THE DOCTRINE OF COMPETENCE-COMPETENCE IN THE EVOLVING LANDSCAPE OF ARBITRATION

INTRODUCTION

Arbitration has long been recognized as the preferred dispute resolution mechanism in international commerce. Parties from different legal systems often turn to it because it promises what domestic courts frequently cannot, to wit: speed, procedural flexibility, independence from national biases, amongst others. These attributes have established arbitration as a cornerstone of global commerce, assuring parties that their disputes will be resolved with fairness, efficiency, and neutrality across borders.[1] However, beneath this promise lies a recurring challenge that often surfaces before the merits of any case are even considered: the question of authority. Should the arbitral tribunal itself determine whether it has jurisdiction to hear the dispute submitted to it, or should this power rest with the national courts? This threshold issue is more than a technicality; it goes to the heart of arbitration's very identity and has given rise to one of its most enduring and hotly debated doctrines.

This article examines the rationale behind the doctrine of competence-competence, the foundations of a tribunal's authority to determine its own jurisdiction, and, by extension, the concept of separability. It further explores the delicate role of national courts in relation to arbitral proceedings, with particular emphasis on the timing, scope, and extent of judicial intervention in jurisdictional challenges. It is also essential to state that the importance of this article lies in the examination of some of the critical factors governing choice of seat of arbitration, to wit, the level of judicial interference or curial support to arbitration and certainty of the legal system in support of arbitration.

DOCTRINE OF COMPETENCE-COMPETENCE

The term "competence-competence" refers to the power of an arbitral tribunal to determine, in the first instance, the scope of its own jurisdiction, including the existence, interpretation, and validity of the arbitration agreement.[2] The doctrine is designed to limit the national court's interference with arbitral proceedings, promote party autonomy, and enhance the arbitration process, making it a definitive and assured method of dispute resolution.[3] Thus, there is a compelling practical necessity for an arbitral tribunal to possess the power to determine any challenge to its own jurisdiction, without necessarily staying its proceedings pending a national court's determination of such a challenge. Without such power, an uncooperative party to a valid arbitration agreement could easily frustrate or delay the arbitral process by merely contesting the tribunal's jurisdiction, thereby undermining the efficiency and integrity of the arbitration proceedings.[4] Therefore, there is a presumption that, by entering into an arbitration agreement, the parties have conferred upon the arbitrator the authority to determine their own jurisdiction, just as they would decide other legal issues arising in the arbitration. Accordingly, courts are expected to respect this contractual

1 Harrison Ogalagu & Nnamdi Ezekwem, "Challenges of Enforcement of Foreign Arbitral Awards in Nigeria: Addressing the Inconsistencies in the Nigerian Legislation," www.topeadebayolp.com; https://www.mondaq.com/nigeria/arbitration-dispute-resolution/1599152/challenges-of-enforcement-of-foreign-arbitral-awards-in-nigeria-addressing-the-inconsistencies-in-the-nigerian-legislations accessed on 25th September 2025.

2 Draft Digest of Case Law on UNCITRAL Model Law on International Commercial Arbitration, RIZ/DIS Conference, 2005.

3 UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, (UNCITRAL Model Law) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/07-86998_ebook.pdf, accessed on 16th October 2025.

4 Doug Jones, "Competence-Competence," https://dougjones.info/content/uploads/2023/04/460-Competence-Competence.pdf, accessed on 16th October 2025.

intent, provided the arbitrator exercises such power in good faith.

It is essential to state that the doctrine of competence-competence primarily seeks to minimize premature judicial interference in arbitral proceedings by empowering the arbitral tribunal to make the initial determination on its own jurisdiction. However, this authority is not absolute, as national courts ultimately retain the power to review and, where necessary, affirm or overturn the tribunal's jurisdictional ruling.[5]

THE CONCEPT OF SEPARABILITY

The concept of separability postulates that an arbitration clause is treated as distinct, independent, and separate in existence from the main contract in which it is contained. It follows that an arbitration clause remains legally valid and enforceable even if the main contract in which it is contained is found to be invalid or unenforceable. Therefore, as long as the arbitration clause was validly executed and drafted broadly enough to include disputes arising from or relating to the contract's validity, the arbitral tribunal retains jurisdiction to determine the consequences of the contract's invalidity, even while declaring the main contract void.[6] Consequently, the concept of separability rescues many arbitration agreements from failing simply because they are contained in contracts, the validity or legality of which is questioned.

The doctrine of separability reinforces the principle of competence-competence by ensuring that, even when the validity of the arbitration agreement and, by extension, the tribunal's jurisdiction, is challenged, the tribunal may proceed with the arbitration and determine its own jurisdiction without interruption.[7] The concept has also been justified on four grounds,[8] to wit: the arbitration clauses are presumed to cover all disputes, including those about the contract's validity, reflecting the parties' intent for arbitration to resolve every issue;[9] if a party can avoid arbitration simply by denying the contract's validity, it creates a loophole that undermines arbitration's speed and efficiency, especially in international cases where no global court has compulsory jurisdiction to enforce the contract's validity; the law treats an arbitration clause as a separate agreement from the main contract, meaning that even if the main contract is invalid, the arbitration agreement remains valid since it stands independently;[10] and that courts generally review only arbitral awards and not the substance of disputes meant for arbitration. Without the concept of separability, however, courts would inevitably have to examine the merits of such disputes, undermining the purpose of arbitration.

Working together, the doctrines of Competence-Competence and separability function to prevent parties from circumventing their agreed dispute-resolution mechanism and ensure that contract disputes are resolved by arbitration as intended.

5 Ibid 57.

6 Marcus S Jacobs, "The Separability of the Arbitration Clause: Has the Principle Been Finally Accepted in Australia?" (1994) 68 ALJ 629 at 629.

7 Carl Svernlöv, "What Isn't, Ain't: The Current Status of the Doctrine of Separability" (1991) 8(4) JIA 37 at 37.

8 Stephen M Schwebel, International Arbitration: Three Salient Problems (1987) ch 1,1–13

9 Applying the officious bystander test. See also: Harbour Assurance v. Kansa General International Insurance (1993) 1 Lloyd's Rep 455 (CA)

10 Paul Smith Ltd v H & S International Holdings Inc (1991) 2 Lloyd's Rep 127

THE DOUBLE EFFECTS OF COMPETENCE-COMPETENCE

The competence-competence doctrine operates in two key aspects, each serving a vital function in preserving the efficiency and integrity of the arbitral process. The first aspect, as already stated earlier, empowers an arbitral tribunal to determine, in the first instance, whether it has jurisdiction to hear a dispute, without having to suspend proceedings or await the court's determination on jurisdiction. This aspect is referred to as the positive aspect or effect, and it has gained widespread international recognition and is codified in most contemporary arbitration statutes[11] and institutional rules.[12]

The second aspect operates to restrain national courts from making their own determinations on questions of arbitral jurisdiction, at least at the preliminary stage, when the parties have agreed to submit their disputes to arbitration. In essence, it prevents courts from intervening prematurely or usurping the tribunal's authority to rule, in the first instance, on its own jurisdiction.[13] This is referred to as the negative aspect or negative effect. However, the negative aspect should not be misunderstood as an absolute bar against judicial oversight. Rather, it establishes a sequential hierarchy between arbitral and judicial authority: the arbitral tribunal is given the first opportunity to decide on issues of its jurisdiction, while the courts retain a subsequent or supervisory role to review that decision if necessary.

It is essential to note that the negative aspect of Competence-Competence varies across jurisdictions and is more controversial.[14] In this regard, while all jurisdictions recognize that the court may review the question of jurisdiction at some point, the most significant area of variation lies in the question of "timing," specifically, at what stage the issue of the tribunal's jurisdiction may properly be referred to a court. Some jurisdictions postpone judicial intervention until after the arbitral tribunal has ruled on its own jurisdiction, either immediately following the tribunal's ruling on jurisdiction or at the stage of enforcing or challenging the final award. Others allow courts to entertain jurisdictional challenges at an earlier phase, including before or during the arbitral proceedings.

DIFFERENT JURISDICTIONAL APPROACHES

Different jurisdictions adopt varying approaches to when courts may consider a tribunal's jurisdictional challenge, each with its own merits and drawbacks. Deferring court involvement until after an award preserves the autonomy of arbitration but risks wasting time and resources if the tribunal ultimately lacks jurisdiction. Conversely, allowing early court intervention may save costs, but it could also invite unnecessary delays or disruptions from uncooperative parties. Thus, a balanced approach that safeguards both efficiency and fairness is most desirable.[15] We will now consider some of the jurisdictional approaches to the negative aspect of Competence-Competence below.

[11] See: Belgium Judicial Code art.1697(1); Netherlands Code of Civil Procedure art.1052(1); German ZPO art.1040.

[12] See, e.g. UNCITRAL Arbitration Rules art.21(1), ICC Arbitration Rules art.6(2), LCIA Arbitration Rules art.23.1, AAA International Arbitration Rules art.15(1)

[13] Amokura Kawharu, Arbitral Jurisdiction, 23 NEW ZEALAND UNIV. L. REV. 238, 243 (2008) [hereinafter Negative Effect].

[14] Ibid 415

[15] Doug Jones, Op. Cit 59

THE UNCITRAL MODEL LAW APPROACH

The UNCITRAL Model Law strikes a careful balance regarding the negative effect of Competence-Competence by disallowing parties to seek early judicial review of a tribunal's jurisdiction and deferring such review until after an arbitral award is rendered. This balanced framework is principally reflected in Article 16 of the Model Law. Specifically, Article 16(1) embodies the positive effect of the competence-competence principle by expressly empowering an arbitral tribunal to determine its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The negative effect of the doctrine, which limits premature judicial interference, is addressed in Article 16(3), outlining the circumstances and timing under which a court may review the tribunal's decision on jurisdiction. Article 16(3) provides thus:

> **"The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article [that the tribunal 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 a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award ."**[16]

Under the UNCITRAL Model Law, a party that disputes an arbitral tribunal's jurisdiction has the right to seek judicial review within 30 days after the tribunal renders its decision on that issue. This structure ensures that the timing of the challenge is tied directly to the tribunal's own determination of jurisdiction, thereby preserving the tribunal's primary authority to decide the question in the first instance. Where a jurisdictional objection is raised at the preliminary stage of the proceedings, the Model Law allows for a swift and limited court review of the tribunal's ruling, designed to be non-intrusive and non-appealable. This mechanism strikes a balance between efficiency and judicial oversight, ensuring that arbitration proceeds without unnecessary disruption while still providing parties with a procedural safeguard against potential jurisdictional overreach by the tribunal. However, it has been argued that allowing an arbitral tribunal to postpone its decision on jurisdiction until the final award may undermine the intended balance of the Model Law, making its approach less of a true compromise than it initially appears.[17]

THE FRENCH APPROACH

The French approach to the negative effect of the competence-competence principle, as codified in Article 1448 of the French Code of Civil Procedure, as amended in 2011,[18] provides that:

> **"When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. A court may not decline jurisdiction on its own motion. Any stipulation contrary to the present article shall be deemed not written."**

The above provisions strictly limit the courts' role in reviewing arbitration agreements. Under this approach, courts may only intervene when no arbitral tribunal has yet been constituted, and even then, only if the arbitration agreement is manifestly void or manifestly inapplicable. Once a

[16] Article 16(3) of the UNCITRAL Model Law

[17] W.W. Park, "The Arbitrability Dicta in First Options v. Kaplan: What Sort of KompetenzKompetenz has Crossed the Atlantic" (1996) 12 Arbitration International 137

[18] Note that the earlier versions of Article 1448 contained essentially the same provisions, but they were limited to domestic arbitration

tribunal has been established, French courts must decline jurisdiction and refer the dispute to arbitration, leaving it to the arbitral tribunal to determine any challenges to its own jurisdiction. Consequently, the French approach strongly favours the autonomy and efficiency of the arbitral process, reflecting a distinctly pro-arbitration stance. It prioritizes the integrity and independence of arbitration by strictly limiting judicial intervention, ensuring that arbitral tribunals are given the first opportunity to rule on their own jurisdiction. This approach reinforces the principle that arbitration should operate with minimal court interference, thereby promoting procedural efficiency, party autonomy, and international confidence in France as an arbitration-friendly jurisdiction.

THE ENGLISH APPROACH

The English approach to the negative aspect of the competence-competence principle aligns closely with that of the UNCITRAL Model Law, as it allows jurisdictional challenges to be raised either during the preliminary stages of the arbitral proceedings or after the arbitral award has been rendered. However, the English approach diverges from the UNCITRAL Model Law in that, while the Model Law gives primary authority to the arbitral tribunal to rule on its own jurisdiction before any court involvement, the English framework grants concurrent jurisdiction, allowing both the tribunal and the court to address jurisdictional issues independently.[19] In this regard, Section 32 of the English Arbitration Act[20] provides thus:

> **(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. (1A) An application under this section must not be considered to the extent that it is in respect of a question on which the tribunal has already ruled. (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. (3) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending."**

The above provisions reflect a qualified or limited application of the negative effect of the competence-competence doctrine. It introduces a measured flexibility by permitting early judicial intervention, but only under carefully controlled circumstances. The provision acknowledges the tribunal's primary authority to determine its own jurisdiction yet allows a court to decide such questions before an award is made, subject to specific conditions designed to safeguard arbitral independence. Thus, while subsection 1(A) of Section 32 of the English Arbitration Act 2025 forbids the court from entertaining applications challenging the tribunal's jurisdiction where the question of jurisdiction had already been determined or ruled on by the tribunal, it further

[19] Sections 30 and 32 of the English Arbitration Act 2025. The English Arbitration Act 2025 came into force on 1st August 2025 and amended the English Arbitration Act 1996.

[20] English Arbitration Act 2025

permits the court to determine the issue of the tribunal's jurisdiction even after the tribunal's determination of same, upon the parties' agreement or with the permission of the tribunal.[21] Notwithstanding the above, it seems that there is no restriction on the court to make pronouncement on the tribunal's jurisdiction, where the tribunal is yet to be constituted or had yet to rule on the its own jurisdiction. At first glance, the above provisions appear to mark a significant move toward embracing the negative effect of the competence-competence doctrine when compared to the English position before the English Arbitration Act 2025 and 1996 Act. However, subsequent case laws after the enactment of the English Arbitration Act 1996 indicate that, in complex or contentious cases, courts have tended to assert jurisdiction and decide questions concerning the tribunal's authority before the tribunal itself has had the opportunity to rule on the matter. This judicial tendency reflected a stance that is less supportive of arbitral autonomy and not entirely consistent with a pro-arbitration approach. In **Law Debenture Trust Corp Plc v. Elektrim Finance BV**, the Court held 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 meantime.[22]

Thus, although the English Arbitration Act 1996 established a framework that allowed courts to recognize the negative effect of the competence-competence principle, judicial interpretation did not fully advance the principle's intent, namely, to affirm the arbitral tribunal's primary authority to determine questions concerning its own jurisdiction. With the coming into force of the English Arbitration Act 2025, attention is now focused on the English Courts to see how they will interpret and apply the negative effect of the competence-competence doctrine.

THE NIGERIAN APPROACH

The Nigerian approach to the negative effect of the competence-competence principle demonstrates a developing yet cautious commitment to arbitral autonomy, influenced primarily by the provisions of the Arbitration and Mediation Act 2023 (AMA),[23] and the evolving jurisprudence of Nigerian courts. **Section 14 of the AMA** provides that "the arbitral tribunal shall rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement." The foregoing provides for the positive effect of the Competence-Competence principle. It is also important to note that Section 14 (5) & (6) of the AMA, just like UNCITRAL Model Law provides that the tribunal may rule on its own jurisdiction either as a preliminary question or in an award on the merits and the ruling is final and binding. However, where the tribunal rules on its jurisdiction as a preliminary question, a party may request a court to decide the matter, within thirty (30) days from the date of receipt of notice of ruling.

The above provisions are consistent with Article 16(3) of the UNCITRAL Model Law, reflecting Nigeria's commitment to international best practices in arbitration. However, unlike the Model Law, which allows a party dissatisfied with a tribunal's jurisdictional ruling to apply to court within thirty (30) days and expressly makes the court's decision final and non-appealable, the AMA does not include any provision limiting further appeals from such court decisions. This omission potentially opens the door to protracted litigation, thereby undermining the efficiency and finality that the competence-competence principle seeks to achieve.

[21] Section 32 (2) of the English Arbitration Act 2025
[22] Law Debenture Trust Corp Plc v Elektrim Finance BV [2005] EWHC 1412 (Ch).
[23] The Arbitration and Mediation Act 2023

It must be stated that the provisions of the AMA suggest that the tribunal will first determine any question(s) regarding its jurisdiction before any reference can be made to the court. It is also important to state that under the National Policy on Arbitration and Alternative Dispute Resolution (ADR), 2024, courts are enjoined to refrain from entertaining actions in respect of a contract in which the parties have included an arbitration clause, without first giving effect to the arbitration clause by referring same to an arbitral tribunal.[24] Thus, where a court is approached by a party to an arbitration agreement, such a court shall refer the matter to the arbitral tribunal, while retaining a supervisory role at the enforcement stage or preliminary stage after the tribunal has made a ruling. This is the purport of Section 5 of the AMA. In **SEMBCORP ENGINEERING PTE LTD V. IPCO (WA) HOLDINGS LTD & ANOR**,[25] the Supreme Court held that "...The attitude of Nigerian Courts towards arbitration and arbitration clauses is to enforce same and hold the parties to an agreement voluntarily entered into by them. It is due to the respect by Courts for arbitration agreements that an arbitration clause in an agreement is treated as separate from and independent of the agreement itself, such that where the agreement which contains an arbitration clause fails or is found to be null and void or is modified, the arbitration clause survives and can be enforced... Hence, where an arbitration clause is contained in a contract, a trial Court ought to give regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed by them."

Nigeria's approach to the negative effect of competence-competence is moderately pro-arbitration but not absolute. The arbitral tribunal has the first opportunity to rule on its jurisdiction, yet the courts maintain a supervisory gatekeeping role that can be invoked early in the process or at the enforcement stage.

CONCLUSION

The doctrine of competence-competence remains one of the cornerstones of modern arbitration, embodying the autonomy, efficiency, and self-regulating nature of the arbitral process. By empowering tribunals to determine their own jurisdiction, it safeguards arbitration from premature judicial interference and upholds the parties' intention to resolve disputes outside traditional courts. However, as arbitration continues to evolve globally, the scope and application of the doctrine, particularly its negative effect, vary across jurisdictions, reflecting differing balances between judicial oversight and arbitral independence. While some jurisdictions adopt a strong pro-arbitration stance that minimizes court intervention, others maintain a more cautious approach that permits limited judicial review in the interest of fairness and procedural integrity.

Ultimately, the effectiveness of competence-competence depends not only on legislation but also on judicial attitude and institutional maturity. Courts must continue to respect arbitral independence while intervening only when necessary. As arbitration expands as a preferred mechanism for dispute resolution, sustaining the delicate equilibrium between autonomy and accountability will be essential to preserving its legitimacy, efficiency, and global appeal.

[24] Article 15.0 of the National Policy on Arbitration and Alternative Dispute Resolution (ADR), 2024

[25] SEMBCORP ENGINEERING PTE LTD V. IPCO (WA) HOLDINGS LTD & ANOR (2024) LPELR-62984(SC)

AUTHORS

HARRISON OGALAGU
PARTNER

NNAMDI EZEKWEM
ASSOCIATE

TALP's Dispute Resolution Department

For further enquiries, log onto www.topeadebayolp.com

Do you need to get in touch with us, to know more on how we can help you and your business? Kindly contact us by using any of the details provided below:

TOPE ADEBAYO LP

3rd Floor, The Phoenix, 31 Mobolaji Bank Anthony Way, Ikeja Lagos, Nigeria.
p: +234 708 869 9174, +234 813 532 1156
e: info@topeadebayolp.com
w: www.topeadebayolp.com