

COMPETENCE TO RULE ON ARBITRAL JURISDICTION: VARIOUS APPROACHES

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Abstract

This article investigates, in different jurisdictions, who, the court or the arbitral tribunal, has the competence and to what extent to decide whether the tribunal has jurisdiction over a case involving an arbitration agreement if one of the disputing parties initiates court proceedings before or concurrently with arbitral proceedings (the pre-award stages). Taking the concept of competence-competence, the article finds three possible approaches and potential patterns among examined jurisdictions to regulate the level of deference between the court and the tribunal at each pre-stage. First, the tribunal has concurrent competence with the court – the United Nations Commission on International Trade Law Model Law approach. Second, the tribunal is the first, or presumed to be the first, judge to decide arbitral jurisdiction, which can be found in France. The final approach, represented by that of the United Kingdom and Vietnam, is the hybrid one in which the tribunal may in certain cases be, or may not be, the first judge depending on individual pre-award stages and the nature of the challenge submitted. The article also comments on three approaches and suggests policy considerations for Vietnam.

Keywords: arbitral jurisdiction, competence-competence, concurrent competence, the “first judge”, exclusive competence, Model Law, French law, English law, Vietnamese law

Received: 10 January 2024

Revised: 04 October 2024

Accepted: 06 October 2024

In international commercial arbitration, the jurisdiction of an arbitral tribunal is fundamental to its power to resolve the parties’ dispute and render an enforceable award.¹ To determine whether or not an arbitral tribunal has jurisdiction over a case at pre-award stages, the following points are of particular importance: (i) there exists a valid arbitration agreement in accordance with the applicable law (“*existence and validity* of arbitration agreement”), including the consideration of arbitrable subject matters covered; (ii) the arbitration agreement is

1 Lew, J., Mistelis, L. & Kröll, S. (Eds.) (2003). *Comparative international commercial arbitration*. Kluwer Law International, p. 329, para. 14-1. Here, the term “jurisdiction” is used to indicate the arbitrator’s power to adjudicate a dispute between the parties and is used in the same sense as mandate, competence, or authority.

applicable or capable of being performed (“*enforceability* of arbitration agreement”); and (iii) the dispute occurred is covered by the valid agreement to arbitrate (“*scope* of arbitration agreement”). Normally, arbitrators do not always have to make a full inquiry into all aspects of their jurisdiction. By submitting themselves to arbitration without raising a timely jurisdictional challenge, disputing parties are deemed to have consented to the tribunal’s jurisdiction. Nonetheless, if one of the parties challenges the jurisdiction of an arbitral tribunal and/or commences court proceedings, a full inquiry, or at least a substantive examination of jurisdictional aspects at issue, may be necessary. The challenge on arbitral jurisdiction may come before either an arbitral tribunal or a national court first, or in some cases, before both at different pre-award stages: before or concurrently with arbitration (Stage 1); after the initiation of arbitration proceedings and before the establishment of an arbitral tribunal (Stage 2); from when the arbitral tribunal is constituted to when a ruling on jurisdiction is rendered (Stages 3A) and to when the final award is issued (Stage 3B). Here, a question naturally arises as to who, the court or the arbitral tribunal, has the competence, and to what extent to decide whether the tribunal has jurisdiction over a case if one of the disputing parties initiates court proceedings before or concurrently with arbitral proceedings? Essentially, this question concerns the allocation of power between national courts and arbitral tribunals to rule on arbitral jurisdictional challenges,² also commonly referred to as the “Who decides” question.³

Nowadays, it is widely recognized that arbitrators have the power to rule on their own jurisdiction, known as the doctrine of competence-competence. Traditionally, it was the German expression “*kompetenz-kompetenz*”, initiated by contracting parties to grant an arbitral tribunal the exclusive power to decide on its own jurisdiction in a contract.⁴ However, after Germany adopted the Model Law in 1998, the use of the “*kompetenz-kompetenz* clause” became largely abandoned, and courts would always have the final word on arbitral jurisdiction.⁵ The French expression “*compétence-*

2 Born, G. (Ed.) (2009). *International commercial arbitration*. Kluwer Law International, p. 853.

3 Barceló, J. (2003, October). Who decides the arbitrator’s jurisdiction separability and competence-competence in transnational perspective. *Vanderbilt Journal of Transnational Law*, 36(4), 1115-1136. <https://scholarship.law.cornell.edu/facpub/508>

4 Gaillard, E. & Savage, J. (Eds.) (1999). *Fouchard, Gaillard, Goldman on international commercial arbitration*. Kluwer Law International, p. 396, para. 651.

5 Draft law on the revision of arbitration law (Arbitration New Regulation Act) (1996), Parliamentary Publication, No. 13/5274, 12 July 1996, p. 26.

compétence” is also used to refer to the tribunal’s authority to render a decision on its jurisdiction, always subject to subsequent judicial review; however, this term emphasizes the initial and primary power of the tribunal.⁶ To avoid possible allusions associated with the German and French expressions, the concept of competence-competence shall be used in this article, and only to describe the arbitral tribunal’s power to rule on its own jurisdiction – “non-exclusive competence”. Whether the tribunal can be the first judge, or in what circumstances arbitrators can be given priority to be the first judge in its own jurisdiction is still left to debate. It should be noted that the New York Convention – an important source of authority for international commercial arbitration – is silent on the competence-competence doctrine; instead, it leaves room for national courts to exercise their discretion on this matter.⁷ Depending on the jurisdiction, different levels of priority are attached to an arbitral tribunal’s power to determine its jurisdiction.⁸ Three possible variations to the application of competence-competence, or the determination of arbitral jurisdiction, can be observed below.

1. Concurrent competence between arbitrators and courts to rule on arbitral jurisdiction: The United Nations Commission on International Trade Law approach

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) with amendments adopted in 2006 (Model Law or ML) expressly recognizes the “positive effect” of the doctrine of competence-competence. This “positive effect” provides that an arbitral tribunal rules on its own jurisdiction, and continues the arbitration of dispute even in the face of a jurisdictional challenge brought by one of the disputing parties to the national court.⁹

Under the Model Law, the possibility of concurrent proceedings between national courts and arbitrators regarding the determination of arbitral jurisdiction is likely generated at all pre-award stages

6 Born (Ed.) (2009), *supra* note 2, p. 854.

7 Besson, S., & Poudret, J. (Eds.) (2007). *Comparative law of international arbitration* (2nd ed.). Sweets & Maxwell, pp. 388, 460; Bachand, F. (2006). Does Article 8 of the Model Law call for full or prima facie review of the Arbitral Tribunal’s jurisdiction?. *Arbitration International*, 22(3), 463–476, p. 463.

8 Park, W. W. (2007, March 18). The arbitrator’s jurisdiction to determine jurisdiction. 13 *ICCA Congress Series 55 (Permanent Court of Arbitration, The Hague, 2007)*, Boston University School of Law, Public Law Research Paper No. 17-33, p. 4. <https://ssrn.com/abstract=3019225>

9 Gaillard & Savage (eds.) (1999), *supra* note 4, p. 406, para. 671.

(“concurrent competence”). Specifically, Article 16(1) explicitly states that arbitrators have the power to decide on their jurisdiction themselves, including a challenge to the very existence or validity of the arbitration agreement. However, Article 8(1) also allows national courts to – when presented with a challenge to the jurisdiction of the arbitrators – determine arbitral jurisdiction by reviewing the parties’ arbitration agreement to see if it is “null and void, inoperative or incapable of being performed.” Article 8(2) goes on to stipulate that while “th[is] issue is pending before the court”, “arbitral proceedings may ... be commenced or continued, and an award may be made.” The language of these provisions, especially the verbs “commence” and “continue” as well as the sentence “an award may be made”, suggests that the judicial review can be conducted before or concurrently with the arbitration, even after the arbitral tribunal has been established (Stages 1, 2 and 3A). This point is well supported when the Model Law provides, in Article 16(2), a time limit for raising a plea against the jurisdiction of an arbitral tribunal before the tribunal itself and, in Article 8(1), the latest time for a dispute to be possibly submitted to a court. That is not later than when a requesting party submits his first statement on the dispute’s substance (usually, the first statement of defense) in arbitration proceedings, which can be agreed upon by the disputing parties and/or decided by the tribunal, except for justified delays. In cases where the arbitral tribunal rules on its jurisdiction “as a preliminary question” (Stage 3B), the court can conduct a subsequent judicial review upon request under Article 16(3) (“subsequent judicial review”) and this decision is subject to “no appeal”.

The Model Law also provides, to a certain extent, for the allocation of power between arbitrators and courts regarding arbitral jurisdictional determination. However, such provisions have received mixed reactions from commentators. Scholars are largely divided on the issue of whether the courts’ review is full, *prima facie*, or otherwise.¹⁰ The term “*prima facie*” here means “at first sight” or “on first appearance” but “subject to further evidence or information” as an adverb; and means “sufficient to establish a fact or raise a presumption unless disproved or rebutted” as an adjective.¹¹

10 Supporting the *prima facie* approach, see Besson & Poudret (Eds.) (2007), *supra* note 7, p. 463. Against requiring a *prima facie* review, see Lew et al. (Eds.) (2003), *supra* note 1, p. 349, para. 14–61.

11 Garner, B. A. (Ed.).(2009). *Black’s Law Dictionary* (9th ed.). West Publishing, p. 1310.

Advocates for the *full* review rely on the Model Law's legislative history to argue that Article 8(1) of the Model Law suggests a comprehensive judicial review of the existence or validity of the arbitration agreement since drafters of the Model Law already rejected a proposal to call for a *prima facie* review. According to the proposal, national courts, when faced with the request to examine arbitral jurisdiction, referred the parties to arbitration unless "it [found] that the [arbitration] agreement [was] *manifestly* null and void."¹² Here, the proposal apparently suggested the term "manifestly" be inserted into Article 8(1) if amended. This proposal was based on "the principle to let the arbitral tribunal make the first ruling on its competence, subject to later control by a court".¹³ However, the majority of delegates rejected this added term. Thus, commentators in support of a full review of the arbitration agreement at the pre-award stage have frequently relied on this rejection of this added term to conclude that a *prima facie* review standard is inconsistent with Article 8(1) of the Model Law.¹⁴

From a different perspective, Bachand argued that the later parts of history reflected otherwise. According to Bachand, Article 8(1) of the Model Law "must be interpreted as calling – at least as a general rule – for *prima facie* review of arbitral jurisdiction."¹⁵ That is because Model Law drafters already pointed to the principle underlying Article 16 that "it was initially and primarily for the arbitral tribunal to decide on its competence, subject to ultimate court control" and relied on this interpretation to reject what was then Article 17 of the Model Law.¹⁶ This Article 17 was on "concurrent court control", and expressly allowed a court to step in at any time during the pre-award stage to render a decision on arbitral jurisdiction.¹⁷

Barceló and Born take a more neutral position. They were both of the view that the Model Law was inconclusive as to the pre-award judicial review standard and that it was best interpreted as

12 Report of the Working Group on International Contract Practices on the Work of its Fifth Session, A/CN.9/233, 22 February – 4 March 1983, p. 15, para. 77. This wording is similar to that adopted in French arbitration law following the 1980-1981 reform, which strongly favors a *prima facie* judicial review and more generally, the negative effect of the *compétence-compétence* doctrine.

13 *Ibid.*

14 Lew et al. (Eds.) (2003), *supra* note 1, p. 349, para. 14-61.

15 Bachand (2006), *supra* note 7, p. 473.

16 Report of the Working Group on International Contract Practices on the Work of its Seventh Session, A/CN.9/246, 6 March 1984, p. 14, para. 55.

17 *Ibid.*, para. 53.

permitting, but not requiring, a *prima facie* review.¹⁸ Commenting on Banchand's reasoning, Barceló and Born contend that the language of the drafters' reasoning could hardly be definitive enough to require the *prima facie* approach to be the default.¹⁹ This point is, perhaps, valid to the extent that nothing in the text or the legislative history of the Model Law forbids a court from performing only a *prima facie* review when, for example, it considers that the other party is clearly trying to obstruct the arbitral proceedings, either.

However, it is unlikely that the courts can decide whether or not an arbitration agreement is "null and void, inoperative or incapable of being performed" in accordance with Article 8(1) of the Model Law, without reviewing an arbitration agreement substantively and comprehensively – "full review". The terms "null" and "void" suggest an assessment of the *validity* of the arbitration agreement, which possibly involves considering the *arbitrability* of disputes covered by the arbitration agreement and occurred between parties. In addition, the terms "inoperative" and "incapable of being performed" call for an inquiry into the *enforceability* of an arbitration agreement. One might argue that the text of Article 8(1) does not prevent the courts from performing either a *prima facie* review; however, it also places no obligation on the courts to avoid conducting a *full* judicial review. Besides, the legislative history of the Model Law shows that the ultimate rejection of the proposal requiring *prima facie*, rather than full, judicial review under Article 8(1) necessarily means that the legislators of the Model Law did not intend for a *prima facie* standard to be a general rule applicable in all cases. In cases where the supporting argument for the *prima facie* review is based on Article 16, it is worth noting that this article is designed to recognize the full competence of the arbitral tribunal to rule on its jurisdiction, including the resolution of any relevant objections, when a dispute comes before it. Article 16 does not address the power distribution between courts and arbitrators to address the jurisdictional issues before the tribunal finalizes its jurisdiction.

In conclusion, under the Model Law approach, arbitrators do not have exclusive competence or the priority to be the first judge to decide their own jurisdiction. At any pre-award stage and upon

18 Barceló, J. J. (2017, September 11). Kompetenz-Kompetenz and its negative effect: A comparative view. *Cornell Legal Studies Research Paper No. 17-40*, p. 8. <https://ssrn.com/abstract=3035485>

19 Born (Ed.) (2009), *supra* note 2, p. 883; Barceló (2017), *supra* note 18, p. 7.

valid request, the courts could take a prior, or concurrent, review of an arbitration agreement, or a subsequent review of the arbitral tribunal's ruling on jurisdiction. Thus, arbitrators and courts have concurrent competence to address jurisdictional matters.

Subsequently, these concurrent proceedings can result in conflicting decisions. It might be said that this problem could be solved by reference to the doctrine of *res judicata* ("a thing adjudged" or "claim preclusion").²⁰ Nonetheless, it is worth noting that the international *res judicata* effect of international arbitral awards is not generally accepted.²¹ It means that the solution to the issues of parallel proceedings and conflicting decisions is not clear-cut. Eventually, it would be up to the decision makers (arbitrators and courts) to decide on the desirability of staying its own proceedings.²² Different jurisdictions adopting the Model Law have held different standards of judicial review with regard to arbitral jurisdictional challenges.²³

2. Arbitrators as the "first judge" to rule on arbitral jurisdiction – The French approach

Being a consistently pro-arbitration jurisdiction, France adopts a non-interventionist approach in which an arbitral tribunal is given the initial authority to determine its jurisdiction in cases where a dispute is brought to a court before, concurrently with, or after the start of arbitration (Stages 1 and 2) – "first judge", and once it is established, the tribunal has an exclusive authority to do so (Stage 3) – "exclusive competence". This approach strongly restricts judicial intervention regarding arbitral jurisdiction determination at the pre-award stages.²⁴ Accordingly, the court is only allowed to take a *prima facie* review of an arbitration agreement if the dispute is brought before the establishment of an arbitral tribunal (Stages 1 and 2) – "*prima facie* judicial review", and takes no review, either *prima facie* or full, before the arbitral award – "no judicial review" (Stage 3).

20 Brekoulakis, S. (2009). The negative effect of compétence-compétence: The verdict has to be negative. *Queen Mary School of Law Legal Studies Research Paper No. 22*, p. 258. <https://ssrn.com/abstract=1414325>

21 Brekoulakis, S. (2005). The effect of an arbitral award and third parties in international arbitration: *Res Judicata revisited*. *American Review of International Arbitration*, 16(1), 1-31.

22 Born, G. (Ed.) (2001). *International commercial arbitration: Commentary and materials* (2nd ed.). Kluwer Law International, p. 86.

23 Born (ed.) (2009), *supra* note 2, pp. 885 et seq.

24 Susler, O. (2012). *Jurisdiction of arbitration tribunals: A comparative Study* [Doctor of juridical science at La Trobe University]. Bundoora, p. 120.

This approach is commonly referred to as the “negative effect” of the doctrine of competence–competence.²⁵

To elaborate, if the party opposing arbitration brings a jurisdictional challenge to a court contesting the jurisdiction of an arbitral tribunal before it is even seized or constituted (Stages 1 and 2), courts are required to decline jurisdiction unless “the arbitration agreement is manifestly void or manifestly inapplicable”, as stipulated in Article 1448 of the French New Arbitration Law (FNAL).²⁶ In this regard, a judicial review of an arbitration agreement is unavoidable. While the terms “void” and “inapplicable” may suggest an inquiry into the existence, validity, and enforceability of an arbitration agreement, the word “manifestly” effectively limits such an inquiry to a *prima facie* one only (“*prima facie* judicial review”). If a court finds an arbitration agreement valid and enforceable upon such a review, it will have to decline jurisdiction, even when an arbitral tribunal is not yet formed. In practice, French courts have generally adopted a relatively narrow interpretation of “manifestly null” or “manifestly inapplicable”.²⁷ Thus, the tribunal would, despite taking an examination after the court, have full competence to decide on its jurisdiction, which is still the first judge.

Conversely, once an arbitral tribunal is constituted (Stage 3), courts are not allowed to conduct any review when a dispute concerning the arbitrators’ jurisdiction is brought before them, pursuant to Article 1448 (“no judicial review”). The arbitral tribunal thus has an exclusive power to deal with any objections to its jurisdiction, which is firmly established in Article 1465 (“exclusive competence”). These provisions are said to protect arbitral proceedings from “potential respondent obstructionism”²⁸ and to avoid parallel proceedings regarding the matter of arbitral jurisdiction. An example of this approach can be found in the *Coprodag* case. In this case, the Court of First Instance held void an arbitration agreement and considered the constitution of an arbitral tribunal to be inappropriate even though

25 Gaillard, E., & Banifatemi, Y. (2008). Negative effect of Compétence–compétence: The rule of priority in favour of the arbitrators. In E. Gaillard & D. D. Pietro (Eds.). (2008), *Enforcement of arbitration agreements and international arbitral awards: The New York Convention in practice*, Cameron May, p. 259 at note 4.

26 French New Arbitration Law (2011), contained in Decree No. 2011-48 of 13 January 2011, Article 2 amending the French Code of Civil Procedure (1981), Book IV, Title I, Articles 1465, 1448, and 1506.

27 Brekoulakis (2009), *supra* note 20, p. 241.

28 Barcelo (2017), *supra* note 18, p. 9.

one party had already initiated arbitral proceedings.²⁹ The Court of Cassation later reversed this decision in 1995. According to this highest court in France, once constituted, an arbitral tribunal would have the power to consider the challenge to its own jurisdiction first. Here, the question of whether the arbitration agreement is patently void or not is for the already constituted arbitral tribunal to decide, not the courts; and courts will have to defer their review of the arbitration agreement to the post-award stage.

The main policy consideration behind the French approach is the enhancement of arbitral efficacy by limiting the prospect of a party employing dilatory tactics in bad faith to derail arbitration (the arbitral efficacy consideration). According to Fouchard, Gaillard, and Savage, the risk of employing dilatory tactics in bad faith by a party is considerably greater than “the risk of having the arbitrators wrongly retain jurisdiction in some cases, and have that decision reversed by the courts several months, if not years, later.”³⁰ The French approach can reduce or mitigate the former risk properly.

The French approach is highly influential and has been followed to a certain degree by several jurisdictions such as Switzerland, India, Hong Kong, and Canada.³¹ However, one problem that generally arises in this approach, or in the recognition of this “negative effect” of the doctrine competence-competence, concerns cases where the confirmation of jurisdiction by an arbitral tribunal is later overturned by the courts at the post-award stage, thus rendering the time and expenses spent on arbitration wasted. When arbitral jurisdiction is lacking, it would be somewhat unfair to force the party opposing arbitration to take part in full arbitration proceedings (the fairness/economy of means consideration). Consequently, in this sense, the French approach appears to slightly favor arbitral efficacy more than the fairness/economy of means in arbitral proceedings.

3. The hybrid approach: The English and Vietnamese methods

3.1. The English approach

Unlike the extreme pro-arbitration approach provided by French law, English law takes a hybrid approach to the doctrine of competence-competence. Accordingly, arbitrators and courts have the power to examine the jurisdiction of an arbitral tribunal, if arbitral and judicial

29 Gaillard & Savage (eds.) (1999), *supra* note 4, p. 407, para. 672.

30 *Ibid*, p. 411, para. 680.

31 Born (Ed.) (2009), *supra* note 2, p. 900.

proceedings are launched, simultaneously or subsequently, to address jurisdictional matters and/or substantive issues of a dispute arising between parties (Stages 1, 2, and 3) – “concurrent competence”. Under certain circumstances, the former is still given the initial/primary authority to rule on its arbitral jurisdiction if arbitration is initiated, even after the commencement of the litigation (Stage 1) – “first judge”, or the sole authority to do so before rendering its arbitral award (Stage 3) – “exclusive competence”.

More specifically, before the start of arbitration proceedings (Stage 1), English courts may have to review the arbitration agreement upon request. To clarify, section 9 of the 1996 English Arbitration Act (EAA) is designed to enable a party that was forced to litigate against its wish to bring up an arbitration agreement to request a stay of court proceedings. The court must grant a stay of court proceedings unless the arbitration agreement is found to be “null and void, inoperative or incapable of being performed”, as stipulated in section 9(4). To make this decision, the court thus needs to consider the arbitration agreement.

However, the standard of judicial review under English law is not as clear-cut as the French approach. The question of whether the phrase “null and void, inoperative or incapable of being performed” in section 9(4) of the EAA requires a court to conduct a *prima facie* or full review of arbitral jurisdiction remains open. This phrase in English law is the same one used in the UNCITRAL Model Law analyzed in the previous section. One might argue that the language of this phrase suggests the court examine the existence, validity, and enforceability of the arbitration agreement, thus allowing a full examination. However, it appears that English case law is yet to be settled on the appropriate standard of review to be exercised, and courts tend to decide the matter on a case-by-case basis.³²

More specifically, certain cases have shown that the answer to the aforementioned question varies considerably depending on the nature of challenges to jurisdiction submitted. One of the landmark cases to illustrate this point is *Birse Construction Ltd v St David Ltd (Birse)*,³³ where the plaintiff’s position was that no contract had been made, but the defendant argued that the parties had entered

32 Husgen, A. M. (2018). *Rethinking the negative Effect of Kompetenz-Kompetenz: Proposal for a restrictive approach* [Master’s Thesis, Catolica Global School of Law]. ProQuest Dissertations & Theses, p. 35.

33 *Birse Construction Ltd v. St David Ltd* [1999] EWHC 253 (TCC).

into a contract that contained an arbitration agreement and requested the court for a stay of proceedings. In this case, as noted by HHJ Lloyd in addressing the power of arbitral tribunal, courts would generally make a full inquiry to ascertain the existence of an arbitration agreement when this matter was in dispute, or when “the determination of whether or not a contract was made also embraces the determination of the scope of the contract and its ingredients”.³⁴ Conversely, when “there is only a dispute about the ambit or scope of the arbitration agreement”, or “it is virtually certain that there is an arbitration agreement”, it is more likely for courts to perform only a *prima facie* review of the arbitration agreement at most, and refer the matter to the arbitral tribunal for determination.³⁵ Here, whether arbitrators are given priority to consider their own jurisdiction varies considerably depending on the nature of the challenge (e.g., the existence, validity, or scope of the arbitration agreement) submitted before arbitral proceedings. It is unclear whether the term “virtually certain” can be construed in the same fashion as the “manifestly null” standard in French arbitration law. In practice, English courts are not systematically required to refer the parties to arbitration whenever the arbitration agreement is not found to be manifestly void or manifestly inapplicable.³⁶

In some other cases, English courts have affirmatively upheld the “negative effect” of the doctrine of competence-competence without necessarily inquiring into the different natures of the jurisdictional challenge. This non-interventionist approach of the English courts can be found in the case *Fiona Trust & Holding Corporation v Yuri Privalov*,³⁷ where the English Court of Appeals held that “it is contemplated by the Act that it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute”.³⁸

From when arbitration is initiated to when an arbitration tribunal is formed (Stage 2), English courts can still intervene and may need to undertake a full examination of the contested arbitration agreement

34 *Ibid*, para. 4.

35 *Ibid*.

36 Synková, S. (2013). *Courts' inquiry into arbitral jurisdiction at the pre-award stage: A comparative analysis of the English, German and Swiss legal order*. Springer, p. 154.

37 *Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20. This case was later changed to the name of *Premium Nafta Products Ltd (20th Defendant) & Ors v. Fili Shipping Company Ltd & Ors* [2007] UKHL 40 (17 October 2007) when it came before the House of Lords.

38 *Ibid*, para. 34.

(“full judicial review”), thus facilitating parallel arbitral and judicial proceedings with regard to the determination of arbitral jurisdiction³⁹ (“concurrent competence”). To be more specific, section 30(1) of the EAA recognizes the full competence of the arbitral tribunal to “rule on its own substantive jurisdiction” when, of course, one party brings the dispute before it. This ruling involves the consideration of (i) “whether there is a valid arbitration agreement” – the *validity* of the arbitration agreement, (ii) “what matters have been submitted to arbitration in accordance with the arbitration agreement” – the *scope* of the arbitration agreement, and (iii) “whether the tribunal is properly constituted” – the *enforceability* of the arbitration agreement. However, section 72(1) also allows the other party who opposes an alleged arbitration agreement and takes no part in the arbitral proceedings to raise one or all of these jurisdictional questions before English courts to obtain a declaration or injunction. Together, sections 30(1) and 72(1) indicate that, regardless of the ongoing arbitration, the court is authorized to substantively address the aforementioned questions, especially the first two, brought up by the non-participating party in arbitration at Stage 2.

After the constitution of an arbitral tribunal (Stage 3), courts and arbitrators may also have to independently deal with the same respective jurisdictional matters concurrently or subsequently in separate proceedings upon request (“concurrent competence”). As previously provided, these matters including the matter of “whether the tribunal is properly constituted” can be submitted individually by a claimant to the arbitral tribunal, and by a respondent who takes no part in arbitral proceedings to the court, pursuant to sections 30(1) and 72(1) of the EAA. In cases where a respondent actively participates in arbitration proceedings, this party can raise “an objection that the arbitral tribunal lacks substantive jurisdiction” before the tribunal itself in a timely manner as prescribed in section 31. Alternatively, such a party can apply for the determination of “any question as to the substantive jurisdiction of the tribunal” to the court in line with section 32. When the application is made to the court, the tribunal under sections 31(5) and 32(4) may continue the arbitral proceedings and make an award, subject to the parties agreeing otherwise.

However, to bring an application to the court, strict conditions need to be satisfied in accordance with section 32(2) of the EAA. To be exact, all parties to the arbitral proceedings must agree to an application in writing. Alternatively, a party as an applicant must

39 Brekoulakis (2009), *supra* note 20, p. 245.

obtain permission for the application from the arbitral tribunal and convince the court on certain aspects. First, the application is made without delay. Second, the possible ruling of the court on any question of jurisdiction submitted is likely to save substantial costs. Finally, there is a valid reason for matters in question to be heard by a court. In the latter option, the application must specify “[ground] on which it is said that the matter should be decided by court”, as articulated in section 32(3). As a result, in cases where an application is qualified, the court still has the authority to hear a jurisdiction challenge, and its relevant decision is subject to an appellate review under section 32(6). The arbitral tribunal is only given the role of “first judge” in the remaining cases at this stage – Stage 3A.

In cases where the tribunal has already decided its jurisdiction (Stage 3B), either in an award/decision on jurisdiction or an award on the merits, a disputing party can still challenge this decision either through (i) an arbitral process of appeal (if available) or through subsequent judicial review pursuant to section 30(2). Here, the tribunal’s decision is by no means final and the court may have to take a substantive review of the award/decision on jurisdiction.

In conclusion, the EAA flexibly regulates the allocation of competence between arbitrators and courts to rule on the arbitral jurisdiction in each pre-award stage (“first judge” and “concurrent competence”). English courts also employ different standards of review concerning different issues in the arbitration agreement, if a dispute is first presented before it (Stage 1). This has, in turn, varied the outcome of whether or not priority will be granted to arbitrators to consider jurisdictional challenges because that would depend on whether it is the existence, validity, or scope of the arbitration agreement that is being questioned. On the one hand, this approach would seem to bring generally fairer results, as it is more tailored to the specifics of each case and not overly extreme like the French approach. On the other hand, given the level of discretion allowed with regard to the determination of the arbitrators’ competence in the English approach, the predictability of the legal framework is inevitably undermined.

3.2. The Vietnamese approach

Similar to English law, Vietnamese law adopts the hybrid approach to the doctrine of *competence-competence*. The arbitrators are *not* given

priority to hear any objections (if any) to their own jurisdiction if the dispute is firstly brought before the courts, possibly leading the situation of concurrent proceedings to deal with arbitral jurisdiction between arbitrators and courts (Stage 1) – “concurrent competence”. However, once arbitration proceedings have commenced, arbitrators are presumed to be the first judge of their jurisdiction (Stages 2 and 3) – “first judge”.

The power of arbitrators to rule on their jurisdiction in Vietnam can be found in Vietnam’s 2010 Law on Commercial Arbitration (VLCA) and Resolution No.1/2014/NQ-HĐTP.⁴⁰ Article 6 of the VLCA states that when one party initiates court proceedings but the parties in dispute already have an arbitration agreement, the courts must decline jurisdiction, except if the arbitration agreement is “void or incapable of being performed”. This Law does not provide any guidance on the appropriate standard of review that should be performed by courts. However, Resolution No.1/2014/NQ-HĐTP, which provides guidelines for certain provisions of the VLCA, does clarify an allocation of competence to consider the arbitral jurisdiction between courts and arbitrators through the operation of Article 2. Accordingly, arbitrators may be, or may not be, the first judge depending on different pre-award stages.

In particular, if the dispute arguably subject to an arbitration agreement is firstly brought to the courts (Stage 1), Vietnamese courts may have to examine (i) whether or not there exists an arbitration agreement and (ii) whether or not the arbitration agreement falls within the scope of cases deemed “void” or “incapable of being performed”, to either undertake the case or return the petition and documents enclosed therewith to the plaintiff. Under Article 18 of the VLCA and Article 3 of Resolution No.1/2014/NQ-HĐTP, an arbitration agreement can be considered “void” in the following cases: (i) occurred disputes fall outside the jurisdiction of arbitration, for instance, not arising from commercial activities or relationships in which at least one party conducts commercial activities;⁴¹ a party to the arbitration agreement lacks (ii) legal

40 Vietnam’s Law on Commercial Arbitration No. 54/2010/QH12, passed by the National Assembly of Socialist Republic of Vietnam on 17 June 2010 and dated on 1 January 2011 (“VLCA”); Resolution of the Council of Judges under the Supreme People’s Court of Vietnam guiding the implementation of a number of provisions of the 2014 Law on Commercial Arbitration, No. 01/2014/NQ-HĐTP, 20 March 2014 (“Resolution No. 01/2014/NQ-HĐTP”).

41 See Article 2 of the VLCA and Article 2 of the Resolution No. 01/2014/NQ-HĐTP.

capacity, (iii) authority/competence or (iv) free consent, and has a request for a court's declaration of the agreement's invalidity;⁴² (v) the arbitration agreement is neither in writing nor through other forms with equivalent legal effect;⁴³ and (vi) the arbitration agreement infringes on prohibitions specified by law. Whereas, under Articles 43 and 17 of the VLCA and Article 4 of Resolution No.1/2014/NQ-HDTP, an arbitration agreement can be possibly classified as "incapable of being performed" (a) in the absence of further modifications/adjustments from the contracting parties to address the matters at issue, or (b) in the lack of consumers' explicit consent to the arbitration agreement/clauses provided in the standard form contract. The matters at issue here include (i) the winding-up of a selected arbitration center without any successor, (ii) the *ad hoc* arbitrators' non-participation in the arbitration due to *force majeure* event or for any other objective reasons, (iii) the *ad hoc* arbitrators' rejection of the appointment, (iv) the unsuccessful search for arbitrators appointed by parties, (v) the competent authority's refusal to appoint arbitrators, and (vi) another situation in which parties appoint arbitrators of one arbitration center but select the arbitration proceeding rules of another arbitration center, while the latter does not allow to do so. Given that these cases/matters are associated with the validity of the arbitration agreement, including its scope and enforceability, it is unlikely that the courts will not take a full inquiry into the arbitration agreement ("full judicial review").

It is possible for a party who takes no part in court proceedings or has an objection to the jurisdiction of the court, to bring a claim to arbitrators, thus, concurrent proceedings in examining arbitral jurisdiction may occur ("concurrent competence"). In these cases, it is unclear for the court whether to take a *prima facie* or full inquiry into the arbitration agreement or for the arbitrators to have the role of the first judge in determining the jurisdiction.

Conversely, if a party files for a petition to litigate in court once arbitral proceedings have commenced (Stages 2 and 3), the court under Vietnamese law must decline jurisdiction, even if it happens to find that the dispute at hand is not within the jurisdiction of the arbitral tribunal, as specified in Article 2(2)(c) of Resolution No. 01/2014/NQ-HDTP ("no judicial review"). Arbitrators shall have

42 See Articles 117, 127, and 132 of the Vietnam's Civil Code No. 91/2015/QH13.

43 See Article 16 of the VLCA and Article 7 of the Resolution No. 01/2014/NQ-HDTP.

the first say on their jurisdiction (“first judge”). Given this aspect, the Vietnamese approach seems analogous to the French approach to the degree that once arbitration is initiated, the courts must decline jurisdiction and refer the parties to arbitration without any prior inquiry on the arbitration agreement. Thus, the risk of possible concurrent proceedings, which can produce conflicting results, might be eliminated.

More specifically, in cases where the dispute is first brought before them, arbitrators have full competence to rule on their jurisdiction. Article 43(1) of the VLCA provides that an arbitral tribunal must consider jurisdictional issues as a preliminary matter before considering the merits of the dispute. If having any issues relating to the existence, validity, and enforceability of an arbitration agreement, a respondent, under Article 35, should include them in his statement of defense, and submit such a statement within 30 days from the receipt of the claim, except otherwise agreed upon by the parties or provided in the selected arbitration rules. Thus, instead of just purely granting an arbitral tribunal the power to rule on its own jurisdiction, the VLCA appears to make it an obligation for the tribunal to consider its own jurisdiction as a preliminary matter. At first sight, this approach appears to have the effect of producing a decision on arbitral jurisdiction at an early stage in arbitral proceedings, thus considerably limiting the risk of the parties having to waste time and money staying until the end just to have the arbitrators’ positive ruling on jurisdiction be dismissed at the post-award stage. Nevertheless, such an approach only makes sense when the determination of the jurisdictional issue can be separated from the merits. In some cases, to decide on arbitral jurisdiction, the arbitrators have to also consider the merits of the case, it would seem more fitting to allow the arbitral tribunal to defer its ruling on jurisdiction until the final award stage.

However, different from the French approach judicial review is provided at Stage 3B, Vietnamese law allows the courts to subsequently review the arbitrators’ ruling on jurisdiction in a final manner if requested by the disputing party (“subsequent judicial review”). In particular, Article 44(1) of the VLCA states that within five working days from the receipt of such a ruling, “if disagreeing with any decision of the arbitral tribunal”, “the parties may file a request with a competent court to re-consider such decision” and “shall concurrently notify such complaint to the arbitral tribunal”.

Under Article 44(5), while the determination of the complaint is pending in court, the arbitral tribunal may nevertheless continue with the arbitral proceedings. However, in practice, it is said that an arbitral tribunal would most likely stay its proceedings to wait for the court's final determination.⁴⁴ This is, unfortunate, considering how, despite having a system in place to allow arbitrators to preserve their jurisdiction and continue with the arbitral proceedings, the practice of the arbitrators inevitably enables a recalcitrant party to employ dilatory tactics to stall the arbitral proceedings and undermine arbitral efficacy. It should be noted that the court's review and decision on the jurisdiction issue at this pre-award stage is final and subject to no appeal.

There are certain suggestions offered herein with the hope of making the Vietnamese legal framework for international commercial arbitration more appealing to its users.

First, Article 6 of the VLCA should be amended to clarify the different levels of deference given to an arbitral tribunal's competence depending on whether the arbitrators have been seized of the parties' dispute or not, and to provide expressly for the standard of judicial review needed to be exercised. As to the standard of review for when court litigation is initiated first in time, it is suggested that a *prima facie* review should generally be adopted, and full review should only be allowed in exceptional circumstances. In this regard, the English discretionary approach may be taken into consideration.

Second, Article 43 of the VLCA should expressly stipulate that an arbitral tribunal may rule on its own jurisdiction, either as a preliminary question or in the final arbitral award. As previously discussed, it may not always be possible for jurisdictional challenges to be correctly determined as a preliminary matter before moving on to the merits. Hence, an arbitral tribunal should be given the discretion to either render a preliminary decision or incorporate its ruling into the final award on the merits, although a preliminary decision would generally be preferred. One more option to consider is to also allow the parties' discretion in whether to have the arbitrators' jurisdictional challenges be decided in a preliminary award or the final award. This suggestion mirrors the approach taken under the Model Law or English law.

44 Le, T. H. & Ton, N. T. B. (2018). Compétence-compétence doctrine in Vietnam – A comparative study. *ALSA Academic Journal*, No. AJLS 2018/19, p. 8.

Conclusion

From the above analyses, this article establishes two main findings. *First*, there are at least three possible approaches to the issues of whether, and to what extent, an arbitral tribunal or a court has competence to rule on arbitral jurisdiction if challenged by disputing parties before the final arbitral award, as summarized in Table 1. The Model Law allows the arbitral tribunal and the court to examine the arbitration agreement relevant to valid requests/claims submitted before them at any pre-award stage, which means that the tribunal has concurrent competence with the court. The French law charts a different course in which the arbitral tribunal is given the initial and primary authority to decide its jurisdiction even when the court receives a claim earlier (“first judge”), and the exclusive authority to resolve any jurisdictional challenge once the tribunal has been seized (“exclusive competence”). Compared to these approaches, the English or Vietnamese approach sits somewhere in the middle of the spectrum, with more discretion being given to the parties as well as the courts as to the recognition of the arbitrators’ competence (“first judge” and “concurrent competence”). Under English law, the power distributed between the tribunal and the court at each stage depends on the nature of the jurisdiction challenge (e.g., existence, validity, scope, or enforceability of arbitration agreement, or the constitution of the arbitral tribunal) and/or the attribute of the requesting party (e.g., participation or non-participation in arbitration proceedings). Thus, the tribunal is only designated the role of the “first judge” to address arbitral jurisdiction matters in certain cases, even when the matters are raised after the initiation of the arbitration proceedings or after the constitution of the tribunal. Under Vietnamese law, the power distribution relies on the timing of relevant requests/claims being submitted to the court and the tribunal. Only after the arbitration is launched, the tribunal has the role of the “first judge” to decide on its jurisdiction.

A further finding is derived from the convergences and divergences of the examined approaches, which suggests potential patterns with some variations among jurisdictions to regulate the level of the court’s deference in a case involving an arbitration agreement at each stage. When a claim is initially presented to the court (Stage 1), the court generally has full competence to investigate any available arbitration agreement to either confirm or decline jurisdiction, unless otherwise explicitly stated, as is the case in French law. If the court receives a claim or a request associated with arbitral

jurisdiction matters when a relevant dispute is pending in arbitration (Stage 2), it still has the authority to review, either *prima facie* or full, the arbitration agreement to dismiss the claim or resolve the request, except for cases in Vietnam. However, once the arbitral tribunal has been established (Stage 3A), the court should respect, or avoid interfering with, the tribunal's authority to the greatest extent, unless a certain condition is fulfilled, as provided in English law, for example, (i) a non-participating party in arbitration seeks relevant support from the court, (ii) an active party in arbitration receives the tribunal's relevant approval and justifies his duly filed application with valid reasons and grounds, or (iii) the parties agree otherwise. In cases where the tribunal finalizes its jurisdiction in an/a (preliminary) award/decision on jurisdiction and a disputing party challenges this award/decision to the court before the issuance of the final award (Stage 3B), the court is allowed to conduct the final review, except for cases in France. ●

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Table 1. Various Approaches to Competence to Rule on Arbitral Jurisdiction

Pre-award Stages	Pre-award Stage 1 Judicial Review Requested <i>Before or Concurrently with</i> Initiation of Arbitration		Pre-award Stage 2 Judicial Review Requested <i>After</i> Initiation of Arbitration & <i>Before</i> Constitution of Arbitral Tribunal		Pre-award Stage 3A Judicial Review Requested <i>After</i> Constitution of Arbitral Tribunal & <i>Before</i> Issuance of Award/Decision on Jurisdiction		Pre-award Stage 3B (Subsequent) Judicial Review Requested <i>After</i> Issuance of Award/Decision on Jurisdiction
	Prior/ Concurrent Judicial Review	Arbitrators' Competence	Concurrent Judicial Review	Arbitrators' Competence	Concurrent Judicial Review	Arbitrators' Competence	
Model Law Approach ("Concurrent Competence")	Yes. Arguably, Full★ (Art. 8, ML)	Possibly, concurrent competence	Yes. Arguably, Full★ (Art. 8, ML)	Concurrent competence	Yes. Arguably, Full★ (Art. 8, ML)	Concurrent competence	Yes. Final. (if award is available) (Art. 16(3), ML)
French Approach ("First Judge")					No (Art. 1448, FNAL)	Exclusive competence	No (Art. 1465, FNAL)
	Yes. Prima facie★★ (Art. 1448, FNAL)	"First judge"	Yes. Prima facie★★ (Art. 1448, FNAL)	"First judge"			

English Approach ("Hybrid")	Yes. Prima facie*** (Art. 9, EAA; case law)	"First judge" in certain cases			No (Art. 32, EAA)	"First judge" in certain cases, Subject to Subsequent Review	Yes (if award is available)
	Yes. Full*** (Art. 9, EAA; case law)	Possibly, concurrent competence in certain cases	Yes. Full Requested by a party taking no part in arbitration (Art. 72, EAA)	Concurrent competence	Yes, subject to appellate review. (Art. 32, EAA)	Concurrent competence in certain cases	
					Yes. Full. Requested by a party taking no part in arbitration (Art. 72, EAA)	Concurrent competence	
Vietnamese Approach ("Hybrid")			No (Art. 6, VLCA; Art. 2, Resolution No.1/2014)	"First judge", Subject to Subsequent Review	No (Art. 6, VLCA; Art. 2, Resolution No.1/2014)	"First judge", Subject to Subsequent Review	Yes. Final. (Art. 44, VLCA)
	Full**** (Arts. 6, 17, 18 & 43, VLCA; Arts. 2-4, Resolution No.1/2014)	Possibly, concurrent competence					

Full*: The review of whether an arbitration agreement is "null and void, inoperative or inapplicable of being performed"; Prima facie**: The review of whether an arbitration agreement is "manifestly void and manifestly inapplicable"; Prima facie*** or Full***: The review of whether an arbitration agreement is "null and void, inoperative or inapplicable of being performed"; Full****: The review of whether an arbitration agreement is "void or incapable of being performed".

Author Contribution

All authors contributed to the study conception and design. All authors read and approved the final manuscript.

Declarations

Conflict of Interest: The authors declare no competing interests.

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