

THE COMPETENCE-COMPETENCE PRINCIPLE IN COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS

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Abstract

Purpose – the purpose of this paper is two-fold: first, to analyse the application of the competence-competence principle in three jurisdictions (France, Sweden and England) and, second, to evaluate the application of the competence-competence principle in these jurisdictions *vis-à-vis* the aim to balance the need to give effect to arbitration agreement and legitimacy of arbitration proceedings.

Design/methodology/approach – comparative and systematic analysis as well as linguistic and teleological methods were used in this research.

Finding – the principle of competence-competence is defined as the cornerstone of commercial arbitration, however, its application varies substantially depending on the jurisdiction. Comparative analysis shows that the extreme applications of a negative effect of the competence-competence principle do not balance, but rather favour either giving an effect to an arbitration agreement or to the legitimacy of arbitral proceedings, and these approaches have considerable downsides. The intermediate approach, which attempts to balance these two objectives depending on a number of particular circumstances, appears to be the most preferred one. For that purpose, legislators, while balancing the effect of the negative competence-competence effect, use a number of useful tools, such as: (i) court's *prima facie* review of arbitral jurisdiction (ii) different standards of review depending on the nature of challenge (e.g. whether the existence or only the scope of the arbitration agreement is challenged); (iii) different standard of review depending on whether arbitral proceedings have been commenced or not.

Research limitations/implications – research is limited to the analysis of the primary features of the competence-competence principle in three jurisdictions - Sweden, France and England. Although the principle of separability of arbitration agreement is closely related to the competence-competence principle, it is not analysed in this research due to its limited scope.

Practical implications – the underlying research and its findings may serve as a basis for or an addition to a further scientific discussion regarding the balanced allocation of jurisdictional competence between a court and an arbitral tribunal. The findings may be useful while solving cases related to the determination of the arbitral tribunal's jurisdiction as well as considering efficacy of national laws which regulate the matter.

Originality/Value – in several jurisdictions, including Lithuania, allocation of jurisdictional competence between a court and an arbitral tribunal raises complex questions and is not settled. A comparative analysis of the various approaches is valuable in searching for the most appropriate and balanced approach.

Keywords: competence-competence principle, commercial arbitration, arbitral tribunal's jurisdiction, court's review of the arbitral tribunal's jurisdiction.

Research type: research paper.

Introduction

Every person has a right to defend his/her rights and interest in a *state court*. This right is one of the most important human rights, protected by international¹ and national² legal instruments, which impose a duty on a state to establish a legal regime which would guarantee a possibility for each person whose rights or interests are infringed to defend such rights and interests in a state court.

In a democratic society where the rule of law is respected, dispute resolution in state courts is not the only means to solve disputes. The principle of the freedom of contract, protected by the Constitution³ and/or being the core of the civil and contract law, allows parties to agree on a dispute resolution method as long as such agreement does not unreasonably infringe other rights and interests.

Commercial arbitration is an internationally recognized⁴ private dispute resolution method based on the parties' consent to solve their dispute with this particular method. Commercial arbitration has its own peculiarities compared to dispute resolution in a state court⁵ and is particularly widely used to solve

¹ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Arts. 6 and 13. *Official Gazette*. 2011, No. 156-7390. Charter of Fundamental Rights of the European Union, Art. 47. [2012] OL, C 326, p. 391–407. International Covenant on Civil and Political Rights, Art. 2(3). *Official Gazette*. 2002, No. 77-3288. Universal Declaration on Human Rights, Art. 8. *Official Gazette*. 2006, No. 68-2497.

² Art. 30 of the Constitution of the Republic of Lithuania provides: “A person whose constitutional rights or freedoms are violated shall have the right to apply to a court” (Constitution of the Republic of Lithuania. *Official Gazette*. 1992, No 33-1014). This provision applies not only to “constitutional rights or freedoms” but also to civil rights. Art. 5 of the Code of Civil Procedure of the Republic of Lithuania establishes the principle of access to a court “Each interested person shall have the right to apply to a court, in accordance with the laws, to defend his/her violated or contested right or interest protected by laws.” (Code of Civil Procedure of the Republic of Lithuania. *Official Gazette*. 2002, No. 36-1340). Access to a court forms part of a broader right to defend one’s right in a court (in Lithuanian: “*teisė į teisminę gynybą*”) implementation procedure whereof is established by the Code of Civil Procedure.

³ Constitutional Court of the Republic of Lithuania, ruling of 30 June 2008, Case No 38/06. Also see Charter of Fundamental Rights of the European Union, Art. 16. [2012] OL, C 326, p. 391–407.

⁴ 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. *Official Gazette*. 1995, No. 10-208. 157 states are currently parties to the New York Convention [interactive], [accessed 14 May 2017] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html). UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006. 24 UNTS 1302 (1985); with amendments adopted on 7 July 2006: [interactive], [accessed 2017-03-15]. http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. 104 jurisdictions in 74 countries have adopted national arbitration legislations based on the UNCITRAL Model Law, [interactive], [accessed 2017-03-06], http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985_Model_arbitration_status.html).

⁵ Generally (i.e. subject to various peculiarities in international and national laws regulating arbitration) commercial arbitration has the following features: (1) in commercial arbitration the dispute is solved by private persons – arbitrators. The parties, depending on the appointment procedure, usually have a possibility to appoint a person who will act as arbitrator in their dispute; (2) principle of party autonomy is widely applied (e.g. the parties have a possibility to agree on virtually all aspects of procedure while solving the dispute, except a few mandatory procedural principles); (3) the dispute is solved privately and confidentially; (4) an arbitral award can be set aside by a state court only on very limited grounds; (5) an arbitral award is binding to the parties and in case a party does not comply with the award it is enforced like a state court’s judgement.

international commercial disputes¹ as the features of this dispute resolution mechanism are highly valued and preferred by parties involved in international commerce.

As already mentioned, commercial arbitration is – primarily – a creature of a contract. If the parties wish to solve their existing or future disputes in commercial arbitration they must agree on such a dispute resolution method. By concluding a valid² arbitration agreement the parties agree to submit their commercial dispute(s) to arbitration, thereby waiving their right to a court access³. An arbitration agreement is, therefore, a source of the arbitrators' authority to solve the Parties' dispute and – generally – the arbitrators exercise their jurisdiction until the arbitral award, which resolves the Parties' dispute, is rendered.

However, if a party makes a jurisdictional challenge which aims to deny arbitrators' jurisdiction to solve a dispute, the question whether arbitrators have jurisdiction to solve the dispute has to be answered, since, if such jurisdiction is lacking, it will be another authority (usually a state court) that will resolve the dispute on the merits. Jurisdictional challenges are possible under a plethora of arguments, such as allegations that an arbitration agreement is inexistent, invalid or its scope does not encompass the parties' dispute. At this juncture, *i.e.* when a jurisdictional challenge is made, it will be for an arbitral tribunal or a state court to solve it. However, the question of who decides on jurisdictional objections and when is far from clear in many jurisdictions (Stojilković, 2016; Erk-Kubat, 2014; Born, 2014; Synková, 2013; Poudret and Besson, 2007; Savage and Gaillard, 1999) including Lithuania⁴, although it is one of the central questions in commercial arbitration. Approaches followed in national laws or case practice on this issue have a significant impact on parties' time and costs, let alone their right either to arbitrate a dispute or to access a court. Therefore, clear rules or guidance on allocation of jurisdictional competence is required.

The competence-competence principle (*i.e.* competence to decide on one's own competence) is one of the tools to strike a right balance while allocating jurisdictional authority between an arbitral tribunal and a state court. As noted by Synková (2013),

¹ According to the 2015 empirical survey of Queen Mary University of London and White & Case, 90 % of respondents indicated that international arbitration is their preferred dispute resolution mechanism for solving cross-border disputes. 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p. 5-6 [interactive], [accessed 13 May 2017], <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

² Arbitration agreement's validity is subject to the requirements of the national law applicable to the arbitration agreement. *E.g.* Article 10 of the Law on Commercial Arbitration of the Republic of Lithuania (*Official Gazette*. 1996, No. 39-961; 2012, No. 76-3932) establishes the form requirement for an arbitration agreement. Further requirements are established by Articles 2(5), 11 and 12 of the said Law.

³ *Tabbane c. Suisse*, No. 41069/12, § 27, ECHR, 2016. *Suovaniemi and others v. Finland* (dec.), No. 31737/96, ECHR, 1999. *Nordström – Janzon, Nordström-Lehtinen v. Netherlands* (dec.), No. 28101/95, European Commission of Human Rights, 1996, 87-A.

⁴ *E.g.* there is no unified approach as to the actions a Lithuanian court should or should not take in case a claim is submitted based on a contract containing an arbitration clause as well as to the applicability and effects of the competence-competence principle and separability doctrine, which are determined by Article 19 of the Law on Commercial Arbitration of the Republic of Lithuania (*Official Gazette*. 1996, No. 39-961; 2012, No. 76-3932). In that regard see different approaches taken in the Lithuanian Supreme Court, Civil Division, 4 May 2016 ruling in the civil case No. e3K-3-247-684/2016 and Lithuanian Court of Appeal, Civil Division, 14 April 2017 ruling in the civil case No. 2A-166-381/2017.

the competence-competence principle (*Kompetenz-Kompetenz*, *compétence-compétence*), depending on the respective jurisdiction, can have the following meanings:

- a) the so-called positive effect of the competence-competence principle allows arbitrators' themselves to decide on their own jurisdiction notwithstanding that their jurisdiction is challenged;
- b) the so-called negative effect of the competence-competence principle provides the authority to the arbitrators to be the *first* ones to decide on their jurisdiction meaning that any court control on this question will be only subsequent;
- c) the competence-competence principle can also be understood as granting the arbitrators the exclusive (final) authority to decide on their jurisdiction.

Given the fragmentation of approaches related to the competence-competence principle, the purpose of this article is two-fold: first, to analyse the application of the competence-competence principle in three jurisdictions (France, Sweden and England) and – second – to distil from the comparative analysis the effects of these different approaches and evaluate them with respect to how well they balance the need to respect an arbitration agreement and the legitimacy of arbitration proceedings. It will be a matter of future research of this author to apply these findings while searching for the most appropriate approach regarding the allocation of the jurisdictional competence between a state court and arbitral tribunal in Lithuania. Comparative and systematic analysis as well as linguistic and teleological methods were used in this research.

The article is divided into 4 chapters: in the first three chapters, the application of competence-competence principle in France (1), Sweden (2) and England (3) is analysed. In chapter (4) comparison and conclusions are provided.

The Competence-Competence Principle under French law

In France, the competence-competence principle was recognized and applied by the courts even before it was codified by French arbitration law in 1981 (Erk-Kubat, 2013; Savage and Gaillard, 1999). As stated in a French court decision as early as 1968:

*“[t]he principle is that the judge hearing a dispute has jurisdiction to determine his own jurisdiction. This necessarily implies that when that judge is an arbitrator, whose powers derive from the agreement of the parties, he has jurisdiction to examine the existence and validity of such agreement.”*¹

Currently applicable French arbitration legislation clearly establishes the so-called positive effect of the competence-competence principle in Article 1465 of the French Code of Civil Procedure² which grants jurisdiction to the arbitral tribunal to decide on its own jurisdiction.

¹ Colmar Court of Appeals, decision of 29 November 1968, in case *Impex v. P.A.Z.* (reference and translation from Born, 2014).

² Decree No 2011-48 of 13 January 2011 of the French Republic Reforming the Law Governing Arbitration. *Official Gazette*. 2011-01-14, p. 777. French arbitration law makes a distinction between domestic and international arbitration. Article 1465 applies to domestic arbitration and, unless the

The negative competence-competence effect is reflected in Article 1448 of the French Code of Civil Procedure:

“When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.”¹

The quoted provision is relevant if a Party submits a claim on the merits to a court which is allegedly subject to an arbitration agreement and, therefore, is arguably to be resolved in arbitration and not in a state court. Should neither party raise an objection regarding a court’s jurisdiction (*i.e.* request that the matter is referred to arbitration in accordance with an arbitration agreement), the French judge cannot raise it *ex officio* (Bensaude, 2013). Such objection must be raised early - at the outset of the proceedings - and in case a party fails to raise such an objection in due time, it may be found inadmissible (Bensaude, 2013).

If a party makes an objection on a court’s jurisdiction based on an arbitration clause, Article 1448 quoted above distinguishes two situations:

- a) if arbitration proceedings have not yet been commenced, the French court must decline jurisdiction unless the arbitration agreement is *manifestly* void or not applicable;
- b) if arbitration proceedings have been commenced, then the French court must refer the dispute to arbitration without any inquiry regarding the substance of the dispute or arbitration agreement’s existence, validity or scope.

While deciding on whether the arbitration agreement is manifestly void or manifestly not applicable, the French courts carry out a *prima facie* assessment of the arbitration agreement. Such assessment includes not only an examination of whether an arbitration agreement “*on its face*” exists and is valid but also an examination of the arbitration agreement’s scope (Poudret and Besson, 2007; Born, 2014). *Prima facie* review means that the courts cannot engage into substantive and in-depth examination and an arbitration agreement cannot be said to be manifestly void or manifestly not applicable if a party has to carry a demonstration that an arbitration agreement is void or inapplicable (Bensaude, 2013). The only exception to the arbitrators’ priority to decide on their jurisdiction that does appear to emerge from the French case law, relates to employment matters.²

Court’s decisions declining or accepting jurisdiction may be appealed. Arbitration proceedings may proceed while such appeals are pending.

There is no provision in French law that would provide for a possibility to apply to a court with a declaratory request regarding the existence validity or enforceability scope of the arbitration agreement (Bensaude, 2013; Poudret and Besson, 2007). However, it is possible to apply to a court in France for assistance in the constitution of an arbitral tribunal. In such a scenario, a court can only consider *prima facie* whether an arbitration agreement is void or not applicable (Born, 2014).

parties agreed otherwise, to international arbitration (see Article 1506 of the French Code of Civil Procedure).

¹ *Ibid.*, Decree No 2011-48.

² French Court of Cassation, decision of 30 November 2011 in *Société Deloitte Conseil v. Serant* (as referenced in Born, 2014).

Thus, in France not only positive effect but also negative effect of the competence-competence principle are recognized and under the latter an arbitral tribunal has a priority to decide on its jurisdiction. In case arbitration proceedings are pending when application is made to the court, such priority is absolute. If arbitration proceedings are not pending, a court will only examine an arbitration agreement *prima facie*. This, however, does not mean that a decision by an arbitral tribunal on its jurisdiction either by an award on jurisdiction or by a final award is final and not reviewable by a court. Quite the contrary - after an arbitral tribunal decides on its jurisdiction, the jurisdictional award – either positive or negative – if challenged, will be revised by the French courts pursuant to Article 1520 of the French Code of Civil Procedure. The standard of review is *de novo* (Bensaude, 2013; Erk-Kubat, 2013; Savage and Gaillard, 1999). It remains, however, unclear whether an agreement of the Parties - namely that the arbitral tribunal will finally resolve jurisdictional dispute - would be valid (Born, 2014).

The Competence-Competence Principle under the Swedish Arbitration Act

Section 4 of the Swedish Arbitration Act¹ provides that a court may not, over objection of a party, rule on an issue which, pursuant to an arbitration agreement, shall be decided by arbitrators. A party that wishes to rely on an arbitration agreement must invoke it no later than with its first pleading on the merits. A court will either stay or dismiss the proceedings unless e.g. a party relying on an arbitration agreement has failed to cooperate in arbitration, disregarded the arbitration agreement in the previous court proceedings or the subject matter of the dispute is non-arbitrable (Hobér, 2011).

Section 2 of the Swedish Arbitration Act, like in France, establishes the positive effect of the competence-competence principle. However, the Swedish approach regarding the negative effect of the competence-competence principle is very different in comparison with the French approach, as Section 2 of the Act further provides:

“The arbitrators may rule on their own jurisdiction to decide the dispute. The aforesaid shall not prevent a court from determining such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court.

Notwithstanding that the arbitrators have, in a decision during the proceedings, determined that they possess jurisdiction to resolve the dispute, such decision is not binding. The provisions of sections 34 and 36 shall apply in respect of an action to challenge an arbitration award which entails a decision in respect of jurisdiction.”

Thus, unlike in France, in Sweden a party may apply to Swedish courts with a declaratory action regarding an arbitrator’s jurisdiction if the Swedish legal order has an interest in resolving the matter (the dispute or the parties have sufficiently strong connection to Sweden) (Hobér, 2011). The standard of the court’s review is *de novo* and not *prima facie* (Born, 2014).

¹ Swedish Arbitration Act. SFS 1999:116.

The declaratory action can be filed prior to or during the arbitration proceedings and in the latter case, even if the arbitrators have decided on their jurisdiction. As noted by Hobér (2011), there is a good argument to be made that such action should not be heard by a court if in all likelihood an arbitral award will be issued prior to a court's decision. However, the court practice, although recognizing rationale of such argument, provides that under the provisions of the Swedish Arbitration Act a declaratory action can be started even if arbitration proceedings will continue and an award will be rendered prior to the resolution of a jurisdictional issue¹.

Notwithstanding such action, arbitration proceedings may be commenced or continued (Madsen, 2007). A Swedish court decision regarding an arbitral tribunal's jurisdiction is binding vis-à-vis the arbitrators and other courts.

As regards the arbitrators' decision on their jurisdiction, it can be rendered separately and prior to the final award, or it can be rendered in the final award on the merits. If the arbitrators decide separately on their jurisdiction and if they confirm jurisdiction, it must be made in the form of a decision and such a decision is not binding. This not only means that a court is not bound by such a decision, but also that the arbitrators are free to find differently later in the proceedings if new circumstances so require. A positive decision on jurisdiction by the arbitrators cannot be separately challenged during the arbitration proceedings². A party can then request the arbitrators to revisit a jurisdictional finding; wait for a final award; or commence the declaratory action referred above in front of a Swedish court (Hobér, 2011). Should the arbitrators decline their jurisdiction, this would be made in the form of an award, which would be subject to challenge in front of a court pursuant to Section 36 of the Swedish Arbitration Act.

Under Section 51 of the Swedish Arbitration Act, if none of the Parties is domiciled or has its place of business in Sweden, such parties in a commercial relationship may, through an expressed written agreement, exclude or limit the application of grounds for setting aside the award. These grounds are provided in Section 34 of the Swedish Arbitration Act and include *inter alia* an award not covered by a valid arbitration agreement between the parties³.

The Competence-Competence Principle under the English Arbitration Act

Like French and Swedish arbitration laws, the English Arbitration Act also establishes a positive effect of the competence-competence principle in Section 30(1), while indicating at the same time which matters are considered to be jurisdictional:

“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 (c) what matters

¹ Supreme Court of Sweden, decision of 12 November 2010 in case *Russian Federation v RosInvestCo UK Ltd*, case No Ö 2301-09.

² *Ibid.*

³ It is to be noted that Section 51 does not refer to the award's invalidity grounds, which are listed in Section 33 of the Swedish Arbitration Act and which provide such grounds as: (a) an award including a determination on a non-arbitrable issue; (b) an award clearly incompatible with the basic principles of Swedish legal system; and (c) an award not complying with the requirements of the written form and signature.

*have been submitted to arbitration in accordance with the arbitration agreement.*¹

Arbitrators may decide on their jurisdiction either as a preliminary issue or in the award on the merits. Positive or negative jurisdictional decisions or awards on the merits by the arbitrators can be challenged under section 67 of the English Arbitration Act and a court will carry out a *de novo* review regarding arbitral jurisdiction (Born, 2014). If certain conditions are met, an arbitral award can also be challenged under Section 69 of the English Arbitration Act on a question of law arising out of award.

Despite the arbitral tribunal's power to decide on its jurisdiction (as provided by Section 30 cited above), Section 9 of the English Arbitration Act requires a court to grant a stay of the legal proceedings brought in respect of a matter which, under the agreement, is to be referred to arbitration unless the arbitration agreement is null and void, inoperative, or incapable of being performed. In addition, Section 32 of the English Arbitration Act provides a possibility to apply to a court and request determination regarding an arbitral tribunal's jurisdiction. Such action is possible only if the parties agree or the arbitral tribunal grants permission, which has to be approved by the court. Under Section 72 of the Act, a party refusing to participate in arbitration proceedings may refer to a court for a judicial determination regarding its jurisdictional objection.

Sections 30 and 9 of the English Arbitration Act cited above create an inherent conflict when deciding who – a court or an arbitral tribunal – should decide on the jurisdictional question *in the first place*. While solving this conflict the English courts have developed a flexible approach where certain relevant factors are considered while deciding whether it should be a court that decides jurisdictional objection or whether it should be dealt with by an arbitral tribunal. As provided by Born (2014) and Synková (2013), the English courts have considered the following factors:

- a) whether a party is specifically challenging an arbitration agreement or the challenge is related to the main contract only. Where a party is challenging the existence, validity or legality of an underlying contract but not specifically an arbitration agreement, the jurisdictional decision should be taken by an arbitral tribunal as the grounds related to the main contract do not directly impeach an arbitration clause (separability doctrine);
- b) whether a jurisdictional challenge is related to existence of an arbitration agreement or merely its scope;
- c) whether arbitrators are in a position to quickly resolve the issue and whether a detailed examination is necessary to determine the objection;
- d) cost efficiency and convenience;
- e) whether a party relying on arbitration agreement has a strong case that there is an arbitration agreement;
- f) whether arbitration is to take place with respect to other issues between the parties, *etc.*

¹ English Arbitration Act, 1996. Reproduced in Heilbron, H. 2008. *A Practical Guide to International Arbitration in London*. London: Informa Law, pp. 136 – 189. See also e.g. *Fiona Trust & Holding Corp and Others v Yuri Privalov and Others* [2007] EWCA Civ 20, [2007] 1 CLC 144 (CA) where the court noted: “it will, in general, be right for the arbitrators to be the first tribunal to be the first tribunal to consider whether they have jurisdiction to determine the dispute”.

English case law is in many ways not settled on the question of when a court, upon jurisdictional objection, should refer the matter to arbitration, as the courts adopted a variety of approaches referring to the factors indicated above as well as to others. It is particularly unclear whether and to what extent a court should be “*virtually certain*” that an arbitration agreement exists before referring the matter to arbitrators (Synková, 2013).

Comparative Analysis and Conclusions

When arbitral jurisdiction is challenged, it is not – and it cannot be – known whether that challenge is justified. A jurisdictional objection can be an attempt to unjustifiably run away from the parties’ binding agreement to arbitrate, but it can also be a fully justified attempt to secure one’s right to access a court when the parties have never agreed to arbitrate. Therefore, the legal provisions regulating the allocation of the jurisdictional competence between a state court and an arbitral tribunal must balance the following objectives:

- a) if the parties have agreed to arbitrate, this agreement must be given effect and any obstruction or delay in solving the dispute in the agreed forum should be avoided;
- b) any arbitration proceedings should be legitimate, thus, if the arbitration agreement is absent, a party cannot be barred from a court access (Synková, 2013).

From the above analysis, it is clear that in all three countries – France, Sweden and England – positive effect of the competence-competence is recognized and provides arbitrators with an authority to decide on their own jurisdiction. This approach resolves an otherwise existing logical trap – as the arbitrators derive their jurisdiction from the parties’ arbitration agreement, a mere challenge of such an agreement may be considered as preventing arbitrators to decide jurisdictional challenge. Positive effect of the competence-competence solves this issue and justifiably provides arbitrators with a power to decide jurisdictional objection, since otherwise any arbitral process could be easily obstructed and any parties’ arbitration agreement deprived of its effect.

At the same time, none of the jurisdictions analysed above provide the arbitrators with the power to have a final word on their jurisdiction (unless agreement to that extent is specifically reached by the parties and a national law recognizes such an agreement). A national court will review a question of arbitral jurisdiction if the jurisdictional decision by the arbitrators is challenged in front of a court.

However, the question whether and, if yes, to what extent arbitrators should be given *priority* to decide on their own jurisdiction, once such jurisdiction is challenged, is dealt with very differently.

In France, the arbitrator faced with jurisdictional challenge has a priority to decide that challenge¹. Therefore, the objective of giving effect to an arbitration agreement, protecting efficiency of arbitration and prevention of dilatory tactics by a recalcitrant party prevails (Poudret and Besson, 2007; Savage and Gaillard, 1999). In certain cases, arbitrators might be more apt to decide on the existence, validity and

¹ French Court of Cassation, 1st civil chamber, decision of 7 June 2006 in *Copropriété Maritime Jules Verne and others (France) v Société ABS American Bureau of Shipping (US)*, Case No 03-12034.

scope of arbitration agreements, especially if such analysis is complex (which is quite often the case) and requires the application of foreign law (Savage and Gaillard, 1999). Additional policy reason, which is referred to by Savage and Gaillard (1999), is that the French approach allows centralisation of arbitration matters in the same courts of higher instances as these courts now deal only with requests to set-aside or enforce arbitral awards as no declaratory actions are possible in lower courts. However, as stated by Park (2006), giving full effect to the negative competence-competence has its costs as “[a] person who never agreed to arbitrate may need to hedge bets in a bogus arbitration, at substantial costs of time and money”.

In Sweden, on the contrary, the arbitrators are not given priority to decide on a jurisdictional challenge and a party may refer to a court which will have a final word on arbitrators’ jurisdiction. Such an approach is generally driven by a belief that not arbitrators but a court is better suited to decide on jurisdiction (which might not always be the case, in particular in international matters); that a right to access a court should be protected and that in case a court’s *prima facie* decision regarding arbitral tribunal’s jurisdiction is erroneous, arbitral proceedings will waste parties’ time and costs, especially if arbitrators take their jurisdictional decision only at the end of the proceedings, *i.e.* in a final award (Girsberger and Voser, 2016).

The above approaches, therefore, represent the protection of *one* of the objectives *over* the other – while in France an arbitral jurisdiction is up front protected, in Sweden possibility to go to a court and obtain a decision on jurisdiction (which will be binding in arbitration) is provided, thereby protecting the legitimacy of the arbitral proceedings and access to a court.

The English approach represents a third model: it allows to consider a number of factors, which may be very different depending on the dispute, without given the priority to one of the objectives. Therefore, the considerable downsides of the French and Swedish approaches mentioned above may be avoided. The English setting is, therefore, better suited to balance the two objectives; however, it does not provide a lot of legal certainty as courts take different approaches on a case by case basis, which are not always compatible.

To conclude, the extreme applications of a negative effect of the competence-competence principle do not balance, but rather favour either giving an effect to an arbitration agreement or to the legitimacy of arbitral proceedings and these approaches have considerable downsides. The intermediate approach, which attempts to balance these two objectives depending on a number of particular circumstances, appears to be the most preferred one. For that purpose, legislators, while balancing the consequences of the negative competence-competence effect, use a number of useful tools, such as: (i) court’s *prima facie* review of arbitral jurisdiction (ii) different standards of review depending on the nature of challenge (e.g. whether the existence or only the scope of the arbitration agreement is challenged); (iii) different standard of review depending on whether arbitral proceedings have been commenced or not.

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