REVISTA ROMÂNĂ DE ARBITRAJ

ROMANIAN ARBITRATION JOURNAL

ANUL 14
NUMĂRUL 3/2020
(IULIE-SEPTEMBRIE 2020)

CAMERA DE COMERȚ ȘI INDUSTRIE A ROMÂNIEI
ÎMPREUNĂ PENTRU AFACEREA TA

Wolters Kluwer
Romania

REVISTA ROMÂNĂ DE ARBITRAJ

ANUL 14, VOLUM 54, NUMĂRUL 3/2020 (IULIE-SEPTEMBRIE 2020)

CUPRINS

CRONICĂ DE CARTE

ARTICOLE. STUDII

ARTICLES

SEPARABILITY AND *COMPETENCE-COMPETENCE*: A COMPARATIVE PERSPECTIVE

SEPARABILITATE ȘI COMPETENȚĂ: UN STUDIU COMPARATIV

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ABSTRACT

Separability and competence-competence are paramount principles in international commercial arbitration. Implementing them in domestic legal systems presupposes balancing competing values, such as legitimacy, efficiency, party autonomy, freedom of contract and state intervention. This article provides a brief overview of separability and competence-competence. It then proceeds to compare the French, English, German and US implementations of these principles, arguing that these different approaches reflect the relative weight that each legal system attaches to the competing values mentioned above. The conclusion sets out the English system as striking the optimal balance.

KEYWORDS: *arbitration agreement; competence-competence; separability; English law; French law; German law; US case law*

REZUMAT

Independența clauzei de arbitraj față de restul contractului, precum și conflictele de competență dintre tribunalele arbitrale și instanțele naționale sunt teme fierbinți în arbitrajul comercial internațional. Implementarea principiilor care le guvernează în sistemele naționale de drept presupune punerea în balanță a unor valori precum legitimitate, eficiență, autonomie și intervenționism. Acest articol debutează cu o explicație succintă a separabilității clauzei de arbitraj și a competenței tribunalului arbitral. Imaginea de ansamblu este urmată de o analiză comparativă a felului în care sistemele de drept francez, englez, german și american aplică aceste principii, ideea principală fiind că diferențele

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de implementare reflectă felul în care fiecare sistem se raportează la valorile menționate mai sus. Concluzia acestui studiu este că sistemul britanic tratează cele două subiecte în maniera cea mai echilibrată.

CUVINTE CHEIE: *convenția arbitrală; competence-competence; separabilitate; legea engleză; legea franceză; legea germană; jurisprudență SUA.*

Lord Thomas of Cwmgiedd describes the attitude that courts have towards arbitration succinctly: "*Maximum support. Minimum interference*"[2]. That surely is the ideal. But in practice it is not always easy to draw the line between support and interference. As leading concepts in commercial arbitration, the principles of separability and *competence-competence* pose important challenges to this division. They raise questions on the relationship between courts and arbitral tribunals, legitimacy and efficiency, party autonomy and paternalism.

This text will provide an overview of separability and *competence-competence*, analysing the functions they serve and the ends they achieve in international commercial arbitration (I). Then, it will offer a brief comparison between the French (II), English (III), German (IV) and US (V) law approaches to *competence-competence*. In so doing, it will be argued that the way in which this principle has been transposed into national legislation reflects the weight that these different systems attach to values such as party autonomy, freedom of contract, legitimacy and efficacy. Lastly, the conclusion will praise the English law approach as the preferable one, since it strikes the optimal balance between the above-mentioned values (VI).

(I) Separability and *competence-competence*: an overview

1. Separability

The principle of separability holds that an arbitration agreement is *distinct and independent from* the main contract which contains it. Thus, when parties enter into a transaction – e.g. a contract of sale – which includes an arbitration agreement, they are held to have entered into two separate agreements: (i) the commercial transaction itself (i.e. the sale) and (ii) the arbitration agreement attached to it.

The main function of the principle of separability is to shield the arbitration clause from any attack directed against the main contract. Since the arbitration clause is separate and distinct from the main contract, a challenge to the latter

[2] Lord Thomas CJ, *Commercial Dispute Resolution: Courts and Arbitration*, Beijing, (6 April 2017) at [25]. Available at: https://www.judiciary.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf. Last accessed on August 20th 2020.

will not automatically impact the former[3]. As Lord Hoffmann put it: "*The principle of separability [...] means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable only on grounds which relate directly to the arbitration agreement*"[4]. For example, if a party alleges that the contract of sale is void for misrepresentation, this does not mean that the challenge automatically extends to the arbitration clause as well. If the party wants to assert the invalidity of the arbitration clause, it must bring in evidence of misrepresentation *directly related* to the clause itself. The logical consequence of this is that, since the arbitration clause is presumed to be valid, it will be the arbitral tribunal who decides if the challenge to the contract itself is founded.

From this follows another vital function of the separability principle. Suppose the arbitral tribunal decides that the contract is indeed void for misrepresentation. Since the arbitration clause "survives" notwithstanding the invalidity of the contract, the arbitral tribunal can still exercise jurisdiction in respect of claims adjacent to the contract – for example, claims in tort or restitution which are not contractual in nature but which flow from the contractual relationship between the parties (in so far as the construction of the clause allows it). This has been made clear by Colman J in *Vee Network v Econet Wireless*: "*If [...] an arbitrator determines that the matrix contract is, for example, void ab initio by reason of illegality and it is not in issue whether the arbitration agreement is also illegal and void,* ***the tribunal can continue to exercise such jurisdiction under the arbitration agreement as its scope permits****. For example, if there were* ***an alternative claim in tort or for restitution*** *which was within the scope of the clause, the tribunal would continue to have jurisdiction conclusively to determine that claim* (emphasis added)"[5].

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[3] Under English Law, there are two exceptions to this rule: forgery and lack of authority. These are the only claims which, if proven on the facts of the case, will render both the main contract and the arbitration clause void. In other words, forgery and lack of authority are the only attacks that are so powerful and all-encompassing that they taint both the contract and the arbitration clause. See: *Premium Nafta Products Ltd v Fili Shipping Company Ltd [2007] UKHL 40*, per Lord Hoffmann at paragraph 17. Available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2007/40.html&query=(Premium)+AND+(Nafta)+AND+(Products)+AND+(Ltd)+AND+(v)+AND+(Fili)+AND+(Shipping)+AND+(Company)+AND+(Ltd)+AND+(.2007.)+AND+(UKHL)+AND+(40). Last accessed on August 20th 2020.

[4] *Premium Nafta Products Ltd v Fili Shipping Company Ltd [2007] UKHL 40*, per Lord Hoffmann at paragraph 17. Available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKHL/2007/40.html&query=(Premium)+AND+(Nafta)+AND+(Products)+AND+(Ltd)+AND+(v)+AND+(Fili)+AND+(Shipping)+AND+(Company)+AND+(Ltd)+AND+(.2007.)+AND+(UKHL)+AND+(40). Last accessed on August 20th 2020.

[5] [2004] EWHC 2909, per Colman J, paragraph 21. Available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2004/2909.html&query=(.2004.)+AND+(EWHC)+AND+(2909). Last accessed on August 20th 2020.

This is especially important since English law, like most modern legal systems, supports a very wide, all-encompassing interpretation of arbitration and jurisdiction clauses: the parties are held to have intended all matters between them to be within the ambit of the clause (even those claims in tort and restitution). This came to be known as the "one-stop shop" presumption. As Lord Hoffmann explained: "*The parties have entered into a relationship [...] which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen [...]. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by the national courts*"[6]. The separability of an arbitration clause can therefore be understood as a form of preserving the jurisdiction of the arbitral tribunal outside the parameters of the contractual matrix.

The principle of separation can seem counterintuitive. After all, fragmenting contracts is not commonplace and can be said to go against the general trend of analysing and interpreting clauses in the context of the contract as a whole. However, I argue that if one looks at the *principles and rationale* behind arbitration clauses, the reason why they are considered separate from the main contract and subject to a different regime becomes clear.

Arbitration clauses are an expression of party autonomy: they give effect to the parties' desire to have their disputes resolved by a forum of their choosing. In electing arbitration as a form of dispute resolution, the parties waive access to standard litigation procedures before national courts. Although art 6 ECHR is fully applicable to arbitration proceedings, the "public hearing" aspect provided therein is not applicable to arbitration, which is private. Parties are, of course, at liberty to renounce benefits such as that of having the proceedings being made public, but their decision to do so cannot be treated lightly. Given their importance, it is sensible for the courts to treat these clauses as an expression of informed and solid consent. They cannot be treated just like any other clause in the contract: they are evidence of a particularly important expression of autonomy. In other words, given the fact that arbitration clauses partially take away an important right, it makes sense to assume that the parties have given it sufficient thought – therefore, it also makes sense to demand a separate, specific ground which challenges this consent independent of any challenge levied against the contract itself.

Bermann makes a similar point: he argues that defects in the arbitration clause itself are seen to impugn the parties' consent to arbitration more than defects in

[6] *Fiona Trust & Holding Corp. v Privalov* [2007] UKHL 40, per Lord Hoffmann, paragraphs 6-7. Available at: https://www.trans-lex.org/312142/_/fiona-trust-holding-corp-v-privalov-%5B2007%5D-ukhl-40/. Last accessed on August 20th 2020.

the clauses which set out the substantive rights and obligations[7]. His argument is that if one sets out to prove that the parties did not consent to arbitration – i.e. that the arbitration clause is void – one needs to challenge the clause which expresses that consent itself, and not just the contract as a whole. He thus concedes that separability has "strong intuitive appeal"[8].

2. Competence-competence

Plainly put, the principle of competence-competence states that the arbitral tribunal has jurisdiction to decide upon its own jurisdiction. As article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration mentions, *"[t]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement"*. Therefore, if one party alleges that the arbitration agreement is void – i.e. that the arbitral tribunal does not have jurisdiction – it must raise this concern *before the arbitral tribunal itself* (and *not* the courts). It follows that the question "does the arbitral tribunal have jurisdiction/is the arbitration agreement valid?" has to be answered by the arbitral tribunal itself. Different states have different approaches to this principle (as it will be shown below), but the general position is that, if one party appears before the national court and claims that the arbitration clause is void, the court will decline to exercise jurisdiction and will refer the party to the arbitral tribunal to determine whether the arbitration clause is valid.

There are two important things worth noting. *First*, *competence-competence* acts like a *presumption*, not as an irrefutable matter of fact. We *presume* that the arbitral tribunal has jurisdiction in order to let it evaluate the validity of the arbitration clause. If the arbitral tribunal decides that it does not have, in fact, jurisdiction, the presumption of competence is rebutted, and the parties will be free to resolve any substantive disputes before national courts.

Second, even if the tribunal decides that it does have jurisdiction, this conclusion is not irrevocable either: the parties can, in certain circumstances and under certain rules, challenge the arbitral tribunal's decision on the question of its competence before national courts.

Therefore, *competence-competence* is not an illogical, overly empowering weapon which confers unlimited power to the arbitral tribunal. It is a presumption which gives effect to freedom of contract and party autonomy by allowing the forum chosen by the parties to have the first (but not necessarily the final) say.

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[7] George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, The Yale Journal of International Law, Vol 37, p. 23. Available at: http://www.yjil.org/docs/pub/37-1-bermann-the-gateway-problem.pdf. Last accessed on August 20th 2020.

[8] *Ibid.*

The next sections briefly analyse the different approaches taken by the French, English, German and US legislation in respect of *competence-competence*. The main question addressed in the following sections concerns the situation in which one party, despite being bound by an arbitration agreement, appears before the national court and challenges the validity of the arbitration clause. The way courts handle this claim varies across the four jurisdictions mentioned.

(II) The French approach

Under French law, the principle of *competence-competence* is recognized by article 1448 of the French Code of Civil Procedure: "*when a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction [...]*"[9]. This is a straight-forward enunciation of the principle of *competence-competence*. The rule in article 1448 is then qualified by two cumulative exceptions: *"[...] 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*".

French law recognizes both positive and negative *competence-competence*: positive in the sense that the arbitral tribunal can decide upon its own jurisdiction, and negative in so far as the courts are prevented from doing the same thing – they cannot look into the issue of the arbitral tribunal's jurisdiction unless the two cumulative exceptions mentioned above are met. Unless the arbitral tribunal has been constituted *and* unless the arbitration agreement is "manifestly void or manifestly not applicable", the arbitral tribunal will have *exclusive* jurisdiction to determine its own competence.

This is a very strong approach to the principle of *competence-competence*, since it almost takes judicial intervention completely out of the picture in the initial stage of the inquiry. *First*, "manifestly null and manifestly not applicable" is a very high standard for the court's intervention. It is inflexible and requires the highest standard of proof, meaning that it will seldom be satisfied. Second, the two exceptions in article 1448 are *cumulative*: both have to apply in order to trigger judicial involvement. This means that, even if the arbitration clause is manifestly null and manifestly not applicable, the courts will still not intervene first if the arbitral tribunal has been constituted.

[9] Code de procédure civile, Article 1448: „*Lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'Etat, celle-ci se déclare incompétente sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable*". Available at: https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070716&idArticle=LEGIARTI000023450943#:~:text=Lorsqu'un%20litige%20relevant%20d,manifestement%20nulle%20ou%20manifestement%20inapplicable. Last accessed on: August 20th 2020.

However, after the arbitral tribunal has ruled on its own jurisdiction, French law allows the parties to challenge the tribunal's finding at the stage of enforcement. Therefore, if the arbitral tribunal finds that the arbitration clause is valid, the substantive proceedings will go ahead. When the arbitral tribunal renders an award (either a final award on the merits or a partial award on the question of jurisdiction), a party can challenge the award before the national courts and ask them to refuse enforcement on the basis that, contrary to the arbitral tribunal's finding, the arbitration agreement was void. Since the principle of *competence-competence* prevented parties from challenging the jurisdiction of the arbitral tribunal at the initial stage, they are allowed to bring this challenge before the courts at the enforcement stage. When French courts are presented with this claim, they will make a full inquiry into the issue and will judge the question of jurisdiction "de novo"[10]. The courts will *not* be bound by the arbitral tribunal's prior finding in respect of its own jurisdiction, nor will they need to defer to the arbitral tribunal or presume that the arbitral tribunal's ruling on jurisdiction was correct.

As Barcelo claims, the French approach has two major benefits: it gives full effect to the principle of *competence-competence* (in its truest and most straight-forward form) and it also deters parties from trying to obstruct or delay arbitration by commencing judicial proceedings from the start[11]. That is surely exact, but it is submitted that the most important rationale behind the French approach is respect for party autonomy and freedom of contract: by refusing to look at the issue of jurisdiction at the initial stages, French courts *presume* that the parties validly exercised their right to enter into deals freely, gave full and informed consent in respect of all contractual clauses and willingly expressed their wish to have their dispute resolved by their chosen forum. This presumption proves that French law adopts a liberal view on arbitration: it shies away from paternalistic incursions into party autonomy.

However, the downside is that the French approach results in high efficiency costs[12]. If the arbitration clause is less than manifestly null, the arbitration will

[10] *République arabe d'Egypte v Southern Pacific Properties Ltd* [1986] Ju Fr 75; [1987] Ju Fr 469 (12 July 1984, Paris Court of Appeal and 6 January 1987, Cour de Cassation) (the *Pyramids* case). Available at: https://www.italaw.com/cases/3300. Last accessed on August 20th 2020. See also: *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, paragraph 20 (on French law). Available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2010/46.html&query=(.2010.)+AND+(UKSC)+AND+(46). Last accessed on August 20th 2020.

[11] John. J. Barcelo III, *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 2003, Cornell Law Faculty Publications, Paper 508, p. 1125. Available at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1293&context=facpub. Last accessed on August 20th 2020.

[12] George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, The Yale Journal of International Law, Vol 37, p. 19. Available at: http://www.yjil.org/docs/pub/37-1-bermann-the-gateway-problem.pdf. Last accessed on August 20th 2020.

go ahead, consuming time and money which will be wasted if, at the subsequent enforcement stage, the French courts will decide that that the clause was actually void. The argument here is that avoiding court intervention at the initial stage but allowing it at the enforcement stage is arguably a waste of resources.

Although a valid concern in general, the costs efficiency problem should not be overstated. *First*, because the duration and the financial implications are more or less issues which the parties can be taken to be aware of when they opt for arbitration. This is so especially since the parties are free to choose the place of arbitration and the law applicable to the merits, meaning they can avoid French law if they consider the efficiency costs of the French approach to be excessive. *Second*, party autonomy also presupposes that parties are free to take the risk of a less timely and more expensive dispute resolution – they should be free to opt for a less cost-efficient procedure if they so desire.

(III) The English approach

Competence-competence is recognized by English law under section 30(1) of the English Arbitration Act 1996: "*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*". [13]

As clear from the statutory language, English law recognizes the positive dimension of the *competence-competence* principle: „the arbitral tribunal may rule on its own substantive jurisdiction". As stated in the case law, the standard which triggers the application of the principle is „good arguable cause"[14]: if there is a good arguable cause that an arbitration agreement exists, the courts will refer the parties to arbitration and let the arbitral tribunal decide on the question of its jurisdiction.

However, unlike French law, English law *does not* recognize the negative dimension of *competence-competence*. Under English law, while the tribunal decides upon its competence, the courts are *not* prevented from doing the same thing simultaneously: rather, "the court may [...] determine any question as

[13] English Arbitration Act 1996. Available at: https://www.legislation.gov.uk/ukpga/1996/23/contents. Last accessed on August 20th 2020.

[14] *Noble Denton Middle East and Another v Noble Denton International Ltd* [2010] EWHC 2574 (Comm), paragraph 16; see also paragraphs 4-5, 12. Available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2010/2574.html&query=(.2010.)+AND+(EWHC)+AND+(2574)+AND+((Comm). Last accessed on August 20th 2020.

to the substantive jurisdiction of the tribunal"[15] during a preliminary hearing, simultaneously with the arbitration tribunal.

Just like the French approach, English law recognizes, at the enforcement stage, the parties' right to challenge the conclusion reached by the arbitral tribunal in respect of its own jurisdiction. Exactly like French courts, English courts will not consider themselves bound by the tribunal's findings and will consider the matter afresh[16]. In explaining the English law approach at the enforcement stage, Lord Mance made an analogy with the game of tennis: the arbitral tribunal's finding regarding its own jurisdiction (at the initial stage) is a useful starting point for the court's assessment at the enforcement stage, but it is by no means a decisive conclusion: it is the advantage of service, not a 30-0 lead[17]. In other words, English courts give credit to the finding of the arbitral tribunal, but not decisively or even strongly: they will decide the matter *de novo*.

One final thing to note about English law is that it does not adopt the "manifestly void or manifestly not applicable" language of French law. The "good arguable cause" standard is much more flexible. Arguably, if an arbitration clause is "very likely void", the courts will exercise jurisdiction under English law, whereas French courts would not do the same since this falls short of the "manifestly void" standard.

(IV) The German approach

The German version of *competence-competence* sits somewhere in between the French and the English approaches. Section 1032(1) of the German Code of Civil Procedure (ZPO), mentions that "a court before which an action is brought in a matter which is the subject of an arbitration agreement shall [...] reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed"[18]. This is further qualified by

[15] English Arbitration Act 1996, section 32. Available at: https://www.legislation.gov.uk/ukpga/1996/23/section/32. Last accessed on August 20th 2020.

[16] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, at paragraphs 25-26. Available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2010/46.html&query=(.2010.)+AND+(UKSC)+AND+(46). Last accessed on August 20th 2020.

[17] *Ibid.*, per Lord Mance at paragraph 30: "Dallah starts with advantage of service, it does not also start fifteen or thirty love up".

[18] Zivilprozessordnung s1032(1): *„Wird vor einem Gericht Klage in einer Angelegenheit erhoben, die Gegenstand einer Schiedsvereinbarung ist, so hat das Gericht die Klage als unzulässig abzuweisen, sofern der Beklagte dies vor Beginn der mündlichen Verhandlung zur Hauptsache rügt, es sei denn, das Gericht stellt fest, dass die Schiedsvereinbarung nichtig, unwirksam oder undurchführbar ist."* Available at: https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html. Translation available at: https://www.trans-lex.org/600550/_/german-code-of-civil-procedure/. Last accessed on August 20th 2020.