# THE DOCTRINE OF COMPETENCE-COMPETENCE

## Introduction

Competence-competence can be regarded as a general doctrine that is present in international commercial arbitration. In international trade agreements, most parties mutually agree to solve their disputes through arbitral tribunals as they are often fast compared to the normal court processes. That being said, the competence-competence principle is important in international trade as it gives the arbitral tribunal the power to rule/decide on its own jurisdiction. The principle asserts merely that a tribunal is mandated to decide its jurisdiction when handling substantive claims in dispute between two parties that have an arbitral agreement[[1]](#footnote-0). However there are existing limits to the use of this doctrine. Firstly, an admission from the moving party of its being partisan of the arbitration agreement is required. Secondly, a party can only invoke the doctrine of competence-competence if it acknowledges that the tribunal has jurisdiction. The scope of the competence-competence doctrine in different states. For this reason, this essay shall analyse the doctrine, its use, and implementation in different countries. The countries that shall be used include England (since it uses competence-competence doctrine in a limited form), the United States (since the broad version of competence competence is not fully accepted), Australia (since there are enacted laws that fully support the competence competence doctrine) and Singapore (since it does not support the competence-competence doctrine). This essay shall consequently discuss the Competence-Competence doctrine in general, the laws on it, a comparison of its application in different jurisdiction and an assessment and recommendations to the use of the doctrine.

## Chapter 1

### Competence-Competence

Firstly, the doctrine of competence-competence consists of two elements. The first part is that the concept itself stipulates that the arbitrators are the decision makers with regard to their jurisdiction and consequently, they can also rule on their competence[[2]](#footnote-1). For this reason, in a circumstance whereby the legitimacy of the arbitration agreement and hence the competence of the arbitrator is challenged, it is not necessarily imminent that the arbitrator halts proceedings. He or she can go on with the arbitration and determine whether he or she, has or does not have jurisdiction[[3]](#footnote-2). The second element of the competence-competence doctrine is that in several countries, the arbitration contract expels the original jurisdiction of courts[[4]](#footnote-3). If the initial existence of the arbitration contract is challenged the court must still refer the dispute to arbitration. However, in relation to the second element, there are variations in different countries. For example, in countries such as France, the arbitrators have an extensive jurisdiction to decide their competence. Such nations are characteristically civil law countries[[5]](#footnote-4). On the other hand, the predominant view in most common law countries is that the arbitrators have a limited competence in relation to ruling on their jurisdictions[[6]](#footnote-5). Additionally, these rulings are subject to reexaminations and scrutiny by the courts.

### Rationale of The Competence-Competence Doctrine

The competence-competence is considered a controversial doctrine as it defies basic logic. This is so since there is a dilemma that occurs when an arbitrator determines his or her competence and validity of the arbitration agreement at the same time. Nevertheless, the doctrine has been rationalized on several bases. One of the grounds that have been used to justify the subject doctrine is that there is often a rebuttable presumption that the existent jurisdictional power has been legitimized by the intentions of the parties, as they entered the arbitration agreement[[7]](#footnote-6). This, therefore, means that the parties expect that in the same way the arbitrator has jurisdiction over the arising disputes between the two subject parties, so should he have jurisdiction with regard to his or her own competence [[8]](#footnote-7). For this reason, it is expected that the courts should respect the will and intentions of the two parties, as stated in their arbitration agreement, as long as the arbitrator acts Uberrima Fides[[9]](#footnote-8) (in good faith) i.e is not bias or compromised by either of the parties.

The second rationalization for this doctrine emanates from Section 30 of the Arbitration Act. This section explicitly permits exclusion agreements. An exclusion agreement is an exclusionary clause within the arbitration agreement that excludes the rule that arbitrators cannot determine their own jurisdiction. The agreements also exclude judicial review of the award given in the arbitral tribunal. Hence, the parties can eliminate the rule that precludes the arbitrator from deciding on his or her own jurisdiction[[10]](#footnote-9). Finally, the competence-competence doctrine is seen as essential in every judicial organ as it aids in allowing the bodies to dispense their functions smoothly i.e without constant interruption from the court with regard to the arbitrators’ competence[[11]](#footnote-10).

Also, it assists in the promotion of the arbitral process since, if arbitrators can decide on their competence, parties must not always seek redress in courts. Since litigation in court is often expensive and time consuming, aggrieved parties in international commerce would opt for an alternative dispute resolution methods such as arbitration. Additionally, the awards given by the tribunal will be final and binding. Conclusively, the competence-competence doctrine is seen as a tool that is designed as a control measure that aids in mitigating the frivolous objections to the jurisdiction of arbitrators. If it were not applied people would always challenge the competence of arbitrators in court, to either frustrate the arbitration process or to buy time.

In the West Tankers case, the proceedings that took place were to protect the rights of the parties to have disputes be decided through arbitration as is stipulated in the contract[[12]](#footnote-11). It was held that the contractual obligation to solve disputes via arbitration lies outside the system of appropriation of court jurisdictions. In essence the court stated that the since the two parties had an arbitral agreement they had some level of autonomy in determining the disputes that would arise between them, that are within the scope of the agreement[[13]](#footnote-12).

## Chapter 2

**The Law**

### The Narrow Variant of Competence-Competence (Positive Effect)

This particular school of thought basically means that an arbitrator’s mandate is inclusive of determining the ongoings of the arbitral proceeding regardless of whether the arbitrator has jurisdiction over the subject issue/claim. This view is present for two significant reasons. One of the reasons is that it aids in precluding parties that frustrate the arbitration process through raising jurisdictional issues[[14]](#footnote-13).

The second reason is that it enhances jurisdiction through inconsistencies that are resulting from some arbitration tribunals determining that they do not have jurisdiction over certain disputes[[15]](#footnote-14). This consequently brings about some practical difficulties in the arbitration process. This version of the competence-competence is the one that is widely accepted. This is well embedded in Article 16 (1)the UCITRAL Modern Law, which states that arbitrators may determine their jurisdiction and also any issues that may arise about the validity of the arbitration agreement[[16]](#footnote-15). For this reason, an arbitration clause that is evident in the contract is deemed to be independent of all the other terms present in the contract. In as much as the FAA (Federal Arbitration Act) does not state expressly state or reiterate the provision in Section 16 (1) seven states in the United States have adopted the UCITRAL Modern Law while the narrow variant of competence-competence doctrine is generally acknowledged in the U.S. courts.

### The Broad Variant of Competence- Competence (Negative Effect)

On the other side of the spectrum, the broad variant of competence-competence basically stipulates that courts of law are to be bound by the determinations made by arbitral tribunals in relation to their own jurisdiction. This particular version is not widely accepted in the United States[[17]](#footnote-16). Therefore, in an attempt to prevent the probable confusion of the various U.S. court decisions on the matter, it is imperative that one takes into account the category of jurisdictional issue that is up for determination in a particular case. This was well expounded on in the case of First Options of Chicago, Inc v Kaplan. This specific case raised three crucial issues that were essential in determination. They included the specific issues of the case, if the parties had agreed to arbitrate the merits and who had the authority to decide whether the parties had agreed to arbitrate the merits. It was eventually decided that with regard to the issue of who had the authority to determine arbitrability, it was dependent on what the parties agreed upon with regard to that matter[[18]](#footnote-17).

Essentially, if the parties had agreed to submit such matters to arbitration, the authority of determining the issue will lie in the arbitral tribunal[[19]](#footnote-18). Additionally, it was also established that the standards applied during the review of the decisions made in an arbitral tribunal should be the same as the standards used in situations where the parties have agreed to arbitrate[[20]](#footnote-19). If the parties had not explicitly decided on submitting their issue via an arbitral tribunal, the courts should then handle the issue just like any other independent claim. The underlying logic that was derived from this case and the subsequent decision is that arbitration is solely dependent on whether there was a contract between the two parties[[21]](#footnote-20). It is an alternative dispute resolution method that only applies if both parties had agreed to submit to it, as and when a dispute arises.

### Factual Presence of the Arbitral Agreement

In relation to the negative competence-competence in the U.S. the fact that parties have entered into an arbitral agreement does not affect it. In the case of China Minmetals Import & Export Co v Chi Mei Cop, the Judge stated that it would be highly improbable that the arbitrator will make the final jurisdictional ruling with regard to the existence of the arbitration clause[[22]](#footnote-21). The adjudicating authority will have to establish whether the party which is adversely affected by the decision of the tribunal had, in fact, agreed to submit to the arbitral process. In essence, a contract cannot give a tribunal for arbitration, the authority to decide their own jurisdiction if the parties never entered into the agreement.

The relevant conventions and the FAA (Federal Arbitration Act) are in congruence when it comes to the matter of establishing the presence of an arbitral agreement through the courts before the courts are required to respect it[[23]](#footnote-22). A good example of this is enshrined in Article 2 (3) New York Convention, where it expressly states that the Contracting State should only refer the parties to arbitration in circumstances where the parties had made an agreement and as and when it determines that the agreement is not null and void or is incapable of being enforced[[24]](#footnote-23).

Additionally, Article 5 of the same convention states that if the subject parties did not have the requisite capacity to indulge in the arbitration agreement the recognition and enforcement of the award are not required. Moreover, the same applies in circumstances where the arbitration agreement is prima facie invalid as per the law which both parties have subscribed to or the award which was not initially contemplated or which does not fall within the set terms and conditions for the submission to arbitration[[25]](#footnote-24).

In support of this convention, the FAA (Federal Arbitration Act) contains provisions that echo the subject sentiments when it comes to the court's determination of whether the parties have first agreed to arbitrate[[26]](#footnote-25). A perfect example of this presents itself in instances where a court of law that seized proceedings stays the parties in favor of arbitration only if it is adequately proven that the bone of contention between the two parties is referable to arbitration as per the initial written arbitration agreement[[27]](#footnote-26). Moreover, a court may prescribe arbitration as per the act if the bone of contention is not the arbitration agreement or if the jury had already determined that a written arbitration agreement was created. For this reason, an arbitral award made in the United States may be avoided if the subject arbitrators acted Ultra vires and also if there was no initial arbitral agreement. Therefore in the case of the First Options, the Supreme Court stated that if the two parties in dispute had initially agreed to deal with the matter through an arbitral tribunal, the tribunal would then be the ultimate decision-maker in relation to determining whether an arbitration agreement was created.

However, courts should exercise this power with caution. This so because in the determination process of whether a party should use arbitration to solve an issue in dispute, the courts should only use the ordinary set laws that relate to the formation of a contract[[28]](#footnote-27). For example, in this subject case, the court sought to establish whether there was an evident interest by the parties to submit the issue of arbitrability to arbitration.

### Substantive scope of the arbitration agreement

This particular jurisdictional matter involves falls within the purview of an existing contract. As was established in the First Options case the arbitral tribunal will only have the power to determine a matter if the parties have conferred the power upon it. Nevertheless, if issues regarding the scope of arbitrable issues arise, they are to be resolved by the courts, in favor of arbitration. In the case of Shaw Group, Inc v Triplefine International Corp, the courts established that the agreement between the parties to utilize the ICC arbitration in disputes that touched on the initial contract[[29]](#footnote-28), in relation to the competence-competence provision in Article 6 of the ICC rules was valid[[30]](#footnote-29). A similar decision was arrived at in Bowden v Delta T Corp.

### Procedural Restrictions and Limitations

The third facet of jurisdictional issues is the procedural limitation of arbitral claims. Although the First Options case provides some guidance in relation to this matter the U.S Supreme Court has decided several cases that deal with this issue[[31]](#footnote-30). In the case Howsam v Dean Witter Reynolds, Inc, the courts dealt with the issue of temporal limitations. In this case, one of the arbitral respondents was resisting arbitration because the particular claim was under NASD Code in section 10304, which included a six-year limitation period. In this matter, the court found that the relevance of the NASD code time limit rule was a matter that was presumptively, to be decided by the arbitrator and therefore not the judge. Basically, the issue relating to the time limit found in the NASD code was not regarded as an issue of arbitrability.

## Chapter 3

### Comparison of Jurisdictions

#### England

It has commonly been purported that English law does not acknowledge the competence-competence rule. However, these sentiments are broad since the competence-competence doctrine exists albeit in a limited form[[32]](#footnote-31). An excellent example of a case whereby this was exemplified is Christopher Brown v Genossenschaft Osterreichischer Waldbesitzer Holzwirtschaftsbetriebe, Registrierte GmBH[[33]](#footnote-32). In this case, it was held that, in circumstances where the jurisdiction of arbitrators is impugned, they might voluntarily choose to down their tools until the issue regarding jurisdiction has been determined by a court that has the power to do so[[34]](#footnote-33). Moreover, the arbitrators can still decide their jurisdiction themselves[[35]](#footnote-34). However, in such a case, the decision made in arbitration is not considered to be binding hence the party that is adversely affected by the determination of the arbitration process reserves the right to go to court to object the previous tribunal determination[[36]](#footnote-35). These sentiments were also reiterated in the Harbour Assurance Case, 1993[[37]](#footnote-36).

It is crystal clear from this decision that the competence-competence doctrine is applied in England albeit not entirely. Based on the above facts, England can be regarded to be utilizing the positive effect of the competence-competence doctrine. This, therefore, means that there is a particular framework that allows concurrent jurisdiction between arbitral tribunal and courts.

#### Australia

In the case of IBM Australia Ltd v National Distribution Services Ltd the obiter dicta from Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales was used. In this case, it was held that arbitrators lack the requisite jurisdiction to decide on an issue that seeks to establish whether a contract, which has incorporated the arbitration clause through which the arbitrator is appointed, is void ab initio[[38]](#footnote-37). This essentially means that if the contract is declared void there was no contractually valid assent to arbitration, from the beginning[[39]](#footnote-38). Nevertheless, these remarks were just by the way statements resultant from the case and hence were not strictly adhered to since they were merely persuasive rather than binding[[40]](#footnote-39). The opposite sentiments to the Obita dictum were in fact expressed in QH Tours Ltd v Ship Design & Management (Australia) Pty Ltd whereby it was held that the arbitration clause could be rendered as separable from the subject contract because, if the arbitrator is empowered, he or she can make the subject contract void ab initio without affecting the grounds of his inherent power to do so[[41]](#footnote-40).

Undoubtedly, this is the best version of the competence-competence doctrine as the arbitrator is allowed to make a decision on the validity of the arbitration clause without creating a dilemma formed by the nullification of his power to do so.

#### United States

With regard to the competence-competence doctrine, the BG Group Plc v Republic of Argentina was one of the landmark cases that aided in clarifying the specific roles that arbitrators and courts are expected to play when determining issues that regard the jurisdiction and arbitrability in international arbitration agreements[[42]](#footnote-41). In this particular case, the U.S. Supreme Court made a two-faceted decision. Firstly, it held that the courts should decide matters that related to substantive arbitrability, in essence, whether a particular arbitration clause binds both participant parties. Moreover, the court should also determine whether a specific arbitration clause includes a specific controversy[[43]](#footnote-42). The second facet of the decision made was that arbitrators were to determine matters that merely regarded procedural arbitrability, for example, time limits, delays, and waivers. For this reason, the Supreme Court stated that the inclusion of the arbitrary rules that preserve the competence-competence doctrine is crucial to that determination[[44]](#footnote-43).

Another landmark decision with regard to the doctrine of competence-competence is the First Options of Chicago Inc. v. Kaplan case. This case involved a dispute between three respondents and a claimant. Two of the respondents stated that they had not agreed to arbitrate. Nevertheless, the arbitral tribunal found that it had the jurisdiction to decide that case. Consequently, it made a decision against the respondents. The dispute was then taken to federal courts to determine whether the award would be upheld or declared void. In deciding the case the courts found three issues that were at the core of it: what were the merits of the case, did the parties agree to arbitrate the merits of the case and who, between the courts and the arbitral tribunal, has the sole power to decide whether the parties had agreed to arbitrate the merits.

The basic determination of the case was that the arbitrators would have the power to decide arbitrability is dependant on whether the parties had agreed to determine arbitrability. This, therefore, means that issues that relate to arbitrability are dependant on what the parties had agreed about the the issue, in their arbitration agreement. If the arbitration agreement states that the arbitral tribunal is to is to decide the arbitrability issue, then, generally, the court should not interfere with the issue. On the other hand if this issue is unclear or is not catered for in the arbitration agreement, then the court should step in to determine the arbitrability of the tribunal. The crux of this case was that arbitration is simply a contract between two parties. The contract should state the issues that are to be arbitrated. If the issues stated in the contract arise, they then should be handled solely by the arbitral tribunal. If issues that are not stated in the arbitration agreement arise, they can be handled by the courts of law.

In conclusion, in order to create a more rigid competence-competence doctrine in the United States, the FAA(Federal Arbitration Act) should be overhauled. Such a legislative solution will create a balanced approach through provisions that allow preliminary awards with regard to jurisdiction, an expeditious process and flexibility that allows the arbitrators or parties to seek judges assistance in relevant cases.

#### Singapore

According to the cases Jackman and New Indian Assurance it is safe to assume that the competence-competence doctrine is inapplicable in Singapore. In the Jackman case, the judge stated that if an arbitrator declared that a contract is non-existent at all and hence, there would be no right to sue on the policy, he or she would be essentially stating that the clause which is the basis of his jurisdiction is non-existent[[45]](#footnote-44). Consequently, the arbitrator could have never had any authority to handle the case.

As opposed to Australia, if the arbitrator declares an arbitration agreement invalid, it subsequently means that he or she had no power to deal with the dispute in the first place. For this reason, there is minimal use of the doctrine of competence-competence in Singapore as a result of the technical difficulties of its application.

### Chapter 4

## Analysis and Recommendation

Based on Chapter 2 (Comparison of Jurisdictions) where I have analyzed the different approaches applied by the different countries, here I will give you my general assessment of the doctrine of competence-competence, its application and the various recommendations that can be made to improve on it.

One of the main advantages of the competence-competence rule is that it allows the subject parties to solve their disputes as fast as possible. Normally, different jurisdictions are involved in international trade. For this reason, there may be a lot of technicalities and differences in the laws of the disputing parties and this may lead to a cumbersome litigation process. Essentially, the doctrine gives arbitral tribunals the power to decide on their own jurisdiction hence preventing the conflict of laws from different courts in different jurisdictions. Secondly, the doctrine also promotes the international trade as disputes are solved internally between companies, through the use of agreed upon arbitrators. Thirdly, the existence of the competence-competence doctrine aids in preventing a floodgate of litigation. If it were left up to the courts to decide the jurisdiction of the arbitral tribunal, there would be a myriad of cases on the same issue day in day out.

On the other hand, there are various problems that cripple the competence-competence doctrine. Firstly, it renders one bound to follow the arbitration agreement and seek arbitration as an avenue of redress before taking the issue to court. Through this, a company may waste time if the award is given to its detriment and hence may be forced to head to court. Secondly, the doctrine of competence-competence requires the parties to have had a prior arbitral agreement before they are subject to an arbitral tribunal. Additionally, in some jurisdictions, such as Singapore, the arbitrators’ hands are tied since he cannot make a ruling that declares the arbitration contract void ab initio as this will be interpreted to mean that the arbitrator did not have any jurisdiction in the first place. Finally, the scope of the matters that the arbitral tribunal has jurisdiction over is limited to the arbitral agreement.

The competence-competence doctrine should be adopted in all spheres of international trade in order to enhance the economy of the respective countries. This is primarily because it provides some neutrality, selection of the arbitrator, confidentiality, lower costs, less time and the ability of decisions to be enforced under the New York Convention. In order to improve the use of the competence-competence rule, all countries that are party to the New York Convention and the UNCITRAL should fully embrace both the positive and the negative effect of the doctrine of competence-competence. This is so since there are several benefits that would accrue from this.

Firstly, it prevents the delaying methods that parties often use to frustrate a case and also it aids in avoiding the centralization of the litigation that relates to the validity of the arbitration agreement. The arbitral process would be seriously affected and eventually rendered ineffective if parties were allowed to initiate parallel proceedings simply to frustrate the arbitral process. The respective parties would also save time and costs as they will not be required to go through two different parallel processes in order to determine the validity of an arbitral agreement. If arbitrators were required to stay the determination of their own jurisdiction, pending a court decision, would substantively affect the doctrine of competence-competence and the also the arbitral process. That being said, this does not mean that the courts should let go of their power to review the existence and validity of an arbitration agreement. It basically means that courts are to acquire their power of full scrutiny once the entire arbitral process is over and the award has been rendered.

## Conclusion

Competence-competence is an international commercial arbitration doctrine that gives tribunals the power to determine substantive claims in relation to the disputes that they handle. The competence-competence doctrine is undoubtedly the most favorable technique of adjudication when it comes to handling matters that involve conflicts that arise in international commerce. Nevertheless, the relationship that exists between courts and arbitral tribunals is somewhat challenging. This is so because courts are expected to assist, guard and guide arbitration, enforce and exercise oversight over the arbitration agreement, issue temporal measures and aid the tribunal access the necessary evidence.

On the other hand, the court’s power to exercise oversight of the arbitration process, which may lead to the process/arbitration agreement being declared unenforceable, creates a dilemma between the two platforms of adjudication. However, the relationship between tribunals and courts is handled differently in different countries. In the United States, there are various variants with regard to the doctrine of competence-competence. They include the narrow version, the broad version, the substantive scope of the arbitration agreement and the actual presence of the arbitration agreement. These four variables aid the courts and arbitral tribunals in determining contentious matters that deal with jurisdiction. Conclusively, it is evident from case law that the competence-competence doctrine is best suited to handle jurisdictional issues that are inherent in courts and tribunals.

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