Competence-Competence

By

DOUG JONES

Reprinted from
(2009) 75 *Arbitration* 56-64

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

Competence-Competence*

by DOUG JONES

1. INTRODUCTION

The competence-competence principle—which essentially gives an arbitral tribunal jurisdiction to rule on its own jurisdiction—is fundamental to the operation of the arbitral process. It is also rather contentious and its application varies between jurisdictions. The most important area of variation relates to the issue of timing; when can the question of the tribunal's jurisdiction be referred to the court? There is a spectrum of approaches taken, ranging from the US position, which allows immediate review of the validity of the arbitration agreement, to the French model, which effectively postpones review until after the final award. The approach is influenced by policy considerations involving balancing the rights of the parties to have recourse to courts in circumstances where there is a real question over a tribunal's jurisdiction, against the need to prevent the opportunity for the parties to engage in delaying tactics. This has implications for the expenditure of both public and private resources as well as the usefulness of the arbitral process as an effective means of alternative dispute resolution.

This article first examines the rationale for the competence-competence principle, as well as the source of a tribunal's capacity to decide its own jurisdiction. Section 4 analyses the different approaches taken as to when a challenge to a tribunal's jurisdiction can be pursued in court, focussing on the UNCITRAL Model Law, English and French positions, and evaluates each to determine which is more appropriate. The paper concludes with a discussion of the effect of a tribunal's decision on jurisdiction and the extent to which it can ever be final and binding.

2. THE COMPETENCE-COMPETENCE PRINCIPLE

The powers of a tribunal are derived from a combination of the parties' intention as encapsulated in their arbitration agreement and the law applicable to the arbitration which will vary depending on the seat of the arbitration. A tribunal's power to decide a dispute is limited to those matters which the parties have agreed to submit to arbitration. This limit on the power of a tribunal becomes an issue when the jurisdiction of the tribunal itself is challenged by one of the parties.

The term "competence-competence" refers to a tribunal's power, or competence, to rule on its own jurisdiction. The immediate concern to which this concept gives rise is that a tribunal, in exercising competence-competence, commits a logical fallacy by presuming to determine whether the parties have agreed to authorise it to determine their dispute, when all along a negative answer to this question means that the tribunal had no authority to determine it in the first place. The complexity of the issue arises from the apparent circularity of the principle.

There is a practical need for a tribunal, when challenged, to make a ruling on its own jurisdiction. If it were not authorised to determine the challenge, an unco-operative party to a genuine arbitration agreement would have the opportunity to halt proceedings, or cause considerable delay, simply by challenging the tribunal's jurisdiction. This would serve to

* A paper delivered to the Society of Construction Arbitrators' Conference, Budapest, May 2008. The author would like to acknowledge the assistance provided in preparation of this article by Jennifer Ingram, Legal Assistant, Clayton Utz, Sydney.

undermine the arbitral process as an effective means of dispute resolution. Equally, not all challenges to the jurisdiction of an arbitral panel are unfounded and a party should have recourse to the courts if it has in fact not agreed to arbitrate. The competence-competence principle aims to reduce frustration of the arbitral process while preserving the rights of those parties with a bona fide challenge to the tribunal's jurisdiction. In order to balance these competing values the competence-competence principle allows for a tribunal to decide its own competence in the first instance but limits this power by giving the decision a provisional status which is open to review by the court.

Doctrine of separability

Linked to the competence-competence principle is the doctrine of separability. This provides that an arbitration agreement is distinct in law and existence from the contract of which it forms a part, or the agreement in which it appears, and thus forms the basis for the ability of a tribunal to rule on its own jurisdiction. The effect of the doctrine is that an arbitration agreement has effect not only in circumstances of breach, repudiation and termination, but also where the main agreement was illegal ab initio. The combination of the competence-competence principle and the doctrine of separability serves to prevent parties acting in bad faith from obstructing arbitral proceedings.

The doctrine of separability of the arbitration clause came of age in England with *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd.*[1] The Court of Appeal held that the arbitration clause, as a matter of construction, was wide enough to cover disputes as to the initial illegality of the contract and, since the particular type of illegality alleged had nothing to do with the arbitration clause itself, the arbitration clause remained operative. Even if the rest of the contract were to fail, this would not bring down the arbitration clause, because the illegality alleged did not affect it.

The doctrine of separability has since been enshrined in arbitration legislation, e.g. the English Arbitration Act 1996 s.7:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

The Australian international arbitration act, which adopts the Model Law, takes a slightly different approach. It provides that, for the purpose of the arbitral tribunal deciding its own jurisdiction with respect to the validity of the arbitration agreement:

> "[A]n arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."[2]

These provisions essentially have the same result—they detach an arbitration agreement from the main contract, allowing a tribunal to decide matters relating to the invalidity of the main contract without affecting its own jurisdiction. The only difference between them, though it is merely a superficial one, is that the provision in the Model Law highlights the link between the doctrine of separability and the competence-competence principle by addressing the two concepts in a single clause. The English Arbitration Act 1996 addresses the two concepts in separate sections.

[1] *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] Q.B. 701.
[2] International Arbitration Act 1974 (Cth) Sch.2 art.16(1).

Two aspects of the competence-competence principle

The competence-competence principle has two aspects. The first prevents the requirement of delaying the proceedings to seek judicial review on the question of jurisdiction, by allowing the tribunal to rule on its own competence. This component has received widespread recognition and is contained in most international arbitration rules[3] and statutes.[4]

The second aspect varies across jurisdictions and is more controversial. In its purist form it limits the role of the courts by giving a tribunal authority to make the first decision on the validity of an arbitration agreement and its jurisdiction over the proceedings. This does not allow a tribunal to make a final and binding decision on its jurisdiction, but rather postpones judicial review of the question of jurisdiction until after challenges relating to jurisdiction have been heard by the tribunal itself.

In determining whether, and to what extent, the second aspect has been adopted by a jurisdiction, one should look to when the question may be submitted to the courts for review. Under the US Federal Arbitration Act, courts may immediately review the validity of the arbitration agreement without waiting for a decision from the arbitrator,[5] indicating a rejection of the negative aspect of the competence-competence principle. This was so in England before the Arbitration Act 1996. At the opposite end of the spectrum, under the French and Swiss jurisdictions the court will decline jurisdiction unless an arbitral tribunal has not yet been formed, in which case the court will decline jurisdiction unless on a prima facie review they find the arbitration agreement to be manifestly null and void. Other jurisdictions, such as England and Australia, lie between these two approaches. The degrees to which particular jurisdictions have embraced this second aspect of the competence-competence principle will be discussed in more detail at section 4 below.

3. CAPACITY OF THE TRIBUNAL TO DECIDE ITS OWN JURISDICTION

The capacity of a tribunal to decide its own jurisdiction does not stem directly from the arbitration agreement itself. If this were the case it would result in the logical problem that the power of a tribunal to decide the validity of an agreement cannot come from the very same agreement. This holds true even in circumstances where the parties expressly submit the question of jurisdiction to an arbitral tribunal, a point which is discussed in more detail at section 5 below. However, it is well recognised that there is a practical need, in the interests of maintaining the arbitral process as an effective means of dispute resolution, for the tribunal to be vested with the capacity to hear challenges to its jurisdiction so that the process cannot be unduly obstructed by parties acting in bad faith. Thus the tribunal's capacity is derived, not from the arbitration agreement, but from the arbitration laws of the country in which the arbitration is held, as well as the arbitration laws of any country in which the agreement is sought to be enforced.

The competence-competence principle is recognised in most national legislation. The English Arbitration Act 1996 states:

> "Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-
>
> (a) whether there is a valid arbitration agreement,
> (b) whether the tribunal is properly constituted, and

[3] See, e.g. UNCITRAL Arbitration Rules art.21(1), ICC Arbitration Rules art.6(2), LCIA Arbitration Rules art.23.1, AAA International Arbitration Rules art.15(1).
[4] See, e.g. Belgium Judicial Code art.1697(1), Netherlands Code of Civil Procedure art.1052(1), German ZPO art.1040.
[5] United States Federal Arbitration Act 1925 ss.3, 4.

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement."[6]

Similarly in the Model Law:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."[7]

These provisions, replicated in various forms across most international arbitration legislation, provide the source of the tribunal's capacity to decide its own jurisdiction. This power comprises the first aspect of the competence-competence principle as outlined in section 2 of this article above. The second, and more contentious, aspect of the principle which relates to the role of the courts will be discussed in more detail below.

4. CHALLENGING A TRIBUNAL'S JURISDICTION

When can the question of jurisdiction be referred to the court?

The varying approaches as to when a challenge can be pursued in court carry both advantages and disadvantages. An approach which delays recourse to the courts on the question of jurisdiction until after an award has been made, while minimising interference by the courts, may create injustice by wasting the parties' time and expense should it be found that the tribunal never had jurisdiction. On the other hand, if recourse to the courts were to be made available to the parties in the preliminary stages of the arbitration in order to prevent the possibility of wasted resources, this might undermine the arbitral process by providing parties wishing to disrupt proceedings with the opportunity to do so. Of course the approach taken need not be at one extreme or the other.

While all jurisdictions recognise that the court may review the question of jurisdiction at some point, their differing approaches as to when this may occur is indicative of the extent of their willingness to embrace the second element of the competence-competence principle which limits the role of the courts. The following discussion outlines the Model Law and the English approach (which is a variation on the Model Law position). It then examines the French approach as an example of a significant restriction on the court's jurisdiction and an expansive application of the competence-competence principle.

The Model Law position

The Model Law represents a compromise between allowing recourse to the courts on the issue of jurisdiction in the preliminary stages of the arbitral proceedings and delaying it until after the award has been made. This approach is largely set out in art.16. Article 16(1) comprises the first element of the competence-competence principle, giving the tribunal the power to rule on its own jurisdiction. The extent to which the Model Law has adopted the second element can be found in art.16(3):

> "The arbitral tribunal may rule on a plea [that the tribunal does not have jurisdiction]... either as a preliminary question or in an award on the merits. 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 specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

[6] Arbitration Act 1996 s.30(1).
[7] International Arbitration Act 1974 (Cth) Sch.2 art.16(1).

Thus, under the Model Law, parties are entitled to recourse to the courts on the question of jurisdiction within 30 days of an arbitral tribunal ruling on the question themselves so that the timing of the challenge depends on when the tribunal decides the matter. Should a tribunal's jurisdiction be challenged in the preliminary stages of the proceedings, rapid and unappealable review of its decision may occur without interruption to the arbitral process. This may be considered a compromise between the extreme approaches as to when in the arbitral process judicial review is permitted. However it has been suggested that the opportunity for a tribunal to delay making a decision on the question of jurisdiction until the final award may make the Model Law position less of a compromise than originally thought.[8]

The English approach

The English approach to the negative element of the competence-competence principle is similar to that of the Model Law, in that a challenge may be brought either in the preliminary proceedings or after the award.[9] The English Arbitration Act 1996 differs from the Model Law in that it provides a mechanism for protecting the legitimate interests of both parties during a dispute over the question of the arbitral tribunal's jurisdiction; s.32:

> "(1) The court may, on application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. . ..
> (2) An application under this section shall not be considered unless-
> (a) it is made with the agreement in writing of all the other parties to the proceedings, or
> (b) it is made with the permission of the tribunal and the court is satisfied-
> (i) that the determination of the question is likely to produce substantial savings in costs,
> (ii) that the application was made without delay, and
> (iii) that there is good reason why the matter should be decided by the court. . .
> (4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending."

Section 32 would appear to prevent the court from deciding the question of jurisdiction unless both parties agree or, alternatively, the tribunal permits the court to decide the issue of jurisdiction and the court is satisfied that intervention is appropriate. This provision should act as a safeguard on the rights of both parties to the proceedings because, if the parties do not agree to the question of jurisdiction being submitted to the court, the tribunal is only likely to permit this course of action if it holds a genuine doubt as to the validity of an arbitration agreement. Furthermore, the requirement that the court be satisfied there is reason for intervention should provide further protection to the interests of the parties.

On first appearances this seems to be a significant step towards acceptance of the negative aspect of the competence-competence principle in comparison to the English position before the Arbitration Act 1996. However, case law since suggests that in hard cases courts are preferring to decide the question of a tribunal's jurisdiction before the tribunal hears the matter. This is clearly not a pro-arbitrator stance. In *Al-Naimi v Islamic Press Agency*[10] it was held that although s.30 allows a tribunal to decide questions of its own jurisdiction, it is not *mandatory* for the court to refer a dispute to arbitration if a party to the alleged

[8] W.W. Park, "The Arbitrability Dicta in *First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz has Crossed the Atlantic" (1996) 12 *Arbitration International* 137.
[9] Arbitration Act 1996 s.30.
[10] *Al-Naimi v Islamic Press Agency* [2000] 1 Lloyd's Rep. 522.

arbitration agreement is disputing its validity. More recently, in *Law Debenture Trust Corp Plc v Elektrim Finance BV*,[11] Mann J. held:

> "There is no support 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."[12]

Therefore, while the English Arbitration Act 1996 has provided the basis for the courts to embrace the second aspect of the competence-competence principle, they have yet to interpret it in a way which promotes the tribunal's primary role on the issue.

The French approach

The French approach, encapsulated in the Nouveau Code de Procedure Civile art.1458, more readily embraces the second element:

> "Whenever a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before the court of the state, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seized of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null. In neither case may the court raise, on it own initiative, the question of its lack of jurisdiction."

Following this approach, judicial intervention is generally delayed until after the final award, except in cases where, before a tribunal is seized, the court finds the arbitration agreement to be manifestly null and void after a prima facie review. The parties may challenge the award on the basis that the tribunal did not have jurisdiction after the final award.

It is clear that in the majority of cases a tribunal will be the first to give consideration to the question of jurisdiction and the opportunity to challenge the decision in court will be delayed until after the final award. This position is justified on the basis that a party challenging a tribunal's jurisdiction in bad faith will have less motivation after an award has been rendered, thereby preventing that party's ability to obstruct the arbitral process. It is also supported by the view that a party seeking to challenge the validity of an arbitration agreement before arbitral proceedings have begun is less likely to be acting in bad faith.[13]

Thus the French approach to the competence-competence principle places more weight on the importance of preventing disruption to the arbitral process than the negative consequences of wrongful retention of jurisdiction by the tribunal. It also shows a significant degree of respect for the tribunal's ability to decide matters of their own jurisdiction in a manner which is fair and protective of the interests of the parties.

What form of review may the court undertake?

Of further debate is the standard to be applied by the court when reviewing the validity of an arbitration agreement during, or before, the arbitral process; should the court undertake a review of the merits of the existence of the arbitration agreement or should only a prima facie test of validity be met (with a full merits review postponed until after the final award)?

The language of the Model Law and English Arbitration Act 1996 seems to suggest that the court is obliged to make a full judicial determination of the validity of the arbitration agreement and the tribunal's jurisdiction. Under the Model Law, parties challenging a tribunal's jurisdiction will be referred to arbitration, "unless [the court] finds that the

[11] *Law Debenture Trust Corp Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch).

[12] *Law Debenture Trust* [2005] EWHC 1412 (Ch) at [34].

[13] Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (London: Kluwer Law International, 1999), p.411.

[arbitration] agreement is null and void, inoperative or incapable of being performed".[14] Similarly, under the English Arbitration Act 1996 the court will refer the parties to arbitration, "*unless satisfied* that the arbitration agreement is null and void, inoperative or incapable of being performed"[15] (emphasis added).

Conversely, the *Nouveau Code de Procedure Civile* art.1458 provides that the court will refuse jurisdiction unless the arbitration agreement is manifestly null, *"manifestement nulle"*. This provision certainly restricts the court to a prima facie review of jurisdiction, postponing a full review of the merits until after the award.

While drafters of the Model Law expressly refused to restrict the court to a prima facie review of the validity of an arbitration agreement, others suggest that this restriction is preferable.[16] Those in favour of limiting courts to a prima facie review argue that a tribunal's power to rule on its own jurisdiction is negated by a court deciding the same question at the same time and with the same level of enquiry. In this sense, they consider the restriction of courts to a prima facie review is essentially a requirement of the competence-competence principle.

Which approach is more appropriate?

This requires a consideration of the policy reasons for and against each approach. The Model Law approach has the potential to save the parties to the arbitration both time and expense if the tribunal, as a preliminary matter, incorrectly finds that it has jurisdiction and the parties are able to immediately challenge this decision in court, thereby halting the arbitration and allowing the parties to pursue litigation. However, this approach allows for parties to invoke delay tactics, thereby wasting both public and private resources. It also seems to place little faith in a tribunal's ability to make fair and just decisions relating to its jurisdiction.

In theory the English variation on the Model Law is able to prevent parties from engaging in delay tactics, thereby saving public and private resources, while placing more faith in the ability of a tribunal to decide questions of jurisdiction. The English variation, therefore, may be considered a more appropriate approach.

However, the courts have chosen to interpret the English Arbitration Act 1996 as merely providing the option to have the question of jurisdiction decided first by the tribunal, thus limiting the effect of the competence-competence principle. Furthermore, where a tribunal *does* make the first decision, the English model has been criticised as inefficient for allowing the tribunal the opportunity to involve the court after only a "superficial" examination of the question.[17] It is suggested that this approach would benefit from allowing a tribunal to determine the question in a preliminary award and only deferring the question to the court if necessary.[18]

The French approach, in delaying judicial intervention until after the final award, is effective in preventing parties from unduly obstructing arbitral proceedings, thereby minimising public and private expenditure. It has the potential to waste private expenditure in circumstances where a party to the arbitration is prevented from making a valid challenge to a tribunal's jurisdiction until after the final award, however this criticism places little faith in the ability of a tribunal to make a fair and just decision; this is perhaps unwarranted.

[14] UNCITRAL Model Law art.8(1).

[15] English Arbitration Act 1996 s.9(4).

[16] Emmanuel Gaillard, "Prima Facie Review of Existence, Validity of Arbitration Agreement" (2005) *New York Law Journal* 225 (105).

[17] Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, p.413.

[18] Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, p.413.

The French model provides a better opportunity to minimise wasted resources on the part of both the judicial system and the parties themselves than the Model Law approach or the English approach as it is currently interpreted. It may be argued, however, that should the English courts be willing to interpret the English Arbitration Act 1996 in a more pro-arbitration manner, this model would have the potential to provide slightly more flexibility to the tribunal and the parties, and would thus be preferable to the French model.

5. FINALITY OF THE TRIBUNAL'S DECISION ON JURISDICTION: WHEN, IF EVER, IS THE DECISION FINAL?

An aspect of the competence-competence principle is the effect of a tribunal's decision on its own jurisdiction; when, if ever, is it binding? Is it possible for the parties to oust the jurisdiction of the court through their arbitration agreement by clearly expressing an intention for a tribunal's decision to be final and binding? What policy consideration might preclude such intentions from being recognised? The short answer is that while the parties may submit the question of jurisdiction to a tribunal for final and binding determination, an agreement to arbitrate future disputes will never, in practice, oust the jurisdiction of the court.

The concept that the competence-competence principle may allow a tribunal to make a final and binding decision on their own jurisdiction, preventing review by the courts, has generally never been accepted in any jurisdiction.[19] The rationale for this position is that by giving a tribunal such authority, parties with a genuine challenge to its jurisdiction would be denied access to the court, which is a fundamental basis of any legal system.

One line of argument suggests that the question of a tribunal's jurisdiction may be submitted to final and binding arbitration if the parties have manifested a clear intention for this to occur and in this situation the tribunal's decision will be final.[20] In reality, the parties to such an agreement will still have recourse to the courts with the question for the judges being: what did the parties intend to submit to arbitration? While the court may not be specifically determining the question of jurisdiction, the tribunal's decision cannot be considered final and binding because the court may determine that the parties did not intend the question to be decided by arbitration.

The assertion that a tribunal's decision on jurisdiction can never be final and binding is subject to one exception. This exception requires an ad hoc agreement to arbitrate an existing dispute about jurisdiction which expressly gives the tribunal sole jurisdiction to decide questions of jurisdiction arising under the first agreement.[21] This could of course occur in an ICC Terms of Reference or following a preliminary meeting at which a party raised the issue of jurisdiction.

The New York Convention 1958 further supports the view that an arbitral tribunal's decision on jurisdiction will never be final and binding. Under art.V.1(c) the courts in the country of enforcement are entitled to review an arbitral tribunal's decision on the question of jurisdiction.

6. CONCLUSION

The competence-competence principle is of central importance to the arbitral process and is embedded, in various forms, in virtually all international arbitration legislation. While most legal systems accept that a tribunal has the power to decide on its own jurisdiction, there is a divergence of views as to when the court may intervene in the arbitral process. This

[19] Gaillard and Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, p.396.

[20] W.W. Park, "The Arbitrator's Jurisdiction to Determine Jurisdiction" in ICCA International Arbitration Congress, *International Arbitration 2006: Back to Basics?* (The Netherlands: Kluwer Law International), pp.72–73.

[21] W.W. Park, "The Arbitrability Dicta" (1996) 12 *Arbitration International* 137.

has significant implications for expenditure of public and private resources as well as the effectiveness of arbitration as a means of dispute resolution.

In theory, both the French and the English approach to the competence-competence principle provide the greatest opportunity to minimise wasted resources, while the Model Law position appears to place less faith in the ability of a tribunal to decide the question of jurisdiction. In practice, however, it would seem that the English court's interpretation of the principle serves to significantly limit its operation by treating the tribunal's power to make the first decision on the question of its jurisdiction as optional rather than mandatory. It is therefore concluded that the French approach constitutes the most appropriate application of the competence-competence principle.