

## AN OVERVIEW OF THE PRINCIPLE OF COMPETENCE-COMPETENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

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### ABSTRACT

The principle of competence-competence seeks to address the question, who determines the jurisdiction of the arbitral tribunal? The issues surrounding the authority of the arbitral tribunal to rule on any objection made to its jurisdiction raises among other things question as to the competence of the arbitral tribunal to determine its own jurisdiction. This article provides a comparative review of jurisdictional approaches to the authority of the arbitral tribunal to rule on its own jurisdiction. Competence-competence is a fundamental principle of the modern law of Arbitration which states that an arbitral tribunal is competence to decide its own competence in other words, the tribunal has the jurisdiction to decide its own jurisdiction. The doctrine of competence-competence is one of the most fundamental pillars sustaining international arbitration some scholars are of the view that International arbitration could not have developed as much as it has if this principle were not considered a true doctrine. The research method employed in this work included analytic and comparative methods of research.

**Keywords:** Competence-Competence, International Commercial Arbitration, Jurisdiction, Arbitral Tribunal, UNCITRAL Model Law

### 1. Introduction

One of the most common intervention that arbitral proceedings may experience from the national court of the seat is a judgment stating that the national legal system, rather than the arbitral panel, has jurisdiction on the case. As arbitration clauses define arbitrators' authority and power, jurisdictional issues may arise not only from the scope of this clause but also from its validity. When a party regrets its agreement to submit the dispute to arbitration, it can avoid or delay arbitral proceedings by simply challenging of the scope and validity of the arbitration clause before the national court. In order to prevent a party from hampering the effectiveness of an arbitration clause by invoking the arbitrators' lack of jurisdiction, the arbitration law of a number of states, supported by case law, has given full recognition to the principle of competence-competence.<sup>1</sup> This article therefore examines the principle of competence-competence and its application in international commercial arbitration through a comparative examination of jurisdictional approaches to the authority of the arbitral tribunal to rule on its own jurisdiction.

#### 1.2 The Principle of Competence-Competence

Competence-competence is the conferral of inherent power on the tribunal to determine whether it has jurisdiction to hear the dispute and subsequently on the existence of the main contract.<sup>2</sup> This principle goes to the heart of the arbitral process. It is one of the most widely

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<sup>1</sup> William Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction* (Kluwer Law Int'l 2007) 59.

<sup>2</sup> Jean Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2<sup>nd</sup> edn, Sweet & Maxwell 2007) 168.

recognised concepts in international commercial arbitration. The principle empowers the tribunal to determine its own jurisdiction, where it has been contested by one of the parties to the arbitration. The goal of this doctrine is to prevent premature judicial intervention from impeding the arbitration process.<sup>3</sup> The doctrine speaks to the question; who decides the jurisdiction of the tribunal?<sup>4</sup> There are however, divergent approaches taken by courts to the question of who decides the jurisdiction of the tribunal. Courts in some jurisdictions take the presumptive approach that the existence and validity of the arbitration agreement are for the courts to determine.<sup>5</sup> The alternative position is that the tribunal is provided the first opportunity to determine the existence and validity of the arbitration agreement. Courts who take the latter position usually limit their examination to a prima facie review of the arbitration agreement. A prima facie review does not entail a full examination as to the existence and validity of the arbitration agreement. It only entails an examination to verify that a valid arbitration agreement exists.<sup>6</sup>

The competence-competence principle enables the tribunal to rule that an arbitration agreement is invalid and to issue an award that it lacks jurisdiction without contradicting itself. Thus, a question may arise as to how a tribunal exclusively relying on the arbitration agreement is able to determine that very agreement to be void. The answer lays at the foundation of the principle of competence-competence which is the arbitration laws of the state where the arbitration is heard (known as *lex arbitri*) in addition to the arbitration laws of any jurisdiction in which the agreement will be enforced.<sup>7</sup>

Where national arbitration laws confer authority on the tribunal, courts in those states have responsibility to enforce an award issued by the tribunal relating to their own jurisdiction, on the proviso that competence-competence is recognised in their national arbitration laws.<sup>8</sup> If a tribunal is to decide its own jurisdiction, it must first assume that jurisdiction.<sup>9</sup> The principle has occasionally been criticised by those who assume that arbitrators will most likely find that they have jurisdiction in order to avoid losing a good opportunity. However, the view in many countries is that by choosing arbitration, parties intend for an arbitrator to decide all disputes arising out of the contract including those concerning the jurisdiction of the arbitrator.<sup>10</sup>

### 1.3 The Dual Effects of Competence-Competence

There are two effects of the principle of competence-competence. The positive and negative effects. The positive effect is to permit arbitral tribunals to make a ruling on their own jurisdiction to hear the dispute. By emphasising the jurisdiction of the tribunal, the positive effect sets out a framework of concurrent jurisdiction between courts and arbitral tribunals. The negative effect on the other hand is more controversial and rests on the notion that the arbitral tribunal should have a chronological priority to rule on its jurisdiction before the

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<sup>3</sup>SuslerOzlem, 'The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence' (2009) 6 Macquarie J. Bus. L. 119.

<sup>4</sup> John Barcelo, 'Who Decides the arbitrators' jurisdiction? Separability and Competence- Competence in Transnational Perspective' (2003) Vand. J. Transnat'l L. 1115.

<sup>5</sup>*First Options of Chicago Inc v Kaplan* [1995] 514 U.S. 938.

<sup>6</sup>SuslerOzlem (n3) 120.

<sup>7</sup> Emmanuel Gaillard and John Savage (eds), *Fouchard Gaillard Goldman On International Commercial Arbitration* (Kluwer Law International 1999) 658.

<sup>8</sup> Ibid

<sup>9</sup>*Mauritius Estate Development Corporation Ltd. v. Systems Building Ltd* [2008] SCJ 69

<sup>10</sup> Margaret Moses, *The Principles and Practice of International Arbitration* (2<sup>nd</sup> edition, Cambridge University Press 2012) 91.

courts.<sup>11</sup> The negative effect thereby restricts the function of the court to provide the tribunal with the first opportunity to determine its own jurisdiction and the validity of the arbitration agreement. In this manner, the negative effect bars a court from reviewing the merits of the dispute when deciding on the existence or validity of the arbitration agreement prior to the arbitral tribunal.<sup>12</sup> According to the negative effect, a national court may review the jurisdiction of a tribunal at the enforcement stage. Such prioritisation of tribunals over national courts concerning the review of validity is an essential feature of the negative effect.<sup>13</sup>

The basis for competence-competence is the intention of the parties to grant the arbitrators authority to determine every issue related to their dispute, including questions of jurisdiction. Such authority usually appears in the language of the arbitration agreement. Meanwhile, the courts still possess the authority to supervise the ruling of the tribunal but not to be a substitute. The empowerment of the tribunal to determine its own jurisdiction in the first instance is tempered by granting the tribunal's ruling a provisional status, which is reviewable by the court.<sup>14</sup> Courts reserve the power to conduct a review once an award is issued, to either set the award aside or enforce it. In order to give full efficacy to the negative effect, priority must be given to the arbitral tribunal if the same subject matter is pending a decision in court. In similar respect, the court should refrain from intervening until the tribunal issues a jurisdictional ruling. Furthermore, this must be combined with the barring of judicial proceedings to determine the validity of a tribunal's jurisdiction as well as any determination on the merits of a dispute. The negative effect does not provide an absolute priority, only a priority for the tribunal to rule on jurisdiction prior to the court.<sup>15</sup>

#### **1.4 Application of the Principle of Competence-Competence**

Not all countries endorse the doctrine of competence-competence and its application varies from one country to another. Under title 9, chapter 1, section 3 of the United States Federal Arbitration Act (FAA), courts may intervene at any moment to judge the validity of the arbitration agreement without waiting until the award is rendered. The US court in *Brake Masters System, Inc. v. Gabbay*,<sup>16</sup> affirmed this position of the law when it stated that the U.S arbitration statutes and the weight of authority from other jurisdictions allow either a pre-arbitration or a post arbitration determination of arbitrability.<sup>17</sup> On the contrary, under Article 1458 of the French Code de Procedure Civile (CPC), a court's review of jurisdictional issues are delayed until the final award. Both of these approaches have advantages and disadvantages. Submitting the jurisdictional issues to the court at the beginning of the arbitral proceedings certainly hinders the promptness of the arbitration and may be considered a delaying tactic. On the other hand, making the recourse to the court available to parties only after the award has been rendered, while avoiding an unwanted interference with the arbitration, may result in a waste of time and money should the court find that the tribunal never had jurisdiction.<sup>18</sup>

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<sup>11</sup> Amokura Kawharu, 'Arbitral Jurisdiction' (2008) 23 New Zealand Univ. L. Rev. 238, 243.

<sup>12</sup> Jean-Francois Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (3<sup>rd</sup> edn Sweet & Maxwell 2017) 488.

<sup>13</sup> Stavros Brekoulakis, 'The Negative Effect of Competence-Competence: The Verdict has to be Negative' Queen Mary School of Law Legal Studies Research Paper No. 22/2009.

<sup>14</sup> Edward Jones, 'Competence-competence' (2009) 75 The Int'l J. of Arb., Mediation & Disp. Mgmt. 56.

<sup>15</sup> Susler Ozlem, 'The English Approach to Competence-Competence' (2013) 13 Pepp. Disp. Resol. L.J. 427.

<sup>16</sup> *Brake Masters System, Inc. v. Gabbay* [2003] Ariz. 363-64.

<sup>17</sup> *Ibid.*

<sup>18</sup> Giulia Carbone, 'Interference of the Court of the Seat with International Arbitration: The Symposium' (2012) J. Disp. Resolution 6.

The English Arbitration Act of 1996 is considered to have developed a mix of the American and French approach. Under Section 32 (2) of the Act, the court may decide a preliminary point of jurisdiction only upon agreement of all parties, or if the tribunal grants permission and the court is satisfied that its intervention is appropriate.<sup>19</sup> In the absence of these conditions, a party may challenge the tribunal's jurisdiction before a court only after the award has been rendered. In both cases, the tribunal may continue the arbitral proceedings while the application to the court is pending. The English approach seems to offer a good compromise between the need to prevent disruption of the arbitral proceedings and the need to save costs and avoid arbitration proceedings when the tribunal lacks jurisdiction. In practice, the application and approach by courts may often deviate from the original intentions of the Legislator.<sup>20</sup> English case law has shown a constant predisposition of the courts to solve the jurisdictional issues before the tribunal. In *Law Debenture Trust Corp Plc v Elektrim Finance BV*,<sup>21</sup> Mann J. held:

In some cases, it would be better for the court to act under Ord 73 r 6; in other cases, it may be appropriate to leave the matter to be decided by an arbitrator. The latter course is likely to be adopted only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement. There is no support here for any suggestion that the court should inevitably allow the arbitral tribunal to decide the jurisdiction question and stay the court proceedings in the meanwhile.<sup>22</sup>

Similarly, the court in *Al-Naimi v. Islamic Press Agency Inc*,<sup>23</sup> had earlier held that the existence of the arbitrators' power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. However, in contrast with the English courts, some U.S. courts have sometimes adopted a cautious approach, even if the Federal Arbitration Act allows judicial intervention before an award is rendered.<sup>24</sup> In *Pacificare v. Book*,<sup>25</sup> the plaintiffs, a group of physicians, filed a suit against managed-health-care organizations, alleging the defendants unlawfully failed to reimburse them for healthcare services they had provided to patients covered by defendants' health plans. They brought causes of action under Racketeer Influenced and Corrupt Organizations Act (RICO) that allows inter alia award of treble damages. Nevertheless, the physicians had signed arbitration agreements to resolve disputes with the health care providers; some of these agreements prevented arbitrators from awarding punitive damages. The District Court refused to compel arbitration of the RICO claims on the basis that the arbitration clauses in the parties' agreements prohibited awards of punitive damages, and hence an arbitrator lacked authority to award treble damages under RICO. The Supreme Court, reversing the lower court's decision, stated that:

Since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. As in *Vimar*, the proper course is to compel arbitration.<sup>26</sup>

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<sup>19</sup> English Arbitration Act 1996.

<sup>20</sup> Giulia Carbone (n 18) 6.

<sup>21</sup> *Law Debenture Trust Corp. Plc v. Elektrim Finance BV* [2005] EWHC (Ch) 1412 [341] (Mann J).

<sup>22</sup> *Ibid.*

<sup>23</sup> *Al-Naimi v. Islamic Press Agency Inc* [2000] EWCA (Civ) 17 [10] (Eng).

<sup>24</sup> William Park, (n 1)28.

<sup>25</sup> *PacifiCare Health Systems, Inc. v. Book* [2000] 538 U.S. 401.

<sup>26</sup> *Ibid.*

In *First Options of Chicago v. Kaplans*,<sup>27</sup> the US Supreme Court recognised the rights of the parties to give arbitrators the final word on some aspects of arbitral power.<sup>28</sup> In this case, an award was rendered against both an investment company MK Investments and its owners Mr and Mrs Kaplan in relation to debts owed to a firm clearing stock trades known as First Options of Chicago. The Kaplans, however, who had not personally signed the document containing the arbitration clause, denied that their disagreement with First Options was arbitrable. The Supreme Court affirmed that the Kaplans were not bound by the arbitration agreement but went further, suggesting the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.

In the case of China, the Arbitration Law of People's Republic of China does not recognize the doctrine of competence-competence.<sup>29</sup> It is the China International Economic and Trade Arbitration Commission (CIETAC) which is China's main international arbitration institution or the People's Court that will rule on the validity of the arbitration agreement, thereby determining the jurisdiction of the tribunal. The tribunal has no say in the decision. Where a party raises the issue of the tribunal's jurisdiction with CIETAC and the other with the People's court, conflicting decision could occur. In such a case, the People's court would prevail.<sup>30</sup>

### **1.5 Application Under the Uncitral Model Law**

Article 16(1) of the UNCITRAL Model law addresses jurisdictional issue in international commercial arbitration. It provides among other things that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the validity of the arbitration agreement. Article 16 sets out a compromise between the possibility to submit to courts the question regarding the tribunal's jurisdiction during the preliminary stages of the arbitral proceedings, and the necessity to protect proceedings from interruptions or delays due to frivolous jurisdictional challenges. Article 16 expressly gives the arbitral tribunal the right to rule on its own jurisdiction, either as a preliminary question or in an award on the merits.<sup>31</sup> Under paragraph 3 of the same provision, if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court to decide the matter which is likely to be the court at the seat of arbitration, which decision shall be subject to no appeal. However, while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.<sup>32</sup> If however, the tribunal delays its decision on jurisdiction to its award on the merits, there are two possibilities. One is that the court at the seat may review it on the basis of a challenge to set it aside for want of jurisdiction. The other is that the court at the place of enforcement may review such decision upon a request to refuse the recognition and enforcement of the award on jurisdictional grounds.<sup>33</sup>

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<sup>27</sup>*First Options of Chicago, Inc. v. Kaplan* [1995] 514 U.S. 938, 943.

<sup>28</sup> William Park, 'The Arbitrability Dicta in *First Options v Kaplan*. What Sort of Kompetenz - Kompetenz Has Crossed the Atlantic?' (1996) 12 *Arb. Int'l* 137.

<sup>29</sup>Jingzhou Tao and Clarisse von Wunschheim, 'Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions (2007) 23 *Arb. Int'l* 309.

<sup>30</sup> Arbitration Law of People's Republic of China, Article 20.

<sup>31</sup> UNCITRAL Model Law on International Commercial Arbitration 1985.

<sup>32</sup> *Ibid.*

<sup>33</sup>Rashad Rana, *International Arbitration, Law Practice & Procedure* (Chartered Institute of Arbitrators 2017) 272.

The Model Law gives first word to arbitrators in relation to their jurisdiction. However, the control powers of the courts on the jurisdictional issues are preserved, subject to two limitations: (i) the court's judgment on jurisdiction cannot be appealed, preventing the parties from a dilatory tactic; and (ii) the judicial review of the arbitral tribunal's preliminary decision does not interrupt the proceedings before it.<sup>34</sup> This approach has the advantage of allowing the parties to immediately challenge the tribunal's jurisdictional decision before the court, with an evident savings in time and money should the tribunal incorrectly find that it has jurisdiction. At the same time, it prevents the parties from dilatory measures that may interrupt or delay the arbitral process, as the parties are able to pursue litigation.<sup>35</sup> However, it is imperative to note that, because arbitrators may choose to delay decisions on jurisdictional issues until the final award, the UNCITRAL Model may represent less of a compromise than originally was intended by its drafters.

### **1.6 Application under the Arbitration and Conciliation Act**

The answer to the question of who determines the jurisdiction of the arbitral tribunal in Nigeria is provided in the Arbitration and Conciliation Act LFN 2004. The case laws have also attempted to answer this question. According to Section 12(1) of ACA, an arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement.<sup>36</sup>

Commenting on this section of the Act, Orojo and Ajomo submitted that the import of the section in Nigeria is that it confer on the tribunal a duty to ascertain for itself whether or not it has jurisdiction in the matter and once it is satisfied that it has jurisdiction, it can proceed with the arbitration, leaving either party to challenge it if it so desired and where it finds that it has no jurisdiction, it should so rule and inform the parties and withdraw.<sup>37</sup>

In *NNPC v. KLIFCO*,<sup>38</sup> the appellant raised the question of objection to the jurisdiction of the arbitral tribunal for the first time on appeal to the high court. The Supreme Court of Nigeria while giving interpretation to section 12 of the Arbitration and Conciliation Act above stated that the interpretation of the above provision and the position on the issue of jurisdiction in arbitral proceedings is that jurisdiction to hear and determine a dispute is raised before the arbitral panel. An appeal on the issue of jurisdiction can be entertained by the High Court provided there was no submission to jurisdiction. A party who did not raise the issue of jurisdiction before the arbitral panel is foreclosed from raising it for the first time in the High Court. The reason being that the foundation of jurisdiction in an arbitration is submission.<sup>39</sup> The above case established the firm stand of the Nigerian courts as regards the authority of the arbitral tribunal to determine its jurisdiction. It is settled that the appropriate place and time to challenge the jurisdiction of the tribunal is before the tribunal and the tribunal is entitled to rule on its own jurisdiction either as a preliminary question or an award on its merit.

The unsatisfactory party according to the Supreme Court is entitled to appeal such ruling to the High Court and such party cannot raise the issue of jurisdiction for the first time at the

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<sup>34</sup> Edward Jones, (n 14) 57.

<sup>35</sup> Ibid.

<sup>36</sup> Arbitration and Conciliation Act Chapter A18 LFN 2004.

<sup>37</sup> Olakunle Orojo and Ayodele Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria* (Mbeyi & Associates Ltd 1999) 169.

<sup>38</sup> *NNPC v. KLIFCO* [2011] 10 NWLR (Pt1255) 215.

<sup>39</sup> Ibid.

High court as he would be deemed to have waived his right to object to jurisdiction since the foundation of jurisdiction in arbitration as the court held is submission.

Firstly, the position of the Supreme Court with regards to the power of the arbitral tribunal to determine its jurisdiction in conformity with the provisions of section 12(1) of the ACA and it is correct. Secondly, the position of the Supreme Court on the ability of a party to appeal the ruling of the tribunal on its jurisdiction with due respect is contrary to the provisions of subsection (4) of section 12 of the ACA. Section 12(4) of ACA provides that the arbitral tribunal may rule on any plea referred to it under subsection (3) of this section either as a preliminary question or in an award on the merits; and such ruling shall be final and binding.<sup>40</sup> Unlike the provisions of Article 16(3) of the Model Law which gives room for an appeal of the tribunal's preliminary rulings on its jurisdiction, the preliminary ruling of the arbitral tribunal on the question of its jurisdiction is final binding on the parties under section 12(4) of the ACA. The provision does not permit of any form of appeal during the course of the arbitral proceedings nor does it provide for immediate review of an arbitral tribunal's decision on jurisdiction. Orojo and Ajomo<sup>41</sup> had also expressed the opinion that a party can appeal the tribunal's ruling on its jurisdiction. It is submitted that the opinion of the authors in this regard is in conflict with the provisions of Section 12(4) the ACA. The Supreme did not avert its mind to the provisions of Section 12(4) of the ACA in its conclusion.

It is therefore submitted that the proper line of action is for a party who is not satisfied with the ruling of the tribunal is to apply to set aside the award under section 48 of the ACA on the basis that the tribunal lacked jurisdiction to render such award. This is possible when the tribunal has rendered its award on the merits. In other words, the aggrieved party is not entitled to challenge the tribunal's ruling on its jurisdiction until an award is rendered on the merits. The role of the court is therefore limited to the review of the arbitrator's award on jurisdiction at the annulment or enforcement stage. The justification for this rest on the need to discourage vexatious litigants from resorting to dilatory tactics through frivolous and unmeritorious jurisdictional challenges.

### **1.8 Conclusion**

The principle of competence-competence is clearly an essential feature in international commercial arbitration which is rooted in many jurisdictions in both national laws and in international conventions. Notwithstanding this broad recognition, its practices and applications are not uniform. It is apparent from the case law examined, that different jurisdictions adopt different approaches to the competence-competence doctrine. These differences have considerable implications for the private and public expenditure of resources and the value of arbitration as a preferred method of resolving international commercial disputes. Notwithstanding, the different approaches, there is a consensus in most jurisdiction that the arbitral tribunal both in law and in practice is empowered to determine its own jurisdiction which it can only do by first assuming such jurisdiction.

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<sup>40</sup> Arbitration and Conciliation Act LFN 18 2004.

<sup>41</sup> Olakunle Orojo and Ayodele Ajomo (n 37) 169.