoires* to interpret it. Furthermore, by applying *Dallah*, an English decision applying the *Arbitration Act*, *1996*,[56] domestic courts are applying a reasoning that takes root in a different statutory framework. Admittedly, this is not a disastrous choice given that the UK legislation is essentially similar to the *Model Law* with respect to the supervisory jurisdiction it attributes to English courts to determine issues of substantive jurisdiction.[57] However, given that the *Model Law* has its own legislative history and has as one of its key goals the convergence of arbitration laws around the world, it is important to continue looking to the primary materials related to the *Model Law*, its history and commentary, to properly interpret it. Decisions of foreign courts can naturally be persuasive—especially when they are rendered by appellate courts—but courts applying the *Model Law* should remember that courts applying a legislation other than the *Model Law* do not have to enact the same legislative intent as them. Moreover, non-*Model Law* statutes may not categorize possible grounds of review in the same way as Model Law jurisdictions.[58] The framing of grounds of challenge necessarily influences the way that a domestic court proceeds with the jurisdictional analysis—in addition to *standard* and *format* of review. The following section illustrates this from another angle—that of domestic legal concepts.

Nevertheless, it is hard to predict the influence that same-language or same-legal family decisions will have on review methodologies. Some evidence exists against the influence of

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[56] *Arbitration Act* (UK), 1996.

[57] The review mechanisms under the UK *Arbitration Act*, 1996 provide that, while an arbitral tribunal has the competence-competence to rule on their own jurisdiction (s 30) and may exercise this competence upon receipt of one party's preliminary objection to jurisdiction (s 31). They may also rule on applications to challenge "any award of the arbitral tribunal as to its substantive jurisdiction" (s 67) or on "serious irregularity" (s 68).

[58] Such is the case of the *Arbitration Act* (UK), 1996.

legal families and traditions, namely, the fact that it is not unusual for jurisdictions within the same legal family whose law offers no prescribed format of review to arrive at different conclusions. This is the case notably between Germany, which accords no deference to the conclusions reached by an arbitral tribunal regarding its jurisdiction,[59] and Switzerland, which defers to the tribunal's factual conclusions and requires challenges to the arbitral tribunal's jurisdictional decision to attack specific arguments in the tribunal's reasons.[60] Further comparison could also be drawn with France, whose courts must independently establish the jurisdiction of French-seated arbitrations if that jurisdiction is challenged as part of annulment proceedings.[61]

b. Use of Domestic Legal Concepts

Domestic influences in arbitration are known to occur in arbitration.[62] They are considered notably when parties choose a seat for their arbitration and sometimes parties use these

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[59] Bundesgerichthof, 6 Jun 2002, *SchiedsVZ* 2003, 39 (Ger).

[60] See *Recofi*, *supra* note 38.

[61] As we argue later on, annulment proceedings must be distinguished from recognition and enforcement proceedings, which often apply a more deferential standard of review, as is the case in France. See Dominique Hascher "Les perspectives françaises sur le contrôle de la sentence arbitrale internationale ou étrangère" (2015) 1:2 McGill J Disp Res 1 at 4.

[62] See Luca Radicati di Brozolo, "The Impact of National Law and Courts on International Commercial Arbitration: Mythology, Physiology, Pathology, Remedies and Trends" (2011) Paris J Intl Arbitration 663 at paras 57-67 [di Brozolo]; Luca Radicati di Brozolo, "International Arbitration and Domestic Law, in *International Commercial Arbitration: Different Forms and Their Features,* Giuditta Cordero-Moss ed (New York: Cambridge University Press, 2013) 40. See also International Bar Association, *The Current State and Future of International Arbitration: Regional Perspectives* (London: International Bar Association: 2015) at 23. ("[a]lso, in some jurisdictions, such as India, there can be a propensity for arbitrators and legal counsel to replicate or be heavily influenced by domestic litigation rules and procedures in conducting international arbitrations").

idiosyncrasies to their advantage.[63] Naturally, domestic law can therefore play a role at the standard of review stage.

Canada offers a notable example of this since its case law on standard of review has been deeply influenced by the standard of review analysis of administrative law.[64] Canadian arbitration decisions have debated between the application of standards of *reasonableness* and *correctness* to review jurisdictional decisions of administrative decision-makers.[65] As part of administrative law, *reasonableness* mandates deferring to the decision of an administrative decision-maker while *correctness* mandates the reviewing court to ensure that the decision-maker adopted the correct reasoning on the question and, if not, to substitute its own—correct—reasoning in place of it.[66] In the 2011 case of *United Mexican States v Cargill*, the Ontario Court of Appeal, ruled that the "*correctness*" standard applied to review jurisdictional decisions of arbitral tribunals. In so ruling, it drew a parallel with the Supreme Court of the United Kingdom in *Dallah*.[67] Through its application of administrative law to arbitration, however, the Ontario Court of Appeal, was

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[63] See *di Brozolo, supra* note 62 at para 59.

[64] See especially, *United Mexican States v Cargill*, 2011 ONCA 622 [*Cargill*]; *Luxtona 2019, supra* note 38; *Ace Bermuda*, *supra* note 35. See Henri C Alvarez, "Judicial Review of NAFTA Chapter 11 Arbitral Awards" in *Fifteen Years of NAFTA Chapter 11 Arbitration*, Emmanuel Gaillard and Frédéric Bachand eds (Huntington: Juris, 2011) 103 at 153. For an Australian perspective on a similar problem, see also, Clyde Croft, "The Temptation of Domesticity: An Evolving Challenge in Arbitration", in *Jurisdiction, Admissibility and Choice of Law in International Arbitration*, Neil Kaplan and Michael J Moser eds (Alphen aan den Rijn: Kluwer Law International, 2018) 57.

[65] See Alexandre Kaufman and Benjamin Jarvis, "The Curial Review of Arbitral Awards After Vavilov" in *Annual Review of Civil Litigation,* Justice Todd Archibald ed (Toronto: Thomson Reuters, 2020) ch H; *Luxtona 2019*, *supra* note 38; *Cargill*, *supra* note 64.

[66] See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. See also *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*].

[67] *Cargill*, *supra* note 64 at para 40.

rather unclear on whether a Court reviewing an arbitral tribunal's jurisdiction should entertain a mere *review* or whether it should conduct a *new trial*.

This has led to much confusion as highlighted in the protracted saga *The Russian Federation v Luxtona.* In one of the decisions in 2018, Dunphy J. interpreted that, consistent with *Dallah*, a new trial should be held to determine the tribunal's jurisdiction.[68] However, Penny J., reviewing that interim decision, distinguished *standard* of review from *format* of review and clarified that while the *standard* of review for an arbitral tribunal's jurisdictional question was indeed *correctness*, the *format* of the review, consistent with administrative law, was a *review* and not a completely new trial as *Cargill* arguably suggested through its analogies to *Dallah*.[69] Hence, a court has to base itself on the arbitral tribunal's jurisdictional decision and the record that was put before it to determine if the tribunal erred in defining or staying within the scope of its jurisdiction.[70] This was overturned in 2021 by the Divisional Court, then upheld by the Ontario Court of Appeal. Corbett J. for the Divisional Court ruled that parties could adduce new evidence as of right on a challenge to an arbitral tribunal's jurisdiction since the procedure to do so is a standard application under the Ontario *Rules of Civil Procedure*.[71] With all due respect, Corbett J.'s reasoning, however, is perplexing. In seemingly trying to uphold *Cargill*, he interprets that *Cargill*

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[68] *The Russian Federation v Luxtona Limited*, 2018 ONSC 2419 at para 28.

[69] *Luxtona 2019*, *supra* note 38 at para 58.

[70] *Ibid* at para 67.

[71] See *Luxtona 2021, supra* note 26 at para 38. See also *Russia Federation v. Luxtona*, 2023 ONCA 393. An emerging case law in Canada is having to compose with the mixing of administrative law and arbitration effected by *Cargill*. It seems very possible that the law as stated in *Cargill* will either be overturned or restated in the years to come. See *Electek Power Services Inc v Greenfield Energy Centre Limited Partnership*, 2022 ONSC 894; *Hornepayne First Nation v Ontario First Nations* (2008) Ltd, 2021 ONSC 5534; *Lululemon Athletica Canada Inc. v Industrial Colour Productions Inc*, 2021 BCCA 428.

directed *correctness* review for arbitral awards challenged under section 34 of the *Model Law* and did not rule on challenges to jurisdiction under section 16 of the *Model Law*, and that, consistent with *Dallah,* a new trial was appropriate for challenges under this latter section*. Dallah*, however, bore on a jurisdictional challenge on a final award on the merits, not a preliminary challenge to jurisdiction. Corbett J. also does not grapple with the administrative law reasoning influencing *Cargill*.

The pitfalls of applying a domestic doctrine without considering the specific context of international arbitration become apparent here. First, using domestic law notions to resolve international arbitration questions can lead to a solution that is both inappropriate and theoretically unsound. Indeed, the equation in *Cargill* of the *correctness* standard of review under Canadian administrative law to the trial *de novo* approach in *Dallah* is fundamentally flawed. The Supreme Court of the United Kingdom in *Dallah* adopted the *de novo* standard of review within the *format* of a completely new trial with a separate evidentiary record. Under Canadian administrative law, a court applying the *correctness* standard of review must consider whether an administrative decision-maker arrived at the correct decision and either uphold their reasoning or substitute it for their own.[72] The court, in so doing, is performing a *review*. As such, it is basing itself on the administrative decision-maker's original decision and associated reasons. It is not putting aside the decision. In Canada, the traditional rule, inherited from English law, is that no more evidence can be presented before the reviewing court than before the administrative decision-maker, absent exceptional circumstances.[73] As such, the administrative

[72] *Vavilov*, *supra* note 66 at para 54; *Dunsmuir*, *supra* note 66 at para 50.

[73] See e.g. *Ktunaxa Nation Council v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at paras 146–48, aff'd 2015 BCCA 352. See also Lauren J. Wihak and Benjamin J. Oliphant, "Evidentiary Rules in a Post-Dunsmuir World: Modernizing the Scope of

decision-maker's decision is the centrepiece of the record and is accompanied essentially only by the document which initiated the judicial review proceedings and the pleadings, if any.[74] The rationale behind this rule is that the more additional evidence a reviewing court is presented with, the more it is likely to engage in a form of substantive review of the merits of an administrative decision under the pretense that "[some] questions […] were not adequately canvassed in evidence [by previous deciders]."[75]

Due to the cross-citation phenomenon between courts in common law jurisdictions that we have highlighted in the previous section, several court decisions adopting the *de novo* standard of review across the world have cited *Cargill* alongside *Dallah*, thus perpetuating the false notion that *correctness* review and *de novo* review, as they were used in each respective decision are synonymous.[76] As we have just demonstrated, this is misguided. It also paints the many excerpts from *Cargill* that courts outside of Canada have referred to with a completely different meaning. For example, at least three Hong Kong decisions[77] refer to this passage of *Cargill*:

> Therefore, courts are to be circumspect in their approach to determining whether an error alleged under art 34(2)(a)(iii) properly falls within that provision and is a true question of

Admissible Evidence on Judicial Review" (2015) 28:3 Can J Admin L Prac 323 at 331 [Wihak].

[74] *Ibid* at 324.

[75] See *Gitxsan Treaty Society v Hospital Employees' Union,* 1999 CanLII 7628 (FCA), [2000] 1 FC 135 at para 15.

[76] A handful of decisions, especially in Hong Kong, have been afflicted by this. See *X v Jimmy Chien* [2020] HKCFI 286 [*Jimmy Chien]*; *Z v A*, *supra* note 55; *S Co v B Co*, *supra* note 55. See also *Lin Tiger*, *supra* note 44, at para 30.

[77] See *Jimmy Chien*, *supra* note 76 at para 5; *Z v A*, *supra* note 55 at para 21; *S Co v B Co*, *supra* note 55 at para 29.

> jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal. [emphasis added][78]

The language used here is highly reminiscent of the rationales put forward to justify the traditional English rule on the prohibition of additional evidence before courts on judicial review. Although the passages used from *Cargill* do not direct the court to adopt an ostensibly *incorrect* approach to standard of review, they nevertheless only provide a superficially strong authority for the Court's approach to standard of review. It is also ironic that, in all three cases, the Hong Kong court adopts the expression "true question of jurisdiction" to describe the judge's task in separating jurisdictional questions from merits questions. The expression, which has been abundantly used in Canadian administrative law, was recently abandoned by the Supreme Court of Canada due to the excessive difficulties that courts have had in defining these questions coherently.[79]

Second, arbitration and administrative law, though analogous, rely on concepts which have developed their own meaning within separate areas of law. Even though judicial review for arbitral and administrative decision-making is premised in both cases on the similar ideas that arbitrators and administrative decision-makers are experts in their respective areas, which warrants showing deference to their decisions, they differ in major respects. Most notably, whereas arbitration is almost completely a creature of party autonomy that is supervised by courts to protect the consent of the parties (a responsibility that favours rigorous judicial review), administrative law is traversed by a defining tension opposing

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[78] *Cargill*, *supra* note 64 at para 47.

[79] See *Vavilov*, *supra* note 66 at para 53.

courts and administrative decision-makers: since judges in Canada are not elected, courts should in principle err on the side of deferring to administrative decision-makers, who enact the policies of the elected government.[80] Thus, the first effect of this blending of distinct bodies of law is that a domestic court having to perform judicial review of an arbitral tribunal's jurisdictional decision must elaborate its reasons with reference to a body of law that although it overlaps with arbitration in terms of some of its objectives, is not entirely consistent with it. The terminology of administrative law can also be unwieldy given that a precise procedural format that is distinct from arbitration is associated with it.[81] This practice obfuscates more than clarifies the law and thus can create significant confusion for judges in future cases.

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All of this shows the importance and usefulness of using a common conceptual vocabulary and nomenclature to discuss arbitration law across jurisdictions. This having been the express purpose of the *Model Law*, it is incumbent on arbitration practitioners from *Model Law* jurisdictions to make this clear to domestic judges, who in turn must make an appropriate use of the legal sources that find their way into their judgment.

3. Positive or Negative Character of the Challenged Decision

When an arbitral tribunal faces a preliminary objection to its jurisdiction, it may immediately decide whether it has

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[80] See *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854, 1996 CanLII 152 at 866. See also David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 at 30; John C. Reitz, "Deference to the Administration of Justice in Judicial Review" (2018) 66 Am J Comp L 269 at 286.

[81] See notably *Cargill*, *supra* note 64 at paras 44–53, explaining the nature of a review.

jurisdiction. There is no question that this decision is subject to the approval of the court of the seat of the arbitration pursuant to Article 16(3) of the *Model Law*. However, some domestic courts have restricted their review only to cases in which the arbitral tribunal renders a so-called "positive" jurisdictional decision—when it confirms its jurisdiction over the parties' dispute.[82] When the arbitral tribunal renders a "negative" jurisdictional ruling—when it finds that it does not have jurisdiction to hear a dispute—some courts have refused to entertain a challenge to the tribunal's jurisdictional decision.[83]

Such an interpretation of the *Model Law* appears plausible on the face of its text. Indeed, Article 16(3) reads "[i]f the arbitral tribunal rules as a preliminary question that it *has jurisdiction*, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter."[84] As such, under the *Model Law*, a party would only be entitled to request judicial review if there is a positive jurisdictional ruling from the arbitral tribunal.[85] On the other hand, the *Model Law* does not expressly foreclose a

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[82] See Born, *supra* note 9 at 1193. See also Art 1065(1) Code of Civil Procedure (Netherlands); Bundesgerichthof, 6 Jun 2002, *Schieds VZ* 2003, 39 (Ger).

[83] This seems to be the minority approach, although some authors argue that it is, in fact, the correct one. See e.g. Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (London: Sweet & Maxwell, 2007) at 407; Giacomo Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law and the UNCITRAL Model Law* (Alphen aan den Rijn: Kluwer Law International, 2017) at 107.

[84] *Model Law*, *supra* note 1 at art 16(3). See e.g. *Resolutions of the Arbitrazh Court for the Moscow Circuit*, Case No A40-132755/14-141-905 (27 March 2015) and Case No A41-77961/14 (29 October 2015); *Resolution of the Presidium of the Supreme Arbitrazh Court of the Russian Federation* No 1787/11, Case No A40-4113/10-25-33, (14 June 2011); *Ruling of the Supreme Arbitrazh Court of the Russian Federation* No BAC-1881/10, Case No. A40-118723/09-63-872, (12 December 2010).

[85] See e.g. Bundesgerichthof, Jun 6, 2002, 2003 SchiedsVZ 39 (Ger).

review of a negative jurisdictional ruling either.[86] Several non-*Model Law* jurisdictions have additionally legislated similarly-worded provisions which provide that the review of an arbitral tribunal's jurisdictional decision applies regardless of whether that decision is positive or negative.[87]

The reviewability of a negative jurisdictional award is a significant question from the perspective of standard of review because it ties the review function to the ultimate position that a jurisdiction attributes to arbitration as a mode of dispute resolution. Deference to a negative jurisdictional ruling, but not a positive jurisdictional ruling reflects a skeptical view of arbitration and a clear preference for national courts. At the same time, other courts have ruled, not unreasonably, that it would be inappropriate to force an arbitral tribunal to continue proceedings that it believes it cannot entertain.[88]

4. Stage of Proceedings in Which a Jurisdictional Challenge Arises

The last two influences on the jurisdictional review analysis are the grounds of challenge and the procedural stages at which they occur. Indeed, while some jurisdictions seem to apply one consistent standard of review at each of the three procedural

[86] See Moscow City Ct, Dec 13, 1994, CLOUT Case No 147 (Russ).

[87] See e.g. Art 1520(1) Civil Procedure Code (France)*; Arbitration Act* (Sweden), art 27; *Arbitration Act 1996* (UK), s 67(1); Art 1690(4) Judicial Code (Belgium). See also Soc Sic v Soc Cnl, Corte di Cassazione (Court of Cassation) no 2896 (1993), Mass Foro it 1993, 295 (It).

[88] See *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*, [2006] SGCA 41; Sebhan Enters Ltd v Westmont Power (Kenya) Ltd, Civil Case No 239/2005 (2006) (Keny. Nairobi High Ct). This argument was also noted during the Model Law's drafting process. See UNCITRAL, *Report of the UNCITRAL on the Work of its Eighteenth Session*, UN Doc A/40/17, Annex I at para 163.

stages (preliminary,[89] annulment,[90] and recognition[91]) at which jurisdictional objections can be raised,[92] others seem to take a more nuanced approach and "afford a measure of deference to arbitrators' factual and legal conclusions on jurisdiction."[93] Thus, even though possible grounds of jurisdictional challenge at the preliminary, annulment and recognition stages are mostly the same, the stage of the proceedings in which the challenge is heard may affect the appropriate standard of review.

Specifically, the degree of deference granted can vary along two axes across jurisdictions: (1) grounds of challenge and (2) procedural stages. With respect to the former, as the reader will know, under the *Model Law*, a party may challenge an arbitral tribunal's jurisdictional decision at annulment and enforcement stages on the basis that (1) one party did not have the required capacity to enter into it under the law applicable to it, or if no choice is made by the parties, under the law of the seat of the arbitration or the arbitration agreement is otherwise invalid;[94] (2) the dispute submitted to the arbitral tribunal did not fall within the scope arbitration agreement;[95] or (3) the tribunal

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[89] *Model Law*, *supra* note 1 at art 16(3).

[90] *Ibid* at art 34.

[91] *Ibid* at art 36.

[92] Germany and the United Kingdom, for example. Looking first at German jurisprudence, see CLOUT case No 868, Judgment of 20 March 2003, 4 Z Sch 23/02 (Bayesrisches Oberstes Landesgericht) conf by Judgment of 23 October 2003, III ZB 29/03 (Ger Fed Sup Ct) (annulment stage); Judgment of 14 December 2006, XXXII YB Comm Arb 372 (Oberlandesgericht Celle) (2007) (recognition stage). Cf Judgment of 26 October 2004, XXX YB Comm Arb 574 (Oberlandesgericht Köln) (2005) (granting deference to findings of the arbitral tribunal at the recognition stage). For English decisions, see *Hellenic Petroleum Cyprus Ltd v Premier Maritime Ltd* [2015] EWHC 1894 (Comm) (English High Ct) (annulment stage); *Dallah*, *supra* note 17 (recognition stage).

[93] See Born, *supra* note 9 at 1192.

[94] See *Model Law*, *supra* note 1 at arts 34(2)(a)(i) and 36(2)(a)(i).

[95] See *ibid* 34(2)(a)(iii) and 36(2)(a)(iii).

rendered an award dealing with a subject-matter that went beyond the submission to arbitration.[96] The last ground is the only ground of challenge under the *Model Law* that cannot be raised during a preliminary challenge since it requires that an award have been made on the merits.

Different grounds of challenge push the arbitral tribunal toward different types of inquiries. Thus, inquiries into the validity of an arbitration agreement may receive greater deference from some reviewing courts if they involve a significant degree of fact-finding and factual conclusions can be separated from legal questions.[97] In most cases, however, since the ultimate question that is asked is whether there exists a valid arbitration agreement between the parties, the question constitutes a decidedly mixed question of fact and law, which attracts *de novo* review in most cases.[98] For the same reason, inquiries into the scope of the arbitration agreement, both at the preliminary and post-award stages also tend to be reviewed *de novo*. However, not unusually, domestic courts have exercised deference with respect to an arbitral tribunal's findings on the question.[99] This is due to the fact that determining the scope of the arbitration is often considered a matter that is at the core of the arbitral tribunal's function.[100] At the post-award stage, more courts tend to be deferent given that several questions that an arbitral tribunal may address can be incidental to the main question(s) submitted by the parties for resolution by arbitration. Refusing to defer to the choices of the arbitral tribunal with respect to the incidental questions it decides to answer means potentially severely obstructing the efficacy of

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[96] *Ibid.*

[97] See Polkinghorne, *supra* note 21 at 312.

[98] See *Dell supra* note 11.

[99] See e.g. *Recofi*, *supra* note 37; *Ace Bermuda*, *supra* note 35; SAP Madrid, Apr 30, 2007, No. 240/2007 (Spain).

[100] See Born, *supra* note 9 at 3587.

the arbitral tribunal, which, ultimately, must rule over a matter with an aim for finality.

In short, parties may have more success challenging an arbitral tribunal's jurisdictional decision on certain grounds rather than others. There are compelling reasons to adopt different standards of review for different grounds of challenge. Such complexity may be unappealing to courts however, which may motivate them to adopt one standard of review across the board for jurisdictional objections.[101] Understanding the possible standard of review permutations may help refine the jurisdictional review analysis for each ground of challenge, however.

The procedural stage at which the challenge is raised may also be significant. The *New York Convention*'s pro-arbitration framework clearly applies at the recognition stage, the last hurdle facing an arbitral award before enforcement. As such, the standard of review should necessarily be more deferential at this stage. However, it does not apply at the annulment stage, and it is debatable that it also extends to the preliminary objection stage.[102] This should, in theory, give way to more deference on the part of the recognition court. However, some courts have downplayed the pro-arbitration regime of Article V of the *New York Convention*. In *Dallah*, notably, the Supreme Court of the United Kingdom noted that:

> [T]he scheme of the New York Convention, reflected in ss.101-103 of the 1996 Act may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and

[101] See e.g. *Sanum Investments v ST Group*, *supra* note 46, at para 39; *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* [2017] SGHC 195 at para 87 ("[i]t is settled law, and undisputed, that I must apply a *de novo* standard of review in assessing the Kingdom's jurisdictional objections").

[102] But see Frédéric Bachand, "Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22:3 Arb Intl 463 at paras 470-471 [Bachand, *Article 8 of the Model Law*].

> applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s.103. But that is as far as it goes in law.[103]

It is not the goal of this paper to analyse in detail the merits of each possible interpretation of the Convention and its effects. For our purposes, it suffices to say that the level of deference that a domestic court is willing to admit can certainly vary according to the stage of proceedings in which a challenge is raised. As such it is an important factor to consider. Ultimately, it can have strategic value for the party trying to enforce the award as they will have more chances of successfully enforcing the award if the award-debtor has to discharge a higher standard of proof to successfully challenge the award.

IV. PRINCIPLES FOR JUDICIAL REVIEW OF JURISDICTIONAL DECISIONS

The foregoing shows the manifold difficulties that can affect the standard of review analysis. This section attempts to develop a framework to resolve these by going back to basics and answering the question: what are the objectives of jurisdictional review in the context of international arbitration? We begin by addressing the values and goals behind jurisdictional review (1). We then consider how the *international* character of international arbitration must impact the way that jurisdictional review is considered, especially within Model Law jurisdictions (2). Finally, we examine how choices affecting the standard of review for jurisdictional decisions cannot be detached from the larger structure of an arbitration law. As such, a commitment to a given standard of review must be viewed within an application of the entire arbitration law of a state (3).

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[103] See *Dallah*, *supra* note 17 at para 30.

1. Values and Goals of Jurisdictional Review

Jan Paulsson writes in *The Idea of Arbitration*:

> [T]he need to strike a balance is inherent in the co-existence of judicial and arbitral authority. They may overlap, and thus either contradict or complement each other at various stages of a dispute. To favour arbitration does not mean instinctive endorsement of would-be arbitrants, would-be arbitrators, or would-be arbitral institutions. Nor does it imply hostility to courts or state authority. To favour arbitration is to make it work for parties who have consented to it; to impose it at all costs would ultimately undermine its legitimacy.[104]

The upshot of this passage is that arbitral tribunals and judicial courts are most effective when they work in symbiosis toward the same goals.[105] The most fundamental of these goals is giving life to the parties' intentions. This implies tensions between finality and fairness as William W. Park describes.[106]

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[104] Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013) at 52 [Paulsson].

[105] See Marchisio, *Jurisdictional Matters*, *supra* note 29; Emilia Onyema, "The Jurisdictional Tensions Between Domestic Courts and Arbitral Tribunals, in *International Arbitration and the Rule of Law: Contribution and Conformity*, Andrea Menaker ed (Alphen aan den Rijn: Kluwer Law International, 2017) 481 [Onyema].

[106] See William W Park, "Why Courts Review Arbitral Awards," in *Recht der internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel anlässlich seines Ausscheidens als Direktor des Instituts für Luft- und Weltraumrecht und des von ihm gegründeten Lehrstuhls für Internationales Wirtschaftsrecht*, Robert Briner, L. Yves Fortier, Klaus Peter Berger & Jens Bredow, eds (Cologne: Carl Heymanns Verlag KG, 2001) 595 at 596 [Park].

Finality means clearly delineating the sphere of influence of the arbitral tribunal in relation to domestic courts. Parties submitting their disputes to arbitration look, first, for neutral adjudication and second, for an efficient process.[107] Since arbitration offers the parties greater confidence that disputes will not be subject to home bias, it reduces the price of a transaction in proportion to the lesser amount of perceived risk incurred.[108] Efficiency of the arbitral process ensures that arbitration continues to offer the best value among all available dispute resolution mechanisms. Increasingly, efficiency has become a cornerstone of arbitration—it has been described as a "defining value"[109] and something to which "the overwhelming weight of authority accords priority to [along with] party autonomy and equality of treatment".[110] As such, efforts on promoting efficient proceedings and dissuading dilatory tactics have acquired a high premium.[111] These considerations therefore play a significant role in developing a standard of review analysis.

Fairness means that procedural safeguards exist to ensure that the terms of the parties' submission to arbitration are respected, and that the arbitration is conducted in accordance with principles of due process.[112] These guarantees are necessary to keep arbitration effective and maintain its users'

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[107] Park, *supra* note 106.

[108] *Ibid*.

[109] See Loukas Mistelis, "Efficiency—What Else?: Efficiency as the Emerging Defining Value of International Arbitration: Between Systems Theories and Party Autonomy" in *Oxford Handbook of International Arbitratio*n, Thomas Schultz and Federico Ortino eds (Oxford: Oxford University Press, 2020) 349 at 357–59.

[110] See Born, *supra* note 9 at 2334.

[111] See, e.g. ICC Commission Report, "Decisions on Costs in International Arbitration" [2015] ICC Disp Res Bull. 1 (discussing methods to combat dilatory tactics in arbitration); ICC Commission Report, Reducing Time and Costs in International Arbitration (2012) ICC (2nd).

[112] See Park, *supra* note 106 at 596.

confidence in the process. Interference from domestic courts in arbitration thus helps to protect party expectations and ensure that the arbitral tribunal renders an enforceable award.[113]

Both finality and fairness are necessary to make arbitration worthwhile. Applied to the judicial review of jurisdictional decisions, these values lead to a number of guiding principles. First, the principal aim of the judicial review of jurisdictional decisions should be upholding the parties' agreement under the arbitration clause. This means that curial review of jurisdictional findings is justified insofar that it ensures that an arbitration agreement is properly performed according to parties' agreement. Second, the other foremost consideration that courts should bear in mind when reviewing jurisdictional decisions is dissuading dilatory tactics.[114] According to one

[113] Pushed to the extreme, this could arguably contribute to a phenomenon referred to as the "creeping judicialization" of arbitration, See Rémy Gerbay, "Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration" (2014) 25:2 Am Rev Intl Arb 223 (defining judicialization as "an increase in the procedural sophistication and formality of international arbitration proceedings as a result of which arbitration increasingly resembles litigation before the domestic courts […] the concern behind judicialization [being] the increase in costs and delay associated with it") [Gerbay]. But cf Leon Trakman and Hugh Montgomery, "The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?" (2017) 30:2 Leiden J Intl L 405. An analogous phenomenon "due process paranoia," that is "the reluctance by [arbitral] tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully" (as defined in the 2015 Queen Mary Arbitration Survey, See Queen Mary University and White & Case, *2*015 International Arbitration Survey: Improvements and Innovations in International Arbitration (New York: White & Case, 2015); See Klaus Peter Berger and J. Ole Jensen, "Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators" (2016) 32:3 Arb Intl 415.

[114] This concern was in fact a prominent part of the discussion during the drafting of the *Model Law*: UNCITRAL Secretary-General, "Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration" (Mar 25, 1985) UN Doc A/CN.9/264 at para 13.

prominent practitioner, most jurisdictional challenges that are lodged in courts under Article 16(3) are dilatory tactics.[115]

This implies a measure of deference. Applying the *de novo* standard across the board would therefore frustrate any attempt to dissuade the lodging of dilatory challenges. At the same time, the fact that the contour of the tribunal's jurisdiction is central to the proper performance of the contract is a compelling reason to impose the *de novo* standard of review. Conversely, this does not mean that absolute deference is always warranted. Most times, it is not and protecting the parties' consent to arbitration gives sufficient reasons to engage in *de novo* review for at least some jurisdictional issues. In short, any approach to reviewing jurisdictional decisions should take a nuanced approach to *standard* and *format* of review depending on the type of challenge and stage of the proceedings. In so doing, domestic courts should take another page from Jan Paulsson:

> There is no simple solution applicable to all situations. Much trouble has been created by the unthinking repetition of labels. They are useful reference points, but perilous shortcuts.[116]

2. *International Interpretation of International Arbitration Legislation*

In addition to the above principles, interpretation taking into account the international character of international commercial arbitration should be adopted by domestic courts when possible. For jurisdictions having adopted the *UNCITRAL Model Law* with its 2006 amendments, this obligation is already incumbent on the courts. Indeed, Article 2A(1) of the *Model Law* reads "In the interpretation of this Law, regard is to be had to

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[115] See Greenberg, *supra* note 28, at 57.

[116] Paulsson, *supra* note 104 at 52.

its international origin and to the need to promote uniformity in its application and the observance of good faith."[117] Jurisdictions having adopted the 1985 version of the *Model Law*, but not the 2006 amendments can still consider themselves bound by the same obligation given that the purpose of the *Model Law* was always intended to be the efficient functioning of the worldwide system of international commercial arbitration, consistent with the use made by it of those it was intended to serve.[118] This weighs heavily in favour of an "international" and "autonomous" interpretation of the *Model Law* as opposed to a nationalist interpretation.[119] International arbitration practitioners are best served by international rules rather than domestic rules, given the number of jurisdictions—and by extension, national arbitration laws—that can be involved in a single case and the infinite combinations of party nationalities.[120] When the applicable international arbitration legislation in force in one country is based on the *Model Law* or otherwise designed to achieve uniformity, and binding domestic legal sources do not prescribe a differing interpretation, an international interpretation is especially appropriate.[121] National courts have adopted such an

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[117] *Model Law*, *supra* note 1 at art 2A(1).

[118] See Frédéric Bachand, "Judicial Internationalism and the Interpretation of the Model Law. Reflections on Some Aspects of Art. 2A" in *UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration,* Frédéric Bachand and Fabien Gélinas eds (Huntington: Juris, 2013) 231 at 235 [Bachand, *Judicial Internationalism*].

[119] See Franco Ferrari, "How International Should International Arbitration Be? A Plea in Favour of a Realistic Answer" in *Eppur Si Muove: The Age of Uniform Law, Essays in Honour of Michael Joachim Bonell to Celebrate His 70th Birthday,* Vol 1 (Rome: UNIDROIT, 2016) 847 at 848 [Ferrari].

[120] See Bachand, *Judicial Internationalism*, *supra* note 117 at 237.

[121] See Frédéric Bachand, "Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism" (2012) J Disp Resol 83 at 84.

international interpretation on that basis.[122] An international interpretation is also warranted in light of Article 31 of the 1969 *Vienna Convention* on the Law of Treaties.[123] Article 31 of the *Vienna Convention* provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[124] While the provision mentions that it applies to treaties at the outset, Article 31 is widely accepted as constituting a rule of customary international law.[125]

An international interpretation should also be taken into account by states whose legislation, though not having adopted the *Model Law*, was nevertheless significantly influenced by it. This would include states such as the United Kingdom and the Netherlands.[126] This should create an impetus for judges in those jurisdictions to at least *consider* and ideally address international case law from *Model Law* jurisdictions in their reasoning when ruling on an objection to an arbitral tribunal's jurisdiction. Engaging in such exercise, while not necessarily leading to the unification of arbitration law, over time, should

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[122] See Bundesgerichthof, Sept 9, 2010, III ZB 69/09 (Ger) (adopting an international interpretation of its international arbitration legislation, based on the 1985 *UNCITRAL Model Law*); Oberstes Landesgericht München, Nov 14, 2011, 34 Sch 10/11.

[123] See Ferrari, *supra* note 118 at 849.

[124] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 31 (entered into force 27 January 1980).

[125] See Richard Gardiner, *Treaty Interpretation* 2nd ed (Oxford: Oxford University Press, 2017) at 13. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Reports 38 at para 94.

[126] See Judith Freedberg, "The Impact of UNCITRAL Model Law on the Evolving Interpretation and Application of the 1958 New York Convention" in *The UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration,* Frédéric Bachand and Fabien Gélinas eds (Huntington: Juris, 2013) 223 at 231.

promote a healthy exchange of ideas and perspectives about arbitral jurisdiction.

The above also further demonstrates the incompatibility of domestic legal concepts with the *Model Law*. Applying such notions when interpreting the provisions of the *Model Law* flies in the face of the *Law*'s purpose and greatly complicates the work of international arbitration practitioners. As we have seen earlier, it can lead to confusion more than clarification of the law.

3. Interpretation Taking into Account the Entire Structure of an Arbitration Law

Finally, although this may seem like a banal principle, the review analysis should take into account the entire structure of the applicable arbitration legislation. Such approach reflects a very widely if not universally accepted principle of statutory interpretation: systematic (also known as "contextual") interpretation.[127] This approach mandates that to interpret one section of a statute, the rest of the statutory scheme must be taken into account.[128] To limit wasting resources, a review

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[127] See Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Leiden: Brill, 2020) 195 at 202 ("[s]ystematic interpretation is a common interpretative method in all jurisdictions that have adopted Savigny's four methods. […] [These methods] can be observed in every national methodology. […] [Systematic interpretation] is also used in common law countries.").

[128] This method complements other interpretive methods, notably the textualist method. See, Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Eagan: West, 2012) ch 24, 27 (describing, respectively, the "whole-text interpretive canon"—pursuant to which "[t]he text must be construed as a whole" and "harmonious reading canon"—pursuant to which "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). Similar to this is the interpretive canon of English law known as the "golden rule". See *Grey v Pearson* (1857) 6 HL 61, 106 ("in construing statutes, as well as in construing all other written instruments, the grammatical and ordinary sense of the words is to be adhered to, *unless that would lead to some absurdity or*

analysis should bear in mind the fact that several provisions in an arbitration may lead to jurisdictional review and consider whether it makes sense for one party to retain the right to invoke one such provision after having invoked another. For example, the *UNCITRAL Model Law* contains four provisions potentially allowing for some form of jurisdictional review: (1) Article 8, under which a court may consider the validity of an arbitration agreement before staying proceedings in favour of arbitration; (2) Article 16, under which a court may rule on an arbitral tribunal's jurisdiction after the arbitral tribunal has ruled on an objection to its jurisdiction from one of the parties; and (3)(4) Articles 34 and 36, under which a court may review the arbitral tribunal's jurisdiction, respectively at the annulment and recognition stages.

To take a simple example: if one party challenges the jurisdiction of the arbitral tribunal with respect to a particular matter before a domestic court under Article 16 of the *Model Law* or its equivalent under a non-*Model Law* statute, they should be precluded from raising the same claim later under Article 34 or its equivalent at the annulment stage. Conversely, if a jurisdictional objection could be raised earlier but was not, a court looking at all the circumstances could make a judgment as to whether it was waived. These propositions will be uncontroversial in several jurisdictions whose courts have ruled thus, not just under statutory interpretation principles,

inconsistence with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further" [emphasis added]).

but under doctrines of waiver[129] and *res judicata* or preclusion.[130]

Two potential problems flowing from this principle should be addressed briefly. First, jurisdictions that adopt positive versus negative *competence-competence* should understand jurisdictional challenges during and after arbitral proceedings differently if they adopt a "full" or "*prima facie*" review. Specifically, a court that engages in a full review of the validity of the arbitration agreement before staying proceedings in favour of arbitration should not entertain any more general challenges to the arbitration. The only challenges it should entertain in such situations should be assessing whether questions addressed by the arbitral tribunal in their award can properly be characterized as questions incidental to the ones that were submitted to arbitration and approved via the court's preliminary jurisdictional determination, or whether they constitute different unrelated questions which should lead to the award's partial annulment. Conversely, if a domestic court exercises only *prima facie* review before staying the case in favour of arbitration, a subsequent jurisdictional challenge applying the *de novo* standard of review could be justified given that *prima facie* review is predicated on the idea of allowing the arbitrator to rule on the challenge to its jurisdiction rather than domestic courts, consistent with the pro-arbitration framework of Article II of the *New York Convention*. As such, in reviewing the *prima facie* validity of an arbitration agreement, a domestic court is taking the role of a gatekeeper—whose purpose is

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[129] See, e.g., Dutch Supreme Court, 27 Mar 2009, ECLI:NL:HR:2009:BG4003 (*Poultry/Burshan*) (Neth); Dutch Supreme Court, 27 Mar 2009, ECLI:NL:HR:2009:BG6443 (*Smit Bloembollen/Ruwa Bulbs*) (Neth.); *Howard University v Metropolitan Campus Police Officer's Union*, 512 F.3d 716, 720 (DC Cir 2008) [*Howard University*]; Bundesgerichtshof 27 Mar 2003, SchiedsVZ 2003, 133, 134 (Ger).

[130] See, e.g., *Collins v DR Horton, Inc*, 505 F.3d 874, 882 (9th Cir 2007); Paris Ct App, Jun 9, 1983, *Iro-Holding v Setilex*, 1983 Rev Arb 497 (Fr); Fed Sup Ct, May 27, 2014, No 508/2013 (Switz). But cf *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services* (Pte) Ltd [2019] SGCA 33.

decidedly more efficiency of process rather than protection of contractual rights.[131]

Second, insofar that there are no contradicting private international law rules binding on a court, the preclusive effect that may flow from the jurisdictional review decision of one court should not be impeded by the fact that it comes from a different state than the one whose court hears a subsequent jurisdictional objection later on in the case. In other words, a domestic court should enforce foreign decisions respecting an arbitral tribunal's jurisdiction and apply its *res judicata* or preclusion doctrine to preclude parties from raising jurisdictional objections on grounds already decided by a foreign court.[132]

While it is true that several states around the world still take a parochial approach to the recognition of foreign judgments, as global private international law progressively develops toward unification—a movement heralded by the adoption of the text of the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* by the Hague Conference on Private International Law[133]—the fact that a

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[131] See, Bachand, *Article 8 of the Model Law*, *supra* note 102 at 466. Of note, Professor Bachand further argues that *prima facie* review also dissuades dilatory tactics.

[132] See, e.g., *Fomento de Constructiones y Contratas SA v Colon Container Terminal SA*, BGE 127 III 279 (2001) (Switz. Fed Sup Ct) (finding that a foreign decision respecting the jurisdiction of an arbitral tribunal seated in Switzerland can be enforced in Switzerland and is binding on the parties). A *lis pendens* issue may arise here given that both under Articles 8 and 16 of the *Model Law* and equivalent provisions adopted in non-Model Law jurisdictions, an arbitral tribunal is entitled to continue proceedings to rule on its jurisdiction even while one party is pursuing a challenge to the tribunal's jurisdiction before courts. As of writing, this is an unresolved issue to which states take varying approaches. See Kaj Hobér, *Res Judicata and Lis Pendens in International Arbitration* vol 366 (Leiden: Brill, 2013) 99 at 222.

[133] *See Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, European Union, Ukraine and Uruguay, 2 July 2019, OJ L 187.

court's jurisdictional review was rendered in another state should become increasingly irrelevant to the efficient operation of the arbitral tribunal.

V. APPLYING STANDARDS AND FORMATS OF REVIEW IN THE FUTURE

Having laid down some principles in the last section, we now consider how to correctly apply standards and formats of review. We consider, first, what the correct presumptive approach should be when courts engage in jurisdictional review (1). We then consider factors that can shift the standard or format of review (2) and outstanding issues that can benefit from further elaboration in the future (3).

1. Choosing the Correct Standard and Format of Review

Since the *New York Convention* specifies no particular framework to review an arbitral tribunal's jurisdictional decision, a domestic court is at liberty to adopt the framework it considers appropriate. This allows a court to choose a standard and a format of review to achieve the goals of arbitration. Achieving this goal requires nuance. Once again, a standard of review circumscribes the potential outcomes available to a domestic court—if *de novo*, the court is at liberty to overturn the tribunal's findings, whereas under a deferential standard, a court is much more limited in what it can overturn. A review format, however, prescribes a manner in which a court may reach its conclusions. In our view, the better approach to jurisdictional review is to grant deference to the arbitral tribunal's factual determinations, while adopting a *review* rather than *new trial* format as a starting point. Courts can decide to grant more or less deference and switch to a *new trial* format if warranted.

Looking first to standard of review, we expressed in the previous section that applying the *de novo* standard of review in all situations can be problematic since it fails to give the deference to the judgment of arbitral tribunals that was

envisioned by the *New York Convention*. Rehearing the entire case is similarly problematic. Not only does it waste party as well as judicial resources,[134] it reflects a skeptical attitude toward arbitration, which is unwarranted and, at any rate, inconsistent with the pro-arbitration spirit of the *New York Convention*.[135] A deferential standard of review is thus appropriate to review the arbitral tribunal's factual conclusions and a *de novo* standard, for legal and mixed factual and legal conclusions.

Skepticism of arbitration is unwarranted, and courts should be wary of adopting this attitude. An arbitral tribunal will be just as capable if not more capable of ruling on its jurisdiction. A tribunal will often be composed of three arbitrators, often with an expertise in the area of the dispute, whereas a domestic judge will usually sit alone and is likely to have no such expertise.[136] Earlier, we mentioned a number of reasons usually given in support of applying the *de novo* standard of review. First, if domestic courts are not fully empowered to review an arbitral tribunal's findings *de novo*, they would effectively have no power to overturn findings of an arbitral tribunal "that itself had no jurisdiction to make such [findings]."[137] Second, since Article 16(3) of the *UNCITRAL Model Law* provides that when an arbitral tribunal rules on its jurisdiction, a party may petition a court of the seat to "decide the matter", this means that the court necessarily has to hear the matter completely anew after an arbitral tribunal has ruled on the matter[138] Finally, courts are

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[134] The high costs and significant delays of arbitration are mentioned as significant grounds for concern. See Gerbay, *supra* note 112.

[135] See Alan Scott Rau, "Matters Beyond the Scope of the Submission to Arbitration" in *Autonomous Versus Domestic Concepts Under the New York Convention*, Franco Ferrari and Friedrich Rosenfeld eds (Alphen aan den Rijn, Kluwer Law International, 2021) 181 at 183.

[136] See Onyema, *supra* note 105 at 484-85.

[137] *Insigma*, *supra* note 17 at para 22.

[138] See Polkinghorne et al., *supra* note 215 at 312.

in "no worse position than an arbitral tribunal to evaluate evidence and hear witnesses on the question of jurisdiction."[139]

All of these arguments are problematic. First, that a domestic court must be able to review all of an arbitral tribunal's conclusions under the *de novo* standard of review to avoid being bound by findings which an arbitral tribunal "had no jurisdiction to make" completely ignores the arbitral tribunal's *competence-competence*. Most jurisdictions nowadays recognize that an arbitral tribunal is vested with the capacity to "rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[140] Applying the *de novo* standard of review for every conclusion would eviscerate this principle and render it meaningless. The argument is furthermore self-contradictory: following its logic, if an arbitral tribunal renders a negative jurisdictional decision, its denial of its jurisdiction is as illegitimate as an incorrect finding of jurisdiction. The point of competence-competence is not that an arbitral tribunal must rule correctly on its jurisdiction, it is that it should rule in priority before a court.[141] Furthermore, courts have power to review jurisdictional objections not to give defendants a "second bite at the cherry," but to ensure that the parties' consent to arbitrate only certain disputes is being respected. As such, it is by nature an exceptional recourse intended to protect a party's rights to litigate disputes not covered by the arbitration agreement before judicial courts. The reverse position would also be inconsistent with the structure of multiple arbitration laws. Since a court must normally refer the parties to arbitration when one party requests it, and upon showing an at least *a priori* valid arbitration agreement binding

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[139] *Ibid.* See also Joseph, *supra* note 22 at 495–496.

[140] *Model Law*, *supra* note 1 at art 16(1).

[141] See, e.g., Emmanuel Gaillard and Yas Banifatemi, "Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice,* Emmanuel Gaillard and Domenico di Pietro eds (London: Cameron May, 2008) 257 at 257.

on the parties, this effectively forces the parties to return to court after having obtained an initial jurisdictional ruling from the arbitral tribunal, which a court could then completely disregard.[142]

Second, no language in Article 16 of the *Model Law*, the Analytical Commentary and its *travaux préparatoires* seems to support an interpretation of "decide the matter" as mandating a new trial.[143] Finally, as we have stated earlier, national court judges are in fact more likely at a disadvantage compared to arbitral tribunals with respect to their ability to make good factual findings given their lesser number and expertise.

For this last reason, a measure of deference, rather, is warranted with respect to the arbitral tribunal's factual findings. In addition to being more efficient, when an arbitral tribunal has conducted extensive fact-finding, its factual conclusions will be of high quality and should stand on judicial review unless one of the parties shows that the tribunal has made a manifest and overriding error in its assessment.[144] A *de novo* standard of review nevertheless seems warranted on legal and mixed factual and legal findings to allow a court to

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[142] This assumes that the court's review before staying proceedings in favour of arbitration is *prima facie*. While not the subject of the present paper, this is the correct approach in our view. See Bachand *Article 8 of the Model Law*, *supra* note 102 at 476. If a court applies full review at the outset, then presumably, the challenge is made on a question that has been raised later in the proceedings regarding an excess of authority. In such a case, the analysis is somewhat different since the question is less whether there is jurisdiction as much as whether the impugned exercise of jurisdiction is incidental to the jurisdiction that has already been deemed appropriate by a court.

[143] See Polkinghorne et al., *supra* note 21 at 312. See also Aron Broches, "Article 16" in *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Alphen aan den Rijn, Kluwer Law and Taxation Publishers, 1990) at para 31 ("it proved difficult… to reach agreement on the… scope of court review").

[144] See Born, *supra* note 9 at 1200.

meaningfully protect the consent of the parties to select the issues to be decided by an arbitral tribunal.[145]

With respect to the format of review, the appropriate format is a *review*, not a new trial. As we have seen, the objectives that the jurisdictional review analysis should pursue are protecting party consent while dissuading dilatory tactics.[146] Thus, while allowing a domestic court the freedom to overturn the arbitral tribunal's mixed factual and legal, and purely legal conclusions on jurisdiction, it must do so in a way that ensures that it properly addresses the reasoning put forward by the arbitral tribunal. A *review* format is best suited to achieve this goal given that it requires a court to find flaws in the reasoning of the arbitral tribunal rather than consider the matter completely anew. A *new trial*, in addition to being wasteful, allows the challenging party to get a "second bite at the cherry".[147] Ultimately a *review* achieves an appropriate balance between efficiency and fairness.

2. Factors that May Shift the Standard or Format of Review

Given the variety of scenarios that may lead to a jurisdictional challenge, a reviewing court may consider shifting the standard or format of review depending on the situation. We suggest two examples of when this could happen, although these may not be the only ones. Domestic courts should have the freedom to determine the circumstances in

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[145] See Williams and Kawharu, *supra* note 13 at 217 ("[t]hat said, where both parties participate in the tribunal's inquiry into its jurisdiction under art 16(3), it is suggested that the rehearing should generally take place on the evidence before the tribunal").

[146] See Part III.

[147] See *Joseph*, *supra* note 22 at 495 ("[t]he concept of two evidential bites at the cherry does not appear to have much to be said in its favour. It is also suggested that it is not a conclusion demanded by the Arbitration Act or the similar concepts underlying the Model Law"); Williams and Kawharu, *supra* note 13 at 217. ("The rehearing standard has been questioned by some, given the 'considerable waste of resources' when all issues, including issues of fact, must be reheard by a court").

which a standard or format of review is more appropriate, in accordance with the principles and policies laid out in this paper. The first example—prior jurisdictional challenges and implied waivers of jurisdictional objections—relates to *standard* of review, whereas the second one—the inclusion of "new" or "fresh" evidence—relates to *format*.

a. Prior Jurisdictional Challenges and Implied Waiver of Jurisdictional Objections

Mixed factual and legal conclusions of an arbitral tribunal with respect to jurisdiction should be subject to deferential review if they have already been subject to the same challenge before a domestic court before. For example, under Article 16(3) of the *Model Law*, a party could challenge the jurisdiction of the arbitral tribunal before making submissions on the merits to the tribunal. Pursuant to that Article, a court at the arbitral seat could dismiss the challenge after the arbitral tribunal has rendered its own decision on jurisdiction. If that same challenge is raised again before the annulment court, the court could deal with it by applying a deferential standard of review extending to mixed factual and legal conclusions and purely legal conclusions of the arbitral tribunal or the reviewing court.

A more drastic—though sometimes appropriate—solution would be to dismiss the objection entirely. Conversely, to make this framework fully effective, a court should also consider precluding further objections if these objections could have been raised at an earlier stage of the arbitration.[148] Finding that a party waived their right to object to an arbitral tribunal's jurisdictional findings or that they are precluded from doing so is a drastic measure. As such, a court may prefer to take a more conciliatory approach and simply review the arbitral tribunal's jurisdictional findings on a deferential standard of review. This would adequately reflect the thought and resources that have

[148] See e.g. *Howard University*, *supra* note 128.

already been put into considering the evidence and arguments for and against jurisdiction in each case.

b. "New" or "Fresh" Evidence

If following the arbitral proceedings but before the arbitral tribunal's award is confirmed or recognized and enforced, "new" or "fresh" evidence is discovered and used to challenge the arbitral tribunal's jurisdiction, a domestic court will be faced with the question of how to address this new evidence in reviewing the arbitral tribunal's jurisdictional decision. Canadian and Singaporean courts have considered the question and offered satisfactory answers on the threshold question of admitting the evidence.[149] In *The Russian Federation v Luxtona* and *Sanum Investments v Lao People's Democratic Republic*, the Ontario Superior Court and the Singapore Court of Appeal both adopted tests based on the English case of *Ladd v Marshall*.[150] In *Sanum Investments*, the Court determined that new evidence could be admitted if "(1) the evidence could not have been obtained using reasonable diligence; (2) the evidence would probably have an important influence on the case; and (3) the evidence must be apparently credible."[151]

These cases are of limited usefulness to understand the interplay between a *review*-type format of review and the admission of new evidence. In *Luxtona*, the Superior Court of Ontario initially found the evidence inadmissible and so did not have to consider how to review the arbitral tribunal's jurisdictional decision based on new evidence,[152] and the Divisional Court and Court of Appeal eventually ruled that the

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[149] See *Luxtona 2019*, *supra* note 38; *Sanum Investments*, *supra* note 19.

[150] [1954] EWCA Civ 1. To be precise, the Ontario Superior Court states that it is adopting the test of *R v Palmer*, [1980] 1 SCR 759, which it asserts to be Canada's equivalent to *Ladd v Marshall*. *See Luxtona 2019*, *supra* note 38 at para 49.

[151] See *Sanum Investments*, *supra* note 19 at para 27.

[152] See *Luxtona 2019*, *supra* note 38.

parties could adduce new evidence as of right.[153] The Singaporean court admitted the evidence but given that Singaporean courts apply the *de novo* standard of review and its format of review approaches a new trial, how to consider the new evidence within the entire record was not a question they had to adjudicate.[154]

When new evidence is admitted and a party challenges the jurisdiction of the arbitral tribunal on one of the grounds laid out in Articles 34 or 36 of the *Model Law*, it may be appropriate to review the tribunal's jurisdictional decision under a *new trial* format. This would ensure that courts see the new evidence as part of the entire evidentiary record and be able to appreciate its relevance. This does not necessarily mean that the parties should be allowed to adduce any additional evidence that they want. If the evidence could have been adduced during the arbitration but was not, it could make sense that the parties should not be allowed to request its inclusion for jurisdictional review. Under any scenario, the admission of new evidence entails a major upset of the course of proceedings. That the evidence sought to be included meets a test akin to the one used by the Singapore Court of Appeal in *Sanum Investments* seems therefore warranted.

3. Outstanding Issues: Positive and Negative Jurisdictional Decisions and Institutional Determinations

Considering the foregoing analysis, two outstanding issues should receive attention as special cases of jurisdictional review from lawyers and commentators: (1) negative jurisdictional decisions and (2) determinations made by arbitral institutions applying their own rules.

We have already touched on negative decisions earlier in this paper. While it was not within the scope of this paper to

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[153] See *Luxtona 2021*, *supra* note 26 at para 38.

[154] See *Sanum Investments*, *supra* note 19 at para 35.

resolve the question of whether they should be reviewed by courts, the principles we reach to govern jurisdictional review can nevertheless offer some guidance as to how to resolve this question in the future. In particular, through framing the jurisdictional review analysis as an attempt to balance finality and fairness, and the promotion of contractual performance and consent, domestic courts can offer strong reasonings on this issue, even as states continue to define for themselves the scope and effects of negative *competence-competence*.[155]

Finally, it should be underscored that in addition to the factors affecting jurisdictional review described in this paper, the fact that a jurisdictional ruling is made by an arbitral institution applying its own rules could also push in favour of deference on the part of the reviewing court.[156] There is authority to support both this proposition and its contrary. As such, counsels arguing before domestic courts should pay great attention to it.[157] Whether a domestic court should grant deference to the ruling of an arbitral institution will, in any event, require a context-specific analysis. As such, this question can benefit from further doctrinal elaboration in the future.

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[155] See Rajarshi Singh, "Between Scylla and Charybdis: Should Negative Jurisdictional Decisions by the Arbitral Tribunal Be Reviewable by Domestic Courts?" (October 12, 2020) *American Review of International Arbitration Blog*, online: <http://aria.law.columbia.edu/between-scylla-and-charybdis-should-negative-jurisdictional-decisions-by-the-arbitral-tribunal-be-reviewable-by-domestic-courts/>.

[156] See e.g. Carte Blanche (Singapore) *Pte Ltd v Carte Blanche Intern Ltd*, F Supp 945, 957 (1988) ("[the ICC] is the best judge of whether its procedural rules have been satisfied"); *AT & T Corporation v Saudi Cable Co*, [2000] [2000] EWCA Civ 15 at para 49 ("[the English Court of Appeal will pay] the closest attention to any interpretation of the ICC Rules adopted by the ICC Court"); *Contra Baffinland v Tower-EBC*, 2022 ONSC 1900.

[157] See Friedrich Rosenfeld, "The Shared Control of Awards" in *The Cambridge Handbook of Judicial Control of Arbitral Awards,* Larry A. DiMatteo ed (Cambridge: Cambridge University Press, 2020) 443 at 449–450; See e.g. *Beebe Med Center v Insight Health Services*, 751 A.2d 426 (1999).

VI. CONCLUSION

This paper sought to give a more robust theoretical foundation to the curial review of jurisdictional decisions made by arbitral tribunals. We began by presenting a spectrum of approaches adopted across jurisdictions. As this made clear, there is a significant amount of variation among jurisdictions. We explained this array of variation by underscoring a number of factors: first, the lack of clarity between *standard* and *format* of review that has affected courts engaging in jurisdictional review analysis. Second, the blending of *Model Law* and non-*Model Law* sources and domestic influences, third, the positive or negative nature of an arbitral tribunal's jurisdictional decision and fourth, the stage of proceedings in which a jurisdictional challenge arises.

In response, we suggested that the review of arbitral awards is rooted in principles of fairness and finality. Based on these principles, we suggested a tentative framework for jurisdictional review, which can be summarized thus and should apply in the absence of explicit provisions to the contrary in a jurisdiction's arbitration law:

1. The presumptive standard of review for the arbitral tribunal's factual determinations is deference.
2. The presumptive standard of review for mixed factual and legal questions, and purely legal questions is *de novo*.
3. The standard of review can switch to a deferential one for mixed factual and legal questions and purely legal questions if
    a) the jurisdictional challenge is raised following an arbitral tribunal's preliminary jurisdictional ruling and the same challenge was raised and dismissed by a court performing a full review of the arbitration agreement prior to staying proceedings in favour of arbitration;

   b) the jurisdictional challenge is raised before the annulment court and that same challenge was raised and dismissed as part of the judicial review of the arbitral tribunal's interim jurisdictional ruling;
   c) the jurisdictional challenge is raised before the recognition court and that same challenge was raised and dismissed before the annulment court.
4. The presumptive format of review is a *review*, not a *new trial*, unless the challenging party is allowed by the court to present new evidence. To be admitted, the evidence should be apparently credible, could not have been obtained through reasonable diligence during the arbitration and, if admitted, would probably have had an important influence on the result.
5. The presumptive standard or format of review applicable in one case may be shifted to secure the fairness and finality of the proceedings.

The goal of such a framework is adaptability and pragmatism. Courts across jurisdictions can legitimately differ with respect to certain elements of the jurisdictional review analysis. As such, the principles above only constitute basic rules and are not exhaustive. More importantly, they direct a fact-specific analysis. Thus, courts can switch the standard or format of review that they apply if the circumstances make it appropriate. More broadly, this framework encourages domestic courts to fully embrace the internationality of international arbitration. By pursuing conceptual and linguistic consistency as one of their goals, courts can make as valuable contributions to the system of international arbitration as the practitioners with whom they interact.