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THE JURISDICTIONAL MULTI-BODY PROBLEM IN INTERNATIONAL ARBITRATION

A core appeal of arbitration is to provide a quick and efficient adjudication. Yet, arbitral disputes are still prone to spiral into jurisdictional turf wars between tribunal and court – a phenomenon that can be aptly analogised as a "multi-body problem". To resolve this problem, the common law courts of England, Singapore and Hong Kong have had to evolve beyond the traditional arbitral doctrines (*ie*, *kompetenz-kompetenz*, one-stop presumption, arbitrability and choice of remedies) and develop new dynamic principles (*ie*, centre of gravity, hiving-off and transnational estoppel). This paradigm shift epitomises the importance of expedient, effective and expansive curial intervention in determining jurisdictional challenges in international arbitration.

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I. Limitations of traditional doctrines and emergence of new principles

1 Why do businesspeople prefer arbitration over litigation as the forum to resolve disputes? One compelling reason is that arbitration promises "a quick and efficient adjudication".[1] In theory, disputes referred to arbitration would fully stay within the four walls of the tribunal "without interference from the courts".[2] This is because an arbitration agreement creates a dual obligation to arbitrate (positive) and obligation not to litigate (negative).[3] Even if a party persists on litigating, the courts are empowered (or even mandated) to grant a stay of court proceedings,[4] in order for the arbitration to commence or continue instead.

2 Alas, cross-border disputes arising from complex commercial transactions rarely operate in such utopia. When one party commences arbitration, the other party will almost invariably retaliate by challenging the tribunal's jurisdiction and institute a fresh action in a separate forum

1 *Fiona Trust & Holding Corporation v Privalov* [2007] Bus LR 686 at [6].
2 *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16 at [1].
3 *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16 at [43].
4 International Arbitration Act 1994 (2020 Rev Ed) s 6(2); Arbitration Ordinance (Cap 409) (Hong Kong) s 20(5); Arbitration Act 1996 (c 23) (UK) s 9(4).

(court or another tribunal). Even if the challenge is defeated and the initial arbitration goes on, the disgruntled party can launch another salvo of jurisdictional challenge against the arbitral award, years later.

3 Jurisdictional turf wars between arbitral tribunals and national courts evoke many vexing legal issues. Should the tribunal always have the first say on its own jurisdiction? If a court is called upon to determine the scope of an arbitral tribunal's jurisdiction or competence[5] prior to the tribunal's ruling on its jurisdiction, should the court undertake a full or provisional review? If the tribunal made a preliminary award on jurisdiction, can its final award be later challenged in court on the same jurisdictional grounds canvassed in the preliminary award? If two or more courts have concurrent jurisdiction over a dispute, which court gets to decide on the tribunal's jurisdiction or competence? Can an arbitral award be challenged on the same jurisdictional grounds twice (or more times) before the seat court or enforcement court(s)?

4 These legal issues stem from a singular conundrum – an arbitral dispute falling within the jurisdictional scope of two (or more) forums will invariably be caught between multiple jurisdictional forces throughout its lifespan (pre-award till post-award). This is akin to the unsolvable centuries-old "three-body problem" in physics.[6] Imagine a cluster of celestial bodies floating in space closely within each other's gravitational field. In a simple system, a lone planet orbits a star – stability and serenity coalesce from such duality. Chaos ensues, however, once a second star floats into proximity – the orbital motions of three bodies are far too complex for modern physicists and mathematicians to compute with formulaic precision. Likewise, analogically, an arbitral dispute pulled by the gravitational fields of the tribunal and courts is doomed to languish in an indefinite jurisdictional limbo.

5 Happily, in recent years, the common law courts of England, Singapore, Hong Kong and Australia are gradually recognising that the traditional doctrines of international arbitration (*ie*, *kompetenz-kompetenz*, one-stop presumption, arbitrability and choice of remedies) are ill-suited to solve the jurisdictional multi-body problem, and instead, have found refuge in new dynamic principles (*ie*, centre of gravity, hiving-off and transnational estoppel). This new paradigm rests upon the *raison d'être* that curial intervention is not only complementary but critical in settling jurisdictional conflicts prevalent in modern commercial disputes.

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5 The rationale and significance in the deliberate choice of words "jurisdiction or competence" will be expounded at paras 46–51 below.

6 Richard Montgomery, "The Three-Body Problem" (2019) 321(2) *Scientific American Magazine* 66.

It is posited that tribunals and courts should embrace this paradigm with more rigour, such that jurisdictional conflicts are determined by the courts expediently, effectively and expansively.

A. Kompetenz-kompetenz *as discretionary power*

6 The doctrine of *kompetenz-kompetenz* empowers an arbitral tribunal to rule on its own jurisdiction (including challenges to the existence, validity or scope of the arbitration agreement).[7] However, contrary to common belief, the doctrine does not restrict judicial intervention in determining preliminary objections to a tribunal's jurisdiction or competence to hear a dispute. This misconception manifests from two aspects: finality and primacy.

7 First, whilst tribunals may have the first say on its jurisdiction in the form of an award, the courts ultimately retain the final say or "last word" on a tribunal's jurisdiction.[8] Otherwise, as Lord Saville aptly put in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*[9] ("*Dallah*"), allowing the tribunal to be the "final arbiter" of its own jurisdiction would be akin to "pulling oneself up by one's own bootstraps".[10] This principle of non-finality justifies why a tribunal's ruling on jurisdiction should always be reviewable by the court *de novo*, whether resolved at a preliminary phase or joined together with the merits.

8 Second, *kompetenz-kompetenz* is a discretionary power.[11] This is reflected by the use of the operative word "may" rather than "shall" in the Model Law.[12] There is no mandatory requirement for an arbitral tribunal to rule on its jurisdiction first. Rather, such a preliminary objection may even be heard by the court at the first instance. Why is it widely (and wrongly) assumed that the doctrine accords primacy to the tribunal? This may be explained by the doctrine's origins from public international

7 International Arbitration Act 1994 (2020 Rev Ed) s 16(1); Arbitration Ordinance (Cap 409) (Hong Kong) s 34(1); Arbitration Act 1996 (c 23) (UK) s 7.

8 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [86]; *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [66].

9 [2010] 3 WLR 1472.

10 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [159].

11 *Hancock Prospecting Pty Ltd v Rinehart* [2017] FCAFC 170 at [147]–[148] and [367]; *Instagram Inc v Dialogue Consulting Pty Ltd* [2022] FCAFC 7 at [37] and [50].

12 UNCITRAL Model Law on International Commercial Arbitration (1985) Art 16(1).

law.[13] Generally, international courts and tribunals derive jurisdiction exclusively from the consent of sovereign states expressed in international instruments.[14] There is no other higher adjudicative or appellate body competent to hear claims advanced against states.[15] Hence, *kompetenz-kompetenz* carries greater significance for the International Court of Justice[16] ("ICJ") being the sole arbiter of its own jurisdictional domain.

9 This is to be juxtaposed with national courts having concurrent supervisory jurisdiction over arbitrations. A court's decision to defer a jurisdictional ruling to the tribunal positively affirms the tribunal's *kompetenz-kompetenz* whilst negating its own *kompetenz-kompetenz*. Conversely, granting a stay of proceedings or anti-arbitration injunction affirms the court's own *kompetenz-kompetenz* whilst depriving the tribunal's *kompetenz-kompetenz*. As succinctly put by Lord Collins in *Dallah*, *kompetenz-kompetenz* does *not* mean that the "tribunal has the exclusive power to determine its own jurisdiction", nor does it preclude the seat court from "determin[ing] whether the tribunal has jurisdiction before the tribunal has ruled on it" and the enforcement courts from "re-examin[ing] the jurisdiction of the tribunal".[17]

10 Thus, the doctrine loses much force in a jurisdictional turf war between two (or more) adjudicative bodies having concurrent jurisdiction over a discrete dispute (or parts thereof). Moreover, since arbitrators are essentially appointed and remunerated by parties, arbitral tribunals are incentivised – consciously or unconsciously – to rule upon its own jurisdiction and affirm its jurisdiction to hear the dispute (or alternatively, join the jurisdictional issues to be heard together with the merits in the final award). Indeed, this risk of bias (actual or perceived) is best mitigated by deferring preliminary objections aimed at the tribunal's jurisdiction or competence to an independent and impartial adjudicator instead – the courts.

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13 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [79]–[80].

14 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (*Jurisdiction and Admissibility*) [2002] ICJ Rep 6 at [65]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 at [76].

15 Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: Questions of Jurisdiction, Competence and Procedure" (1958) 34 Brit YB Intl L 1 at 26–27.

16 *Nottebohm (Liechtenstein v Guatemala)) (Preliminary Objection)* [1952] ICJ Rep 111 at 119; *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 at [46].

17 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [84].

B. One-stop presumption and "centre of gravity" test

11 Lord Hoffmann, in *Fiona Trust & Holding Corporation v Privalov*,[18] laid down the oft-cited *dictum* that "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal".[19] In simpler but equally empathic terms, Lord Hope described an arbitration agreement as evincing the parties' choice of arbitration as "as a one-stop method of adjudication for the determination of all disputes".[20] This "one-stop presumption" presents a good starting point for some, but not all, arbitral disputes.

12 In the Hong Kong Court of First Instance's recent ruling in *AAA v DDD*[21] ("*AAA*"), Reyes SC helpfully categorised jurisdictional conflicts into three buckets. A single forum of adjudication is a sensible default answer to a commercial dispute arising from a single contract with an arbitration agreement (basic paradigm).[22] However, the one-stop presumption loses much force in complex commercial transactions comprising a chain of related contracts (intermediate paradigm), especially with different dispute resolution clauses (generalised paradigm).[23] For instance, Party A commenced court action against Party B based on Contract X with an exclusive jurisdiction clause. Concurrently, Party B commences arbitration against Party A based on Contract Y with an arbitration agreement. At court, Party B sought a stay of proceedings, whilst Party A applied for an anti-arbitration injunction. Both applications represent two sides of the same coin – the granting of a stay would entail the dismissal of the injunction (and *vice versa*).[24]

13 Instead of the one-stop presumption, the courts will resort to the "centre of gravity" test to ascertain whether the arbitration agreement or exclusive jurisdictional clause bears closer connection to the claim.[25]

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18 [2007] Bus LR 686.
19 *Fiona Trust & Holding Corporation v Privalov* [2007] Bus LR 686 at [13].
20 *Fiona Trust & Holding Corporation v Privalov* [2007] Bus LR 686 at [27].
21 [2024] HKCFI 513.
22 *AAA v DDD* [2024] HKCFI 513 at [47] and [51]–[53].
23 *AAA v DDD* [2024] HKCFI 513 at [47] and [54]–[61].
24 *Sabbagh v Khoury* [2019] EWCA Civ 1219 at [96]–[98].
25 *Trust Risk Group SPA v Amtrust Europe Ltd* [2015] EWCA Civ 437 at [48]; *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998 at [61]–[63]; *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal* [2011] EWHC 1842 (Comm) at [37]; *Oei Hong Leong v Goldman Sachs International* [2014] 3 SLR 1217 at [30]; *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [24]; *X v Y* [2021] 2 HKC 68 at [46]–[49]; *H v G* [2022] HKCFI 1327 at 33–39; *AAA v DDD* [2024] HKCFI 513 at [57]–[67].

The utility of this test is even more pronounced in extreme conditions, such as a jurisdictional turf war fought between two arbitral tribunals constituted based on different arbitration agreements,[26] or where different contracts contain different dispute resolution provisions stipulating different countries as the *lex fori* or *lex arbitri*.[27] Indeed, the phenomenon of two (or more) courts and one (or more) tribunal having concurrent jurisdiction over a dispute bears the hallmark of a "multi-body problem" (or *n*-body problem).

14 Nevertheless, whilst there is currently no known formula in physics to predict the trajectory of a planet orbiting two stars, one inexorable truth remains constant – each star is far more massive than the tiny planet. In international arbitration, the "centre of gravity" test recognises the overlapping jurisdictions of different adjudicative bodies over a discrete dispute. The test strives to measure the strength of the jurisdictional fields of each body. It is immaterial that the court may have a weaker jurisdictional force than the tribunal in the majority of cases. Ultimately, the arbiter of this test ought to remain constant – the court.[28]

C. Arbitrability and fragmentation of disputes

15 The doctrine of arbitrability delineates the "outer limits" of the private sphere of arbitration – any dispute involving pervasive public rights or interests is deemed to be "incapable of settlement by arbitration" (non-arbitrable).[29] On 20 September 2023, two landmark judgments penned by Lord Hodge were simultaneously delivered to provide clarity over disputes straddling between the worlds of arbitration and insolvency.[30] The Privy Council appeal of *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation*[31] ("*FamilyMart*") arose from a petition to wind up a joint venture company incorporated in the

26 *AAA v DDD* [2024] HKCFI 513 at [57]–[67] (both arbitration agreements stipulate Hong Kong International Arbitration Centre as the administering institution and Hong Kong as the arbitral seat).

27 See *eg*, *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [28]–[29].

28 In a three-body problem, uncertainty arises as to which one of the two national courts wields the ultimate authority to resolve the jurisdictional conflict for all three bodies. The problem is exacerbated if the two courts are governed by distinct sets of arbitral laws. It is beyond the scope of this analysis to solve the three-body problem in all its possible legal permutations (much less a *n*-body problem involving more than two courts).

29 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [71].

30 Both appeals were unanimously decided by a five-member bench. All other Law Lords concurred with Lord Hodge's sole judgment for the majority. Lord Lloyd-Jones was the only other Law Lord sitting in both benches.

31 [2024] Bus LR 190.

Cayman Islands on just and equitable grounds. The majority shareholder applied to stay the petition in reliance of the arbitration agreement in the shareholders' agreement governing the joint venture's affairs. For many years, the English, Singapore and Hong Kong courts have leaned towards treating a contributory's winding-up petitions as arbitrable.[32] Unsurprisingly, the Privy Council fell in line with the same trajectory.

16 What is remarkable, however, was the Privy Council's granting of a partial stay.[33] Only the issues on liability (*ie*, whether the minority lost trust and confidence in the majority's management, and whether the fundamental relationship between shareholders had irretrievably broken down) were deemed arbitrable and warranted a mandatory stay.[34] Conversely, the issues on remedy (*ie*, whether it is just and equitable to wind up the company, and whether a share buy-out ought to be granted as an alternative relief) were deemed non-arbitrable but nonetheless warranted a discretionary stay since the issues on liability form the "essential precursor" to the issues on remedy.[35] Thus, the first half of the dispute (liability) was hived off to arbitration, whilst the second half (remedy) determinable by the winding-up court is stayed pending conclusion of the arbitration.[36]

17 Lord Hodge's second judgment in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)*[37] ("*Privinvest*") concerned a dispute arising from two distinct chains of contracts: (a) supply contracts governed by Swiss law containing an arbitration agreement stipulating Geneva or Zurich as the seat; and (b) facility and guarantee agreements to finance the supply contracts governed by English law subject to the exclusive jurisdiction of the English courts.[38] Mozambique sued

32 *Fulham Football Club (1987) Ltd v Richards* [2012] Ch 33 at [77] (unfair prejudice); *Dickinson Holdings Enterprise Company Limited v Morovia CV* [2019] HKCFI 1424 at [31]–[32] (unfair prejudice); *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [106] (oppression); *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 at [14] (just and equitable); and *Champ Prestige International Ltd v China City Construction (International) Co Ltd* [2020] HKCFI 355 at [10] and [13] (just and equitable).

33 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2024] Bus LR 190 at [97] and [103].

34 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2024] Bus LR 190 at [23(1)]–[23(2)], [96] and [105].

35 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2024] Bus LR 190 at [23(3)]–[23(5)], [103] and [105].

36 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2024] Bus LR 190 at [25].

37 [2023] Bus LR 1359.

38 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [11]–[18] and [21]–[24].

Privinvest for conspiracy and bribery in the English court.[39] Privinvest retaliated by applying for a stay and commencing various arbitrations in Switzerland.[40] The court had to consider the preliminary issue of whether Mozambique's claims fell within the scope of the arbitration agreement.[41]

18 The timing of both judgments was no coincidence. Lord Hodge explicitly acknowledged the *FamilyMart* judgment being handed down on the same day.[42] The concurrent deliberation of both benches is evinced by the near-identical set of guiding principles laid down on arbitrability, notably: that a "matter" is a substantial issue legally relevant to a claim or defence susceptible to determination by the tribunal as a discrete dispute;[43] and the judicial evaluation entails an application of common sense.[44]

19 The Supreme Court found that none of Mozambique's claims required "an examination of the validity of any of the supply contracts".[45] Alternatively, Privinvest argued that Mozambique's claims formed a "partial defence on quantum" to Privinvest's claims on the supply contracts in the Swiss arbitrations.[46] However, unlike in *FamilyMart*, Lord Hodge declined to grant a partial stay on the quantification of Mozambique's claims, as a matter of "common sense" and absence of authorities ordering a bifurcation of such nature.[47] Thus, Privinvest's stay application failed and Mozambique's court action could proceed to trial.

20 Months later, on 19 March 2024, the Privy Council delivered yet another ground-breaking judgment on the arbitrability of creditors' winding-up petitions in *Sian Participation v Halimeda International*

39 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [4].
40 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [9]–[10].
41 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [26].
42 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [70].
43 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2024] Bus LR 190 at [61]; *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [75].
44 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2024] Bus LR 190 at [65]; *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [71].
45 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [87].
46 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [101].
47 *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] Bus LR 1359 at [107]–[109].

Ltd. This time, the Privy Council departed from a long line of common law precedents[48] granting a discretionary stay on petitions "where an insubstantial dispute about the creditor's debt is raised between parties to an arbitration agreement".[49] The Privy Council distinguished *FamilyMart* on the basis that a contributory's winding-up petition on just and equitable grounds involved "distinct matters which can be resolved by a declaratory arbitral award"[50] whilst a creditor's winding-up petition is premised upon the non-payment of a specific debt being produced as proof that a company is unable to pay its debt (as opposed to "a claim for payment of the debt" itself).[51]

21 The Law Lords' readiness to employ greater flexibility in moulding reliefs to resolve different jurisdictional conflicts is a positive step in the right direction. As vividly put by Reyes SC in *AAA*, the one-stop presumption "can only be pressed so far" and "should not be a procrustean bed into which all multiple contract situations are made to fit, ignoring indications of a contrary intention among the parties".[52] It may be "possible and commercially rational" for a dispute to "have a degree of fragmentation" and trundle along separate tracks in different jurisdictions.[53]

22 Even so, some may consider the notion of hiving off subordinate matters of a wider dispute to arbitration as repugnant as the Solomonic justice of splitting the proverbial baby in half. Should a partial stay be made conditional upon the arbitration being expedited?[54] Should the winding-up court also insert an ancillary order that parties are bound by the tribunal's factual findings when the dispute resumes in court at the second phase? Should the seat court rather than the winding-up court be in a better position to determine questions of arbitrability?[55] Indeed,

48 See *eg*, *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589; *AnAn Group (Singapore) PTE Ltd v VTB Bank* [2020] 1 SLR 1158; and *Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426.

49 *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16 at [71]–[78] and [125].

50 *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16 at [95].

51 *Sian Participation Corp v Halimeda International Ltd* [2024] UKPC 16 at [54]–[55].

52 *AAA v DDD* [2024] HKCFI 513 at [69].

53 *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal* [2011] EWHC 1842 (Comm) at [37]; *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [24].

54 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [190(e)].

55 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2024] Bus LR 190 at [3]–[4] and [12]. The stay application was heard by the winding-up court in the Cayman Islands (country of incorporation of the joint venture company) whilst the arbitration agreement stipulated Beijing, the People's Republic of China as the arbitral seat. Hypothetically, if the tribunal makes a declaratory award, the issue of arbitrability may be relitigated by parties before the seat court at the annulment phase – giving rise to a "three body problem".

whilst the jurisdictional multi-body problem may be readily untangled at the pre-award phase as a matter of procedure, splitting a dispute to different forums may potentially bring about a new tangle of Gordian knots at the post-award phase. In short, it remains to be seen (and fully tested at the post-award phase) whether forum fragmentation serves as a permanent cure, or merely a temporary reprieve, to the jurisdictional multi-body problem.[56]

D. Choice of remedies and transnational estoppel

23 When an arbitral award is challenged on jurisdictional grounds, both the seat court and enforcement court are required to undertake a full and independent *de novo* review of the tribunal's jurisdiction based on the totality of evidence.[57] A tribunal's own finding of its jurisdiction "has no legal or evidential value" because a jurisdictional challenge essentially takes aim at the tribunal's "legitimate authority" over the challenging party.[58]

24 The "choice of remedies" available to a party wishing to impugn an arbitral award is well-exemplified in *Dallah*. An agreement containing an arbitration clause between Dallah and Awami Hajj Trust ("Trust") purportedly envisaged Pakistan guaranteeing the Trust's payment obligation to Dallah. After the Trust dissipated due to a change in regime, Dallah commenced arbitration against Pakistan in Paris (which Pakistan refused to participate in). The tribunal issued a partial award on jurisdiction, a second partial award on liability and a final award. Concurrently, Pakistan resisted Dallah's application to enforce the final award in the English court and applied to set aside the three awards in the French court. The Supreme Court clarified that Pakistan has two non-mutually exclusive options: set aside the award at the seat court, or resist

56 In the context of insolvency law, the author is doubtful that hiving off shareholder disputes to arbitration will provide a "quick and efficient adjudication". First, the winding-up courts may not so easily cede their discretionary powers in determining a winding-up petition grounded upon an arbitral award and instead view the "hiving off" as artificial and illusory – especially since the determination of the appropriate remedy (*eg*, winding-up and share buy-out) is often intertwined with the determination of liability. Second, a decision of the winding-up court in reliance (substantially or otherwise) of the factual findings of an arbitral award is highly susceptible to appeal on a wide range of issues unique to the national laws of the winding-up court's jurisdiction.

57 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [26], [96], [104] and [161].

58 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [30].

recognition or enforcement of the award in the enforcement court.[59] A party is not obliged to set aside the award at the seat court before resisting its enforcement.[60]

25 Three years later, the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV*[61] restated that the "choice of remedies" forms "not just a facet of the Model Law enforcement regime [but] the heart of its entire design". As the drafters did *not* intend for the Model Law to adopt a "one shot remedy" system, a party electing to not challenge a tribunal's preliminary award on jurisdiction will not be "precluded from relying on its passive remedy to resist recognition and enforcement" of the final award.[62] Thus, enforcement of the final awards was partially refused against non-parties to the arbitration agreement improperly joined to the arbitration (despite failing to challenge the preliminary award on jurisdiction).[63]

26 Is an enforcement court bound by a seat court's ruling on the validity of an arbitral award? In 2023, the issue was addressed by the Singapore Court of Appeal in *The Republic of India v Deutsche Telekom AG*[64] arising from an investment treaty arbitration instituted by Deutsche Telekom ("DT") against India. The tribunal delivered an interim award on jurisdiction and liability, and final award on quantum. India's applications to annul both awards were dismissed by the Swiss court. Before the Singapore court, India resisted DT's application to enforce the final award primarily on the same jurisdictional grounds previously canvassed before the Swiss court.

27 The Court of Appeal ruled that "the doctrine of transnational issue estoppel is applicable in the context of international commercial arbitration at least in relation to a prior decision of a seat court regarding the validity of an award".[65] By choosing the arbitral seat, parties have chosen the national legal system to be accorded primacy.[66] Moreover, the doctrine alleviates the risk of inconsistent judicial decisions, and wastage of time and cost.[67] The operation of transnational estoppel, however,

59 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [98].
60 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [28]–[29] and [103].
61 [2014] 1 SLR 372 at [65].
62 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [117]–[118].
63 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [230].
64 [2014] 1 SLR 56.
65 *The Republic of India v Deutsche Telekom AG* [2014] 1 SLR 56 at [96] and [102].
66 *The Republic of India v Deutsche Telekom AG* [2014] 1 SLR 56 at [98].
67 *The Republic of India v Deutsche Telekom AG* [2014] 1 SLR 56 at [100].

may vary between grounds with "more 'transnational' resonance" (*eg*, procedural irregularities) and grounds with "a distinctly 'domestic' flavour" (*eg*, public policy).[68] Thus, India was precluded from relitigating issues at the Singapore court (enforcement) that were previously rejected by the Swiss court (seat).[69] Thus, whilst the "choice of remedies" entitles a party to challenge an award at the seat court and enforcement court, such party may nonetheless be precluded by the doctrine of transnational estoppel from regurgitating the same jurisdictional challenges before different courts.

II. Importance of curial intervention to resolve jurisdictional conflicts

28 To resolve the jurisdictional multi-body problem, the common law courts are gradually appreciating the importance of curial intervention. This paradigm shift is not a novel idea. As early as 2007, Lord Hoffmann in *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA*[70] presciently observed that whilst party autonomy entails respecting the will of commercial parties in choosing arbitration as a dispute resolution mechanism "in order to be outside the procedures of *any* national court" [emphasis in original], one must nevertheless be alive to the "practical reality" that "arbitration cannot be self-sustaining … [and] needs the support of the courts". In 2015, similar sentiments were echoed by Menon CJ in rejecting the radical notion of arbitration "float[ing] ethereally … completely delocalised from any jurisdiction" and recognising that "despite arbitration's roots in party choice, national courts remain the final gatekeepers of the legal fitness of arbitral awards and processes".[71] In 2023, Prakash J reiterated that the relationship between tribunals and courts "should not be antagonistic or acrimonious" and instead be conceptualised as a "partnership".[72]

68 *The Republic of India v Deutsche Telekom AG* [2014] 1 SLR 56 at [101].
69 *The Republic of India v Deutsche Telekom AG* [2014] 1 SLR 56 at [176].
70 [2007] UKHL 4 at [17]–[18].
71 Chief Justice Sundaresh Menon, Supreme Court of Singapore, "Standards in Need of Bearers: Encouraging Reform from Within", paper presented at the Chartered Instituted of Arbitrators, Singapore Centenary Conference, Singapore (3 September 2015) at para 21(b) <http://www.ciarb.org.sg/chief-justice-sundaresh-menons-keynote-speech-ciarb-singapore-centenary-conference/> (accessed 16 August 2024).
72 Justice Judith Prakash, Supreme Court of Singapore, "The Critical Role of the Courts in Arbitral Disputes: Conceptualising the Partnership Between the Courts and Arbitration", speech delivered at Singapore International Arbitration Centre Symposium 2023 (29 August 2023) at para 8 <https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-judith-prakash-speech-delivered-at-singapore-international-arbitration-centre-symposium-2023> (accessed 16 August 2024).

29 This renewed rigour for greater complementarity between court and tribunal does not exist as a mere abstract ideal. There are real-life repercussions at stake. After all, dispute resolution clauses "are rarely the subject of detailed negotiation" between commercial parties or even their legal advisors.[73] Empirical studies have shown that "parties do not fully appreciate the extent of control that the seat court may exercise over the arbitral process".[74] Being indefinitely stuck in a jurisdictional limbo scarcely lives up to the arbitration's promise of providing "a quick and efficient adjudication"[75] to commercial parties.

30 As a first step, the well-settled doctrine of "minimal curial intervention"[76] should be put into proper perspective. There are exceptional circumstances which justify the courts taking a more interventionist stance in the arbitral process – the prime example being to resolve jurisdictional turf wars between court and tribunal (or between two different tribunals). After all, no tribunal can insist on being the final arbiter of its own jurisdiction.[77] And as aptly put by Hwang, minimal curial intervention means that the courts "should supervise with a light touch but assist with a strong hand" in the arbitral process.[78]

31 The *raison d'être* of this new paradigm is simple – that at any point of time, the courts must be ready to step up and wield its full supervisory authority in resolving jurisdictional conflicts, once and for all, guided by the overarching objectives to promote legal certainty and procedural efficiency.[79] Broadly, this paradigm ought to consist of three core attributes – that the courts should resolve challenges to an arbitral tribunal's jurisdiction or competence expediently (primacy), effectively (finality) and expansively (flexibility).

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73 *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998 at [56] (derivative contracts containing different exclusive jurisdiction clauses referring to the courts of New York and England).

74 Chief Justice Sundaresh Menon, Supreme Court of Singapore, "Standards in Need of Bearers: Encouraging Reform from Within", paper presented at the Chartered Instituted of Arbitrators, Singapore Centenary Conference, Singapore (3 September 2015) at para 21(b) <http://www.ciarb.org.sg/chief-justice-sundaresh-menons-keynote-speech-ciarb-singapore-centenary-conference/> (accessed 16 August 2024).

75 *Fiona Trust & Holding Corporation v Privalov* [2007] Bus LR 686 at [6].

76 *COT v COU* [2023] SGCA 31 at [1]–[3] and [26]–[29].

77 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [86] and [159]; *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [66].

78 Michael Hwang, "Commercial Courts and International Arbitration – Competitors or Partners?" (2015) 31(2) Arb Intl 193 at 194 (cited in *COT v COU* [2023] SGCA 31 at [3]).

79 *Fiona Trust & Holding Corporation v Privalov* [2007] Bus LR 686 at [6] and [26].

A. Primacy: proper timing of curial intervention

32 The first attribute of the paradigm is primacy. The core idea being that the courts ought to seize the initiative to resolve preliminary issues targeted at the arbitral tribunal's jurisdiction or competence at the earliest possible opportunity. This relates to the proper timing of curial intervention.

33 To promote efficiency, most arbitral rules allow for the determination of jurisdictional challenges at a preliminary phase without a full-blown trial on the merits. This can be done by the tribunal making a partial award on jurisdiction, or the court making a ruling on jurisdiction. The Model Law empowers the tribunal to "rule on a plea [that it does not have jurisdiction] either as a preliminary question or in an award on the merits", and further provides that, if the "tribunal rules as a preliminary question that it has jurisdiction", a dissatisfied party may request for the seat court "to decide the matter".[80] This provision is incorporated in the arbitral statutes of Singapore[81] and Hong Kong.[82] In the UK, the tribunal may deliver a preliminary "award as to jurisdiction"[83] which is susceptible to judicial review.[84]

34 However, the Model Law framework does not go far enough. In certain civil law jurisdictions, the permissive provision is elevated as the default rule. Under Swiss law, the tribunal "shall, *in general*, decide on its jurisdiction by a preliminary decision"[85] [emphasis added]. Similarly, German law provides that "[w]here the arbitral tribunal considers that it has jurisdiction, its decision on an objection raised [as to the arbitral tribunal lacking jurisdiction] *generally* takes the form of an interlocutory decision"[86] [emphasis added].

35 Notably, under public international law, bifurcation of proceedings into two phases for preliminary objections and merits is the norm.[87] The ICJ is empowered to "decide, if the circumstances so warrant, that questions concerning its jurisdiction or the admissibility

80 UNCITRAL Model Law on International Commercial Arbitration (1985) Art 16(3).
81 International Arbitration Act 1994 (2020 Rev Ed) ss 10(1)–10(2).
82 Arbitration Ordinance (Cap 409) (Hong Kong) s 34(1) (with the additional clarification that "if the arbitral tribunal rules that it does not have jurisdiction to decide a dispute, the court must, if it has jurisdiction, decide that dispute").
83 Arbitration Act 1996 (c 23) (UK) s 31(4).
84 Arbitration Act 1996 (c 23) (UK) s 67.
85 Federal Act of Private International Law Act (Switzerland) (SR 291) Art 186(3) (non-authoritative official translation).
86 Code of Civil Procedure (Germany) s 1040(3) (non-authoritative official translation).
87 Exceptionally, proceedings may be trifurcated for a third phase to address the quantification of compensation.

of the application shall be determined separately".[88] At the first phase, the ICJ may uphold or reject the preliminary objection, or even decline to answer on the basis that the "objection does not possess an exclusively preliminary character".[89] The same practice is adopted in investment treaty arbitrations, especially those constituted under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"). When an objection is raised against the tribunal's jurisdiction or competence, ICSID tribunals will "determine whether to deal with it as a preliminary question or to join it to the merits of the dispute".[90]

36 The same approach is readily transposable into international commercial arbitration, with minor modifications. The default rule being that the tribunal ought to resolve all preliminary objections to its jurisdiction or competence by way of a preliminary award. However, the tribunal should abstain from doing so, if the same challenge is concurrently raised before the court arising from a civil action commenced by the party resisting the tribunal's jurisdiction. The seat court is free to decide all jurisdictional issues arising from a stay or anti-arbitration injunction application, without waiting for the tribunal's preliminary award.[91]

37 Thus, the question of whether the court or tribunal should consider jurisdictional challenges at the first instance depends on the timing of proceedings. If both proceedings run closely in parallel and parties cannot consent to a stay of either proceeding, primacy is to be afforded to the seat court (and the tribunal ought to make a procedural order referring the preliminary issue to the court out of good measure). If the tribunal delivers a preliminary award on jurisdiction instead, a party may challenge the award at the seat court. Either way, the seat court will always remain available as the "final arbiter" of jurisdictional challenges.[92]

88 Statute of the International Court of Justice (26 June 1945), 33 UNTS 933, Art 79(1) (entered into force 24 October 1945).

89 Statute of the International Court of Justice (26 June 1945), 33 UNTS 933, Art 79*ter*(4) (entered into force 24 October 1945).

90 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), UNTS 575, Art 41(2) (entered into force 14 October 1966).

91 The tribunal should only defer to the seat court, and not any other court, to hear an anti-arbitration injunction (*Sabbagh v Khoury* [2019] EWCA Civ 1219 at [86]; *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato KFT* [2011] EWHC 345 (Comm) at [32]).

92 *Dallah Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [159].

B. Finality: binding effect of curial intervention

38 The second attribute of the paradigm is finality. The core idea being that the court's determination of preliminary issues targeted at the arbitral tribunal's jurisdiction or competence ought to be conclusive and binding. This relates to the binding effect of curial intervention.

39 It is trite that both the seat court and enforcement court are empowered to undertake a *de novo* review of the tribunal's ruling on jurisdiction (pursuant to either a preliminary award or final award on the merits) unencumbered by the tribunal's reasoning and findings.[93] Uncertainties arise, however, at the pre-award phase – where the court is requested to decide on a stay or anti-arbitration injunction application at the onset of arbitration *before* the tribunal has made any ruling on its jurisdiction. Should the court undertake a provisional (*prima facie*) or full (*de novo*) judicial review? Does it matter whether arbitration or litigation was instituted first? What if the application was heard by the court before arbitration has even been instituted by the party invoking an arbitration agreement to displace the court's jurisdiction?

40 Intriguingly, there is a stark divergence in scholarly opinions and national laws.[94] Some jurists hold the view that the Model Law and New York Convention framework merely requires the court to make a *prima facie* ruling,[95] whilst others believe that each country is afforded freedom to decide on the standard of review.[96] True to its pro-arbitration roots, French courts will decline jurisdiction to hear a claim if arbitration was commenced first, and refer parties to arbitration so long as the arbitration agreement is not manifestly void or invalid if arbitration ensued later (*prima facie*).[97] In Germany, the courts will generally defer to the tribunal to make a ruling on jurisdiction[98] and stay the court proceedings pending

93 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [31] and [160].

94 John Barceló, Kompetenz-Kompetenz *and Its Negative Effect – A Comparative View* (2017) *Cornell Legal Studies Research Paper* No 17–40.

95 Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer Law International, 1981) at p 155; Howard Holtzmann & Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers 1989) at p 303, fn 5.

96 Gary Born, *International Commercial Arbitration* (Kluwer Law Intl, 2nd Ed, 2014) at pp 1052–1257; Frédéric Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22 Arb Intl 463 at 471.

97 Code of Civil Procedure (France) Art 1458 (unofficial translation).

98 Code of Civil Procedure (Germany) s 1040(3).

the tribunal's ruling[99] – effectively obviating any judicial intervention at the pre-award phase.

41 In the common law world, there is lack of uniformity on the applicable standard of review. In the UK, it is left exclusively for the court "finally to decide the issue of whether or not to refuse a stay".[100] That said, if unable to decide the issue "in a summary fashion on the written evidence", the court may stay the proceedings for the tribunal to decide the issue instead.[101] The burden of proof first lies on the party asserting the existence of the arbitration agreement; once proven, the burden then shifts to the other party to prove that the agreement is null and void, inoperative, or incapable of being performed.[102] The standard of proof in both instances is on a balance of probabilities.[103] Conversely, the Hong Kong courts adopt a *prima facie* review in determining stay applications.[104]

42 The latter approach is favoured in Singapore.[105] In *Tomolugen Holdings Ltd v Silica Investors Ltd*, the Singapore Court of Appeal reasoned that "to undertake a full determination of an arbitral tribunal's jurisdiction could significantly hollow the *kompetenz-kompetenz* principle of its practical effect".[106] This concern, however, is misplaced because it overstates the importance of the doctrine in the context of arbitration (see paras 6–10 above). Next, the Court of Appeal dispelled the "fear of resource duplication" because "a robust recognition and enforcement of the *kompetenz-kompetenz* principle may … deter a plaintiff from commencing proceedings in court in the face of an arbitration agreement" and "parties to an arbitration are likely to accept a well-reasoned jurisdictional determination rendered by an arbitral tribunal without appealing against it".[107] This view may be optimistic. Once a dispute escalates to arbitration and litigation, parties have geared up for all-out war. The losing party will not be cowed into defeat

99 Code of Civil Procedure (Germany) s 148.
100 *Joint Stock Company Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784 at [78].
101 *Joint Stock Company Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784 at [73].
102 *Joint Stock Company Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784 at [73] and [77].
103 *Joint Stock Company Aeroflot Russian Airlines v Berezovsky* [2013] EWCA Civ 784 at [73] and [77].
104 *PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309 at [60]; *T v TS* [2014] 4 HKLRD 772 at [16].
105 *Sim Chay Koon v NTUC Income Insurance Co-operative Limited* [2016] 2 SLR 871 at [5].
106 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [67].
107 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [68].

as *kompetenz-kompetenz* accords no primacy nor finality to an arbitral award on jurisdiction.[108]

43 Thus, the better approach is for the court to undertake a *de novo* review of jurisdictional challenges, whenever a final order is sought.[109] There is little principled basis in applying different standards of review merely based on the timing of institution of proceedings. There is a myriad of scenarios allowing one party to steal a march over the other party, due to malice rather than merit. For instance, Party A may sue in court before Party B can commence arbitration because Party A took the drastic action of terminating their contract based on anticipatory breach before expiry of the contractual period of performance. Or the arbitration agreement forms part of a multi-tier dispute resolution clause which permits recourse to arbitration only after certain preconditions are exhausted (*eg*, mediation and negotiations). Disputes escalate to litigation or arbitration precisely because parties do not meet their contractual obligations or abuse their contractual rights.

44 Moreover, if both proceedings move at roughly the same pace, it is inefficient for the court to conduct a *prima facie* review on a jurisdictional challenge and refer the dispute to arbitration, only for the tribunal to conduct a full review of its jurisdiction and make a preliminary award. Instead, the court should either await the tribunal's ruling, or fully review the jurisdictional challenge and save the tribunal's trouble. This is consistent with the binary approach under German law.

45 Lastly, there must be primacy in the seat court's ruling on jurisdiction. If a jurisdictional issue is resolved in a preliminary award by the tribunal and duly recognised by the seat court, parties should be precluded from relitigating at the merits phase (tribunal) and challenging the final award (court) on that very same issue. This default rule is subject, of course, to the usual defences of estoppel (*eg*, change of circumstances and fresh discovery of material evidence). Exceptionally, in a "three-body problem" scenario where a jurisdictional challenge has been heard by a court other than the seat court (*eg*, winding-up court in *FamilyMart*), issue estoppel may operate in *reverse*. A seat court may consider a prior judicial ruling as binding or having "persuasive" effect on a jurisdictional challenge advanced by the losing party for the second time (especially

108 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 at [84].

109 Exceptionally, where an interim stay or anti-arbitration injunction is sought pending the hearing (especially on an *ex parte* basis), it is perfectly permissible for the court to undertake a *prima facie* review.

one that concerns the national laws of the former court).[110] Ultimately, it is still left for the seat court's full discretion to decide a jurisdictional challenge afresh, whether previously decided by an arbitral tribunal or another court of competent jurisdiction.

C. Flexibility: wide threshold of curial intervention

46 The third attribute of the paradigm is flexibility. The core idea being that the courts retain a wide margin of discretion in determining whether a discrete issue alleged to be targeted at the arbitral tribunal's jurisdiction or competence is ripe for early determination and amenable to judicial review. This relates to the wide threshold of curial intervention.

47 Throughout this analysis, the term "tribunal's jurisdiction or competence" has been constantly adopted. As foreshadowed at the onset, the choice of words is deliberate. The purpose being to emphasise that a "jurisdictional challenge" and "preliminary objection" ought to encompass a wider range of matters than conventionally assumed, for the purposes of identifying what issues are fit for curial determination on a *de novo* basis.

48 Since 2020, the English, Singapore and Hong Kong courts have overseen the transposition of the dichotomy between jurisdiction and admissibility from public international law to international commercial arbitration.[111] This has regrettably culminated in the prevailing view that only a tribunal's ruling on issues of jurisdiction – and not admissibility (*eg*, time bar,[112] *res judicata*[113] and pre-arbitration condition precedents[114]) – are reviewable by the courts. A growing minority of judges[115] and commentators[116] have denounced this view as being doctrinally unsound – and rightly so.

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110 *Sacofa Sdn Bhd v Super Sea Cable Networks Pte Ltd* [2024] SGHC 54 at [63]–[64] and [71]–[74].

111 Judicial transposition of the dichotomy in the context of investment treaty arbitral awards began earlier in 2018 (*PAO Tatneft v Ukraine* [2018] 1 WLR 5947 at [99]–[101]; *The Republic of Korea v Mohammad Reza Dayyani* [2020) Bus LR 884 at [83]; *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263 at [207]–[209]).

112 *BBA v BAZ* [2020] 2 SLR 453 at [76]–[78].

113 *BTN v BTP* [2020] 5 SLR 1250 at [68]–[70].

114 *The Republic of Sierra Leone v SL Mining Limited* [2021] Bus LR 704 at [16]–[21]; *NWA v NVF* [2021] Bus LR 1788 at [42]–[55]; *C v D* [2023] HKCFA 16 at [1], [6], [13], [51], [97] and [101]–[102].

115 *Czech Republic v Diag Human SE* [2024] Bus LR 929 at [40] and [133]; *C v D* [2023] HKCFA 16 at [142], [148], [149] and [159].

116 Raphael Ren, "The Dichotomy between Jurisdiction and Admissibility in International Arbitration" (2024) 73(2) ICLQ 417 at 441–445; Michael Hwang & *(cont'd on the next page)*

49 First, the dichotomy is but a mere label of convenience. The term "admissibility" is absent from most arbitral instruments.[117] The ICJ's classification of preliminary objections as "jurisdictional" (lack of parties' consent) and "admissibility" (other legal reasons) merely serves the limited function of ascertaining whether an objection possesses "an exclusively preliminary character" or ought to be joined with the merits.[118] So long as a preliminary objection is separated from the merits, the ICJ is unconcerned of its precise description (jurisdiction, admissibility, competence, or receivability).[119] Notably, issues labelled as "admissibility" by the ICJ (*ie*, mootness of dispute,[120] exhaustion of local remedies[121] and bond of nationality[122]) have no parallel with commercial arbitration. As for transposition of the dichotomy between jurisdiction and admissibility in investment treaty arbitration, even ICSID tribunals are sharply split between its reception[123] and rejection.[124] Crucially, ICSID annulment committees are emphatically against limiting its scope of review under the ground of "manifest excess of power"[125] to only jurisdictional errors or excesses.[126]

Lim Si Cheng, "The Chimera of Admissibility in International Arbitration" in *Jurisdiction, Admissibility and Choice of Law in International Arbitration*: Liber Amicorum *Michael Pryles* (Neil Kaplan & Michael Moser gen eds) (Kluwer Law International, 2018) at pp 262–264.

117 Christer Söderlund & Elena Burova, "Is There Such a Thing as Admissibility in Investment Arbitration?" (2018) 33(2) ICSID Rev 525 at 526–527.

118 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Preliminary Objections)* [2008] ICJ Rep 412 at [120].

119 *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Objection to Jurisdiction)* [1924] PCIJ Rep Series A No 2 at 10.

120 *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15 at 38.

121 *Interhandel (Switzerland v United States of America) (Preliminary Objections)* [1959] ICJ Rep 6 at 26.

122 *Nottebohm (Liechtenstein v Guatemala)* (*Second Phase*) [1955] ICJ Rep 4 at 25.

123 See *eg*, *CMS Gas v Argentina*, ICSID Case No ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) at [33]; *Enron v Argentina*, ICSID Case No ARB/01/3, Decision on Jurisdiction (14 January 2004) at [33]; *LESI-DIPENTA v Algeria*, ICSID Case No ARB/03/08, Award (10 January 2005) at [40]; and *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) at [87].

124 See *eg*, *SGS v Philippines*, ICSID Case No ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) at [149]–[154]; and *Micula v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) at [63].

125 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), UNTS 575, Art 52(1) (entered into force 14 October 1966).

126 *Urbaser v Argentina*, ICSID Case No ARB/07/26, Decision on Jurisdiction (19 December 2012) at [117]; *TECO v Guatemala*, ICSID Case No ARB/10/23, Decision on Annulment (5 April 2016) at [216].

50 Second, there is no principled basis to exclude admissibility issues from judicial review. A "jurisdictional challenge" is wide enough to encompass all preliminary objections that go to the root of a tribunal's "competence" to hear a claim.[127] Why should jurisdictional and admissibility objections be treated differently? If upheld, both have the same effect of "bring[ing] the proceedings in respect of that claim to an end" without further examination of the merits.[128] Shielding admissibility issues from review is a recipe for abuse – arbitrators will be perversely tempted to characterise preliminary objections as admissibility to immunise their awards from review, whilst judges are content to have less difficult decisions to make. Freed from legal jargon, any ruling on a preliminary objection can be expressed in these simple terms – whether the tribunal is competent or not competent to hear the claim on the merits.

51 Third, the true dichotomy is between preliminary objections and merits – especially for the purposes of bifurcation of arbitral proceedings.[129] To promote efficiency, the courts should determine preliminary objections at the earliest juncture before the merits phase (whether hearing at the first instance or reviewing the tribunal's preliminary award). Even if a discrete jurisdictional challenge "bleeds into the merits" and blurs the "line between a jurisdictional and a substantive challenge" (*eg*, inexistence of main contract and arbitration agreement), the court is still empowered to undertake a *de novo* review of the final award on the mixed jurisdictional and substantive issue.[130] Thus, regardless of the timing of intervention (preliminary award or final award) and classification of challenge (jurisdiction or admissibility), the court retains the final binding authority to determine all preliminary objections targeted at the arbitral tribunal's tribunal or competence to resolve a dispute (even if joined with the merits).

127 *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15 at 102 (Separate Opinion of Fitzmaurice). Fiztmaurice explained that the "line" that divides "questions of jurisdiction" ("competence of the Court to act at all") and "questions of admissibility, receivability or examinability" ("nature of the claim, or to particular circumstances connected with it") as "apt in certain cases to get blurred", and therefore, international courts tend "to decline to draw too hard and fast a distinction" or even "have declared the distinction to be of secondary importance".

128 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) (Preliminary Objections)* [2008] ICJ Rep 412 at [120].

129 Raphael Ren, "The Dichotomy between Jurisdiction and Admissibility in International Arbitration" (2024) 73(2) ICLQ 417 at 443–445.

130 *COT v COU* [2023] SGCA 31 at [4] and [29]–[30].

III. Conclusion

52 Party autonomy lies at the heart of arbitration.[131] By entering into an arbitration agreement, commercial parties expressly consent to arbitrate rather than litigate their disputes. Yet, in the modern era where commodities, funds and services freely flow across borders, commercial transactions are often bound in a complex chain of contracts with different dispute resolution clauses. This heightens the risk of fragmentation of disputes between arbitral tribunal and national court[132] or different arbitral tribunals.[133] If left unchecked, the jurisdictional multi-body problem threatens to rip apart the very fabric of the universe of international commerce.

53 Why do jurisdictional turf wars between arbitral tribunals and national courts languish for years in limbo? The basic arbitral doctrines (*ie*, *kompetenz-kompetenz*, one-stop presumption, arbitrability and choice of remedies) were envisaged as simple solutions to a simple two-body problem, and concomitantly, are ill-suited to solve the countless permutations arising from *n*-body problems prevalent in modern commerce. Happily, the common law courts are gradually appreciating the limitations in these doctrines, as well as endeavouring to fill the lacunae by devising fresh principles (*ie*, centre of gravity, hiving-off and transnational estoppel).

54 Thus, the time is ripe for a paradigm shift – that curial intervention is critical to the determination of preliminary challenges aimed at a tribunal's jurisdiction or competence to hear a dispute. This new paradigm has three core attributes, that specifically address three core questions arising from such preliminary challenges. *When* is the right moment for this curial intervention? *How* conclusive is this curial intervention? *What* matters warrant this curial intervention? Admittedly, this paradigm is still incubating as a raw theorem. There are plenty of legal conundrums that can arise from the jurisdictional multi-body problem in international arbitration, that have yet to be satisfactorily resolved by the courts and call out for even more dynamic solutions.

55 For now, some interesting propositions can be derived from this legal theorem (and scientific analogue). First, that arbitral tribunals (planets) do not float in legal vacuum (deep space) but rather revolve around the courts (stars). Second, the sustainability of proceedings (life)

131 *The Republic of India v Deutsche Telekom AG* [2014] 1 SLR 56 at [202].
132 *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2024] Bus LR 190 at [66].
133 *AAA v DDD* [2024] HKCFI 513 at [56] and [70].

within an arbitral tribunal (planet) depends upon the discretionary providence of the courts (stars). Third, a discrete dispute (system) caught within the jurisdictional fields (gravity) of multiple courts (stars) and tribunals (planets) is exceedingly chaotic (*n*-body problem). In short, the fate of arbitral proceedings (life on a planet) in a multi-body system ultimately lies in the powers of the courts (stars).

56 For commercial end-users, an even more basic question comes to mind, to which any legal advisor can swiftly answer, with full conviction and without any caveat. *Who* ultimately decides whether an arbitral tribunal is competent to resolve a dispute? The courts, of course – as they rightly should, and always have.