Early in the life cycle of an arbitration often comes disagreement over whether a party may be made to arbitrate a dispute that it would prefer to bring to court. It is simply not always the case that both parties to an arbitration agreement appear immediately and cooperatively before the panel. Rather, with great frequency, one of the parties takes to court a dispute that is arguably governed by an arbitration clause. It may do so because it perceives substantive or procedural advantages in such a move, or purely for strategic reasons. The defendant will then commonly challenge the court’s jurisdiction in light of the arbitration agreement, and may seek a stay of the litigation or an order to compel arbitration, or both. That is the setting for my remarks on this occasion.

By definition, the issues that arise in this setting are preliminary or threshold issues. The U.S. Supreme Court has taken to calling them “gateway” issues,1 though sometimes reserving that term for preliminary issues that presumptively go in one direction or the other, i.e. to the court or to the arbitral panel.

In these remarks, I use the term “gateway issues” generally to denote the range of issues that arguably need to be decided by a court before it will stay litigation or compel arbitration of a dispute that is before it. (The point is that the requirement of a threshold court decision on such issues is only arguable, hence the problem.) I find the term “gateway issue” useful, and certainly more useful than the term “arbitrability,” which is sometimes used, even in such high circles as the U.S. Supreme Court itself,2 to denote this same full range of issues. There is nothing inherently wrong with using the term “arbitrability” in this wide sense; after all a dispute will not go to arbitration on the merits until all these issues, if raised, are addressed. But using the term “arbitrability” in this sense deprives that term of the narrower meaning to which in usage around the world it is commonly confined and for which no better term has been found.

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Accordingly, I reserve the term “arbitrability” for the narrower issue of whether a given dispute is legally capable of being arbitrated under the law deemed applicable to that question.\(^3\) Of course arbitrability, in this sense, is itself a gateway issue, but it is only one among many. A party determined to resist arbitration legally has at its disposal many objections to the arbitration, of which “non-arbitrability” (in the sense of a prohibition at law on submitting the dispute to arbitration) is only an example.

The waterfront of gateway issues is indeed a broad one. It is complicated not only by the number of different issues properly regarded as “gateway,” but by the fact that there reigns considerable uncertainty over which of these impediments to arbitration are properly decided by a court at the outset, and which are left at least initially to the arbitral panel, though presumably reviewable to at least some extent on vacatur or on the occasion of an action to enforce the resulting award.\(^4\)

The stakes are not inconsiderable. The greater the number of gateway issues reserved to courts, if raised, the greater the opportunities for an arbitration to be deferred. And the more difficult the gateway issue is to resolve, the longer the period of deferral. But, even if the waterfront is cluttered in this way, the costs to arbitration could be reduced if greater clarity could be brought to this particular “jurisdictional” issue. At least the “who decides the gateway issue?” will have been resolved, even if the gateway issue itself remains open for a while and is sometimes difficult.

The jurisdictional aspect is by no means the only important dimension of the “gateway” problem. Whoever it is who gets to decide gateway issues also has, at least in principle, a choice of law question to address. As to each gateway issue, it may be asked whose law supplies the rule of decision to be employed in deciding whether the gateway issue at hand is an obstacle to arbitration. The jurisdictional and choice of law dimensions must be kept separate. Deciding whether a judge or arbitrator gets to decide the question at the outset does not tell us in itself the law by reference to which the question is to be answered. Given time limitations, I must necessarily confine myself to the gateway jurisdictional issue and leave aside the gateway choice of law issue.

The fact that a gateway issue is assigned at the outset to a decisionmaker (be it a court or tribunal) does not of course mean that it will not arise at

\(^3\) See Restatement of the Law Third, The U.S. Law of International Commercial Arbitration, section 5-13 (tent. draft no. 1, March 29, 2010).