Applicable laws and procedures in international commercial arbitration

Section C: Jurisdictional issues in arbitration

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3.1 Determination of jurisdiction by an arbitration tribunal

Before it can decide on the substantive issue in dispute, an arbitration tribunal must ascertain that it has jurisdiction. This does not mean that arbitrators always have to make a full inquiry into all aspects of their jurisdiction. Generally, jurisdiction will not be an issue where both parties:

- participate in the appointment of the tribunal
- introduce their respective claims and counterclaims without reservations.

Where the tribunal is concerned about the scope of the arbitration agreement, and where there is no jurisdictional challenge, it may ask the parties to confirm the jurisdiction of the tribunal over the issue before it, which will give it jurisdiction if it did not exist before.

Many modern arbitration laws consider any participation in proceedings on the merits without challenging the jurisdiction of the tribunal as a submission to arbitration.[1] An exception to this general rule is the question of objective arbitrability of a given dispute which is outside the reach of party autonomy.

A full inquiry into all aspects of the tribunal's jurisdiction is necessary when one party explicitly contests the jurisdiction or does not take any part in the proceedings. In these cases a decision on the jurisdiction of the tribunal is required.

To strengthen the jurisdiction of the arbitration tribunal and to minimise challenges being used to delay or derail arbitration proceedings most modern arbitration laws employ different techniques. The central element in those efforts is the recognition of the tribunal's authority to determine its own jurisdiction or competence, the so-called **Kompetenz–Kompetenz principle**.

3.1.1 Kompetenz–Kompetenz

The doctrine of Kompetenz–Kompetenz overcomes the conceptual problems arising out of any decision by the arbitrator on his own jurisdiction. Any decision by the tribunal that no valid arbitration agreement exists would include at the same time a corollary finding that the tribunal also lacked jurisdiction to decide on its own jurisdiction (since there was no basis for such a jurisdiction).

The doctrine of Kompetenz–Kompetenz is a legal fiction granting arbitration tribunals the power to rule on their own jurisdiction. To justify the assumption of these powers, reference was first made in Article 36(6) Statute of the International Court of Justice (ICJ) which allows the ICJ which to rule on its own jurisdiction. A comparable competence was recognised for arbitration tribunals in the European Convention Article V(3).

Since then the doctrine has found recognition in the ICSID Convention Article 41(1) and is now firmly established in most modern arbitration laws. However, even if such provisions did not exist arbitration tribunals have traditionally assumed a right to rule on their own jurisdiction.

3.1.2 Separability and other techniques to strengthen the arbitrator's jurisdiction

The doctrine of separability is another technique recognised in arbitration rules and laws and further strengthens the jurisdiction of the arbitrator. While Kompetenz–Kompetenz empowers the arbitration tribunal to decide on its own jurisdiction, separability affects the outcome of this decision.

Any challenge to the main agreement does not affect the arbitration agreement: the tribunal can still decide on the validity of the main contract.[2]

Without the doctrine of separability, a tribunal making use of its Kompetenz–Kompetenz would potentially be obliged to deny jurisdiction on the merits since the existence of the arbitration clause might be affected by the invalidity of the underlying contract.

Null and void, inoperative or incapable of performance

The New York Convention and the majority of arbitration laws exempt national courts from referring a matter to arbitration, if the court concludes that the arbitration agreement is 'null and void, inoperative or incapable of being performed.'

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term also covers cases where arbitration is no longer possible at the agreed place of arbitration.

Different views exist as to whether the lack of sufficient funding will render arbitration agreements 'incapable of being performed' or 'inoperative'.

Standard of review of arbitration agreement

It is an open question whether courts should engage in a complete review of the existence and validity of the arbitration clause at any time, regardless of whether the arbitration tribunal has already determined the issue. The other option is to defer a review of the jurisdiction question until the post-award stage when either an appeal or challenge against the award is filed or enforcement is resisted.

Alternatively they could limit it to a review until the arbitration tribunal has ruled on its own jurisdiction.

The advantage of a court dealing with the question of jurisdiction at an early stage is certainty. The parties do not have to wait for months or years for a final decision on the validity of the arbitration agreement. Furthermore, parties do not have to engage in arbitration proceedings which, in the end, may prove futile if the court dealing with the issue at a later stage denies the existence of a valid arbitration clause. The disadvantage of this approach is that it provides the opportunity for a party to abuse court proceedings to delay and obstruct the arbitration.

Although arbitrators, are according to modern laws, not required to stay the arbitration while court proceedings are pending, in some cases they will feel it is necessary to do so. Most arbitrators want to avoid a situation where (after considerable time and money has been spent) the court decides that there is no basis for jurisdiction. According to Article 6 of the Model Law and comparable provisions in a number of modern arbitration laws,[9] appeals or challenges against awards or actions for enforcement can only be brought in certain designated courts.

It is often unclear whether courts called upon to decide a dispute on the merits should at a pre-award stage only verify the existence and validity of the arbitration clause, or can engage in a complete review of the issue. This is less of a problem with rules which contain limits on the extent of the pre-award review of the arbitration agreement by courts.[10]

Most rules, however, do not contain such limits, but in line with Article 8 Model Law or Article II(3) New York Convention provide that a court must refer the parties to arbitration unless it finds that the arbitration agreement is 'null and void, inoperative or incapable of being performed'. This wording seems to imply that the courts can engage in a full trial of the existence, validity and effectiveness of the arbitration agreement. However, in some jurisdictions a restrictive interpretation has been given to this provision.

'Referral' to arbitration

Considerable differences exist as to what is required from the courts if the defendant invokes a valid arbitration agreement. According to the New York Convention the Model Law and a number of national laws the courts have to 'refer the parties to arbitration' .Other

arbitration laws require the courts to decline jurisdiction,[11] while