

The *Compétence-Compétence* Principle, Revisited

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*Recently the Mexican and U.S. Supreme Courts issued judgments that impact upon the understanding and scope of one of the most important principles of arbitration law: *compétence-compétence*. In essence, the view adopted by both Supreme Courts is that, whilst the arbitrator has the authority to rule on its jurisdiction, this authority is confined to challenges involving the validity of the contract as a whole. Should the challenge involve the validity of the arbitration agreement, it will be for the national courts to rule on the same. Interestingly, both cases display an impressive parallelism: not only in outcome, but in reasoning and other procedural aspects. This article addresses this development and concludes that it is mistaken. In the author's opinion the new theory misconstrues the purposes of *compétence* and produces law that curtails the effects the principle was originally designed to yield.*

I. INTRODUCTION

For reasons yet to be determined, changes in paradigms tend to happen simultaneously and in more than one forum. Historical examples are aplenty, and the science of the law is not an exception. Arbitration law is proving to be yet another example.

One of the most venerable and important principles of arbitration law, *compétence-compétence*, is currently being redefined—and in more than one jurisdiction. I shall discuss this development, and to this end, I will comment on the purposes of the principle (part II), summarize the recent cases (part III), proffer a view on the new doctrine (part IV), advance what I believe to be a better view (part V), and conclude with some final remarks (part VI).

II. *LEITMOTIF* OF *COMPÉTENCE-COMPÉTENCE* AND SEVERABILITY OF THE ARBITRATION AGREEMENT

The principles of *compétence-compétence* and the autonomy of the arbitration agreement are two of the most fundamental in arbitration. To fully grasp their *raison d'être* they must be studied in conjunction.

Although these principles originated in a common point of departure, they seek different ends. The point of departure is the desire to give effect to the parties' intent to use arbitration in lieu of litigation. To assess their impact, imagine for a moment a world where the principle of *compétence* does not exist. In any given relationship covered by an

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arbitration agreement, should a dispute arise and one of the parties question (or challenge) the scope of the arbitrator's jurisdiction, recourse to a court would be necessary to determine whether the dispute in issue was one upon which the arbitrator is legitimately entitled to rule. The irony is glaring: to arbitrate you must litigate! To avoid going to court you need to go to court to compel arbitration.

Now assume the non-existence of the autonomy principle. In a given dispute, should the relief sought by one of the parties include a claim that the contract is null and void, further to the *compétence* principle, the matter would need to be submitted to arbitration, whereupon a final award would decide the issue. But again, an awkward result could follow: should the contract be found to be non-existent or null and void, the arbitration agreement, as an accessory, would be helplessly impacted by this nullity. By now the reader has no doubt noticed that a result even more awry would ensue: the award would lack legal effect, with both legal and logical consequences, since *ex nihilo nil fit*. Again, the result would be both ironic and contrary to the intent of the parties, but it would also be ridiculous, as it would imply the obligation to arbitrate in order to seek an award lacking legal effect.

In essence, both principles seek to give effect to the parties' desire to use arbitration, rather than litigation, to solve their disputes.

It is true that an element of overlap exists. It is because of the principle of autonomy that a challenge to the validity of the contract or the arbitration agreement will not impact the jurisdiction of the arbitration tribunal; and it is because of *compétence* that an arbitrator may assess the validity of both the arbitration agreement and the contract without reaching pointless results. But each one provides a different added value: *compétence* allows an arbitrator to analyze the tribunal's jurisdiction and decide that it lacks jurisdiction without leading to an inherent contradiction; the principle of autonomy allows for the determination that a contract is defective without destabilizing the legal foundation of the decision (the arbitration agreement). But—and here lies an important subtlety—whereas autonomy allows a claim that the arbitration agreement is invalid on the basis that the contract was found to be null and void to be resisted, without *compétence* this principle by itself would not permit the arbitrator to proceed when the claim involves an arbitration agreement. Such a result is achieved by *compétence*.

As may be observed, both principles are the foundation upon which a legal edifice can be constructed that ensures the effects of the arbitration agreement.¹ There are instances of legal creativity that have been used to surmount an obstacle in the path of the desired goal: legal engineering at its finest.

¹ These results flow not from the arbitration agreement, but from the applicable arbitration law. If they arose from the arbitration agreement, a "chicken and egg" problem would ensue.

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III. THE CASES

Two judicial bodies have recently revisited the *compétence* principle, as summarized below.

A. MEXICO

The Mexican Supreme Court of Justice resolved a conflict between two Circuit Courts involving this topic. I shall summarize their background and rationale and then address the Supreme Court's decision.

1. *The (Conflicting) Criteria of the Circuit Courts*

Two Circuit Courts stood in conflict. Whereas the Sixth Civil Court for the First Circuit (*Sexto Tribunal Colegiado en Materia Civil del Primer Circuito*) held that the decision on the validity of the arbitration agreement fell under the jurisdiction of the arbitration tribunal,² the Tenth Civil Court for the First Circuit (*Décimo Tribunal Colegiado en Materia Civil del Primer Circuito*) held otherwise: that the decision belongs to the national court.³

Although I shall not dwell on the procedural details of the decisions, it is noteworthy that both display a procedural zig-zag: all of the courts involved took different views.

The first case⁴ began with an ordinary commercial suit before a Mexican Federal Court of first instance by LDC, S.A. de C.V. against ADT Security Services, S.A. de C.V. and the National Chamber of Commerce of Mexico City (*Cámara Nacional de Comercio de la Ciudad de México*, CANACO). The respondents challenged the jurisdiction of the court. In response, the Federal Court⁵ referred the parties to arbitration.⁶ The referral decision was challenged through a constitutional (*amparo*) suit and revoked by the District Court, which held that the referral could not take place as the suit involved the nullity of the arbitration agreement.⁷ The Sixth Circuit Court, on appeal, revoked the determination of the lower court, holding that the said decision fell within the authority of the arbitral tribunal.

In the second case, Servicio Electrónico Digital, S.A. de C.V. (SED) filed an ordinary commercial suit against ADT and CANACO.⁸ The court referred the parties to arbitration. SED appealed and succeeded in having the referral revoked.⁹ The appeal decision

² Amparo en revisión 3836/2004.

³ Amparo en revisión 31/2005.

⁴ Amparo en revisión 3836/2004.

⁵ Fiftieth Civ. Ct., F.D. [Juez Quincuagésimo de lo Civil del Distrito Federal].

⁶ To be precise, the incompetence was decided by the Third Civil Chamber of the Superior Court of Mexico City [Tercera Sala Civil del Tribunal Superior de Justicia del Distrito Federal], ordering the lower court to refer the parties to arbitration.

⁷ Reasoning that if referral to arbitration took place it would implicitly decide the validity of the arbitration agreement and submit the parties to the jurisdiction of a tribunal created by an agreement considered invalid by one of them.

⁸ Amparo en revisión 31/2005.

⁹ By the Tenth Civil Chamber of the Superior Court for the Federal District [Décima Sala Civil del Tribunal Superior de Justicia del Distrito Federal].

was challenged through *amparo*. The District Court¹⁰ revoked the challenged decision and, on appeal, the Tenth Circuit Court held that referral to arbitration should not take place when a question as to the validity of the arbitration agreement is raised, and that the said authority lies with the court of origin (not the arbitrator).

This conflict was taken up to the Mexican Supreme Court.¹¹

2. The Mexican Supreme Court Solution

The Mexican Supreme Court took the view that the authority to rule on the validity of the arbitration agreement fell within the purview of the court, not the arbitrator. In so doing, it issued the following jurisprudence:¹²

Commercial arbitration. Jurisdiction to take cognizance of the nullity suit of an arbitration agreement covered by the first paragraph of Article 1424 of the Commerce Code is within the jurisdiction of the court and not the arbitration tribunal. The possibility of opting out of state intervention in a dispute so as to submit it to commercial arbitration is a manifestation of the rights of parties to waive their subjective rights and establish legal provisions to which they wish to bind themselves; hence, an arbitration agreement may be included in an agreement as an arbitration clause which, as a general rule, and pursuant to Article 1432 of the Commerce Code, grants jurisdiction to the arbitrators to intervene, take cognizance and decide as to the existence and validity of the agreement as well as the arbitration clause. The contrary would breach the will of the parties. However, an exception to said rule exists, when, pursuant to Article 1424 of the cited Code, a dispute is submitted before a jurisdictional organ, involving a contract which includes an arbitration clause and at the same time a suit to have the same declared as null, inoperative or incapable of being performed is initiated, in which case a prior judicial decision as to the said nullity action would be necessary. The foregoing is because, on the one hand, the judicial control over the arbitration must not be overridden, and, on the other, the jurisdiction of the arbitrators stems from the autonomy of the parties. Therefore, if, for example, the existence of a defect in the intent of the parties is alleged, it must be previously resolved by the judicial authority, and the parties' rights under Article 1424 to arbitrate the matters involving the existence and validity of the contract, which are in the sole jurisdiction of the arbitration tribunal, remain intact.¹³

¹⁰ Eighth District Court for Civil Matters of the Federal District [Juzgado Octavo de Distrito en Materia Civil del Distrito Federal].

¹¹ In Mexico, conflicts between circuit courts may be brought before the Supreme Court in a manner similar to the *certiorari* authority of the U.S. Supreme Court. Technically, the issue is "denounced" [denunciada] before the court.

¹² Contradiction 51/2005, S.C.J.N., 1st ch., January 11, 2006. (Jurisprudential Thesis 25/2006, Contradiction Thesis 51/2005-PS between the Sixth and Tenth Circuit Courts for Civil Matters of the First Circuit. Decided by a majority of three votes. Opposing votes were cast by Olga Sánchez Cordero de García Villegas and José Ramón Cossío Díaz. Juan N. Silva Meza delivered the opinion of the Court.)

¹³ The Spanish version reads as follows:

"Arbitraje comercial. Competencia para conocer de la acción de nulidad del acuerdo de arbitraje prevista en el primer párrafo del artículo 1,424 del código de comercio, corresponde al juez y no al tribunal arbitral. La posibilidad de apartar la intervención de la justicia estatal en un conflicto, a fin de someterlo al arbitraje comercial, es una manifestación de la potestad de los particulares para renunciar a sus derechos subjetivos y establecer los dispositivos legales a los cuales desean someterse; de ahí, que un acuerdo de arbitraje pueda estar incluido en un contrato como cláusula compromisoria, lo que por regla general y en términos del artículo 1,432 del Código de Comercio, otorga su competencia a los árbitros para intervenir, conocer y decidir aún sobre la existencia o validez del propio contrato, así como de dicha cláusula compromisoria, lo contrario violaría la voluntad de las partes. Sin embargo, existe una excepción a dicha regla, cuando en términos del artículo 1,424 del citado Código, ante un órgano jurisdiccional se somete el diferendo, sobre un contrato que contenga una cláusula compromisoria, y se ejerza al mismo tiempo la acción para que la misma se declare nula, ineficaz o de ejecución imposible, la que en dicho supuesto haría necesaria

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This reasoning is based on the following premises: (1) parties submit their disputes to arbitration through an arbitration agreement, waiving the right to have them resolved by state courts; (2) as a rule such an agreement implies that the arbitrator decides upon the existence and validity of the agreement; and (3) the rule has an exception: should the nullity claim relate to the arbitration agreement—not the contract as a whole—it is for the national court to rule on the matter.

B. UNITED STATES

In *Buckeye Check Cashing, Inc. v. Cardegna et al.*¹⁴ the U.S. Supreme Court held that the jurisdiction to rule on the validity of the arbitration agreement lies with the arbitral tribunal when the jurisdictional challenge stems from a nullity action against the contract in its entirety.

The subtleties of this reasoning are worthy of comment. I shall therefore summarize the background of the case, and then discuss the decision and its reasoning.

1. Background

A Florida court of first instance denied the referral to arbitration requested by Buckeye, further to a suit brought by Cardegna against Buckeye, holding that the authority to rule on a claim that the contract is null and void *ab initio* is the national court's, not the arbitrators'.¹⁵ (It was argued that the contract was null and void given that the interest charged was usurious.)

The State Court of Appeal reversed the decision, and was itself reversed by the Florida Supreme Court, reasoning that the enforcement of the arbitration agreement in a contract in which illegality was being claimed would breach local public policy and contract law. The Florida Supreme Court held that "to enforce an agreement to arbitrate in a contract challenged as unlawful ... could breathe life into a contract that not only violates state law, but also is criminal in nature."¹⁶ The U.S. Supreme Court granted *certiorari*¹⁷ and revoked the decision of the Florida Supreme Court.

una decisión judicial previa, sobre la acción de nulidad. Lo anterior porque, por un lado, no debe soslayarse la existencia del debido control judicial sobre el arbitraje y, por el otro, la competencia de los árbitros proviene de la autonomía de la voluntad de las partes, de manera que si se alega, por ejemplo, la existencia de algún vicio de la voluntad en el acto que otorga competencia al árbitro, la acción de nulidad debe resolverse previamente por el órgano jurisdiccional, quedando a salvo los derechos de las partes para que en términos del segundo párrafo del referido artículo 1,424 puedan iniciarse las actuaciones arbitrales relativas a la disputa sobre el cumplimiento e inclusive la existencia o validez del propio contrato que contiene la cláusula compromisoria, ya que a ese respecto el tribunal arbitral conserva su competencia exclusiva."

¹⁴ 546 U.S. 440 (2006).

¹⁵ In the United States, referral to arbitration operates through a "motion to compel arbitration."

¹⁶ 894 So. 2d. 860, 862 (2005), citing *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. App. 2000).

¹⁷ 126 S. Ct. 1204.

2. *The U.S. Supreme Court Decision*

The U.S. Supreme Court overturned the Florida Supreme Court, holding that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court." This conclusion was premised on a fact to which the Court gave pivotal importance: that the claim was for the annulment of the contract *in its entirety*, and not solely the arbitration clause.

Following *Prima Paint*¹⁸ and *Southland*¹⁹ (also U.S. Supreme Court precedents), the Court distinguished between two situations: (1) an annulment claim involving only the arbitration agreement; and (2) an annulment claim of the contract in its entirety, whether because it affects the validity of the contract as a whole or because the illegality of a contract provision makes the entire agreement null and void. *Buckeye* involved scenario (2). As the Court observed, "because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court."

The decision is grounded in three premises. The first is that the arbitration agreement is severable from the rest of the agreement.²⁰ The second is that, unless the claim involves the arbitration agreement itself, the issue of the validity of the contract must first be considered by the arbitrator. Finally, this case involved a nullity claim of the entire agreement (including the arbitration agreement).²¹ Therefore, the Court determined that the arbitration agreement was enforceable independently of the rest of the agreement, and the claim should be considered by the arbitrator, not the court.

A noteworthy aspect is that not one line is dedicated to the flipside question that is begged by such reasoning: if the claim involves only the arbitration agreement, is the court—not the arbitrator—the competent organ to rule on this?

Although such a holding could implicitly be read into the decision, it is important to note that it was never directly stated that way.

C. SIMILARITIES

The reasoning of the Mexican and U.S. Supreme Courts of Justice are congruent, albeit inverse: according to the Mexican Court, if what is claimed is the nullity of the arbitration agreement, not the contract as a whole, the challenge before the competent court must be exhausted before the arbitration proceedings take place. In the opinion of

¹⁸ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967). *Prima Paint* held that if the claim for nullity involved fraud in the inducement of the contract in its entirety, the arbitrator should then rule on the matter. If the claim involved only the arbitration agreement, however, the court had jurisdiction to rule on this issue.

¹⁹ *Southland Corp. v. Keating*, 465 U.S. 1 (1984). This case holds that the Federal Arbitration Act created a body of federal substantive law that is to be applied both in local and federal courts.

²⁰ *Prima Paint* was the authority. Literally "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."

²¹ The ground for challenge was the alleged existence of usurious interest in deferred payment operations.

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the U.S. Supreme Court, when the nullity claim involves the entire agreement, it is the arbitrator, not the court, who is competent to decide the matter. The opposite enunciation of the principle was not advanced, and only hinted at: if the nullity suit involves only the arbitration agreement, the decision as to the matter falls upon the competent court.

The cases reflect an impressive parallelism. Not only are they decisions by the highest courts of each jurisdiction, they rely on similar premises, were issued within one month of each other, and both were preceded by a procedural zig-zag, with all the inferior courts having arrived at opposite conclusions.

Does this state something about the law being created?

IV. PARTIAL COMPÉTENCE: GOOD LAW?

In my opinion, the new scope of *compétence* as judicially crafted—"partial *compétence*"²²—violates the letter and spirit of the law.

A. THE LETTER OF THE LAW

The first paragraph of Article 1424 of the Mexican Commerce Code establishes that:

El juez al que se someta un litigio sobre un asunto que sea objeto de un acuerdo de arbitraje, remitirá a las partes al arbitraje en el momento en que lo solicite cualquiera de ellas, *a menos que se compruebe que dicho acuerdo es nulo, ineficaz o de ejecución imposible.*

[A court before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the parties to arbitration at any time requested by any of them *unless it finds that the agreement is null and void, inoperative or incapable of being performed.*]²³

The first paragraph of Article 1432 of the Commerce Code provides that:

El tribunal arbitral estará facultado para decidir sobre su propia competencia, incluso sobre las excepciones relativas a la existencia o validez del acuerdo de arbitraje.

[*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*]²⁴

It was the text emphasized above that gave rise to the different interpretations.

In the Mexican case, while the Sixth Circuit Court considered that the authority of the arbitrator to rule on its jurisdiction²⁵ prevails over the authority of the court to determine the validity of the arbitration agreement before referring it to arbitration,²⁶ the

²² Hereafter I shall refer to the two (opposite) views as "partial *compétence*": where the arbitrator decides upon the validity of the contract in its totality, and the court rules upon the validity of the arbitration agreement (as coined by the Mexican Supreme Court and the U.S. Supreme Court); and "total *compétence*": where the arbitrator decides upon the validity of the contract in its entirety as well as the arbitration agreement.

²³ Emphasis added. This copies almost verbatim art. 8 of the UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985) [hereinafter "Model Law"].

²⁴ Emphasis added. Identical to art. 16 of the Model Law.

²⁵ Under art. 1432 of the Mexican Commerce Code (art. 16 of the Model Law).

²⁶ Under art. 1424 of the Mexican Commerce Code (art. 8 of the Model Law).

Tenth Circuit Court found the opposite—and the Supreme Court agreed. The reasoning was as follows.

The Sixth Circuit Court considered that the determination of the validity of the arbitration agreement is part of the authority of the arbitral tribunal to rule on its jurisdiction. In contrast, the view of the Tenth Circuit Court was premised on two grounds:

- (1) Having established, as an exception to the duty to refer the parties to arbitration, that the court “find[s] that the agreement is null and void, inoperative or incapable of being performed,” in the event that the original claim includes a request that the arbitration agreement be stricken as invalid, the court must follow a trial proceeding which meets all Mexican due process requirements.²⁷ Otherwise, a breach of the Due Process Clause in the Mexican Federal Constitution would ensue.
- (2) Referral to arbitration before a finding of validity of the arbitration agreement would assume the answer to precisely what is being asked: it would be acting as if the arbitration agreement were valid.

In the U.S. case, the Supreme Court held that if the nullity claim involves the contract in its entirety, jurisdiction to rule on the matter falls within the purview of the arbitral tribunal. The textual point of departure is section 4 of the Federal Arbitration Act, which provides that:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in a manner provided for in such agreement ... [U]pon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

In my opinion, both courts misunderstood the thrust of the *compétence* principle: the exception to the duty to refer was used as an exception to the rule of *compétence*. In doing so, they threw a monkey wrench into the mechanism that the rule was designed to follow.

Partial *compétence* confuses exception for rule. In fact, it reverses the exception into the rule: the court decides upon the validity of the arbitration agreement, and the arbitrator, the contract in its entirety. It reduces the scope of *compétence*—the arbitrator no longer decides the defenses involving the existence and validity of the arbitration agreement, but only those involving the main contract.

It is correctly understood that while *compétence* establishes the rule (that the arbitrator decides on the validity of the contract and the arbitration agreement), the determination of the validity of the arbitration agreement is an exception to the obligation to refer the parties to arbitration. In other words, and using the Mexican Commerce Code to anchor

²⁷ Under Mexican due process case law certain steps need to take place for the procedure to meet constitutional due process requirements (called “*formalidades esenciales de procedimiento*” under this line of cases). The Due Process Clause is embodied in the Mexican Federal Constitution, art. 14.

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the explanation, while Article 1432 establishes *who* shall decide on the validity of the contract and the arbitration agreement (the arbitrator), Article 1424 establishes an exception to the court's obligation to refer the parties to arbitration.²⁸

B. THE SPIRIT OF THE LAW

Articles 1424 and 1432 of the Mexican Commerce Code constitute the script of a scene where two actors interact: the arbitrator and the judge. Each has his role carefully defined: the judge must refer and the arbitrator must decide.

The duet is explained by three reasons. To begin with, for compliance with the arbitration obligation, a procedural device must exist to channel a suit from the judicial forum to the arbitral. Otherwise, the obligation would lack efficacy. Secondly, if it were not for the arbitrator to rule on the tribunal's jurisdiction, an absurd result would ensue: the parties entering into an arbitration agreement, in order to resolve their differences outside the judicial forum, would have to go to court.

Thirdly, it could not operate any other way. To establish a different scenario would imply that the arbitrator could review a court determination, and then the court could (at the time of nullity or enforcement) re-evaluate the arbitrator's determination. Under the correct view, the arbitrator decides first, and the court decides in definitive. This is the end of the story.

The *ratio legis* is clear: to avoid frustrating the intention of the parties who entered into an arbitration agreement that all of their disputes would be resolved through arbitration. If one of the areas of dispute involves the validity of the arbitration agreement, this ancillary matter should follow the main issue: it is to be decided by the arbitral tribunal.

The foregoing explains why the arbitrator has to decide at the outset: the court will review the arbitrator's determination, whether at the time of the issuance of the award,²⁹ or at the time of its setting aside,³⁰ or at the time of recognition and enforcement.³¹

It could be asked why, then, does the law authorize the court to perform a determination of the validity, operation or capability of performance of the arbitration agreement?³² The answer lies with the design and purpose of the provision: it is an exceptional escape clause created so as to avoid the absurd result of having to refer the parties to arbitration when it is evident that referral should not take place. The motive has to be manifest; evident. No doubt should exist. And any doubt should be resolved in favor of referral; otherwise the *compétence-compétence* principle would be compromised.

²⁸ The verb "refer" ["remitirá"] (to arbitration) in art. 1424 of the Mexican Commerce Code is imperative. It does not allow discretion; it only creates obligation. The court must refrain from entertaining both the substance of the dispute as well as the jurisdiction of the tribunal (which would be a specific topic falling under the general heading "validity of the arbitration agreement").

²⁹ Mexican Commerce Code, art. 1432(3).

³⁰ *Id.* art. 1457(1)(a).

³¹ *Id.* art. 1462(1)(a).

³² After all, of the Mexican Commerce Code, art. 1424 and the Federal Arbitration Act, sec. 4 expressly provide for this review.

The above assertion as to the authentic content of Article 1424 of the Mexican Commerce Code finds its origin in its legislative history and the most accepted interpretation, which I shall now briefly address.

1. *Legislative History*

The working group that drafted Article 1424 of the Mexican Commerce Code (based on the Model Law³³) sought to echo the text of the New York Convention³⁴ so as to ensure uniformity. The New York Convention provides:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, *unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*³⁵

During the debates on the Model Law, the inclusion of the word "manifestly" before the word "null" was suggested, so as to clarify that the level of review to be performed by the court is a superficial one.³⁶ The proposal did not succeed. It was deemed unnecessary, given the consensus that, as the provision stood, it reflected the intent, and modifying the text would have lessened uniformity. Two influential commentators³⁷ have explained that, notwithstanding that the word "manifestly" was not included, it should be understood in such a manner, given the pro-enforcement bias that permeates throughout the New York Convention which militates in favor of strictly interpreting any ground for invalidating the arbitration agreement.³⁸ Other experts disagree.³⁹

As may be observed, the emphasized extract of Article II(3) of the New York Convention is identical to Article 1424 of the Mexican Commerce Code,⁴⁰ which was intended to be interpreted in a similar manner. Elaborating on the New York Convention, therefore, is both relevant and convenient.

³³ The antecedent of art. 1424 is art. 8 of the Model Law.

³⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

³⁵ *Id.* art. II(3) (emphasis added).

³⁶ REPORT OF THE THIRD WORKING GROUP, U.N. Doc. A/CN.9/233, at 315, para. 77.

³⁷ HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 303 (1994).

³⁸ Similarly, ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 155 (1981). See also Albert Jan van den Berg, *The New York Convention: Summary of Court Decisions*, in *The New York Convention of 1958, A Collection of Reports and Materials* delivered at the Conference held in Zurich on February 2, 1996, 9 ASA SPECIAL SERIES 22 (1996).

³⁹ Julian Lew believes that the result of the non-inclusion of the word "manifestly" is that the state court can perform a more profound review (more than a *prima facie* review). See JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 349, paras. 14-61 (2003).

⁴⁰ A slight textual—albeit not conceptual—difference exists. Art. 1424 of the Mexican Commerce Code refers to "*nulo, ineficaz o de ejecución imposible*", whereas the New York Convention speaks of "*nulo, ineficaz o inaplicable*". The terms "*ejecución imposible*" in the Mexican Commerce Code and "*inaplicable*" in the New York Convention have the same legal meaning. (See GONZÁLEZ DE COSSÍO, ARBITRAJE 91-97 (2004).)

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The *travaux préparatoires* to the New York Convention do not reflect much discussion on what was intended to be understood by “null and void, inoperative or incapable of being performed.”

One of the most renowned experts on the New York Convention has explained that the intention was to make it clear that courts lack jurisdiction to take cognizance of the substance of the dispute, and that they would only have a “partial” or “subsidiary” jurisdiction for matters involving the arbitration agreement, such as interim measures of protection.⁴¹ As to the determination of the validity of the agreement, this may only take place in extreme cases where it is clear that no arbitration agreement exists, or the same is ostensibly ineffective.⁴²

Another interesting study touches upon the topic and describes cases where the national court may retain jurisdiction, but does not elaborate as to the level of review that a local court must exercise to determine if the agreement is “null and void, inoperative or incapable of being performed.”⁴³

Notwithstanding the lack of analysis, the goal appears to have been achieved. Most courts which have applied Article II(3) of the New York Convention have, usually, simply referred the matter to arbitration.⁴⁴ However, the level of review of the “null and void, inoperative or incapable of being performed” determination is an open issue, and different jurisdictions apply contrasting levels of review. While some provide for a limited standard of review,⁴⁵ others allow for an extensive one,⁴⁶ others a mixed

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⁴¹ VAN DEN BERG, *supra* note 38, at 168.

⁴² *Id.* at 154–61.

⁴³ DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS, THE NEW YORK CONVENTION OF 1958 113–22 (2001).

⁴⁴ Jan Paulsson, *The New York Convention in Practice: Problems of Assimilation*, in *The New York Convention of 1958, A Collection of Reports and Materials delivered at the Conference held in Zurich on February 2, 1996*, 9 ASA SPECIAL SERIES 103–4 (1996).

⁴⁵ France (art. 1458 of the Code de Procedure Civile provides that the court must declare itself incompetent unless the arbitration agreement is “manifestly null.” Its interpretation by the Cour de Cassation is strict. The court must perform a preliminary (*prima facie*) revision of the existence of the arbitration agreement (*Coprodag v. Dame Bohin*, Cour de Cassation, May 10, 1995, *REVUE DE L'ARBITRAGE* 617 (1995); *Renault v. V 2000* (previously *Jaguar France*), Cour de Cassation, May 21, 1997, *REVUE DE L'ARBITRAGE* 537 (1997); and *American Bureau of Shipping, Cour de Cassation*, June 26, 2001). The same happens in Canada (which adopted the Model Law) (*Rio Algom v. Sammi Steel*, Ontario Court of Justice, March 1, 1991, 18 *Y.B. COM. ARR.* 166 (1993); *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* and others, May 7, 1996, 6 *ARB. & DISP. RES. LJ* 37 (1997)) and Hong Kong (*Pacific International Lines (Pte) Ltd. v. Tsinlien Metals and Minerals Co. Ltd.*, Hong Kong Supreme Court of Justice, July 30, 1992, 18 *Y.B. COM. ARR.* 180 (1993)).

⁴⁶ Some authors consider that a level of review greater than a limited review is possible in the context of the determination of the validity, operativeness and capability of performance of the arbitration agreement. LEW, MISTELIS & KRÖLL, *supra* note 39, at 347. Some jurisdictions have followed this route: the United States, for example, where certain cases have interpreted art. II(3) of the New York Convention in the sense of permitting a total revision of the validity of the arbitration agreement. *Sandvik AB v. Advent International Corp.*, 26 *Y.B. COM. ARR.* 961, 968 (2001). Others have decided that it is for the court to determine the validity of an agreement to arbitrate, unless the parties have expressly given this authority to the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1985). *Buckeye* seems to leave such a possibility open. As explained, by holding that it is for the arbitrator to decide as to validity when the claim involves the *totality* of the agreement, the implication appears to be that, should the claim involve only the arbitration agreement, it is the court that will rule on this matter. The decision leaves the matter open, although the *contrario sensu* interpretation seems defensible.

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review,⁴⁷ and yet others provide for the possibility of bringing a special claim before a court seeking a preliminary determination on the jurisdiction of the arbitration tribunal.⁴⁸

3. *The Doctrine*

Originally, the *Kompetenz-Kompetenz* principle meant that the arbitral tribunal was the *only* judge of its jurisdiction (the German School).⁴⁹ A qualification rapidly occurred: the arbitrator is the first judge of the tribunal's jurisdiction, subject to the final determination to be performed by the competent court (the French School).⁵⁰ The French School is the accepted paradigm, and this is currently being revisited in Mexico and the United States.

The theory leaves open an important question: when should the court perform the determination? Should it be carried out before, during or after the arbitration proceedings? The Model Law⁵¹ provides an answer by stating that the arbitrator addresses the matter first, subject to the final review by the competent court.⁵²

One of the veterans of arbitration, Gerold Herrmann, in his frequently cited study *The Arbitration Agreement as the Foundation of Arbitration and its Recognition by the Courts*,⁵³ explains the interplay between the court and the arbitrator through his "First Shot Theory": the arbitrator will have the first "shot" at assessing the validity of the arbitration agreement, subject to the second (and final) "shot" of the respective court.

Important commentators have described this interplay as a "relay race"⁵⁴ in which the court and the arbitrator run at different times. First, the baton is in the hands of the court, which passes it to the arbitrator through the referral to arbitration, for the arbitral

⁴⁷ Switzerland provides an interesting response. A dichotomy exists: when the place of arbitration is Switzerland, a *prima facie* revision will take place. When it is not, the Swiss court will perform a *total* review. The reason for the difference in treatment is that, while the revision of jurisdiction of the arbitrator is possible in the final award, it is not possible when the place of arbitration is not Switzerland. *Compagnie de Navigation et de Transports S.A. v. MSC Mediterranean Shipping Company S.A.*, Federal Tribunal, January 16, 1995, 121 III ATF/BGE 38; *Foundation M v. Banque X*, April 29, 1996, ATF/122 III 139. In *Fomento de Construcciones y Contratos S.A. v. Colon Container Terminal S.A.*, Int'l (ALR N-28 [2001]), the court concluded that no grounds existed to allege that the arbitration tribunal should have priority in ruling on its jurisdiction.

⁴⁸ United States (secs. 4, 206 and 303 of the Federal Arbitration Act). See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* 388 U.S. 395 (1967) and *Sedco Inc. v. Petroleos Mexicanos Nat'l Oil Corp.* 767 F.2d 1140, 1145 (5th Cir. 1985); United Kingdom (sec. 32 of the Arbitration Act 1996); Germany (sec. 1032(3) ZPO, Oberlandesgericht Hamm, February 10, 1999, RPS 2/1999, Supp. 11, BETRIEBSBERATER 38/1999).

⁴⁹ It is curious to note that although this is the meaning generally attributed to the German doctrine, its *lex scripta* in fact never reflected such an approach, whether before or subsequent to the amendment of December 22, 1997. Arts. 1032(1) and (2) of the ZPO allow the parties to request from state courts a determination as to whether the arbitration should proceed.

⁵⁰ It has been so since the decision of the French Cour de Cassation in *Cauliez-Tibergien v. Cauliez-Hannart*, February 22, 1949.

⁵¹ Arts. 8 and 16 (arts. 1424 and 1432 of the Mexican Commerce Code).

⁵² This "intermediate solution" has been applauded in many fora as it has the advantage of allowing for the judicial review of the arbitrator's jurisdiction without permitting dilatory tactics.

⁵³ ICCA CONGRESS SERIES NO. 6, 48 (Albert Jan van den Berg, ed., 1994).

⁵⁴ Lord Mustill, *Comments and Conclusions, in CONSERVATORY & PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION*, 9th Joint Colloquium (1993). This position is cited with the approval of ALAN REDFERN & MARTIN HUNTER (with Nigel Blackaby & Constantine Partasides) in *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 391 (2005).

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tribunal to review the substance of the dispute. Once this has taken place, the baton is passed back to the court to rule upon the nullity and enforcement of the award.

Another practitioner, Goldman,⁵⁵ qualifies the relationship between the state court and the arbitral tribunal as an “association” pursuant to which each party has different obligations.

As may be observed, although the metaphors vary, the content is generally accepted: while the arbitrator rules first, the competent court provides the final answer.

V. TOTAL COMPÉTENCE: BETTER LAW

The jurisdiction of the arbitrator should include both the decision on the validity of the contract as a whole and the arbitration agreement. This is better law. I shall explain why, in section A below; address the arguments supporting Partial *Compétence* in section B; comment on its impact in section C; and conclude with suggestions on how to avoid the negative results from the adoption of partial *compétence* in section D.

A. TOTAL COMPÉTENCE AS BETTER LAW

Total *compétence* is more efficient and less prone to chicanery. Furthermore, it is more consistent with the intentions of the parties.

It is more efficient, as it avoids duplicity. The resolution of the dispute is limited to one forum: the arbitral tribunal. The arbitrator, who will be in the process of ruling on the substance of the dispute, will be better informed and hence in a better position to decide the matter.

It avoids the possibility of underhandedness by not providing a recalcitrant party with the opportunity to challenge the arbitration agreement in parallel in two fora. Under partial *compétence* the arbitration proceedings may have to be suspended while awaiting the judicial decision of the nullity suit of the arbitration agreement.

But the most forceful argument in favor of total *compétence* is teleological. It stems from the parties’ intent. On entering into an arbitration agreement the parties intend that all of their disputes will be resolved through arbitration, not litigation. Partial *compétence* restricts this intent. The reasons become apparent by looking at the legal effects. Under total *compétence*, entering into an arbitration agreement forces all disputes to be channeled to the arbitral forum. Under partial *compétence*, entering into an arbitration agreement means that almost all disputes will be solved through arbitration: all but for the validity of the arbitration agreement.

Total *compétence* means that the arbitrator rules first and the court rules in the definitive. Under partial *compétence*, there are four judicial instances for the analysis of the validity of the arbitration agreement.⁵⁶ And *compétence de la compétence* no longer means that it is the

⁵⁵ THE COMPLEMENTARY ROLE OF JUDGES AND ARBITRATORS, ICC Publication No. 412, at 259.

⁵⁶ At the time of referral (Mexican Commerce Code, art. 1424); against the partial jurisdiction award (art. 1432(3)); setting aside (art. 1457(1)(a)); and enforcement (art. 1462(1)(a)).

arbitrator who rules first on the tribunal's jurisdiction, but that "sometimes the arbitrator rules first on its jurisdiction." The derogatory effect of the principle is evident.

A historical digression is appropriate. The judicial debate described in part III repeats what took place many decades ago: who decides upon the jurisdiction of the arbitral tribunal, the court or the arbitrator? It was this debate that gave rise to the *compétence-compétence* principle.

The partial *compétence* theory thus ignores decades of history and experience and relives a debate considered moot.

B. THE CASE FOR PARTIAL *COMPÉTENCE*

A frequently used argumentative device—euphemistically called the "straw man fallacy"—involves exposing an argument in a weakened fashion so as to facilitate its rebuttal.⁵⁷ I do not wish to use this here. Therefore, I shall address the reasoning that led both of the criticized judiciaries to favor partial *compétence*: the reasons I have heard others advance, as well as reasons I have deduced myself. I shall then provide my own opinion.

It is correct that the position I put forward is not without counter-arguments. I have found four in favor of the partial *compétence* theory:

- (1) Efficiency: it could be argued that it is more efficient to deal with a question as to the validity of the arbitration agreement as early as possible. Partial *compétence* caters for this. A preliminary judicial ruling provides certainty and saves resources by avoiding having to litigate before an arbitrator with the risk that the court will eventually determine that the tribunal lacked jurisdiction, which would be wasteful.
- (2) Textual arguments: two textual arguments support the partial *compétence* theory. The use by the Mexican *lex arbitri* of the verb "finds" ("*comprobar*")⁵⁸ in the phrase "unless it finds that the said agreement is null and void, inoperative or incapable of being performed"⁵⁹ requires a court to follow a procedure which meets Mexican due process standards.⁶⁰ Failure to do so could breach the Mexican Due Process Clause (Article 14 of the Mexican Federal Constitution).
- (3) Another textual argument, which I have not heard anyone voice, is worth considering: if the legislative intent was for a local court to abstain from ruling on the arbitral tribunal's jurisdiction, it should have been expressly provided for in Article 1424 of the Mexican Commerce Code, as it has in other arbitration

⁵⁷ The implication of the metaphor is that it is easier to defeat a feeble or false adversary (a man of straw) than a true one.

⁵⁸ Which I translated above as "finds," following the Model Law text.

⁵⁹ Literally, "El tribunal ... remitirá a las partes al arbitraje ... a menos que compruebe que dicho acuerdo es nulo, ineficaz o inaplicable." Mexican Commerce Code, art. 1424.

⁶⁰ Called "essential procedural formalities" ["formalidades esenciales del procedimiento"] in Mexican case law.

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instruments, such as Article 7(3) of the European Convention of 1961.⁶¹ In other words, the legislative omission is intentional.

- (4) It could also be posited that, although it is under the authority of the arbitral tribunal to decide upon the validity of the arbitration agreement, given that the referral obligation requires, as an exception, the court to determine the validity of the arbitration agreement, it is only the court that can perform this determination.

Although each of the arguments canvassed above has certain merit, none is persuasive.

Let us begin with the efficiency argument. It is true that solving the jurisdictional question at the beginning avoids duplicity and waste of resources (time, energy, focus on the real dispute and monetary funds). But why does it militate against the arbitrator performing such determination? Further, how can it be reconciled with the intention of the parties to resolve their disputes by arbitration and not litigation?

The textual arguments offer an interesting challenge. It is true that the current wording presents an overlapping between the arbitrator's and the court's authority. It is also true that the legal mandate to "find" ("*comprobar*") the validity, operability and capability of performance of the arbitration agreement necessarily implies that a proceeding take place, and failure to do so would be contrary to due process. But both arguments are rebutted if a minimum standard of review is adopted:⁶² the ground must be manifest; evident. Otherwise, it is incumbent on the arbitrator to rule on the same.

The court's authority to assess the validity of the arbitration agreement was designed as an exception to the duty to refer the parties to arbitration in cases where it is *evident* that the referral is not justified. To illustrate, think of the case where, notwithstanding that a dispute has already been resolved through a final award, it is resubmitted before a court. It would be absurd to initiate an arbitration to rule on the matter. It would only generate delays and expenses over a matter that has already been ruled upon. Paradoxically, the arbitration mechanism would be used as a dilatory tactic. The antidote is the court's authority to find that the agreement is null, inoperative or incapable of being performed. This scenario would be a case of an "inoperative" arbitration agreement validly excusing the referral to arbitration. Another example may be of assistance. If the claimant party is caught up in a bankruptcy proceeding and it wishes to collect an amount owed by a defaulting debtor, the seeking referral to arbitration by the debtor could in and of itself be a dilatory tactic: the plaintiff would not have the funds to shoulder the arbitration expenses, as would be evidenced when the advance on costs was requested. In this case, the court could—if the claimant party so requested—not refer the parties to arbitration because of "incapability of performance."

Examples are abundant, and the implication is that there are situations where arbitration is not justified, or may (ironically) be used to block the exercise of rights. In these cases, the court has the authority to abstain from referring the matter to arbitration. But

⁶¹ European Convention on International Commercial Arbitration, April 21, 1961, 484 U.N.T.S. 364.

⁶² As performed by sophisticated arbitration jurisdictions.

these are exceptional cases. Stretching this exception into a rule (as done by partial *compétence*) is a mistake which impinges upon the mechanics of the rule of which it forms a part. It allows for the exception to devour the rule.

The fourth argument is interesting, for it questions the mechanics of the referral decision. It is true that it *could* be interpreted as both the Mexican and U.S. Supreme Courts did,⁶³ but this is not the best interpretation. The reason is twofold: it invites exactly the type of chicanery the original design of the rule sought to avoid (to activate it, all that is required is bringing suit before a court for the nullity of the arbitration agreement) and it loses sight of the fact that this exception is precisely that: an exception. It does not grant authority to the court to decide on the validity of the arbitration agreement as a general matter. It only authorizes the possibility of not referring in certain cases.

Granted, partial *compétence* has some merit. But that only highlights the reason why *compétence-compétence* was developed in the first place. It is because without *compétence*, the legal and logical outcome would invite results contrary to the intention of the parties on entering into an arbitration agreement, and this was why the principle was coined: to rechannel the flow of the legal results to the desired outcome. Otherwise, *compétence* would not mean anything. It would be an empty and redundant concept.

Another Achilles heel of partial *compétence* merits exposure. It establishes a difference between two types of claims: a suit seeking the nullity of an entire agreement and a claim seeking the nullity of the arbitration agreement. Why? What motivates such difference? What does the total nullity claim lack that the partial (the arbitration agreement only) has that justifies the different treatment? The answer is straightforward: nothing. Why, then, should different organs rule on these issues? What about *ubi eadem ratio, idem jus* (similar situations should be governed by the same legal principles)?

This is not the case according to partial *compétence*. In my opinion, "what is sauce for the goose is sauce for the gander." The differentiation is artificial and unwarranted.

In sum, the arguments are insufficient to reduce the scope and trample the objectives and effects of the principle, severing its combined effect with the principle of autonomy.

C. IMPACT OF PARTIAL *COMPÉTENCE*

In essence, the theory of partial *compétence* is erroneous for it:

- (1) curtails the intention of parties wishing to have a non-judicial arbitration proceeding;
- (2) is contrary to the spirit and mechanics of Article II(3) of the New York Convention and Article 1424 of the Mexican Commerce Code;

⁶³ And it would not be a breach of the duty to refer to arbitration nor a breach by the court of what is known as the "negative effect of the arbitration agreement" (the duty on courts not to entertain the substance of the dispute), because the *substance* of the dispute will not be dealt with, only the validity of the arbitration agreement.

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- (3) severs the effects of the phrase “the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement” included in Article 1432 of the Mexican Commerce Code. Doing so violates the principle *ut magis valeat quam pereat* (a legal text should be construed in a manner allowing it to have legal effects);
- (4) weakens one of the pivotal principles of arbitration;
- (5) invents yet another instance of court review of the arbitrator’s jurisdiction (in addition to being able to review it at the end⁶⁴ and during⁶⁵ the proceedings, the court can also review it at the beginning); and
- (6) is contrary to Article 1421 of the Mexican Commerce Code, which provides that “[i]n matters governed by this Law, no court shall intervene except where so provided in this Law.”

However, there is no need to be alarmist. Although unfortunate, arbitration law provides ways to reduce the negative impact of the decision.

When facing a court action seeking the nullity of the arbitration agreement, the arbitral tribunal may choose to continue with the proceedings. It is not obliged to suspend them.⁶⁶ This authority was expressly designed to limit the success of dilatory tactics. And doing so should not be deemed offensive to the respective judiciary. After all, it is a proviso carefully designed so as to allow an arbitrator, at his discretion, to suspend or proceed. Faced with such an issue an experienced arbitrator would continue the proceedings if the challenge before the court were without merit (used only to delay proceedings) and would suspend them if the challenge had some merit.

As may be observed, the authority discussed above has been carefully calibrated to efficiently address and resolve opposing procedural situations. All that is required is a sophisticated arbitrator.

D. SUGGESTIONS TO REDUCE HARM

To curtail the negative effects of the (unfortunate) adoption of the partial *compétence* concept, certain recommended steps may be taken, as set out below:

- (1) The judges before whom the challenge to the arbitration agreement is brought should adopt a limited standard (*prima facie*, for example) of review. In this manner, both mandates of partial *compétence* would be complied with, while remaining true to the original purpose of the principle.
- (2) The court review as to the validity of the agreement should be summarily performed: i.e., the procedure should be conducted quickly and where possible an immediate pronouncement take place.

⁶⁴ At the setting aside (Mexican Commerce Code, art. 1457(I)(a)) and enforcement (art. 1462(I)(a)) stages.

⁶⁵ *Id.* art. 1432(3).

⁶⁶ *Id.* art. 1424(2); Model Law, art. 8(2).

- (3) When faced with frivolous requests, or requests seeking only to delay or obstruct the arbitration proceeding, courts should be disposed to issue awards on costs. In doing so, a self-equilibrating rule would be developed.⁶⁷

In sum, if the steps described are followed (an expedited application plus a limited threshold of review) the mistake will be corrected and the original sense returned to the rule.

VI. FINAL COMMENT

History is pendular: it tends to repeat itself. As the great Spanish historian Carlos Santayana warned, he who ignores history is bound to relive it.

When history is repeated in a manner that displays a lack of awareness of the lessons of the past, unforgivable mistakes occur. We trip on stones where we ought not. In the legal sphere, bad law is created.

And this is the mistake of both the Mexican and U.S. Supreme Courts. They repeat a debate that took place decades ago: it is for the arbitrator to decide first as to the tribunal's jurisdiction, subject to the final decision by the competent court. Holding otherwise ignores the intentions of the parties in agreeing to arbitration. Whether the jurisdictional challenge involves the contract in its entirety or only the arbitration agreement is completely irrelevant.

⁶⁷ A "self-equilibrating" statute is one that includes mechanisms that diminish the abuse of the rights for which it provides without the need for their enforcement. It is a mechanism that the economic analysis of law suggests should be tailored to produce efficient norms. To illustrate, I will use a contextually convenient example. Should courts provide for significant cost awards against parties when the use of a right translates into an abuse of that right, a healthy result would be procured: assuming counsel are sophisticated, they will think twice before bringing such an action and will only commence proceedings on the belief that it has certain merit, and not as a chicanery device. Otherwise, their client could be left with higher legal fees. The ancillary effects are important: fewer requests will be made, and they will have an aura of legitimacy. As far as I know, the term "self-equilibrating statute" is not used in literature. I have coined it with my students of the economic analysis of law.