WHO DECIDES THE ARBITRATOR'S JURISDICTION IN INTERNATIONAL COMMERCIAL ARBITRATION: THE COMPETENCE-COMPETENCE DOCTRINE FROM A TRANSNATIONAL PERSPECTIVE*

HAKEMLERİN ULUSLARARASI TİCARİ TAHKİM SÜREÇLERİNDEKİ YETKİ SINIRLARINA KİM KARAR VERMEKTEDİR: ULUSLARARASI PERSPEKTİFTE COMPETENCE-COMPETENCE DOKTRİNİ

Av./*Atty.* Lütfi GÖKTAŞ
Göktaş Hukuk Bürosu
Goktas Law Office

Abstract
The contractual character of international arbitration raises questions regarding jurisdiction of the arbitral tribunal. Although arbitration is a consensual process, the issue of who decides the arbitrator's jurisdiction is problematic because the arbitral proceedings cannot be deemed as being entirely separate from the court in the seat of the arbitration. As leading conventions, the UNCITRAL Model Law and the New York Convention provides multinational parties with a dispute resolution mechanism that enables them to have their disputes resolved by a neutral adjudication in order not to be affected by diminutions of national courts and to have easily enforceable judgments. To understand the authorization of arbitrators, the competence-competence doctrine must be scrutinized. Whereas the positive effect of the doctrine is widely recognized, the Model Law and the NYC are not clear on the negative effect, and different countries adopt different approaches regarding the negative effect of the competence-competence doctrine, which is concerned with who decides the arbitrator's jurisdiction when a party objects to the validity or scope of the arbitration agreement. Some apply the prima facie approach, which places greater value on the parties' interest for the purpose of preventing dilatory tactics and providing cost-efficiency. Others take a more interventionist and presumptive approach, which seeks to affirm the parties' intention at all stages in order to minimize the risk that parties who never agreed to arbitration are forced to participate. This dissertation offers a comparative analysis of jurisdictional approaches to granting priority to the arbitral tribunal to rule on its own jurisdiction.

Arbitration Agreement, Arbitrator's Jurisdiction, Intention of the parties, Competence-Competence Doctrine.

Öz
Uluslararası tahkimin akdi yapısı tahkim heyetlerinin yargı yetkilerine dair soruları ortaya çıkarmaktadır. Tahkim süreçlerinin yürütüldüğü makamların mahkemelerden bütünüyle bağımsız olduğu kabul edilememesi nedeniyle, hakemin yetkisinin kim tarafından tespit edileceği tahkimin karşılıklı mutabakata dayalı bir süreç olmasına rağmen problematiktir. Önde gelen konvansiyonlar olarak UNCITRAL Model Kanunu ve New York Konvansiyonu, ulusal mahkemelerin sahip olabileceği noksanlıklarından kaynaklanan etkilerin önüne geçilebilmesi ve kolayca uygulanabilecek kararlar alınabilmesi için çok uluslu taraflara anlaşmazlıklarını tarafsız yargılama yoluyla çözebilmelerine olanak sağlayacak bir ihtilaf çözme mekanizması sağlamaktadır. Hakemlerin yetkilerini anlayabilmek için Competence-Competence doktrininin incelenmesi gerekmektedir. Doktrinin sahip olduğu müspet etkisi büyük ölçüde kabul görürken Model Kanunu ve New York Konvansiyonu kapsamında menfi etkisi çok açık değildir ve birden fazla ülke Competence-Competence doktrininin bu menfi etkisine karşı, taraflardan herhangi birisinin tahkim anlaşmasının geçerlilik veya kapsamına itirazda bulunduğu hallerde hakemin yetkisine kimin karar vereceği hususunda farklı yaklaşımlar benimsemektedir. Bazıları, geciktirici taktiklerin önüne geçmeyi ve maliyet etkinliği sağlamayı amaçlayarak tarafların menfaatlerine daha çok değer veren karine yaklaşımını (prima facie) uygulamaktadır. Diğerleri daha müdahaleci ve varsayımsal bir yaklaşım izlemekte olup bu, hiçbir zaman tahkimi kabul etmeyen tarafların tahkime katılmaya zorlanmaları riskini en aza indirgemeyi ve tarafların iradesini tüm tahkim sürecinde teyit etmeyi amaçlar. Bu çalışma, tahkim kurulunun kendi yetkisi dâhilinde karar vermek yönünde bir öncelik tanıyan adli yaklaşımların karşılaştırmalı bir analizini sunmaktadır.

Tahkim Anlaşması, Hakemin Yetkisi, Tarafların İradesi, Competence-Competence doktrini.

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Abbreviations

DACA	:Departmental Advisory Committee on Arbitration
EAA	:English Arbitration Act 1996
FAA	:United States Federal Arbitration Act 1925
FCAFC	Federal Court of Australia Full Court
ICC	:International Chamber of Commerce
LJ	:Lord Justice
UKHL	:United Kingdom House of Lords
NYC	:New York Convention
UNCITRAL	:United Nations Commission on International Trade Law
AI LCIA	: Arbitration International London Court Of International Arbitration
VJTL	: Vanderbilt Journal of Transnational Law
PSL	: Penn State Law
Tul L Rev	: Tulane Law Review
AJCL	: The American Journal of Comparative Law
HJIL	: Houston Journal of International Law
BCDR	: BCDR International Arbitration Review
SJ	: Svensk Jursittidning
ILM	: International Legal Materials
CIARB	: Chartered Institute Arbitrators
NZULR	: New Zealand Universities Law Review
ICLQ	: International Comparative Law Quarterly
ARIA	: American Review of International Arbitration
J IntlArb	: Journal of International Arbitration
FILJ	: Fordham International Law Journal
UFLR	: University of Florida Law Review
MQJBL	: Macquarie Journal of Business Law
Nev LJ	: Newada Law Journal

I. Introduction

Arbitration is a private judicial system authorized and regulated by law which allows parties to resolve the dispute outside of the usual state procedural system and constitution. As a primary issue, arbitration requires an arbitration agreement – a contract in which the parties agree to submit their existing or future disputes to arbitrators, and not to the courts. In positive terms, an arbitration agreement obligates the parties to rely on this promise and provides the ground for the jurisdiction of the arbitral tribunal. At the same time, in negative terms, an arbitration agreement hinders

the parties from pursuing resolution by the courts in respect of disputes covered by the arbitration agreement.[1]

Thus, it is true that arbitration requires a contract providing the arbitral tribunal with jurisdiction to hear and determine the specific or all disputes that the parties agree upon. It is accepted that arbitration is a consensual process based on the objective expression of a party that waives recourse to otherwise competent courts, either in whole or in part. In this respect, in order for the arbitral tribunal to be authorized and entitled to hear the dispute, there must be a valid arbitration agreement, also called the 'jurisdictional clause'.[2]

Ultimately, provided that the parties have agreed to arbitrate, this derogation from the state's procedural system should be respected and should be compelled on the ground of the parties' intention.[3]

However, if there is a challenge concerning the parties' intention, the existence or the validity of the parties' agreement to arbitrate and the scope of arbitrable disputes become preliminary matters in arbitration and may bring objection to the legality of the arbitrator's jurisdiction. For example, one party might assert that it never agreed to arbitrate, or it might contest that the arbitrator exceeded its jurisdiction concerning the disputes uncovered by the arbitration agreement. However, some person must determine the existence, validity, and/or scope of the arbitration clause since the issue is whether there is essentially consent to derogate from the state's system of justice.[4] At this point, the question of 'who decides' arises on the issue of jurisdiction.

In international arbitration there are two linked concepts, which are 'separability' and 'competence-competence', dealing with issues pertaining to the validity and existence of the arbitration agreement. Both concepts examine the validity and operation of the arbitration agreement. Whereas separability concerns only the issue of the function of the arbitration agreement, competence-competence deals with both the function of the arbitration agreement and judicial scrutiny by courts and arbitrators.

The main principle is that arbitrators may rule on their own jurisdiction, at least until the court intervenes. This principle is that the heart of arbitration, often expressed as *Kompetenz-Kompetenz*[5] (literally,'jurisdiction on jurisdiction') has been applied to questions of assessing the arbitrator's jurisdiction and its power to be exercised.[6] In other words, competence-competence seeks to answer the 'who decides' jurisdiction

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[1] E Gaillard and J Savage (eds),*Fouchard Gaillard Goldman* on *International Commercial Arbitration* (Kluwer 1999) 381.

[2] A Tweeddale and K Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (OUP 2005) 34.

[3] WM Reisman and others, *International Arbitration Commercial Arbitration: Cases and Materials and Notes on the Resolution of International Business Disputes* (West Publishing Company 1997) 645.

[4] William W Park, 'Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law' (2008) 8 Nev LJ 135, 136.

[5] Normally interchangeable, *competence-competence* and *kompetenz-kompetenz* often take their usage by the speaker for a German or a French formulation. The phrase 'competence-competence' will be used in this paper. See generally, Pierre Mayer, *L'autonomie de l'arbitre dans l'appreciation de sa propre competence* 217 Recueil des Cours 320 (Academie de droit international de La Haye 1989).

[6]William W Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction* (Kluwer Law International 2007) 3-4.

question on a broader scale,[7] although both concepts have a common goal: to preserve the arbitration process unobstructed by early judicial intervention.

Specifically, according to the competence-competence principle, the arbitral tribunal is entitled to determine its own jurisdiction where one of the parties challenges the arbitration. Yet, although arbitration is a consensual process for the resolution of disputes in private, the courts of the forum play an important role within arbitration proceedings or at the stage of recognition.[8] Different countries take divergent approaches of the principle. Hence, the basic precept of the principle constitutes only a part of story resulting in further controversial questions concerning the judicial role of national courts in determining the jurisdiction of arbitrators.[9]

Fundamentally, in no system of law should an arbitrator's determination overreach the scope of review by a court. It is likely that an arbitrator's determination beyond his jurisdiction might be rescinded at the seat of arbitration.[10] Therefore, although principally the arbitral tribunal is authorized to determine its own jurisdiction, the negative effect of the principle is open to debate on the conflict of jurisdiction between arbitrators and judges. Consequently, there are various approaches taken by courts to the question of who decides the jurisdiction of arbitrators and at what stage of the arbitral tribunal judicial intervention should take place.[11]

In some jurisdictions, courts take the presumptive approach that the existence and validity of the arbitration agreement are left to the courts to determine. By contrast, others limit their examination to a prima facie review of the arbitration agreement, which only requires an examination to affirm that a valid arbitration agreement exists.[12]

Each alternative has its own possibilities and risks for the parties. Courts taking a prima facie approach, which causes a delay in judicial scrutiny, can subject respondents to the expense of unauthorized proceedings before going beyond arbitrators. Nonetheless, early recourse to courts can enhance occasions for dilatory tactics.[13]

Moreover, although arbitration is a significant dispute settlement mechanism in the business world due to its benefits such as cost-efficiency and speed in final and binding awards, it cannot be assumed entirely detached from national courts, which render the awards enforceable. Hence, while addressing the matter of 'who decides', there should be striking a balance assisting the arbitral procedure without undue court intervention and minimizing the possible waste of time and expense in the event of a competent court's intervention.[14]

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[7] JJ Barcelo, 'Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transactional Perspective' (2003) 36 VJTL 1115.
[8] Michael Kerr, 'Arbitration and the Courts: The UNCITRAL Model Law' (1985) 34 ICLQ 1-2.
[9]Ozlem Susler, 'Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence' (2009) 6 MQJBL 119, 120.
[10]Reisman and others (n 3).
[11] ibid.
[12] ibid.
[13] ibid.
[14]Susler (n 9) 142.

Above all, various approaches taken by countries affect the answers to specific questions: When should courts intervene to determine challenges to arbitral authority? What standards courts should apply to refer the parties to arbitration? In what circumstances (if any) should an arbitral tribunal's decision on its authority be final? These questions create problems for the competence-competence principle concerning the timing of the court's determination and the finality of the arbitrator's decision on his authority and will be analysed in this work.[15]

In addition, in international commercial arbitration, the question of who decides the arbitrator's jurisdiction may arise in court or arbitration at different stages. Countries have taken different approaches to be performed in these stages, which frame variations on the competence-competence principle. Accordingly, an accurate analysis requires clarification of these stages.[16]

The first stage generates litigation usually at the beginning of the dispute with regard to whether the court has jurisdiction to hear the dispute or send the parties to arbitration. In other words, at this stage the judges decide on the 'who decides' question as a primary matter. This stage is vital regarding whether the arbitration is authorized to proceed *de facto* or is impeded by court intervention due to a set of legal matters necessitating court decision, rather than arbitration.[17]

The second stage is decision making by arbitrators whether to hear the dispute or decline jurisdiction. The parties may pass directly to this stage without seeking court decision or it is possible for both stages to proceed simultaneously, with one party seeking to hear the case in the court and the other in an arbitral tribunal. In the event that the parties proceed directly to arbitration but one party still challenges the arbitral tribunal's jurisdiction, the tribunal will determine whether it has jurisdiction. This authority of arbitrators is what is referred to by competence-competence, at least as a primary issue.[18]

The third stage encompasses court review of an arbitral award concerning jurisdiction. This stage can occur in either setting-aside proceedings or in recognition and enforcement proceedings where arbitrators have decided they have jurisdiction, either in a preliminary award or in the final award itself accordingly.

This dissertation will first examine the elements of international arbitration agreements since the doctrine of competence-competence deals with the validity and scope of arbitration agreements. Also, as a linked concept, the separability doctrine will be analysed, in order to clearly show the meaning of international arbitration agreements and to indicate the aim of the doctrine of competence-competence.

After examining the meaning of international arbitration agreements, since the doctrine is provided for in the Model Law, related articles in the Model Law will be analysed together with various applications of the competence-competence doctrine. In particular, the negative effect of the doctrine will be shown and discussed by

[15]Park (n 4).
[16]Barcelo (n 7) 1118.
[17] ibid.
[18]Barcelo (n 7) 1119.

reference to international arbitration principles. The study will conclude and make suggestions for creating a better application of the doctrine.

II. Elements of International Arbitration Agreements

In order to better analyse the various implementations on the determination of jurisdictional questions through courts and arbitral tribunals, arbitration agreements must be analysed. The legal framework of arbitration must to be introduced for the purpose of establishing the ground contributing to divergent practices.

A. International Legislative Regimes in Commercial Arbitration

In the international commercial context, it is widely regarded that the cornerstone of current international commercial arbitration[19] is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[20] ('New York Convention or 'NYC'), which has been ratified by over 130 countries and the United Nations Commission.

The progress of international arbitration law has been undoubtedly furthered by the large-scale ratification of the NYC and its pro-arbitration standpoint. The NYC substantially deals with the simplifying of the recognition and enforcement of arbitral awards. Also, it broadens its safeguard to the outset of the arbitral process by virtue of the recognition and enforcement of the parties' agreement to resolve their disputes by international arbitration.[21]

In addition to the NYC, the 1985 International Trade Law Model Law on International Commercial Arbitration[22] ('UNCITRAL Model Law') is the most significant statutory instrument in the field of international commercial arbitration, which has been adopted in a considerable number of jurisdictions, serving as a model for legal bodies in various other jurisdictions. It concerns the international arbitral process in an all-inclusive manner.[23]

It has been suggested that the NYC's provisions centre upon the recognition and enforcement of arbitration agreements and arbitral awards, whereas the UNCITRAL Model Law provides a comprehensive legislative framework for all aspects of international arbitration.[24]

Furthermore, it is important to highlight the purpose of arbitration. Due to the limited jurisdiction and enforceability of court judgments, arbitration is more preferable to

[19] Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer 1994).
[20] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, *United Nations Treaty Series*, vol 330, No 4739 ('The New York Convention') <http://www.newyorkconvention.org/texts> accessed 10 July 2015.
[21] E Gaillard and Y Banifatemi, 'Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators' in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 257, 257.
[22] United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (Vienna; United Nations 2008) ('UNCITRAL Model Law') <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html> accessed 10 July 2015.
[23] Gary Born, *International Arbitration: Law and Practice* (Kluwer 2012) 19-25.
[24] ibid.

litigation in an international commercial environment.[25] The prominent feature of the NYC is that it ensures that the courts of other contracting states must enforce an arbitral award delivered in a contracting state.[26] Consequently, difficulties with enforceability of arbitration awards are an important factor with regard to why most parties will choose a contracting state to the Convention for the purpose of jurisdiction.[27]

However, despite the inviting facilitation of the NYC for accessing more easily enforceable judgments, it does not provide any limitations or guidelines to be implemented on the court's determination of the matters of existence, validity, or scope of the arbitration agreement, instead leaving the issue to the discretion of national legal systems.[28] Before proceeding to examine the provisions of the NYC and the UNCITRAL Model Law on the issue of existence and scope of arbitration agreements, it will be necessary to analyse the meaning of arbitration agreements provided in the NYC and the UNCITRAL Model Law together with leading cases.

B. Agreements to Arbitrate In International Commercial Contracts

The commonly acknowledged definition of arbitration in both civil law and common law is that arbitration is a form of resolving disputes between one or more parties that obtain their power from an agreement between them and resulting in a binding decision upon them.[29] In order to understand the issue of jurisdictional questions, it is necessary to examine the meaning of an agreement to arbitrate.

Arbitration agreements are contractual and jurisdictional in character;[30] that is, as in any mechanism of dispute, consent to arbitration is mandatory, and by which the parties waive recourse to ordinary legal bodies.[31] Moreover, the parties' agreement provides the arbitral tribunal with its jurisdiction to hear and determine the disputes whose scope is designated by the parties.[32]

Thus, the agreement to arbitrate is the fundamental cornerstone of international commercial arbitration and contributes to evidence the consent of the parties in favour of arbitration. In fact, the agreement to arbitrate is sufficiently clear and valid. Also, arbitration agreements between the parties to international commercial contracts are recognized and enforced by a great number of national laws and international conventions.[33]

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[25] Rebecca Callahan, 'Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum' (bepress Legal Series, 2006), Working Paper 1248 <http://law.bepress.com/expresso/eps/1248/> accessed 13 July 2015.
[26] Paolo Contini, 'International Commercial Arbitration: The United Nations Conventions on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 8 AJCL 283, 291.
[27] Susler (n 9).
[28] Gaillard and Banifatemi (n 21).
[29] Henry P DeVries and P Henry, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1983) 57 Tul L Rev 42.
[30] Janet A Rosen, 'Arbitration under Private International Law: The Doctrines of Separability and Competence de la Competence' (1994) 17 FILJ 599, 599.
[31] A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn. Sweet & Maxwell 1999) 135.
[32] Tweeddale (n 2) 34.
[33] Susler (n 9) 121.

Article 7(1) of the UNCITRAL Model Law refers to an agreement to arbitrate as 'an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'.[34] Also, the Convention provides a similar provision in article II(1) and states that each contracting state 'shall recognize' the defined arbitration agreements as having these requirements.[35]

On the other hand, the parties must comply with their undertaking to submit to arbitration any disputes covered by their agreement.[36] This obligation originates from the straightforward application of the principle that parties are bound by their contracts. This principle is often expressed as the maxim *pacta sunt servanda,* which is one of the most widely recognized rules of international contract law and has been regarded as a substantive rule in international commercial arbitration.[37] Consequently, the courts of a given country are prohibited from hearing such disputes; in other words, if the dispute is covered by an arbitration agreement, the courts will be expected to refer the parties to arbitration.[38]

For the purpose of referring parties to arbitration, article II (3) of the NYC provides:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[39]

By virtue of this provision, international arbitration agreements are presumptively valid and shall be recognized and subject to an exclusive and limited number of grounds for invalidity –where agreements are 'null and void', 'inoperative', or 'incapable of being performed', or where they involve a 'subject matter not capable of settlement by arbitration' referred to in article II(2) of theNYC.[40]

It has been suggested that the NYC's drafters allowed no room for national courts to formulate additional bases for holding an international arbitration agreement invalid.[41] Accordingly, if there is no ground provided on the provision, courts of contracting states must enforce an award given in any state that has ratified the NYC.

In essence, the courts' determination on the validity of an arbitration agreement arises from this provision in international arbitration. However, a court applying article II(3) faces the vital question of the extent of its review of the arbitration agreement. Fundamentally, a court may determine whether the arbitration agreement is 'null and

[34] UNCITRAL Model Law, art 7(1).
[35] NYC, art II(1).
[36] Gaillard and Banifatemi (n 21) 258-260.
[37] Gaillard and Savage (n 1) 382.
[38] JDM Lew, LA Mistelis and S Kroll, *Comparative International Commercial Arbitration* (Kluwer 2003) 78.
[39] NYC, art II(3). See also, in similar terms, UNCITRAL Model Law, art 8.
[40] ibid, art II(3).
[41] HM Holtzmann and JE Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Int 1989) 303.

void, inoperative or incapable of being performed' with the purpose of referring the parties to arbitration.[42]

However, notwithstanding this, it is a widely held view that arbitration agreements are contractual and jurisdictional in character, and presumptively valid. The NYC does not provide any limitations or standards to be executed on the court's determination of the matters of existence, validity, or scope of the arbitration agreements. Conversely, it delegates the issue to the discretion of national legal systems. This has generated a variance of approaches and led to opportunity for undesirable judicial review in a number of jurisdictions.[43]

More specifically, due to lack of limitation on the provision, critical questions arise. Are the courts required to determine, in a comprehensive manner, the existence and validity of the arbitration agreement and make a final decision? Insofar as arbitrators have the power rule on their own jurisdiction, should the courts defer this determination until the jurisdictional award of the tribunal in order not to frustrate such power? Should courts only implement a prima facie verification that the arbitration agreement exists and is valid, and reserve their full review of the question at the time of enforcement?

The answers to these questions form the notion of negative effect of competence-competence doctrine, providing that courts should not engage in the examination of an arbitrator's jurisdiction before the arbitrators have decided on their own jurisdiction. This rule of priority on the side of the arbitrators represents the specific character and autonomy of international arbitration, in accordance with the NYC's recognition of the validity of the arbitration agreement and of the award resulting from the arbitral process.[44]

C. The Doctrines of Separability and Competence-Competence

In an international arbitration context, separability is a commonly accepted principle, and ensures the autonomy of the parties to the contract. Its widespread recognition is fundamentally ascribed to several factors such as: being accepted in the world's leading institutional arbitration rules; its essentially unanimous recognition in arbitration legislation; its acceptance in arbitration case law globally; and its application in current awards of international courts.[45]

In fact, the doctrines of separability and competence-competence are fundamental concepts and well established in the field of international commercial arbitration for the purpose of facilitating international trade.[46]Although they perform different functions, both principles are designated in tandem to confer chief responsibility on the tribunal for determining whether it has jurisdiction.[47]

However, although separability concept is recognized and applied in an effective and similar way in current international practice, it is not possible to affirm that the actual meaning of competence-competence is enforced in the same way. Indeed both

[42] Gaillard and Banifatemi (n 21) 258.
[43]Susler (n 9) 121.
[44] Gaillard and Banifatemi (n 21) 258.
[45] Gaillard and Savage (n 1) 199.
[46] Rosen (n 30) 602-603
[47] Julian DM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) AI LCIA 179, 193.

concepts come to the fore when there is an assertion as to the validity of the arbitration agreement. In this respect, the separability concept, as a cornerstone of arbitration agreements, will be analysed in the light of leading cases and international legislation.

However, it is first necessary to clarify the aim of these two concepts. Parties to arbitration agreements, aiming to detract a particular dispute from the jurisdiction of the arbitral tribunal, may conceive and make objections to the validity and scope of the arbitration clause. The doctrines of competence-competence and separability of the arbitration agreement have appeared to rationalize a legitimate attempt by arbitrators, courts and scholars to avoid the consequences of such misconducts and unacceptable behaviour.[48]

The generally accepted definition of separability is that the arbitration clause in a contract is regarded to be separate from the main contract of which it comprises and, in this respect, survives the termination of that contract.[49] In particular, if the substantive contract is deemed to be null, void, or terminated, this does not *ipso facto* render the arbitration clause invalid, since in a similar way to a jurisdiction agreement, an arbitration clause confers authority on the tribunal to determine the merits of the substantive contract and its consequences.[50]

In other words, separability means that the arbitration agreement is separable from the rest of the contract, and claiming that the latter is invalid does not prevent the arbitrators from ruling on the validity of the former.[51]

To illustrate the meaning of the separability doctrine, in the leading and well-known case of *Buckeye Check Cashing Inc v Cardegna*,[52] the US Supreme Court first addressed how challenges to the validity of arbitration agreements can be divided into two types: challenging the agreement to arbitrate and other challenges that the contract as a whole is invalid as a result of illegality (eg the agreement was fraudulently induced). The Court concluded that a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must be referred to the arbitrator.

Also, the court referred to *Prima Paint Corp v Flood & Conklin Mfg Co*[53] in relation to the question of who should decide jurisdictional challenges. Notably, the US courts take a presumptive approach and apply the separability doctrine; in other words, since the US approach does not recognize the negative effect of competence-competence, it confers the authority of determining the validity of the arbitration agreement upon the courts at any stages, although they do accept the separability doctrine when interpreting these challenges.

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[48] Carl Svernlov, 'What Isn't, Ain't: The Current Status of the Doctrine of Separability' [1991] J IntlArb 37, 37-38.
[49] Redfern and Hunter (n 31) 193.
[50] Jean Francois Poudret and others, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007) 168.
[51] Kaj Hober, 'The Doctrine of Separability Under Swedish Law, Including Comments on the Position of American and Soviet Law' [1983] SJ 257, 264.
[52] *Buckeye Check Cashing Inc v Cardegna* [2006] 546 US 440 (US Supreme Court).
[53] *Prima Paint Corp v. Flood & Conklin Mfg Co* 388 US 395, 87 S Ct 1801, 18 L Ed 2d 1270 (1967).

On the other hand, the main reason for the separability doctrine is that both contracts have different meanings and consequences. The reason for the competence-competence doctrine is that the meaning and consequences of arbitration agreements need to be determined by arbitrators, not judges. While separability ensures that the arbitration clause is separate from the main contract and needs to be determined by arbitrators on the one hand, the competence-competence doctrine gives the authority to determine the validity of an arbitration clause to arbitrators. [54]

Ultimately, the compound effect of both doctrines is that arbitration agreements are autonomous and must be treated as having a different meaning from the principal agreement, and courts, in the place of arbitration, are empowered to monitor the arbitral proceedings. However, courts should not exceed their role of assisting the arbitration proceedings; rather, national courts are entitled to lend assistance to arbitrators so that they are able to hear the case and deliver the judgment at the request of the overseas parties. Thus, jurisdictional scrutiny should be in accordance with the purposes of voluntary arbitration.[55]

Furthermore, inter alia, the separability doctrine permits the application of different substantive laws to the parties' arbitration agreement and underlying contract, and procures an effective single decision-making process[56] which is promoted by the reasonable commercial presumption. That is, the parties in international commercial arbitration often wish to avoid the inconvenience of having disputes arising from their transaction being heard in different fora.[57] This approach valuing the autonomy in arbitration was well illustrated by Allsop J in *Comandate Marine Corp v Pan Australian Shipping Pty Ltd*.[58]He stated that such an approach is especially applicable when the parties are based in different countries and legal systems since it provides autonomy.

Parties to transactions from different states might be reluctant to recourse to the courts in other jurisdiction is because the proceedings would be operating in another language, or in accordance with unfamiliar procedural and substantive laws of another state. Arbitration thus operates to 'equalize' the non-state entity by resolving the dispute in accordance with the parties' designation to minimize or ignore the prevailing character of one of the parties in a national court.[59]

In addition, in a modern perspective, while courts work in accordance with the established tradition, arbitration represents an unorthodox and innovative method of settling disputes. In this regard, arbitration, through the instrument of 'international designation', is able to respond to questions that have not been answered by the judicial system, and is a mechanism that satisfies specific needs of the parties, which usual courts cannot provide due to its procedural system with its own legal requirements.[60]

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[54] Richard C Reuben, 'First Option, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions' (2003) 56 SMU Law Review 820, 828.
[55] ibid.
[56] Alan S Rau, 'Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions' (2003) 14(1) ARIA 11.
[57]Susler (n 9) 123.
[58]*Comandate Marine Corp v Pan Australian Shipping Pty Ltd* [2006] FCAFC 192, 165.
[59]Reisman (n 3) ixxvii.
[60] ibid.

Therefore, it is possible to assert that arbitration is a special mechanism meeting the needs of parties from different fora and that the courts are likely to fail to meet all needs in the same way without causing unfairness since they are designated as a state mechanism, not an international one.[61] Ultimately, while addressing the components of arbitration agreements it will be necessary to consider the demands on arbitration.

Additionally, in *Fiona Trust & Holding Co v Privalov*,[62] Lord Hoffman, while interpreting the case in the light of separability, stated that arbitration is consensual depending upon the intention of the parties as expressed in their agreement. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose, and an understanding of this purpose will influence the way in which one interprets their language. They will want the disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration, and the unobtrusive efficiency of its supervisory law.

Finally, numerous institutions and national legislatures draft their rules with regard to separability to sustain the validity of arbitration clauses, which consist of 'non-existent' contracts. However, this non-existence cannot signify 'never existed', but must signify 'ceased to exist'.[63] Correspondingly, if a contract is no longer in existence by the time of the arbitration, the tribunal still may retain the platform. By contrast, if the contract never existed, then an arbitration agreement never existed. However, the latter situation is rarely faced in practice.[64]

Therefore, separability is applicable if a contract existed at some point in the course of time. Separability is recognized in the UNCITRAL Model Law, and numerous national arbitration laws and institutional arbitration rules have incorporated it by enacting the Model Law or using it as the ground of their arbitration legislation.[65]

Article 16(1) of the UNCITRAL Model Law enshrines separability by providing:

> For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms within the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.[66]

Article 8(1) of the Model Law goes a step further and provides the circumstances in which an arbitration agreement should not be referred to a tribunal:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the

[61] Frank EA Sander, 'Alternative Methods of Dispute Resolution: An Overview' (1985) 37 UFLR 2.
[62] *Fiona Trust & Holding Co v Privalov* [2007] UKHL 40 (HL).
[63] Redfern and Hunter (n 31) 543-544.
[64] ibid.
[65] Susler (n 9) 125.
[66] UNCITRAL Model Law, art 16(1).

> parties to arbitration unless it finds that the agreement is null and void, and inoperative of being performed.[67]

The above provision of the Model Law does not contain the term 'non-existent'. Therefore, it is controversial that the court, before considering whether an arbitration agreement is 'null and void' and 'inoperative of being performed', must primarily determine whether an arbitration agreement ever existed at all. Alternatively, it has been suggested that the term 'non-existent' may be inferred from the provision that if challenges concern the existence or validity of the arbitration agreement (for instance, that the arbitration agreement did not exist), it is within the remit of the tribunal's authority to rule upon it, unless the court determines the arbitration agreement to be prima facie invalid.[68]

To illustrate, in *Al-Naimi v Islamic Press Agency Inc*,[69] Waller LJ addressed the exercise of the inherent jurisdiction by the court to stay proceedings in favour of arbitration where the issue of agreement or its scope is the subject matter. Waller LJ stated that it will be fair to refer the dispute to arbitration in some cases, but 'only where the court considers that it is virtually certain that there is an arbitration agreement or if there is only a dispute about the ambit or scope of the arbitration agreement.[70]

There is concern about the possibility of the waste of time and expense that can result from having a dispute heard both by arbitrators and the court, or the opportunity of appeal on points of law that could have been overcome at the outset by the court. In addition, it has been suggested that a court should not deprive the party of the benefit of the contract is has made to resolve disputes by arbitration.[71]

Further, competing demands on the practice of law are to protect arbitration from dilatory tactics on the one hand and to allow genuine disputes concerning the tribunal's jurisdiction to be determined by a court on the other. It is at this point of policy tension that there exists an overlap between separability and competence-competence.[72]

III. The Principle of Competence-Competence

The rules governing international arbitration provide courts with power of review concerning the existence and validity of an arbitration agreement. In the same manner, as well-founded bodies, national courts have no impediment to ruling on the validity and scope of an agreement conferring them jurisdiction. It is generally accepted that every judge is judge of his jurisdiction.[73] As a voluntary agreement, arbitration needs to establish a legal foundation with the purpose of being internationally effective.

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[67] ibid art 8(1).
[68] *Albon v Naza Motor Trading SDN BHD* [2007] All ER (D) 501.
[69] *Al-Naimi v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 ('*Al-Naimi*).
[70] Nicholas Pengelley, 'Albon v. Naza Motor Trading: Necessity for a Court to Find that there is an Arbitration Agreement before Determining it is Null and Void' [2008] AI, LCIA 171, 178-179.
[71] ibid.
[72] Susler (n 9) 124-125.
[73] G Cornu and J Foyer, *Procedure Civile,* (Presses Universitaires de France 1958) 138.

Thus the principle of competence-competence has been founded in international arbitration law.[74]

Competence-competence is defined as the conferral of inherent power on the tribunal to rule on whether it has jurisdiction to hear the dispute and afterwards on the existence of the main contract.[75] Consequently, challenging the existence or the validity of the arbitration agreement will not prevent the tribunal from proceeding with the arbitration, ruling on its own jurisdiction. This is known as the positive effect of the competence-competence principle and is currently recognized in a large number of countries.[76]

The doctrine has another much more prominent and controversial aspect, known as the negative effect. It is well known for its pro-arbitration character, engendered in French law.[77] The negative effect limits the function of the court with regard to granting the tribunal the initial opportunity to determine its own jurisdiction and the validity of the arbitration agreement. Also, this authorization of the tribunal to determine its own jurisdiction at the first stage is galvanized by assuming that the tribunal's ruling is a provisional status which is reviewable by the court.[78]

The courts reserve the authority to perform a complete review once an award is issued, to either set the award aside or enforce it.[79]

Accordingly, arbitrators are the first judges of their own jurisdiction and the courts' control is deferred to the stage of enforcing or setting aside the arbitral award given on the ground of the arbitration agreement. In short, a court that is faced with the question of the existence or validity of the arbitration agreement must abstain from a substantive assertion concerning the arbitrator's jurisdiction until such time as the arbitrators themselves have had an occasion to do so.[80]

Specifically, the competence-competence doctrine concerns the question of jurisdiction, which is a typical preliminary matter for the arbitral tribunal to determine. *Christopher Brown Ltd v Genossenschaft*[81] is a good illustration of the matter of being preliminary, in which it was held that if the jurisdiction of arbitrators is challenged or questioned, they are neither bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally, nor bound to continue without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which has power to determine it. The arbitrators are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties (because that they cannot do) but for the purpose of

[74] Gaillard and Savage (n 1) 259.
[75] Amokura Kawharu, 'Arbitral Jurisdiction' (2008) 23(2) NZULR 238, 238-239.
[76] Gaillard and Banifatemi (n 21) 259.
[77] Barceló (n 7) 1124.
[78] Doug Jones, 'Competence-Competence' (2009) 75(1) CIARB 56, 57.
[79] Susler (n 9) 125.
[80] Gaillard and Banifatemi (n 21) 260.
[81] *Christopher Brown Ltd v Genossenschaft Oesterreichister Waldbesitzer Holzwirtschaftsbetriebe Registrierte GmbH* [1954] 1 QB 12, 13 (Devlin J).

satisfying themselves as a preliminary matter whether they ought to continue with the arbitration or not.[82]

As a preliminary matter the question of jurisdiction and whether a dispute ought to be determined by a tribunal rather than a court is subject to questions such as whether an arbitration agreement exists, whether it is valid, and whether the dispute falls within the scope of the arbitration agreement.[83]

In fact, the doctrine of competence-competence is the heart of the arbitral process and is a reflection of international trade's necessities in the judicial process. It is particularly true that parties from different nationalities in international transactions generally proceed with the consideration that any and all disputes about their contractual relationship, including disputes concerning their agreement to arbitrate, will be resolved in a neutral, non-national forum. Substantially, the competence-competence doctrine is a practical necessity since, without it, a party to an arbitration agreement would be able to obstruct the arbitration solely by challenging the parties' arbitration agreement.[84]

Consequently, the policy notion underlying the rule of priority in favour of the arbitrators is substantially the prevention of delaying tactics by the parties and the centralization of litigation regarding the existence and validity of the arbitration agreement. The arbitral process would be severely hampered if parties were able to exploit the courts to start parallel proceedings for the only purpose of conflicting with progress of the arbitration. In conjunction with delaying tactics, the parties' time and costs efforts would be better saved if they were not obligated to endure parallel and duplicative proceedings on the question of the existence and validity of the arbitration agreement.[85]

Requiring arbitrators to stay the determination of their own jurisdiction pending the conclusion of court proceedings on the same matter would be contrary to the essential principle of competence-competence and the arbitral process. In addition, providing the arbitrators with the first opportunity to determine their own jurisdiction and inviting the courts to perform a full examination of the existence and validity of the arbitration agreement after the arbitral award is issued rather than immediately conserves the centralization of the court review of disputes in association with arbitration. That it is to say, jurisdiction to review the existence and validity of an arbitration agreement should remain with the courts having jurisdiction to review arbitral awards rather than being scattered, depending on the parties' specific procedural preferences, among commercial and civil courts which would, under normal circumstances, have jurisdiction in default of an arbitration agreement.[86]

On the other hand, it has been suggested that, theoretically, there is no base for an arbitrator's authority to decide his own jurisdiction since an arbitrator's authority originates exclusively from the parties' arbitration agreement. Arbitrators, thus, lack

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[82] ibid.
[83] T Varady, JJ Barcelo and Arthur T von Mehren, *International Commercial Arbitration: A Transnational Perspective* (3rd edn, Thomson West 2006) 87.
[84] Robert H Smit, 'Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (2002) 13 ARIA 15.
[85] Gaillard and Savage (n 1) 260.
[86] ibid.

authority to determine anything unless and until their authority under the parties' arbitration agreement is established.[87]

To illustrate, in *Ottley v Sheepshead Nursing Home*,Newman J (dissenting) stated:

> Our deference to arbitrators has gone beyond the bounds of common sense. I cannot understand the process of reasoning by which any court can leave to the unfettered discretion of an arbitrator the determination of whether there is any duty to arbitrate. I am even more mystified that a court could permit such unrestrained power to be exercised by the very person who will profit by deciding that an obligation to arbitrate survives, thus ensuring this own business. It is too much to expect even the most fair-minded arbitrator to be impartial when it comes to determining the extent of his own profit. We do not let judges make decisions, which fix the extent of their fees… How, then, can we shut our eyes to the obvious self-interest of an arbitrator?[88]

Furthermore, in *Trafalgar Shipping Co v Int'l Milling Co*, it was held that 'it is not likely that arbitrators can be altogether objective in deciding whether or not they ought to hear the merits. Once they have bitten into the enticing fruit of controversy, they are not apt to stay satisfying of their appetite after one bite.'[89]

Goldman suggests:

> Since arbitration remains consensual at its core, one might even ask how a purported tribunal can be 'seized' of any matter on the basis of a void clause. There exists a risk of loading the analytic dice by using the term 'arbitration' to refer to a process that was never accepted by the two sides.[90]

He gave an example by referring to Abraham Lincoln's phrase and stated:

> When a signature on an alleged arbitration agreement was clearly forged, or signed with a gun at her head, to label someone an arbitrator would not provide decision-making authority any more than calling a dog's tail a 'leg' would give the animal five limbs instead of four.[91]

Thus, it is argued that allowing the arbitral proceedings based on an invalid arbitration agreement, which had been found valid by arbitrators, does not, indeed, render the agreement valid. Therefore, a party who has not consented to arbitration might be forced to endure the arbitral proceeding until the stage of enforcement and it would bring about undue costs and efforts.[92]

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[87] Gaillard and Banifatemi (n 21) 22.
[88] *Ottley v Sheepshead Nursing Home,* 688 F. 2d 883, 898 (2d Cir 1982) (Newman J).
[89] *Trafalgar Shipping Co v Int' l Milling Co,* 401 F.2d 568 573 (2d Cir 1968).
[90] Park (n 6) 92.
[91] Abraham Lincoln once asked, 'If I call a tail a leg, how many legs does a dog have?' He then answered, 'No. Four. Calling a tail a leg does not make it so.'
[92] ibid.

Finally, there are numerous differences in standards and tests applied to determine questions concerning the existence and validity of the arbitration agreement. The dissimilarities in the approaches of the national courts to the negative effect are also linked to the respective national policy rationales.

One approach to competence-competence is based on the policy of preventing dilatory tactics used by parties to delay arbitration. Another approach is based on the policy of obtaining centralization of judicial review of disputes regarding arbitration. These dissimilarities arise in the interpretation of the NYC and the UNCITRAL Model Law between the courts of the contracting states. Therefore, it will be necessary to analyse these approach questions of what is inferred from the provision and what should be inferred.

A. The UNCITRAL Model Law Approach

The UNCITRAL Model Law has been largely used as a sample for national laws because of its adoption by the United Nations Commission on International Trade Law. It has been criticized due to its overly general content using minimal standards and inadequate guidelines.[93] In this part, articles 8(1), 8(2), 16(1) and 16(3), which are provisions relevant to competence-competence, will be analysed before discussing the various approaches taken by national laws on the application of competence-competence.[94]

1. The New York Convention's Relevance with UNCITRAL Model Law

Before analysing the text of the UNCITRAL Model Law itself, the NYC must be considered, since if the NYC deals with the actual ground of the court's liability to refer the parties to arbitration, the Model Law should be construed accordingly. This is because the Model Law has always aimed at complying with the NYC's provisions.[95] Additionally, the rules governing the relationship between international duties and domestic law require national courts in many countries to give effect to the particular rule of the NYC with respect to the extent of the review of the arbitration agreement's validity.[96] Therefore, while addressing the issue of court review, both legislations will be handled in tandem by considering that the UNCITRAL Model Law must follow the NYC.

Article II(3) of the NYC addresses the referral application, which is similarly provided in article 8(1), yet it does not provide a clear answer to the limitation of court review[97] Yet two decisions given in 1995 and 1996 by the highest Swiss court – the Tribunal federal – proposes that article II(3) obliges courts to deal fully and in a ultimate sense with challenges to the arbitral tribunal's jurisdiction asserted by the

[93] A Reid, 'The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?' (2004) 21 J IntlArb 227, 237.
[94] UNCITRAL Model Law, arts 8(1), 8(2), 16(1) and 16(3).
[95] *Report of the United Nations Commission on International Trade on the Work of its Twelfth Session* (Vienna, 18-19 June 1979) (a/34/17), (1979) X *UNCITRAL Yearbook* 11, 21 (para 81).
[96] Frederic Bachand, 'Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?' (2006) 22 AI LCIA 463, 469.
[97] NYC, art II(3); UNCITRAL Model Law, art 8(1).

party who started the court proceeding.[98] However, this interpretation of article II(3) was found not to be persuasive.

It is true that the interpretation does not have any support in the NYC's *travaux preparatoires*.[99] Thus, the justification is that the conclusion of the Swiss courts has been found not to be coherent with the object and purpose of the NYC on economic means.[100] The consideration must be in accordance with the aim of increasing the efficiency of international commercial arbitration by securing the enforcement of arbitration agreements and awards.[101]

From a theoretical viewpoint, the debate substantially concerns the actual ground of the court's liability to refer the parties to arbitration and a tension between procuring the efficiency of the arbitral process and dealing immediately and decisively with challenges to the tribunal's jurisdiction in order that the parties do not waste time, money and other expenses in possibly inaccurate arbitral proceedings.[102]

2. Prima Facie and the UNCITRAL Model Law

In principle, the UNCITRAL Model Law provides a strict prohibition on court intervention. Article 5 provides that 'in matters governed by this law, no court shall intervene except where so provided in this Law'.[103]However, it is argued that the Model Law position does not impose competence-competence as rigorously as the French approach, which applies the prima facie approach. In essence, the issues are the extent and standard of the review of the arbitral jurisdiction to be determined by a court seized of a referral application based on article 8(1).[104]Essentially, it is debatable whether the Model Law permits application to the judiciary regarding the question of jurisdiction in the early stages of the arbitral process or whether it reserves it until the award has been issued.[105]

Article 8(1) scrutinizes the role of the court regarding a valid arbitration agreement by stipulating:

> A court before which an action is brought in a manner which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[106]

The phrase 'unless it finds that the agreement is null and void, inoperative or incapable of being performed' may be interpreted as implicit permission for a full

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[98] Trib Fed, 16 January 1995 (1995) *Bull Asa* 503 (comm JF Poudret and G Cottier at p 383); Trib Fed, 29 April 1996 (1996) *Bull ASA* 527 (comm CU Mayer at p 361).
[99]The NYC's *Travaux Preparatoires* <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html> accessed 10 August 2015.
[100] Which must be taken into consideration as per the Vienna Convention on the Law of Treaties, art 31(1).
[101] Berg (n 19) 4.
[102] Jones (n 78) 59.
[103] UNCITRAL Model Law, art 5.
[104] ibid art 8(1).
[105] Bachand (n 96) 463.
[106] UNCITRAL Model Law, art 8(1).

court review in regard to the existence and scope of the arbitration agreement.[107] The problem is, however, that it does not provide guidelines concerning the standard to be applied for a determination.

The working group on the UNCITRAL Model Law explicitly refused a prima facie review of the arbitration agreement's validity by declining to incorporate the term 'manifestly' prior to the words 'null and void' in the text of article 8(1). The justification behind this refusal was that the court should wholly determine the question of the existence and scope of the arbitration agreement before referring the parties to arbitration.[108]

It has been suggested that the pro-arbitration character of the NYC should give countenance to courts to interpret article II(3) narrowly.[109] This means that arbitration agreement should be found invalid solely in 'manifest cases'. French and Swiss jurisdictions, *inter alia*, have adopted this narrow interpretation.

Article 7(b) of Switzerland's Federal Statue on Private International Law expressly deals with the existence and validity of the arbitration agreement. It provides:

> If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed…[110]

As observed, the provision lays down a low threshold requirement for a prima facie agreement to arbitrate to exist.

However, article 16 of the UNCITRAL Model Law deals more directly with the competence-competence principle. Article 16(1) relates to the positive competence-competence concept by providing that '[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement'. [111]

Articles 16(3) and 8(2) go further and adopt a partial negative competence-competence by providing:

> The arbitral tribunal may rule on a plea… [that it does not have jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such request is

[107] Barcelo (n 7) 1128.
[108] Holtzmann and Neuhaus (n 41) 303.
[109] Poudret (n 50) 169.
[110] The Federal Code on Private International Law 1987 (Switzerland), art 7(b) <http://www.rwi.uzh.ch/lehreforschung/alphabetisch/haas/lehrveranstaltungen/fs2015/intro-sports-law/PILA.pdf> accessed 12 August 2015.
[111] UNCITRAL Model Law, art 16.

pending, the arbitral tribunal may continue the arbitral proceedings and make an award.[112]

In addition, article 8(2) provides that ' … an action [in] arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.'[113]

Pursuant to article 8(2), it has been assumed that allowing the tribunal to hold its proceedings after judicial review of the tribunal's jurisdiction occurs could incline the court to refer the entire matter to the tribunal, or to obtain a prima facie review of the arbitration.[114] Perhaps the court deferring the entire matter to the tribunal puts the parties' interests in jeopardy. It has been suggested that although article 8(2) does not clearly give priority to tribunals to determine competence-competence, it presumes to ensure some weight to the negative effect.[115]

Although, articles 16(3) and 8(2)do not accord with the French system (ie the negative effect of the competence-competence doctrine), they nonetheless correlate with it. Although the legislative history indicates that the doctrine was controversial,[116] the adopted text was a compromise and article 8(2) permits arbitral proceedings to continue in spite of court determination of the arbitrators' jurisdiction.[117]In this regard the court might be encouraged to defer the entire matter to the arbitrators or to provide the arbitration agreement with only prima facie scrutiny while the proceeding is still pending.

In addition, article 16(3) further promotes this consequence by permitting, even encouraging, arbitrators to rule on their jurisdiction as a preliminary question and ensuring quick and unappealable judicial review of that award. In fact, in jurisdictions that have adopted the Model Law, some courts purport to have read the negative competence-competence principle into article 16.[118]

To illustrate, in *Pacific Int'L Lines Ltd Tsinlien Metals & Minerals Co*,[119] article 16 was interpreted as requiring that the court give only a prima facie consideration to whether a valid arbitration agreement exists, leaving to the arbitrators a full examination of that issue. Also, in *Rio Algom Ltd v Sammi Steel Co*,[120] it was stated that articles 8 and 16 mean that the arbitrators are to decide the arbitration agreement's existence and validity in the first instance, with court review to follow.

B. The French Approach

The French legal position, on the jurisdiction of the tribunal, obviously favours a non-interventionist, prima facie approach, mainly as a result of the public policy goal of

[112] ibid arts 16 (3) and 8(2).
[113] ibid.
[114] Barcelo (n 7) 1129.
[115] Gaillard and Banifatemi (n 21) 675.
[116] Report of the United Nations Commission (n 95).
[117] Holtzmann and Neuhaus (n 41) 468.
[118] UNCITRAL Model Law, art 16.
[119]*Pacific Int'L Lines Ltd Tsinlien Metals & Minerals Co,* 18 YB Intl Arb 180, 185-86 (SC HK 1992).
[120]*Rio Algom Ltd v Sammi Steel Co*,18 YB Intl Arb 166, 170-171 (Ont Ct Justice 1991).

promoting international arbitration in France.[121] An arbitral process is essentially contractual in nature, which gives effect to the parties' intentions.[122] Parties who enter into an arbitration agreement agree both to authorize the arbitrator to hear their dispute and at the same time to deprive the courts of such authority. Court intervention in the arbitral proceedings operates in opposition to the parties' intention in performing an arbitration agreement.[123]

Accordingly, France encourages the credibility of arbitration as a dispute resolution mechanism by favouring the creation of a legal structure, which allows court intervention at minimum in arbitral proceedings. In other words, the French approach places courts in a complementary role in international arbitration proceedings. By virtue of acknowledgment of separability and competence-competence, particularly by widely accepting the negative effect of competence-competence, French arbitration law gives effect to the parties' intentions, supports the inherent competence authority of arbitral bodies, and sustains the link between the two concepts, thereby hindering the avoidance of arbitration agreements.[124]

The negative effect competence-competence principle was codified in French law with the 1981 enactment of article 1458 of French New Code of Civil Procedure (hereinafter 'the French Code').[125]Article 1458 of the French Code recognizes the negative effect by ensuring, inter alia, that courts must defer any action if the merits are already pending before a tribunal. It provides:

> Whenever a dispute submitted to an arbitral tribunal by virtue of an arbitration agreement is brought before the court of the state, such court shall decline jurisdiction. If the arbitral tribunal has not yet been seised of the matter, the court should also decline jurisdiction unless the arbitration agreement is manifestly null.[126]

The French approach depends on two principal considerations. First, the French court will decline jurisdiction and refer disputes concerning the arbitration agreement's existence, validity and scope to the arbitrators if an arbitration tribunal has already been seized of the matter.[127] Second, if an arbitration tribunal has not been established, the court will embark on a restricted scrutiny of those questions and will seize jurisdiction provided that the arbitration agreement is manifestly null. In this way, as long as the court finds prima facie existence, validity and scope, it will direct the parties to arbitration to submit their disputes. The court at the stage of review when the award has been issued will review the arbitrator's jurisdiction de novo.[128]

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[121] Thomas E Carbonneau, 'The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity' (1980) 55 Tul L Rev 1, 5.
[122] JL Devolve, J Rouche and GH Pointon, *French Arbitraiton Law and Practice* (Kluwer 2003) 14.
[123] Jean Robert and Thomas E Carbonneau, 'The French Law of Arbitration' [1983] Mathew Bender1, 1.
[124] Stephen M Schwebel, *International Arbitration: Three Salient Problems* (CUP 1987) 4-5.
[125] French Code of Civil Procedure, (1983) Book IV, Title V, Article 1458 <http://www.jus.uio.no/lm/france.arbitration.code.of.civil.procedure.1981/doc.html> accessed 19 August 2015 (the 'French Code').
[126] ibid.
[127] Barcelo (n 7) 1125.
[128] Jean-Louis Delvolve, *Arbitration in France:The French Law of National and International Arbitration* (Kluwer 1982) 82; ICSID, 'Award in Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt' (July 1993) 32(4) ILM 933-1038.

Essentially, the reversed judgment delivered by the Cour de Cassation (the highest court in the French judiciary), in *Copradag v Dame Bohin*[129] was an unambiguous victory for the negative effect, which has been constantly upheld in the French jurisdiction. At the first stage, the court of first instance in this case granted the tribunal full confidence to determine the matter of validity of the arbitration agreement in accordance with article 1458.[130]

The court of first instance ruled that an arbitration agreement was void and the arbitral tribunal should not be constituted, although one party had started arbitral proceedings. The Court of Appeals upheld this decision, yet the Cour de Cassation reversed it stating:

> The president of the Tribunal of First Instance cannot declare that the arbitrators should not be appointed on the basis that the arbitration agreement is clearly void unless there is a problem involving the constitution of the arbitral tribunal; the arbitral tribunal alone has jurisdiction to rule on the validity or limits of its appointment, on the provision that the issue has been brought before it.[131]

Accordingly, article 1458 gives confidence on the priority of the tribunal and does not revoke the authority of review which the court reserves if an appeal to the arbitration award is on a valid ground. Soon after, in the case of *Renault v V2000*,[132] the Cour de Cassation stated that arbitrators have the authority to determine the arbitration clause, and the arbitral award concerning jurisdiction can be subject only to later judicial review.The Court refused, in the absence of exceptional grounds, to rule the arbitration agreement as void.

More recently, an explicit reference to the negative effect was made by the Cour de Cassation in the case of *American Bureau of Shipping v Copropriete Maritimes Jules Verne*,[133] upon an appeal against an award by the Paris Court of Appeal which was allowed on the grounds that it had passed over the consideration of negative effect. The Cour de Cassation held that the manifest nullity of the arbitration agreement to be 'the only barrier to [the competence-competence principle] that establishes priority of arbitral competence to rule on the existence, the validity and the scope of the arbitration agreement'.

Thus, the language of article 1458 ensures an effective and chronological priority to tribunals on the matter of jurisdiction, unless the criterion of being 'manifestly null and void' is found in the arbitration agreement.[134] The underlying policy justification for this approach is to preclude obstructing and delaying tactics in arbitration. The French doctrine permits major scrutiny if a party submits jurisdictional questions to the court before the case has been submitted to arbitrators. The theory is that such a

[129] *Copradag v Dame Bohin,* (1995) Revue de l'arbitrage 617.
[130] ibid, cited in Gaillard and Savage (n 1) 672.
[131] ibid.
[132] *Renault v V2000*, (1997) Reveu de l'arbitrage 537.
[133] *American Bureau of Shipping v Copropriete Maritimes Jules Verne,* (2001) Cour de cassation Chambres Civiles.
[134] French Code.

party is more inclined to challenge the jurisdiction in good faith with legitimate concerns concerning the arbitrator's jurisdiction.[135]

However, even though such a way exists in French doctrine, initial court review is restricted only to establishment of a prima facie scrutiny for arbitration. In the event that this prima facie scrutiny is met, or an arbitral tribunal is already established, the arbitrators must be entitled to give full consideration to jurisdictional objections.[136]

Given that most arbitration legislation and institutional rules authorize the arbitrators to render a preliminary award regarding jurisdiction,[137] in the majority of cases such a preliminary award will not take long. This will subsequently allow a party to apply for judicial review of the issue on jurisdiction. According to the French approach, if the seat of arbitration is in France, article 1052 of the French Code[138] gives the court authorization for a full verification of the award which has been issued by arbitrators. This annulment review will be conducted de novo pursuant to article 1052.[139]

The French approach ensures higher priority to serving the arbitral proceeds at minimum intervention.[140]In most of the cases, chronological priority over a court to rule on the issue of the validity and existence of a contract is given to the tribunal for the purpose of efficiency. Essentially, efficiency depends on preserving the parties' intention.

Where the parties consent to arbitration they usually intend that the arbitrators, not the courts, shall resolve their all disputes.[141] Since the competence-competence doctrine has been justified on this theory, then unless there is a contrary intent, the presumption is that parties to an arbitration agreement entrust the authority to determine its own jurisdictional competence to the arbitral body.[142] Thus, court intervention can be assumed to be contrary to the parties' intention, which is a fundamental nature of the arbitration process.[143]Ultimately, the arbitrator's jurisdictional competence is fundamental to provide for the tribunal's capacity to function.[144]

Therefore, the priority of the tribunal to rule on its jurisdiction should be given, at least, until a jurisdictional award has been issued. Consequently, article 1458 can be used as a model in other jurisdictions in which negative effect is interpreted more widely.[145]

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[135] Gaillard and Savage (n 1) 679-680.
[136]Barcelo (n 7) 1125.
[137] UNCITRAL Model Law, art 16(3); London Court of International Arbitration Rules (2014), art 23 <http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> accessed 20 August 2015: International Chamber of Commerce Rules of Arbitration (2012) art 6 <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_1> accessed 20 August 2015.
[138] French Code, art 1052.
[139] Barcelo (n 7) 1125.
[140]Jones (n 78) 61.
[141] Carbonneau (n 121) 1.
[142] Ibrahim FI Shihata, *The Power of The International Court to Determine its Jurisdiction: Competence de la Competence* (1st edn, Harvard 2013) 25-26.
[143] Mauro Rubino Sammartono, *International Arbitration Law and Practice* (2nd edn, Kluwer 1990) 34.
[144] Shihata (n 142).
[145] Susler (n 9) 133.

On the other hand, it has been argued that the discretion of arbitrators provided by arbitration statutes and institutional rules can be taken advantage of by according these rules and delaying their decision on jurisdiction until the final award. Arbitrators might utilize this possibility to expand their jurisdictional authority – for example, because the questions involved are so closed to the merits that a full proceeding is required to resolve these jurisdictional questions, or because arbitrators might not be sensitive to the consequences of delaying judicial review. Despite the possibility that the arbitrators might not rule on jurisdiction until the final award, some may still prefer the French solution. It has been suggested that the party being against arbitration based on reasonable grounds is more likely to be successful before a court.[146]

By contrast, it has been argued that French approach is risky because the parties may be forced to submit their dispute to arbitration against their intention. At this point, an unwilling party might argue the cost of arbitral proceedings. Still, in many legal systems the successful party will have the right to recoup the arbitration and litigation costs against the losing party. In addition, the party submitting its dispute to arbitration who eventually loses will of course incur the wasted costs of the arbitral proceeding. It might therefore be assumed that this is the concomitant risk of proceeding with arbitration in relation to a controversial jurisdictional challenge.[147]

Finally, the French position stands against arbitral proceedings being obstructed by dilatory tactics used by parties. Fundamentally, the French position supports the essential nature of international arbitration which is to give effect to the intent of the parties[148] and is most likely to require parties to adhere to the arbitration agreement and enable an expeditious recourse to arbitration.[149]

Also, the ICC is a leading institution for international arbitration and originated in France. The ICC Rules of Arbitration in article 6(3) provide:

> If any party against which a claim has been made does not submit an Answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).[150]

Also, article 6(4) provides that ' …the arbitration shall proceed if and to the extent that the Court is prima facie that an arbitration under the Rules may exist… '.[151]

Consequently, French law promotes the application of international arbitration agreements by ensuring greater neutrality under its arbitration rules.[152] Many scholars

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[146] Barcelo (n 7) 1126.
[147] ibid.
[148] Rosen (n 30) 655.
[149] Susler (n 9) 133.
[150] International Chamber of Commerce Rules of Arbitration 2012, art 6(3), <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_6> accessed 15 September 2015.
[151] ibid art 6(4).
[152] Rene David, *Arbitration in International Trade* (Kluwer 1985) 285.

hold the view that submitting an arbitrable dispute to national courts, particularly in the context of international law, is paradoxical to the nature of arbitration.[153]

Furthermore, it has been argued that the internationalization or denationalization of international arbitration is accepted as one of the most paramount and essential elements for the improvement and recognition of arbitration; this internationalization thus requires elimination of the limitations of national laws.[154]

C. The English Approach

The English position on the negative effect is based on the UNCITRAL Model Law. Section 30 of the English Arbitration Act 1996 (EAA 1986)[155]permits a challenge to jurisdiction during the preliminary proceedings or subsequent to the award. Before proceeding to examine the competence of the tribunal to rule on its own jurisdiction pursuant to section 30, it is necessary to explain the general principles regarding court intervention in arbitral proceedings.

The context of Part I of the EAA 1996 regarding submitting jurisdictional objection to the tribunal or the court is intended to restrict a party's right to recourse to the court with the purpose of determining the jurisdiction of the tribunal.[156]

In the general principles part of the EAA 1996, section 1(a) provides: 'The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.'[157] In addition, section 1(c), in parallel with article 5 of the Model Law,[158] provides 'In matters governed by this Part the court should not intervene except as provided by this Part.'[159]

However, despite the fact that this provision limits court intervention, it has been argued that the term 'should' is a weaker restriction on court intervention than the word 'shall' in the Model Law.[160]In *Vale de Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd*, the court held that the use of the word 'should' as opposed to the word 'shall' indicates that an absolute prohibition on intervention by the court in circumstances other than those specified in Part I was not intended and added that 'it is clear that the general intention was that the courts should usually not intervene outside the general circumstances specified in Part I of the Act'.[161]

Additionally, it was stated that 'the principle provided in section 1 was included due to international criticism that courts of England and Wales intervened more than it

[153]Schwebel (n 124) 4.
[154] Julian DM Lew (eds), *Contemporary Problems in International Arbitration* (Queen Mary College University of London 1986) 1.
[155] English Arbitration Act 1996, s 30 <http://www.legislation.gov.uk/ukpga/1996/23/contents> accessed 22 August 2015.
[156]Susler (n 9) 133.
[157] UNCITRAL Model Law, art 5.
[158] EAA 1996, s 1(a).
[159] ibid s 1(c).
[160] Peter Gross, 'Competence of Competence: An English View' (1992) 8(2) AI LCIA 205-214.
[161]*Vale de Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2007] UKHL 40, para 52 (*'Premium Nafta*').

was thought they should in the arbitral process, and this was a discouragement to the selection of London as a forum for arbitration'.[162]

On the other hand, it has been suggested that the English courts sustain their inherent jurisdiction by statement or injunction concerning the ruling on the jurisdiction of a tribunal at any time.[163]In particular, section 9(4) of the EAA 1996 represents the language of article II(3) of the NYC and essentially the language in article 8(1) of the Model Law. It provides: 'On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.' The negative effect of competence-competence here deals with whether 'unless satisfied' requires only a prima facie review. It is arguable that 'unless satisfied' is more similar to 'unless it is manifest' than is the Model Law terminology 'unless it finds'.[164]

The better approach to section 9 of the EAA 1996 was clearly expressed by the House of Lords in the contemporary pro-arbitration conclusion of *Premium Nafta Products Ltd v Fili Shipping Co Ltd*:

> … to determine on the evidence before the court that [an arbitration agreement] does not exist in which case (if the disputes fall within the terms of that agreement) a stay must be granted, in the light of the mandatory 'shall' in section 9(4). It is this mandatory provision, which is the statutory enactment of the relevant article of the New York Convention, to which the United Kingdom is a party.[165]

This decision is significant for the responsibilities of the UK as a signatory to the NYC, by *ergo* sustaining it as a jurisdiction favourable to respecting arbitration agreements and ensuring priority for tribunals to determine their jurisdiction.

The House of Lords stated:

> If in a case where an arbitrator does have jurisdiction to decide particular dispute, he is to be restrained from so doing and no stay of court proceedings is to be granted, there is likely to be a potential breach of the United Kingdom's international obligations in relation to commercial arbitrations under the New York Convention…as enshrined in the 1996 Act.[166]

In addition, in *Premium Nafta*, the House of Lords 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…'.[167] This decision

[162] ibid para 49.
[163] Peter Aeberli, 'Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map' (2005) 21(3) AI LCIA 253, 276.
[164] EAA 1996, s 9.
[165] *Premium Nafta*(n 161) para 37.
[166] EAA 1996, s 31(5).
[167] ibid.

is relevant concerning asserting the doctrine of separability and the principal of competence-competence.[168] Section 30(1) provides:

> 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 have been submitted to arbitration in accordance with the arbitration agreement.[169]

In addition, section 30(2) gives opportunity for court review by providing: 'Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.'[170]

The risk is that a tribunal may take advantage of its discretionary power and avoid declaring a preliminary award as in the French approach.[171]

At this point, section 31(5) of the EAA 1996 provides that '[t]he tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under Section 32.'[172] Thus, in order to prevent the arbitrators from abusing their discretion and denying rendering a preliminary award, and thus delaying judicial review, section 31(5) permits the parties by agreement to compel the arbitrators to resolve the jurisdiction issue preliminarily.[173]

Furthermore, section 32 of the EAA 1996 provides:

> (1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal…
> (2) An application under this section shall not be considered unless–
> (a) It is made with the agreement in writing of all the other parties to the proceedings, or
> (b) It is made with the permission of the tribunal and the court is satisfied–
> i. That the determination of the question is likely to produce substantial savings in costs,
> ii. That the application was made without delay, and
> iii. That there is good reason why the matter should be decided by the court.
> (3) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while and application to the court under this section is pending.[174]

[168] Hilary Heilbron QC, 'The English Courts' Approach to Review of Awards by Way of Challenge and Enforcement' (2015) 2(1) BCDR 153-170.
[169] EAA 1996, s 30(1).
[170] ibid s 30(2).
[171] French Code.
[172] EAA 1996, s 31(5).
[173] Barcelo (n 7) 1130.
[174] EAA 1996, s 32.

From section 31(5) it is likely that the party opposing the arbitration will not object to a stay of the arbitral process with the purpose of having judicial review of jurisdiction and the party on behalf of arbitration will determine whether to recourse to the tribunal for a preliminary ruling concerning jurisdiction. Such a ruling will subsequently be subject to an expedited judicial review.[175]

In addition, section 32 appears to be protective of the warrant of parties regarding the jurisdiction of the tribunal.[176] That is to say, the possible concomitant risk of arbitration proceedings as a result of forceful jurisdictional challenge is that if the pro-arbitration party loses, it will presumably face the wasted costs of the tribunal proceedings. Section 32 is able to enable a pro-arbitration party, who is worried about such a risk, to come to agreement with the anti-arbitration party and have the issue determined beforehand by judicial intervention.[177]

Accordingly, it might be an appropriate solution for where a party starts arbitration and the other party opposes the arbitral tribunal's jurisdiction and refuses to participate. In this case, the claimant might have opportunity to directly have the issue addressed by court rather than by the arbitral tribunal in order to acquire a cheaper and quicker result.[178] Conversely, the Departmental Advisory Committee on Arbitration (DACA)[179] stressed that this approach would be an exception, yet the non-participating party cannot be assumed to take any positive steps to challenge the jurisdiction. DAC asserted: 'To do otherwise would be to assume against that party (before the point has been decided) that the tribunal has jurisdiction.'[180]

Moreover, it has been argued that allowing the tribunal to refer the jurisdictional question to the court in the first instance could be contrary to the principles of arbitration as the underlying goal of the parties is to submit their disputes to arbitrators to be resolved and the main role of the court in the arbitral place is to assist arbitrators to do so rather than having priority on the determination of jurisdiction. It has been suggested that the tribunal should render a preliminary award on jurisdiction if necessary and thereupon refer the issue for judicial review.[181]

For the purpose of negative effect, section 32 should be balanced with its goals to establish a high threshold to be satisfied before judicial intervention through protecting the interests of both parties to the arbitral proceedings. Primarily, the tribunal must have legitimate reservations regarding the validity of the arbitration agreement prior to referring the matter to judicial review in case there is illegality affecting mutual agreement between the disputing parties.[182]

Section 32 appears to preserve arbitration proceedings and prevent any obstacles such as dilatory tactics by allowing the parties or tribunal to defer the matter to the court. Courts have essential ground for intervening in the arbitral process. Indeed, the EAA

[175] Barcelo (n 7) 1130.
[176] Jones (n 78) 60.
[177] Thomas Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) 22 PSL 131, 143.
[178]Tweeddale (n 2) 691.
[179] The Departmental Advisory Committee on Arbitration <http://uk.practicallaw.com/5-205-4994?service=arbitration> accessed 25 August 2015.
[180] ibid February 1996, 141(iii).
[181] Gaillard and Savage (n 1) 682.
[182] Jones (n 78) 60.

1996 provides a mechanism protecting parties' interest in accordance with arbitration principle and parties' intention. [183]

However, despite the decision in *Premium Nafta* and such safeguard from judicial intervention, an anti-arbitration practice may occur when case law is scrutinized regarding the negative effect of competence-competence.[184]

In *Harbour Assurance Co v Kansa Gen Int'l Ins Co*, the Court of Appeal stated that it is common ground that in English law an arbitrator cannot bind the parties by a ruling on his own jurisdiction, and therefore the validity of the arbitration clause is not an arbitrable issue.[185]

In, *Al-Naimi,* It was stated

> …the existence of the power [of competence-competence] does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed. The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal.[186]

Moreover, in *Law Debenture Trust Corp Plc v Elektrim Finance BV*, the court declined a stay and stated that there is no support for any suggestion that 'the court should inevitably allow the arbitral tribunal to decide the jurisdiction question and stay the court proceedings in the meanwhile.'[187]

Despite section 30 of the EAA 1996, which allows the tribunal to determine the positive effect of competence-competence, the decision in *Al-Naimi* seems to be contrary to the competence-competence principle by interpreting the tribunal's power to have first priority to rule on jurisdiction as non-obligatory. In such a way, it might be inferred that the English courts' interpretation of negative effect limits its actual essence.[188]

Finally, case law indicates that despite the provisions in the EAA 1996 regarding jurisdictional challenge, the court obviously sustains its authority to rule upon jurisdictional issues and has not interpreted all cases in a way that is relevant to the negative effect. In other words, the English approach involves an interlocutory clarification procedure allowing jurisdictional questions, which arise during the arbitral proceedings to be deferred to the court determination.[189]

Moreover, English courts maintain jurisdictional control through their strict examination of the wording of arbitration clauses. Parties who fail to elaborate such

[183] Barcelo (n 7) 1130.
[184] *Premium Nafta*(n 161).
[185]*Harbour Assurance Co v Kansa Gen Int'l Ins Co* [1993] QB 721.
[186] Al-Naimi (n 69) 522.
[187]*Law Debenture Trust Corp Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch) ('*Law Debenture*').
[188]Susler (n 9) 137.
[189] Robert and Carbonneau (n 123) 101.

language carefully during the drafting of arbitration clauses risk a court's refusal to waive judicial control when a conflict arises.[190]

However, it has been suggested that recourse to a national court generally operates contrary to the spirit of arbitration and is particularly prejudicial in the case of international arbitration.[191] Whereas arbitration clauses are to be given autonomous interpretation much more based on parties' intention, a court usually interprets agreements as they are written. Thus there is a possibility that an arbitration clause can be found to be valid by an arbitrator but might be found invalid (especially as a result of such a strict determination) by a judge particularly, in the interpretation of pathological arbitration clauses.[192]

Finally, English law reduces the credibility of the arbitral process as an alternative to litigation by not applying the competence-competence doctrine as in France. Strict interpretation of courts and case law allowing court intervention during the arbitral process avoid or delay arbitration by claiming that the arbitrator lacks jurisdiction.[193]

D. The US Approach

The US approach concerning review of the tribunal's jurisdiction is more interventionist and presumptive than in other countries; namely, whereas US courts are free to order jurisdictional questions to be resolved by a jury at any stages, other jurisdictions usually provide full jurisdictional review by courts only subsequent to an award being issued.[194]The US approach seems to establish that the parties, in fact, agreed to arbitrate by giving courts the opportunity to decide whether there is consent to arbitration as a preliminary matter in order to preclude arbitration in the absent of valid and existent intention.[195]

US court disputes that are subject to the NYC shall be resolved under Chapter 2 of the FAA 1925[196] and, based on section 201 of the FAA,[197] the question of who decides the jurisdiction of the tribunal is substantially subject to the interpretation of article II(3) of the NYC.[198]

Despite the fact that it is assumed that the language of article II(3)[199] evokes a prima facie review of arbitration agreements, practically the US courts have not usually applied such an approach and the FAA does not provide a legitimate presumption that courts should decide on jurisdictional matters before the award has been issued by the tribunal.[200]

Section 3 provides:

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[190] Jones (n 78) 663.
[191] David (n 152) 285.
[192] Born (n 23) 71-75.
[193] Robert and Carbonneau (n 123) 9.
[194] Park (n 4) 156.
[195] Aeberli (n 163) 290.
[196] United States Federal Arbitration Act 1925 ('FAA').
[197] ibid s 209.
[198] NYC, art II(3).
[199] ibid.
[200] Berg (n 19) 169.

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[201]

From this provision, courts can determine whether a particular issue has been submitted to arbitration, generally within the context of a request to order arbitration or to stay litigation.

In order to illustrate the US approach with regard to determining the jurisdictional question, *AT&T Technologies, Inc v Communications Workers of America* is a good example, in which it was held that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submitted that the question of arbitrability is undeniably an issue for judicial determination.[202]

There are two leading cases on the arbitrability question in the US: *First Options of Chicago Inc v Kaplan*[203] and *Howsam v Dean Witter Reynolds Inc*.[204] Both cases are relevant to an analysis of section 3 of the FAA, which deals with a stay of proceedings where the matter is referable to arbitration.[205]

In essence, US courts have adopted the old German concept of a Kompetenz-Kompetenz clause, by which the parties might agree to submit a jurisdictional issue to final and binding arbitration. The litigants' consent allows a jurisdictional issue to fall within the authority of substantive matters to be resolved by arbitrators. The court authority is simply to ask, 'Is there consent to arbitrate?'[206]

If the litigants did not consent to arbitrate, the alleged consent might be void or non-existent from the beginning, because of lack of capacity or forgery. Also, consent might have once existed yet is now absent since one side was forced to arbitrate by fraud to start directly the arbitral process (not the main agreement), rendering the arbitration clause subject to annulment. Accordingly, the US approach refers to a matter on jurisdiction as an 'arbitrability question'.[207]

In order to understand the 'arbitrability question', *First Options* is the starting point. The court ruled that if the dispute arises at the beginning of arbitration, then questions

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[201] FAA (n 196) s 3.
[202] *AT&T Technologies, Inc v Communications Workers of America*, 475 US 643, 648-49 (1985).
[203] *First Options of Chicago Inc v Kaplan,* 514 US. 938 (1995) ('*First Options*').
[204] *Howsam v Dean Witter Reynolds Inc,* 537 US 79 (2002) ('*Howsam*').
[205] FAA (n 196) s 3.
[206] Park (n 4) 156.
[207] ibid. For a case involving fraud related to the arbitral process, see *Engalla v Permanenta Medical Group*, 938 P.2d 903 (Cal 1997), involving a malpractice claim against a healthcare provider in which habitual delays in arbitration were found to constitute fraud by the provider.

concerning the existence and validity of the arbitration agreement are presumptively for the courts to determine.[208]

In addition, it was stated that US courts should not presume that the parties consented to have arbitrability matters arbitrated, unless there exists clear and unmistakable evidence to support it.[209] The proposition is that contracting parties may agree to arbitrate jurisdictional matters, yet such agreement must be founded on clear evidence.

Thus, the US courts stand for the approach that seeks to ensure there exists a valid arbitration agreement to be resolved by the tribunal and not leave these questions to the tribunal. It is argued that although the presumption in *First Options* is a refutable one, such rebuttal will seldom be clear and unmistakable.[210]

In *First Options*, an arbitral award had been rendered against both an investment company and its owners regarding debts owed to a securities clearing house. The owners (husband and wife) claimed that they had never signed the arbitration agreement and ultimately were not bound by the award. The Supreme Court identified three questions: Did the Kaplans owe money (the substantive merits)? Did the Kaplans agree to arbitrate (jurisdiction, which the court called 'arbitrability')? And who (court or arbitrator) should decide whether the Kaplans agreed to arbitrate (which the court called the 'standard review' question)?[211]

The Supreme Court confirmed the lower court's finding that the owners had not consented to arbitrate, without any judicial deference to the tribunal's determination. The Court held that the district court, and not the tribunal, must determine whether the parties are bound to arbitrate by reason of a clause signed by their investment company.[212]

The Supreme Court ruled

> If [the parties agreed to submit arbitrability to arbitration] then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard, which courts apply when they review any other matter hat parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrators' setting aside his or her decision only in certain narrow circumstances.[213]

Moreover, it has been suggested that the term 'arbitrability' can cover various issues: whether a person ever agreed to arbitrate at all, the scope of a valid arbitration clause, and public policy limits on what arbitrators can and cannot determine. However, only the second of those matters (scope of the parties' agreement) would in general be

[208] William W Park, 'The Arbitrability Dicta in First Options v. Kaplan: What sort of Kompetenz-Kompetenz Has crossed the Atlantic?' (1996) 12 Arb Intl 137.
[209] ibid.
[210] Barcelo (n 7) 1132, 1133.
[211] Park (n 4) 157.
[212] *First Options* (n 203).
[213] ibid.

allowed to delegate those issues to arbitrators in a single agreement whereas the third category (public policy) would never be delegated.[214]

To illustrate the implementation of the US approach concerning the determination of the parties' intention, in *Apollo Computer v Berg* (where a contract between a Massachusetts computer company and a Swedish distributor was terminated and the rights of the bankrupt Swedish distributor were assigned to a third party), the Massachussetts company claimed that the contract's non-assignment provision covered the arbitration clause, which became void as a result of the assignment.[215]

The court stated that the arbitrator's jurisdiction over the claims was a question for the arbitrators to determine. An arbitral tribunal was appointed based on the Rules of International Chamber of Commerce ('ICC Rules'), which require prima facie determination for jurisdictional objections.[216]

The US court reasoned that the parties had agreed to submit the arbitrability question to the arbitrators and the problem was not whether the parties were entitled to submit the jurisdictional question to arbitration, but whether they had actually consented to do so. If the arbitration agreement was in fact by itself terminated, the ICC Rules become relevant.[217]

On the other hand, another conclusion from *First Options* is that questions on scope involving arbitrability, will, as a practical issue, be referred to the arbitrators. In essence, the presumption on scope issues is that a court will usually decide whether a disputed matter is merits-based and, if so, will refer that merits-based issue to the arbitrators.[218]

Thus the rule arising from *First Options* gives too much discretion to courts regarding jurisdictional questions.[219] For this reason, it is criticized that this standard of review may cause US courts to assume that the arbitration agreement is invalid and such an interventionist and presumptive approach by the courts could result in the attrition of arbitration agreements.[220]

By contrast, 'procedural arbitrability' matters are subject to a negative competence-competence and US courts have taken a less interventionist approach in these matters.[221] In *Howsam*, it was concluded that such issues (for example, time limits on claims and possible waiver or estoppel issues) are presumptively for the arbitrators at the outset of arbitration. The reason is that these issues are given to arbitrators to be resolved having regard to the intention of the parties.[222]

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[214] Park (n 4) 159.
[215] *Apollo Computer, Inc v Berg,* 886 F.2d 469, 473 (1st Cir 1989).
[216] ibid.
[217] ibid.
[218] Reuben (n 54) 829.
[219] Leonardo D Graffi, 'Securing Harmonised Effects of Arbitration Agreements under the New York Convention' (2006) 28(3) HJIL 664, 742.
[220] Susler (n 9) 139.
[221] Barcelo (n 7) 1133.
[222] Howsam (n 204).

Notably, *Howsam*'s 'procedural arbitrability' might be interpreted as simply an example of a scope problem. The parties agreed that they had an existing and valid arbitration agreement and objected only to whether the 'procedural arbitrability' issue itself was arbitrable. In other words, was the matter within the scope of the arbitration agreement? The only difference from the conclusion in *First Options* was that *Howsam* referred a 'gateway' matter to arbitrators whereas in *First Options* a merits-based matter was referred to them. Accordingly, the arbitrators were authorized to determine whether or not to hear the merits-based issue.[223]

Once an award on jurisdiction or a final award is issued, US courts presumably conduct only a deferential review of procedural arbitrability issues, whereas French courts might conduct a de novo review. This does not, however, change the US position on the substantive issues regarding jurisdiction.[224]

It must be noted that although *First Options* and *Howsam* dealt with domestic arbitrations, they have application for international arbitration in the US and the negative effect. An example of such a case is *China Min Metals Materials Import and Export Co Ltd v Chi Mei corp*, which held that *First Options* was a domestic arbitration case but that the international nature of the present litigation did not affect the application of *First Options* principles.[225]

To summarize, US arbitration law does not include the negative competence-competence doctrine. Questions for the existence and validity of an arbitration agreement are for the courts to decide at the outset of arbitration, whether or not arbitrators are, in fact, empowered to hear the dispute.[226]

The advantage of the US approach to review of the tribunal's jurisdiction is that the issue of whether the parties have agreed to arbitrate is properly examined in order to minimize the risk that parties who never agreed to arbitration are forced to participate. However, there is another risk that recalcitrant parties to arbitration might object to the tribunal's jurisdiction as a dilatory tactic, which must be weighed against this advantage.[227]

Finally, it has been suggested that the US laws are outdated and should be aligned more closely with current improvements in international arbitration laws, including enabling a greater priority for the tribunals to determine their own jurisdiction.[228]

IV. Conclusion

This dissertation is a critical study of who decides the arbitrator's jurisdiction in international commercial arbitration and different application regarding the negative effect of the competence-competence doctrine, which is designed by the UNCITRAL

[223] Barcelo (n 7) 1134.
[224] Park (n 4) 160.
[225] *China MinMetals Materials Import and Export Co Ltd. v Chi Mei corp,* 334 F 3d 274 (3rd 2003).
[226] Barcelo (n 7) 1134.
[227] Graffi (n 219) 754.
[228] Gabrielle Kaufmann Kohler, 'Global Implications of the US Federal Arbitration Act: The Role of Legislation in International Arbitration' (2005) 30(2) ICSID Review355 <http://www.lk-k.com/data/document/global-implications-the-faa-the-role-legislation-international-arbitration.pdf> accessed 5 September 2015.

Model Law. In addition, elements of international arbitration agreements, as linked concepts of the doctrine, have been demonstrated.

The fundamental principle of arbitration is to provide priority to the parties' agreement to arbitrate and ensure there is access to courts if a party submits a genuine challenge to the jurisdiction of the tribunal.[229] To intervene in the arbitral proceedings can be against the interests of the parties since the international arbitration mechanism is designed to achieve internationally recognizable and enforceable judgments without any unnecessary delay or costs. Indeed, this designation stands for preserving the parties' intention in accordance with their interests. Therefore, it is also significant to establish that there is no genuine challenge against the parties' intention.[230]

It has been shown that there must be a balance in assisting the tribunal and intervening where necessary to preserve the interests of the parties. The negative effect of competence-competence comes to the fore by providing the tribunal with discretion to determine its own jurisdiction and giving courts opportunity to review its award concerning jurisdiction.[231]

The principle of competence-competence is obviously a vital element in arbitration and well established in many jurisdictions in both national laws and international conventions. In spite of this wide recognition, the practices differ regarding jurisdictional questions, especially in terms of at what stage of the arbitral proceedings the court should intervene in the arbitral procedure.

This dissertation has examined various approaches concerning the interpretation of the competence-competence doctrine taken by the leading countries in international arbitration. These variances have key results for the private and public expenditure of resources and the use of arbitration as a preferred dispute resolution method in international commercial transactions.

Although there are international provisions, such as article II(3) of the NYC and article 8(1) of the UNCITRAL Model Law, the standards and interpretation applied by courts from different jurisdictions regarding the tribunal's priority to determine its own jurisdiction vary greatly.[232]

Indeed, the debate regarding whether article 8 of the Model Law calls for prima facie review of the arbitral tribunal's jurisdiction is substantially a debate concerning whether preventing dilatory jurisdictional obstacles is more significant than ensuring that time, money and other resources will not be wasted on the arbitration process. Basic structure and underlying principles indicate that the prevention of dilatory jurisdictional obstacles is a more important objective and, as a result, article 8(1) should be read as requiring courts to apply a prima facie standard while determining the jurisdictional question.[233]

[229] Lew,Mistelis and Kroll (n 38) 49.
[230] Gaillard and Banifatemi (n 21) 269.
[231] Susler (n 9) 143.
[232] UNCITRAL Model Law, art 8(1); NYC, art II(3).
[233] Bachand (n 96) 476.

In the event of an incorrect ruling on jurisdiction by the tribunal, the Model Law's purpose is to reduce the loss of time and incurring of costs for parties to the arbitration, by allowing the parties to have judicial review of the tribunal's preliminary ruling on competence-competence.[234]

The disadvantage of the Model Law approach is that it shows less confidence in the capability of the tribunal to make enforceable awards and presents an opportunity for parties to abuse the system by operating dilatory methods, hence wasting public and private resources.[235]

The EAA 1996 aims to ensure more deference to the tribunal and prevent parties from using dilatory methods by adoption of a modified position of the Model Law; however, it is not as effective as may appear at first view. This is because the EAA 1996 offers the choice of leaving the jurisdictional question to the tribunal at the outset of arbitration, yet not interpreting it as compulsory. Such an application does not meet the real efficacy of the negative effect.[236]

Also, the interventionist approach adopted by the US and the standard of judicial review have been criticized for the rule arising from *First Options*, which gives too much discretion to courts to determine the jurisdiction of the tribunal. A revision of the FAA is essential to accord American arbitration law with current trends in international arbitration.[237]

Thus, US and English case law shows that the US and England do not recognize the negative effect of competence-competence, allowing US and English courts to preserve a greater degree of judicial control over arbitration.[238] Moreover, English courts preserve control over arbitration by their strict determination of the wording of an arbitration clause, and by way of interlocutory clarification.[239]

In addition, by withholding the authority to intervene in arbitral proceedings, US and English courts impair the neutrality of the arbitration procedure.[240] This might give rise to opting out of the obligation to arbitrate by initiating court proceedings despite there being an arbitration agreement, or submitting the dispute to the court to declare the arbitration agreement void, or challenge the arbitrator's jurisdiction.[241]

Similarly, the traditional reading of the text of arbitration agreements by English courts reduces the effectiveness of the arbitration process, permitting parties to delay arbitral proceedings, by alleging that the dispute falls outside the scope of the arbitration agreement.[242] Also, the public policy goal of promoting arbitration with the purpose of reducing busy court calendars and impairing the parties' costs is frustrated where the courts rather than arbitral tribunals hear arbitrable disputes.[243]

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[234] Susler (n 9) 143.
[235] Jones (n 78) 62.
[236] ibid.
[237] Barcelo (n 7) 1136.
[238] *AT&T Technologies* (n 202); Harbour (n 185).
[239] David (n 152) 15-17.
[240] ibid.
[241] ibid 50.
[242] Alan Redfern, 'The Jurisdiction of an International Commercial Arbitrator' [1986] 3 J Intl Arb 19, 30.
[243] *Sauer-Getriebe KG v White Hydraulics, Inc*, 715 F.2d 348, 352 (7th Cir 1983) (in which it was stated that '[a]rbitration lightens court's workloads, and it usually results in a speedier resolution of controversies').

On the other hand, the French 1981 reform of international arbitration law aims to simplify the way of challenging awards before the courts and it is more successful for achieving that goal. The French approach to the principle of the negative effect, in particular Article 1458 of the French Code, provides an express priority to the tribunal, different from any other jurisdiction scrutinized.[244]

The current application of the French Code by the courts enables a better structure of reducing abuse of resources for the parties and also for the courts, through establishing an optimum balance between assisting the tribunal and intervening in manifest cases of invalid arbitration clauses to safeguard the parties' interests.[245]

As Reisman stated,'…too much national judicial review will transfer real decision-making power from the arbitration tribunal, selected by the parties in order to be non-national and neutral, to a national court whose party neutrality may be considered less.'[246]

Thus, French law, in contrast to English and US law, accepts the negative effect of the competence-competence doctrine and provides a greater degree of neutrality in its arbitration rules in conformity with the UNCITRAL Rules, the ICC Rules, and the UNCITRAL Model Law.[247]

International conformity of French arbitration rules in France make it clear that favouring less court intervention and court review is the public policy of promoting arbitration in France, thereby creating a favourable forum in France for international arbitration.[248]

The reason for this policy is that the fundamental aim of the arbitral process is its contractual nature, which grants effect to the parties' intentions.[249] Parties who perform an arbitration agreement consent both to invest the arbitrator with the authority to hear their disputes and at the same time to deprive the courts of such authority.[250]

At this point, court intervention in arbitration would work contrary to the parties' intentions in determining an arbitration agreement.[251] Also, providing an occasion where there is minimal court intervention in arbitral proceedings and where courts are considered in a complementary role, promotes the credibility of arbitration as a dispute resolution mechanism.[252]

It has been argued that the internationalization of arbitration is accepted as a substantial element that must occur if arbitration is to be fully recognized in

[244] Gaillard and Savage (n 1) 681.
[245] Jones (n 78) 63.
[246] Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (Duke University Press 1992) 113.
[247] David (n 152) 285.
[248] Carbonneau (n 121) 97.
[249] Sammartano (n 145).
[250] Carbonneau (n 121) 1.
[251] ibid 9.
[252] ibid.

international commerce. This internationalization requires avoidance of the limitation by national laws.[253]

Finally, the ICC Rules and the UNCITRAL Model Law are both neutral and internationalized in nature and are favoured by parties who are willing to opt out the bias inherent in national courts proceedings.[254] Therefore, it is true to say that French arbitration law provides a more preferable arbitration mechanism in parallel with the UNCITRAL Rules, the ICC Rules and the Model Law by accepting conformably both the doctrine of separability and the competence-competence doctrine.[255] Thus, the French approach seeks to inhibit parties from opting out of arbitration agreements,[256] and promotes international arbitration by providing for greater neutrality in the arbitral process.[257]

In conclusion, French arbitration law is different from other jurisdictions, applying the competence-competence doctrine effectively; however, this does not mean that it is always best practice. The pro-arbitration approach taken by French courts serves for the promotion of France as a centre for international arbitration. It has been suggested that other jurisdictions should amend national arbitration laws and reinforce the French position, by ensuring priority to the tribunal regarding its own jurisdiction.[258]

The doctrine of competence-competence should be improved to provide efficient and uniform application in international arbitration in order to ensure that the parties' interest is preserved. In particular, during the arbitral process courts should take the French approach, which gives arbitrators more privilege in determining their jurisdiction. However, the French approach, which restricts access to the court after the tribunal is established, can result in unnecessary cost and expense since the reluctant party is compelled to proceed with arbitration and it can mean that genuine challenges are not determined by courts until an award is issued. At this point, there should be a mechanism which provides parties with access to court without causing unnecessary delay and expense. In order to achieve uniform application, the UNCITRAL Model Law has to be redesigned and clarified regarding the application of the doctrine without allowing any different interpretation.

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[253] Lew,Mistelis and Kroll (n 38) 1.
[254] Schwebel (n 124) 16.
[255] Carbonneau (n 121) 8.
[256] Redfern and Hunter (n 31) 32.
[257] Lew,Mistelis and Kroll (n 38) 1.
[258] Ibid.

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