Enforcement of Arbitration Agreements and International Arbitral Awards

The New York Convention in Practice

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CHAPTER 8
NEGATIVE EFFECT OF COMPETENCE-COMPETENCE: THE RULE OF PRIORITY IN FAVOUR OF THE ARBITRATORS

Emmanuel Gaillard and Yas Banifatemi***

The development of international arbitration law has unquestionably benefited from the vast acceptance of the 1958 New York Convention[1] and its pro-arbitration stance. Although essentially concerned with the back end of the arbitral process through the facilitation of the recognition and enforcement of arbitral awards, the New York Convention extends its protection to the front end of the arbitral process through the recognition and enforcement of the parties' agreement to settle their disputes by international arbitration.

The basic requirement that the parties to an arbitration agreement honour their undertaking to submit to arbitration any disputes covered by their agreement entails the consequence that the courts of a given country are prohibited from hearing such disputes. If seized of a matter covered by an arbitration agreement, the courts will be required to refer the parties to arbitration. This principle is embodied in Article II(3) of the New York Convention:

> 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.[2]

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on June 10, 1958, hereinafter the 'New York Convention'. As of 1 January 2008, 142 States were parties to the New York Convention.

[2] See also, in similar terms, Article 8 of the UNCITRAL Model Law: '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 parties to arbitration'. In situations where arbitral proceedings have already been initiated, compare with Article VI(3) of the European Convention on International Commercial Arbitration, done at Geneva, 21 April 1961: 'Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement

(continued...)

A court applying Article II(3) is faced with the crucial question of the extent of its review of the relevant arbitration agreement. Indeed, a court seized of the matter may determine, in order to refer the parties to arbitration, whether the arbitration agreement is 'null and void, inoperative or incapable of being performed', but no indication is provided as to the standard that should be applied for such determination. Are the courts required to inquire, in a detailed manner, into the merits of the existence and validity of the arbitration agreement and issue a final decision on this question? To the extent that the arbitrators have the power to rule on their own jurisdiction, would the simultaneous examination of the existence and validity of the arbitration agreement by the courts frustrate such power? Should the courts, instead, restrict their control to a prima facie verification that the arbitration agreement exists and is valid, and reserve their full review of the question until the time when there is an action to enforce or to set aside the resulting arbitral award? The question is, in effect, one of *timing*: to the extent that the courts are entitled to review the existence and validity of the arbitration agreement and the arbitrators' decision regarding their jurisdiction, should they be allowed to decide on any challenge to the arbitrators' jurisdiction immediately upon the request of a party, or should the arbitrators be allowed to exercise their power to rule on their own jurisdiction first?

The answer to these questions is to be found in the notion of competence-competence, one of the founding principles of international arbitration law. Providing for the arbitrators' power to rule on their own jurisdiction, this principle embodies the mirroring effect that the courts should refrain from engaging into the examination of the arbitrators' jurisdiction before the arbitrators themselves have had an opportunity to do so. Known as the 'negative effect of the principle of competence-competence', this rule of priority in favour of the arbitrators, today increasingly recognised in practice, exemplifies the specific nature and autonomy of international arbitration, in full harmony with the New York Convention's philosophy of recognition of the validity of the arbitration agreement and of the award resulting from the arbitral process.

1. The Dual Function of the Principle of Competence-Competence

The rules governing the review by the courts of the existence and validity of an arbitration agreement are found in international arbitration law itself. In the same way as national courts, which are permanent bodies, have no difficulty ruling on the validity and scope of an agreement

was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary'.

conferring them jurisdiction, international arbitration law has conceived the principle of competence-competence which empowers an arbitral tribunal to rule on its own jurisdiction without any illogicality arising from the fact that it is not a permanent body and that the determination of its jurisdiction is founded on the parties' agreement, which it may eventually find to be inexistent or vitiated, to arbitrate their dispute. As a result, challenging the existence or the validity of the arbitration agreement will not prevent the arbitrators from proceeding with the arbitration, ruling on their own jurisdiction and, if they retain jurisdiction, rendering a decision on the merits of the dispute notwithstanding any court action aimed at setting aside the decision on jurisdiction. This is known as the 'positive effect' of the principle of competence-competence, today recognised in a vast majority of countries.[3]

Accepting this positive effect of the principle of competence-competence and the arbitrators' inherent power to determine their jurisdiction on the basis of the arbitration agreement entails the consequence that domestic courts should not, in parallel and with the same degree of scrutiny, rule on the same issue, at least at the outset of the arbitral process. In other words, the courts should limit, at that stage, their review to a prima facie determination that the agreement is not 'null and void, inoperative or incapable of being performed'. This principle is known as the 'negative effect' of competence-competence,[4] which means that the arbitrators must

[3] In this respect, the UNCITRAL Model Law has played an influential role, see Article 16 on the Competence of an arbitral tribunal to rule on its own jurisdiction: '(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement .... (3) The arbitral tribunal may rule on a plea ... 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'.

[4] This terminology was originally suggested by Emmanuel Gaillard in 1994: see Emmanuel Gaillard, 'Convention d'arbitrage', in *Juris Classeur: Droit International* Fasc. 586-5, ¶¶ 49, 50 (1994); see also E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶¶ 660 et seq., Kluwer (1999). On the negative effect of competence-competence and the prima facie review more particularly, see Emmanuel Gaillard, 'L'effet négatif de la compétence-compétence', in *Etudes de procédure et d'arbitrage en l'honneur de Jean-François Poudret* 387, Univ. Lausanne (1999); Emmanuel Gaillard, 'La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence', in *Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in honour of Robert Briner* 311, ICC Pub. No. 693 (2005). The terminology is now increasingly used by commentators. See, eg, François Perret, 'Parallel Actions Pending Before an Arbitration Tribunal and a State Court: The Solution under Swiss Law', 16(3) *Arb. Int'l* 333, 336 (2000); Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* ¶¶ 458 and 488 et seq., Sweet & Maxwell (2007); Nathalie Najjar, *L'arbitrage dans les pays arabes face aux exigences du commerce international* ¶¶ 567 et seq., LGDJ (2004); Bertrand Ancel, 'Le contrôle de la validité de la convention d'arbitrage: l'effet négatif de la compétence-compétence', in Brazilian Congress on Arbitration, Curitiba, 14–16 September 2004, published

(continued...)

be the *first* (as opposed to the *sole*) judges of their own jurisdiction and that the courts' control is postponed to the stage of any action to enforce or to set aside the arbitral award rendered on the basis of the arbitration agreement. As a result, a court that is confronted with the question of the existence or validity of the arbitration agreement must refrain from hearing substantive arguments as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had an opportunity to do so.

The policy considerations underlying the rule of priority in favour of the arbitrators are essentially the prevention of delaying tactics by the parties and the centralisation of litigation concerning the existence and validity of the arbitration agreement. First, the arbitral process would seriously be hindered if parties were allowed to exploit the courts to initiate parallel proceedings for the sole purpose of interfering with the progress of the arbitration. Correlatively, the parties' time and costs efforts would be better preserved if they are not submitted to the obligation of going through parallel and duplicative proceedings on the question of the existence and validity of the arbitration agreement. Requiring the arbitrators to stay the determination of their own jurisdiction pending the outcome of court proceedings on the same subject—regardless of whether they were initiated prior to or after the appointment of the arbitrators—would simply drain of its substance the fundamental principle of competence-competence and the arbitral process altogether. Second, allowing the arbitrators to make a first determination on their own jurisdiction and inviting the courts to conduct a full examination of the existence and validity of the arbitration agreement at the end of the arbitral process rather than immediately safeguards, in those legal systems where it exists,[5] the centralisation (both territorially and in terms of subject matter) of the court review of disputes associated with arbitration. In other words, jurisdiction to review the existence and validity of an arbitration agreement would remain with the courts having jurisdiction to review arbitral awards

in Portuguese as: *O Controle de Validade da Convenção de Arbitragem: O Efeito Negativo da "Competencia-Competencia"*', 2005 *Rev. Bras. Arb.* 52; William W. Park, 'The Arbitrator's Jurisdiction to Determine Jurisdiction', in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series No. 13, at 55, 68 et seq., Kluwer (2007). For an example of its use by courts, see Ct. First Inst. Geneva, 2 May 2005, *Air (PTY) Ltd. v. International Air Transport Ass'n (IATA)*, 23(4) *ASA Bull.* 739, 746 (2005).

[5] This is the case, for example, of French law (centralising actions against arbitral awards before the court of appeal of the place where the award was made, see Article 1505 of the French New Code of Civil Procedure) and Swiss law (giving exclusive jurisdiction to the Federal Tribunal to hear actions to set aside awards made in Switzerland unless the parties specifically elect to give jurisdiction to the court of the seat of the arbitral tribunal, each Canton designating a sole cantonal court, see Article 191 of the Swiss International Private Law Act). See also Articles 6 and 34(2) of the UNCITRAL Model Law, aimed at the 'centralization, specialization and efficiency' of the arbitral process as well as the 'Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006', ¶ 16, available on the UNCITRAL website.

rather than being dispersed, depending on the parties' particular procedural choices, among commercial or civil courts which would normally have jurisdiction in the absence of an arbitration agreement.

Recognising the arbitrators' priority in the determination of their jurisdiction—consistent with Article II(3) of the New York Convention notwithstanding the absence of a specified standard of examination in that provision[6]—by no means suggests that domestic courts relinquish their power to review the existence and validity of an arbitration agreement. The acceptance by national legal systems—by way of rules incorporated in their arbitration statutes or in international conventions such as the New York Convention—that the courts refer the parties to arbitration simply means that the courts, when making a prima facie determination that there exists an arbitration agreement and that it is valid, leave it to the arbitrators to rule on the question and recover their power of full scrutiny at the end of the arbitral process, after the award is rendered by the arbitral tribunal. The arbitrators' power to rule on their own jurisdiction would otherwise be, in practice, negated.

2. The Recognition of the Rule of Priority

Although the general position adopted in comparative law has been somewhat hesitant,[7] there is today a movement towards a greater recognition of the negative effect of competence-competence and the priority of the arbitrators in the determination of their own jurisdiction. The decisions rendered during the past decade by the highest courts in Switzerland, France, India, England and Canada are, in this respect, of particular interest.

The Swiss Federal Tribunal has unequivocally recognised the necessity of protecting the arbitrators' power to rule on their own jurisdiction by preventing the courts from interfering with such power and postponing the courts' review until after the arbitrators have reached their decision. The seminal case in this respect is *Fondation M.*, rendered in 1996,[8] where the Federal Tribunal held that a court can only reasonably find that an arbitration agreement is 'null and void, inoperative or incapable of being performed'[9]

[6] Indeed, this provision does not exclude the possibility of a prima facie examination of the validity of the arbitration agreement. On this question see also Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 155, Kluwer (1981); Julian D.M. Lew, Loukas A. Mistelis, Stefan M. Kröll, *Comparative International Commercial Arbitration* 340 et seq., Kluwer (2003).

[7] On the controversies, see in particular the references by Emmanuel Gaillard and Jean-François Poudret, supra note 4 and infra note 12.

[8] Swiss Fed. Trib., 29 April 1996, *Fondation M. v. Banque X.*, ATF 122 III 139, 1996(3) *ASA Bull.* 527; see also the note by C.U. Mayer at 1996(3) *ASA Bull.* 361.

[9] In reference to the wording of Article 7(b) of the Swiss Private International Law Act (on the arbitration agreement) and Article II(3) of the New York Convention.

> where this appears obvious, without it being necessary to analyse the question in detail, since in any event, in the absence of such evidence, the arbitral tribunal will be empowered to decide, if necessary, on its own jurisdiction in accordance with Article 186 of the Private International Law Act, in any event where the arbitral tribunal has its seat in Switzerland.[10]

The courts' review was thus limited at the outset of the arbitration to a prima facie verification of the existence and validity of the arbitration clause. The Tribunal confirmed the rule that:

> if the State court is seized of a request to decline jurisdiction in favour of an arbitral tribunal and if the arbitral tribunal has its seat in Switzerland, the court shall decline jurisdiction if a summary examination of the arbitration agreement does not allow it to find that the agreement is null and void, inoperative or incapable of being performed.[11]

The Federal Tribunal having expressly referred to the seat of the arbitration being in Switzerland, the only question that remains to be clarified in Swiss law today is whether the Swiss courts' acceptance of the negative effect of competence-competence would be recognised in situations where the seat of the arbitral tribunal is not in Switzerland.[12]

French courts have consistently and unambiguously confirmed their full acceptance of the negative effect of competence-competence regardless of the seat of the arbitration.[13] To name but one example in French case law that has forcefully addressed the question is the decision rendered by the Cour de Cassation in 2001 in *American Bureau of Shipping*,[14] allowing an

[10] Swiss Fed. Trib., 29 April 1996, *Fondation M.*, supra note 8, 1996(3) *ASA Bull.* at 531.
[11] ibid. at 532.
[12] For a position in favour of the non-limitation of the negative effect of the principle of competence-competence depending on the seat of the arbitration, see Emmanuel Gaillard, 'La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence', supra note 4, in particular at ¶¶ 319 et seq.; Andreas Bucher, 'L'examen de la compétence internationale par le juge suisse', 2007 *La semaine judiciaire* 153, in particular at 173 et seq. For a different view, see Jean-François Poudret, 'Exception d'arbitrage et litispendance en droit suisse – Comment départager le juge et l'arbitre?', 25(2) *ASA Bull.* 230 (2007); Jean-François Poudret, Note following the Swiss Federal Tribunal's decision of 14 May 2001 in *Fomento de Construcciones*, 2001(4) *Rev. arb.* 835.
[13] For a detailed analysis of the position under French law, see Emmanuel Gaillard, 'L'effet négatif de la compétence-compétence', supra note 4, at 391 et seq. See also the references and examples in Philippe Fouchard, Note following the decision of the French Cour de Cassation (1re civ.) of 5 January 1999, *Zanzi v. de Coninck*, 1999(2) *Rev. arb.* 262; Note following the decisions of the French Cour de Cassation (1re civ.) of 1 December 1999, 2000(1) *Rev. arb.* 98.
[14] Cass. 1e civ., 26 June 2001, *American Bureau of Shipping (ABS) v. Copropriété Maritime Jules Verne*, 2001(3) *Rev. arb.* 529, with note by E. Gaillard; for an English translation, see Emmanuel Gaillard, 'The Negative Effect Of Competence-Competence', 17(1) *Int'l Arb. Rep.* 27 (2002). See also Ibrahim Fadlallah, 'Priorité à l'arbitrage: entre quelles parties?', II *Cahiers de l'arbitrage* 65 (2004).

appeal against a decision by the Paris Court of Appeal on the basis that it had not respected the negative effect of the principle of competence-competence. In a remarkably concise decision, the Cour de Cassation held the manifest nullity of the arbitration agreement to be

> the only obstacle to the [principle that an arbitrator is entitled to rule on his own competence] that establishes priority of arbitral competence to rule on the existence, the validity and the scope of the arbitration agreement.[15]

After the Paris Court of Appeal, on remand, confirmed and applied the principle set in the decision of 2001,[16] the Cour de Cassation reaffirmed these principles in a subsequent decision:

> [T]he principle of the validity of the international arbitration agreement and the principle according to which it is for the arbitrator to rule on his own jurisdiction are substantive rules of French international arbitration law which establish, on the one hand, the validity of the arbitration clause irrespective of any reference to a national law, and on the other hand, the efficiency of arbitration by permitting the arbitrator faced with a challenge

[15] Translated decision in Emmanuel Gaillard, 'The Negative Effect Of Competence-Competence', supra note 14, at 30.

[16] The reasoning of the Paris Court of Appeal is worth mentioning in this respect, in particular as it highlights the French courts' view of the more favourable regime under French law as compared to the rules of the New York Convention, including Article II(3):

> The principle of validity of the international arbitration agreement and that according to which it is up to the arbitrator to rule on his own jurisdiction are substantive rules of French international arbitration law. The first establishes the legality of an arbitration clause irrespective of any reference to a national law—to be thus distinguished from Articles II and V of the New York Convention on the formal and substantive requirements for the clause, which call, in particular, for the application of national laws to render the clause valid—but without exempting nevertheless the party invoking the clause from proving its existence; the second principle establishes the efficiency of arbitration, on the one hand by permitting the arbitrator faced with a challenge to his jurisdiction to decide on it, and on the other, in permitting the arbitrator to be the first to rule on the validity of the clause, such priority accorded to an arbitrator, who is not yet seized of a matter, over a State judge, not being provided for by the New York Convention of June 10, 1958 of which Article II only provides that a court of a Contracting State shall refer the parties to arbitration unless the arbitration agreement is void, inoperative or incapable of being performed.
>
> The combination of the above-mentioned principles of validity and of the competence of the arbitrator prohibit, as a consequence, the French judge to carry out a substantive and thorough review of the arbitration agreement, irrespective of where the arbitral tribunal has its seat. The only limit to the judge's examination of the arbitration clause, before being asked to review its existence or validity in the context of an action brought against the award, is whether that clause is manifestly null or inapplicable, in order to avoid, for the sake of saving effort and costs, an arbitration procedure that is bound to be unsuccessful.

CA Paris, 4 December 2002, *American Bureau of Shipping v. Copropriété Maritime Jules Verne*, 2003(4) *Rev. arb.* 1286, with note by E. Gaillard at 1290, 18(12) *Int'l Arb. Rep.* D-1 (2003), XXIX *Y.B. Com. Arb.* 657 (2004).

> to his jurisdiction to have priority to decide the challenge. The combination of the principles of validity and competence-competence prohibit, as a consequence, the French judge from carrying out a substantive and thorough review of the arbitration agreement, irrespective of where the arbitral tribunal has its seat. The only limit to the judge's examination of the arbitration clause, before being asked to review its existence or validity in the context of an action brought against the award, is whether that clause is manifestly null or inapplicable.[17]

The rule of priority in favour of the arbitrators is thus unambiguously recognised and applied by the French courts.

A similarly unequivocal recognition of the negative effect of competence-competence can be found in the decision rendered in August 2005 by the Supreme Court of India in *Shin-Etsu*.[18] The Court established the correct approach to the review of the arbitration agreement by the courts to be the prima facie finding that there exists an arbitration agreement that is not null and void, inoperative or incapable of being performed. The key rationale for the Court's holding that the courts' review of the arbitration agreement should be limited to a prima facie standard is the principle of competence-competence. The Court decided that, were the courts to be empowered to fully scrutinise the arbitration agreement, an arbitral proceeding would have to be stayed until such time that the court seized of the matter renders a decision on the arbitration agreement. If it were to be held that the finding of the court 'should be a final, determinative conclusion, then it is obvious that, until such a pronouncement is made, the arbitral proceedings would have to be in limbo. This evidently defeats the credo and ethos of the [Indian Arbitration] Act, which is to enable expeditious arbitration without avoidable intervention by the judicial authorities'.[19] As a result, 'the approach to be adopted is whether it is 'plainly arguable' that the arbitration agreement was in existence'.[20]

The Court found support for its decision in the comparative law approach – notably by reference to French and Swiss laws – in legal writings

[17] Cass. 1e civ., 7 June 2006, *Copropriété Maritime Jules Verne v. American Bureau of Shipping*, 2006(4) *Rev. arb.* 945, at 946–47, with note by E. Gaillard; see also the note by A. Mourre in 133(4) *J.D.I.* 1384 (2006).

[18] Sup. Ct. India, 12 August 2005, *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, [2005] 7 SCC 234, XXXI *Y.B. Com. Arb.* 747 (2006).

[19] ibid. ¶ 72. Article 45 of the Indian Arbitration and Conciliation Act of 1996, based on Article 8(1) of the UNCITRAL Model Law, reads in pertinent part that '... a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'.

[20] Sup. Ct. India, 12 August 2005, *Shin-Etsu*, supra note 18, ¶ 97.

endorsing a prima facie approach[21] and in the language, object and purpose of the Indian Arbitration and Conciliation Act. It also laid emphasis on the fact that the rule of priority in favour of the arbitrators is counterbalanced by the courts' power to review the existence and validity of the arbitration agreement at the end of the arbitral process:

> Even if the court takes the view that the arbitral agreement is not vitiated or that it is not invalid, inoperative or unenforceable, based upon purely a *prima facie* view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon .... Even after the court takes a *prima facie* view that the arbitration agreement is not vitiated on account of factors enumerated in Section 45, and the arbitrator upon a full trial holds that there is no vitiating factor in the arbitration agreement and makes an award, such an award can be challenged under Section 48(1)(a). The award will be set aside if the party against whom it is invoked satisfies the court *inter alia* that the agreement was not valid under the law to which the parties had subjected it or under the law of the country where the award was made. The two basic requirements, namely, expedition at the pre-reference stage, and a fair opportunity to contest the award after full trial, would be fully satisfied by interpreting Section 45 as enabling the court to act on a *prima facie* view.
>
> ... [T]he object of the Act would be defeated if proceedings remain pending in the court even after commencing of the arbitration. It is precisely for this reason that I am inclined to the view that at the pre-reference stage contemplated by Section 45, the court is required to take only a *prima facie* view for making the reference, leaving the parties to a full trial either before the Arbitral Tribunal or before the court at the post-award stage.[22]

This modern approach of safeguarding the arbitral tribunal's power to determine its own jurisdiction and postponing the control of such power to the post-award stage was also adopted by the Supreme Court of Canada in a decision of July 2007 rendered in *Dell*,[23] although the application of the rule of priority was, in effect, limited by the Court.

Having examined the different views of the negative effect of competence-competence—including as regards the interpretation of Article II(3) of the New York Convention, which it interpreted as 'not mean[ing] that [the court] is required [to rule on whether an agreement is null and void, inoperative or incapable of being performed] before

[21] Reference is made in particular, at paragraph 106 of the decision, to Gaillard and Savage, supra note 4, ¶¶ 412 et seq., and to Lew, Mistelis, Kröll, supra note 6, at 346.
[22] Sup. Ct. India, 12 August 2005, *Shin-Etsu*, supra note 18, ¶¶ 74–75 and 105.
[23] Sup. Ct. Canada, *Dell Computer Corp. v. Union des consommateurs*, 13 July 2007, 2007 SCC 34, 2007(3) *Rev. arb.* 567, with note by A. Prujiner at 593.

the arbitrator does—and the increasing acceptance of the 'deferential approach to the jurisdiction of arbitrators' in the international community,[24] the Court held as follows:

> I would lay down a *general rule* that in any case involving an arbitration clause, *a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law.* This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, *in ruling on the arbitrator's jurisdiction,* consider the facts leading to the application of the arbitration clause....
>
> Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.[25]

Although this decision, which lays down a 'general rule of referral', is considered as having clearly adopted the negative effect of competence-competence,[26] the limitation of the arbitrators' power to rule on their jurisdiction to the sole facts of the case, and the upholding of the courts' power to 'ru[e] on the arbitrator[s'] jurisdiction' in relation to questions of law narrow the recognition of the rule of priority in favour of the arbitrators.

A comparable limitation arises from the English House of Lords' recognition of the negative effect of competence-competence. In a series of cases since the adoption of the 1996 Arbitration Act, the courts in England had applied a restrictive vision of the principle of competence-competence and an expansive vision of the power of the courts to determine questions of arbitral jurisdiction in the first instance.[27]

[24] ibid. ¶¶ 69–78.
[25] ibid. ¶¶ 84–86 (emphasis added).
[26] See, eg, Note by A. Prujiner in 2007(3) *Rev. arb.* 593, 601. On the Canadian perspective more generally, see Frédéric Bachand, *L'intervention du juge canadien avant et durant un arbitrage commercial international,* LGDJ (2005).
[27] See in particular *Downing v. Al Tameer Establishment* [2002] EWCA Civ. 721, ¶ 31; *Al-Naimi v. Islamic Press Agency* [2000] 1 Lloyd's Rep. 522, 525; *Law Debenture Trust Corp. Plc*
(continued...)

In the celebrated *Fiona Trust* decision of October 2007,[28] that strongly reaffirmed the severability of the arbitration agreement, the House of Lords determined that the proper approach to Section 9 of the 1996 Arbitration Act, which provides for a stay of legal proceedings in favour of arbitration,[29] is

> to determine on the evidence before the court that [an arbitration agreement] does 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.[30]

In this respect, the House of Lord further laid emphasis on the international obligations resulting for the United Kingdom from the New York Convention:

> If in a case where an arbitrator does have jurisdiction to decide a 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 of 195[8] as enshrined in the 1996 Act.[31]

With respect to the particular question of a stay of the legal proceedings, the House of Lords held that:

> [The] combination of sections [9 and 72 of the Arbitration Act] shows, together with the prescriptive section 9(4), 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*. In these circumstances,

v. Elektrim Finance BV [2005] EWHC 1412, ¶ 34 (Ch); *Fiona Trust & Holding Corp. v. Privalov* [2006] EWHC 2583, ¶ 29 (Comm). See also Jan Paulsson, 'Arbitration-Friendliness: Promises of Principle and Realities of Practice', paper presented at the International Financial Services London Conference: 'Has London Met the Challenge?', London, 1 December 2006.

[28] *Premium Nafta Products Ltd. v. Fili Shipping Co. Ltd.* [2007] UKHL 40

[29] Section 9 of the Arbitration Act 1996, based on the UNCITRAL Model Law, provides in relevant part that: '(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter .... (4) 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'.

[30] *Fiona Trust*, supra note 28, [2007] UKHL 40, ¶ 37.

[31] ibid. ¶ 31.

> although it is contemplated also by section 72 that a party who takes no part in arbitration proceedings should be entitled in court to 'question whether there is a valid arbitration agreement', the court should, in light of section 1(1) of the Act, be very cautious about agreeing that its process should be so utilised. *If there is a valid arbitration agreement*, proceedings cannot be launched under section 72(1)(a) at all.[32]

This ruling shows that the terms under which the arbitrators are, 'in general', recognised the right 'to be the first tribunal to consider whether they have jurisdiction to determine the dispute' are limited by the requirement that a valid arbitration agreement exist, as well as the further requirements that the arbitration agreement be 'wide enough to comprise the relevant dispute' and that the arbitration agreement not be 'directly impeached by whatever ground... to attack the invalidity of the contract in which the arbitration clause is contained'.[33] In other words, to the extent that the English courts retain a degree of scrutiny as regards the existence, validity and scope of the arbitration agreement, the question of the extent to which English courts will give effect to the negative effect of competence-competence remains uncertain.

These decisions show that, despite the limitations that remain in certain jurisdictions, the rule of priority in favour of the arbitrators is, today, increasingly recognised. The full application of the negative effect of competence-competence requires, however, that the courts clear the ambiguity resulting from the limitation of this priority to situations where the seat of the arbitration is in the courts' own jurisdiction, where the challenge to the arbitrators' jurisdiction raises questions of facts only, or where the courts have already established the validity and scope of the arbitration agreement. Imposing requirements as regards the seat of the arbitration, denying the arbitrators' aptitude to determine legal questions relating to their jurisdiction, or requiring that the courts fully examine the existence and scope of an arbitration agreement before referring the parties to arbitration all impair the arbitrators' power to rule on their jurisdiction or, in other words, the principle of competence-competence itself. Adopting a prima facie standard of review, on the other hand, is nothing more than accepting a temporary deference to the arbitrators, as opposed to a prima facie suspicion that the arbitrators will not be able, after full scrutiny, to determine whether they have been established on the basis of an existing and valid arbitration agreement and to reach decisions that are fair and protect the interests of society as well as those of the parties to the dispute.

[32] ibid. ¶ 34 (emphasis added).
[33] ibid. ¶ 35.

3. The Arbitrators' Priority Under the Negative Effect of Competence-Competence as Distinct from the Courts' Chronological Priority Under *Lis Pendens*: the Autonomy of International Arbitration

The existing practice regarding the negative effect of competence-competence is a reflection of the view that each court takes with respect to the arbitral process as a whole: the more international arbitration is viewed as a fully autonomous process that is not anchored in any particular national legal system and that operates in accordance with specific rules, the more firmly the negative effect of competence-competence is recognised and applied. Conversely, the more hesitations remain as to the autonomous character of international arbitration, the more interventionist the courts become.

The principle of competence-competence, in both its positive and its negative effects, is at the heart of the self-contained character of international arbitration. In its negative effect, the principle justifies the priority given to the arbitrators for the determination of their own jurisdiction without undue interference by the courts, both when the rule addresses the courts seized of the question of the existence and validity of the arbitration agreement, and when it allows the arbitrators to continue arbitral proceedings while a court has been seized of the matter. In the former situation, the rule of priority requires the courts to refer the parties to arbitration after a prima facie examination of the existence and validity of the arbitration agreement. In the latter situation, the arbitral tribunal that has determined having jurisdiction should not be required to stay the arbitral proceedings based on the existence of a pending court proceeding.

The question of concurrent proceedings was raised in the *Fomento* decision,[34] whereby the Swiss Federal Tribunal set aside an award by an arbitral tribunal sitting in Switzerland and finding that it had jurisdiction to decide a dispute that had already been submitted to the courts of Panama. The basis for the Federal Tribunal's decision was essentially that the Arbitral Tribunal, by ruling on its own jurisdiction instead of staying the proceedings, had violated the jurisdictional rule contained in Article 9 of the Swiss International Private Law Act ('PILA').[35] The Federal Tribunal's opinion was based on its understanding of the rule of *lis pendens*. The question facing the Federal Tribunal was whether Article 9 of the PILA applies to arbitral tribunals as well as foreign courts. In

[34] Swiss Fed. Trib., 14 May 2001, *Fomento de Construcciones y Contratas SA v. Colon Container Terminal SA*, 2001(3) *ASA Bull.* 555.

[35] Article 9(1) of the International Private Law Act provides that: 'If the parties are engaged in proceedings abroad having the same object, the Swiss court shall stay the proceeding if it may be expected that the foreign court will, within a reasonable time, render a decision that will be recognizable in Switzerland'.

other words, must an arbitral tribunal sitting in Switzerland stay the arbitral proceedings if the same dispute is already pending before foreign courts? The Federal Tribunal held that the arbitral tribunal in such a situation is required by Article 9, which is based on considerations of public policy, to defer to the foreign court.

The Federal Tribunal's policy reasons for applying the same rules to national courts and arbitral tribunals were as follows. First, since both arbitral awards and court judgments are enforceable in the same way, there exists the same interest in avoiding contradictory decisions that are equally and simultaneously enforceable. Second, arbitral tribunals, in the same way as State courts, are bound by *res judicata*, and therefore the closely connected principle of *lis pendens*, which serves the same function, should apply in the same way. Third, the position taken in legal writings is that Article 9 applies to arbitral tribunals sitting in Switzerland. At the same time, the Federal Tribunal held that the risk of a party seeking recourse to a foreign court hostile to arbitration is mitigated by the fact that Article 9 of the PILA only requires the arbitrators to defer to a foreign court where the foreign judgment is likely to be enforceable in Switzerland, which is not likely to be the case where the foreign court disregards a valid arbitration clause.

Based on this reasoning, the Federal Tribunal decided that there was no legal basis for granting priority to arbitral tribunals over national courts in deciding on the arbitrators' jurisdiction and disregarding the rule of chronological priority under Article 9:

> There is no serious legal basis for a priority in favour of the Arbitral Tribunal. The State Court seized of an action on the merits ... must rule on its own jurisdiction even if in order to do so it has to express a view on the validity of an arbitration clause. According to Article II(3) of the New York Convention or to Article 7(b) PIL, the State Court may examine whether the arbitration clause has fallen through, is inoperative or cannot be applied. Such may be the case if the parties renounced the arbitration clause.
>
> When one of the parties relies on an arbitration agreement and the other argues that a subsequent agreement took place in favour of the State court, it is clear from the outset that both courts in competition (the Arbitral Tribunal and the State Court) are equally empowered to deal with the issue.
>
> There is therefore no reason to grant a priority to the Arbitral Tribunal which has no legal foundation and justification. The rule of *lis pendens* must be upheld, as stated at article 9, which gives priority to the court first seized.[36]

[36] Swiss Fed. Trib., 14 May 2001, *Fomento*, supra note 34, 2001(3) *ASA Bull.* at 562–63.

As a result, the Federal Tribunal held that Article 9 of the PILA applies to an arbitral tribunal sitting in Switzerland, requiring it to stay the arbitral proceeding during the pendency of an action filed earlier in a foreign court, unless it finds that the foreign court action is not between the same parties, the court action does not involve the same dispute, or the foreign court is not able, within a reasonable time, to render a judgment likely to be enforced in Switzerland. Since the award was not based on such findings, it was held to have violated Article 9 and was set aside.

By accepting to apply to international arbitration the rule of *lis pendens*, which is not contained in Chapter 12 of the PILA on international arbitration, the *Fomento* decision—at odds with the Swiss courts' case law relating to international arbitration—created a presumption that the rules applicable to the courts are, by analogy, applicable to arbitral tribunals conducting an arbitration in Switzerland, a presumption specifically rejected by the PILA. The *Fomento* decision also paved the way for the parties' tactical manoeuvres consisting in bringing an action in foreign courts prior to the initiation of arbitral proceedings in Switzerland in order to circumvent the arbitral process. Confronted with the risk that the Swiss courts may set aside an award rendered by the arbitral tribunal having proceeded with the arbitration instead of staying the arbitral proceedings, and the resulting disincentive as regards Switzerland as an international arbitration venue, the Swiss legislator intervened to remedy the situation.

Recognising that the rule of chronological priority should be firmly rejected and the autonomous nature of arbitration reaffirmed, with the possibility for arbitral tribunals to decide on their own jurisdiction without undue interference of any kind,[37] the Swiss legislature adopted a new paragraph to Article 186 of the PILA designed to remedy the legal uncertainty introduced by the *Fomento* decision. This new provision, adopted in 2006 and modifying the first paragraph of Article 186 of the PILA, provides that:

> The arbitral tribunal shall decide on its own jurisdiction without regard to proceedings having the same object already pending

[37] On these principles, see the report issued on 17 February 2006 by the Judicial Affairs Committee of the Swiss National Council, 'Initiative parlementaire – Modification de l'art. 186 de la loi fédérale sur le droit international privé – Rapport de la Commission des affaires juridiques du Conseil national du 17 février 2006', Feuille fédérale No. 21, 30 May 2006, at 4469, available on line at www.admin.ch/ch/f/ff/2006/4469.pdf. See also the report by the Federal Council dated 17 May 2006, 'Initiative parlementaire – Modification de l'art. 186 de la loi fédérale sur le droit international privé – Rapport de la Commission des affaires juridiques du Conseil national du 17 février 2006 – Avis du Conseil fédéral', Feuille fédérale No. 21, 30 May 2006, at 4481, available on line at http://www.admin.ch/ch/f/ff/2006/4481.pdf.

> between the same parties before another State court or arbitral tribunal, unless there are serious reasons to stay the proceeding.[38]

With this change, the arbitration-friendly legal framework provided in Chapter 12 of the PILA will no longer be contaminated by Article 9. In other words, the principle of competence-competence is recognised to its fullest extent, an arbitral tribunal with a seat in Switzerland being in a position to rule on its own jurisdiction regardless of any action abroad on the same dispute and between the same parties, while the Swiss courts retain their power of full scrutiny of the award at the end of the arbitral process on the basis of Article 190 of the PILA.

More generally, the modification of Article 186 of the PILA highlights the clear distinction that should be made between the principle of competence-competence in international arbitration and the rule of *lis pendens* in matters of concurrent jurisdiction. Indeed, the principle of *lis pendens* provides that when a court is seized of a matter that is already pending in another court, the second court may not rule on the matter until there is a final decision in the first proceeding. The priority between the two proceedings is purely chronological: the first action filed has priority. This rule, which addresses the allocation of jurisdiction between two different courts equally entitled to decide a dispute, is entirely neutral with respect to each branch of the alternative and serves only the purpose of avoiding the same dispute to be brought in multiple fora and possible contradictory decisions, as opposed to protecting the jurisdiction of a particular court. The rule of competence-competence, on the other hand, is not neutral. It is specifically designed to protect and safeguard the arbitrators' power to rule on their jurisdiction without premature court intervention, while allowing for a review by the courts at the end of the arbitral process.[39]

[38] New Article 186, al. 1 bis, adopted the Federal Law of 6 October 2006 and entered into force on 1 March 2007. See the commentaries by Charles Poncet, 'Swiss Parliament Removes Lis Pendens as an Obstacle to International Arbitrations in Switzerland', in 2006 *World Arb. & Med. Rep.* 395; Domitille Baizeau, 'Modification de l'article 186 de la LDIP suisse : procédures parallèles et litispendance, clarification du législateur après la jurisprudence Fomento', *Gaz. Pal.*, 22–24 April 2007, at 19; Bucher, supra note 12, at 188 et seq.

[39] On the distinction between *lis pendens* and competence-competence, see Emmanuel Gaillard, 'La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence', supra note 4; Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, forthcoming in *Collected Courses of the Hague Academy of International Law*, ¶¶ 82 et seq. (2008); Bucher, supra note 12, at 173 et seq. For a different view in favour of the logic of *lis pendens* in the relations between arbitral tribunals and national courts, see Poudret and Besson, supra note 4, ¶¶ 509 et seq. and 518 et seq.; see also Jean-François Poudret, 'Exception d'arbitrage et litispendance en droit suisse – Comment départager le juge et l'arbitre?', supra note 12.

The inapplicability of the principle of *lis pendens*—which is relevant only in situations of concurrent jurisdiction of State courts—to arbitral proceedings shows the aptitude of international arbitration law to provide specific and self-contained rules as regards its sources, its objectives and its operation, including as regards its relations with national legal systems. To the extent that it closely touches upon the arbitrators' adjudicatory power and manifests the courts' confidence or, by contrast, suspicion towards arbitration, the question of court intervention in relation to the arbitrators' jurisdiction (and the response provided by the rule of priority in favour of the arbitrators) is archetypal of the degree of recognition of the autonomy of international arbitration.[40]

[40] On the question of the various visions of international arbitration, see, generally, Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international*, supra note 39.