Applicable laws and procedures in international commercial arbitration

Section C: Jurisdictional issues in arbitration

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Introduction

The jurisdiction of the tribunal is fundamental to the authority and decision-making power of the arbitrators. Awards rendered without jurisdiction have no legitimacy. The absence of jurisdiction is one of the few recognised reasons for a court to set aside or refuse recognition and enforcement of an award. Accordingly, it is often necessary to resolve the issue of jurisdiction at an early stage. The question may arise before an arbitration tribunal as well as before a state court.

An arbitration tribunal faced with the issue of its own jurisdiction must first determine:

- whether it is competent to deal with the specific jurisdictional question
- or whether it must be referred to the court.

The question that follows is the form in which the decision should be made.

This chapter considers the determination of jurisdiction of the arbitration tribunal by:

- the tribunal itself
- a national court.

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- understand how the jurisdiction of a tribunal is determined and by whom
- understand the importance of an early determination of the tribunal's jurisdiction
- understand how the issue of jurisdiction is raised and treated by tribunals and courts.

Essential reading

- Lew, Mistelis and Kröll, chapter 14.

3.1 Determination of jurisdiction by an arbitration tribunal

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

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

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

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

[1] See Model Law Article 16(2), also England, Arbitration Act s.31; Germany, ZPO s.1040(2); Netherlands, CCP Article 1052(2).

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

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

3.1.1 Kompetenz–Kompetenz

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

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

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

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

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

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

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

[2] While the Model Law deals with the two doctrines in one provision, Article 16(1), other laws deal with them in separate provisions: England, Arbitration Act ss.7 and 30; Sweden, Arbitration Act ss.2 and 3; Switzerland, PIL Articles 178(3) and 186.

3.1.3 Form of decision on jurisdiction

The form of the tribunal's decision on its jurisdiction depends on its outcome. Any decision denying jurisdiction should invariably be in the form of a final award so that it can be recognised under the New York Convention. By contrast, if jurisdiction is assumed the tribunal can:

- either render a decision on jurisdiction before going on to decide the merits
- or include its decision in the final award on the merits.

In this respect the tribunal has full discretion which path to follow despite the underlying assumption in some arbitration rules and laws that on a challenge of jurisdiction a preliminary decision should be rendered.[3]

In the absence of an agreement between the parties to the contrary, the arbitration tribunal can include its decision on jurisdiction in the final award.

The incorporation of the ruling on jurisdiction in the award on the merits is appropriate when both jurisdiction and merits turn on the same issues. In those cases it is artificial and impractical to render a separate decision on jurisdiction. Rendering a single award on jurisdiction and merits may also be appropriate where one party attempts to delay the proceedings. Preliminary decisions on jurisdiction are generally open to challenge either under express provisions to that effect or under the general provisions dealing with challenges of an award.

Challenge proceedings before state courts may lead to considerable delay, in particular if they involve several instances. Inevitably, an objecting party could initiate to challenge proceedings against each award, the preliminary award on jurisdiction and the final award on the merits.

[3] According to UNCITRAL Rules Article 21(4) a preliminary decision should be the rule; see also Switzerland, PIL Article 186(3); for the different forms the decision on jurisdiction may take see the Zurich Chamber of Commerce, Preliminary Award of 25 November 1994, XXII *YBCA* 211 (1997) 213 *et seq.*

3.1.4 Review of arbitrator's decision by courts

The tribunal's decision on its jurisdiction is open to a full review by the courts.[4] This is not the case for an award on the merits where review is limited to public policy issues. The reason for such a

[4] See for example England, Arbitration Act, s.67; Model Law Article 34(2)(a)(i); but see the decision of the Swiss Tribunal Fédéral, 17 August 1995, *Transport- en Handelsmaatschappij Vekoma BV v Maran Coal Company*, 8 ADRLJ 87 (1999) where there are indications that the standard of review concerning jurisdiction may be different depending on whether issues of law or of fact are at stake.

complete review is that it would be contrary to public policy to bind a party to a decision of a tribunal to which it never agreed.

In most countries the courts retain the last word on excluding their jurisdiction.[5]

[5] Park, 'Determining Arbitral Jurisdiction: Allocation of Tasks between Courts and Arbitrators', 9 *ADRLJ* 19 (2000) 29 *et seq.*

3.2 Determination of jurisdiction by a national court

Courts may be asked at both the pre-award and post-award stages to deal with questions related to the jurisdiction of the arbitration tribunal. The most frequent situation is where one party brings a claim on the merits in the courts and the other party asks for the court to stay its jurisdiction relying on an arbitration agreement.

Some arbitration laws contain special provisions allowing the parties to apply to the courts for a declaration that an arbitrator has or lacks jurisdiction. Jurisdiction of the tribunal may also be an issue in court proceedings in support of arbitration (e.g. an application for the appointment of an arbitrator).

3.2.1 Actions on the merits despite an arbitration agreement

The principle that a valid arbitration agreement requires courts to refer parties to arbitration is firmly established. It is a major prerequisite for the success of arbitration as an international dispute settlement mechanism. In addition to being provided for in Article II(3) of the New York Convention the principle can also be found in national arbitration laws. They usually require that the arbitration agreement will be invoked or relied on by the defendant and that it is valid and can be effectively implemented (i.e. is not 'null and void, inoperative or incapable of being performed'), However, differences exist as to the standard of review and the action to be taken by the courts where there is a valid arbitration agreement.

Request for a stay of court proceedings in favour of arbitration

A common feature of all these national and international provisions is that the defendant in the court proceedings has to request a referral to arbitration. The courts are not obliged *ex officio* to stay their proceedings since each party is free to renounce its right to have a dispute decided by arbitration. By not invoking the arbitration agreement the defendant makes clear that it does not insist on its right to arbitration but tacitly accepts the claimant's choice of referring the dispute to the state courts.

National arbitration laws and the Model Law often require that a referral of the case to arbitration must be requested before any steps relating to the merits of the case are taken.[6]

Even where the provisions of the national law are not so clear, courts have generally required the parties to raise the defence of an arbitration agreement.[7]

[6] Model Law Article 8(1); Germany, ZPO s.1032(1); Belgium, Judicial Code Article 1679; England, Arbitration Act s.9(3); Switzerland, PIL Article 7.

[7] See for example the decisions in *Tracomin SA v Sudan Oil Seeds* [1983] 1 All ER 404.

Null and void, inoperative or incapable of performance

The New York Convention and the majority of arbitration laws exempt national courts from referring a matter to arbitration, if the court concludes that the arbitration agreement is 'null and void, inoperative or incapable of being performed.'[8]

This phrase, however, was not discussed in any detail during the preparations of the New York Convention nor when national provisions were drafted. Courts have also not defined these terms. Rather, they usually limit themselves to determining whether an arbitration agreement is 'null and void, inoperative or incapable of being performed'.

In an arbitration-friendly environment these terms should be interpreted narrowly. Furthermore, in the context of the New York Convention an autonomous interpretation should prevail which excludes national idiosyncrasies. Only such an autonomous interpretation can lead to the harmonisation intended by the Convention.

However, it is not necessary to distinguish meticulously between the different grounds. Irrespective of the grounds on which a court bases its decision whether an agreement is 'null and void, inoperative or incapable of being performed', the result will always be the same.

Null and void

The words 'null' and 'void' have the same meaning, as evidenced by the use of a single word in the French and Spanish versions of the New York Convention. They refer to the cases where the arbitration agreement is affected by some invalidity right from the beginning. This would be the case, for example, if the arbitration agreement:

- does not refer to a defined legal relationship
- has not been validly agreed by the parties (due to lack of consent, misrepresentation or duress in relation to the arbitration agreement)
- refers the dispute to an uncertain or non-existent arbitration institution.

Inoperative

The term 'inoperative' refers to arbitration agreements which have not been invalid from the beginning but have since lost their effect. For example:

- termination or revocation of the agreement by the parties
- the rendering of an award or judgment with *res judicata* effect in parallel proceedings.

The arbitration agreement could also become inoperative where the applicable arbitration rules or law requires that the award has to be made within a certain time after which the arbitration tribunal loses its authority.

Incapable of being performed

Arbitration agreements are 'incapable of being performed' where the arbitration cannot effectively be set in motion. Examples are agreements where the arbitrator appointed in the agreement refuses to act or cannot perform the function ascribed to him. The

[8] See for example Switzerland, PIL Article 7(b); Germany, ZPO s.1032(1); England, Arbitration Act s.9(4); Bermuda, Arbitration Act s.8; for a slightly different wording, but with the same meaning, see European Convention Articles V(1), VI(3) ('non-existent or null and void or had lapsed'); France, NCPC Article 1458 ('null and void'); Belgium, Judicial Code Article 1679(1) ('not valid or has terminated'); Netherlands, CCP s.1022(1) ('invalid'); US, FAA s.3.

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

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

Standard of review of arbitration agreement

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

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

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

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

[9] See for example Germany, ZPO s.1062; Sweden, Arbitration Act s.56; England, Arbitration Act 1996 s.105.

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

[10] See for example European Convention Article VI(3) or France, NCPC Article 1458.

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

'Referral' to arbitration

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

[11] See for example France, NCPC Article 1458; Switzerland, PIL Article 7; Netherlands, CCP Article 1022; Belgium, Judicial Code Article 1679.

arbitration laws require the courts to decline jurisdiction,[11] while under German law courts have to declare themselves as not having jurisdiction. Common law countries traditionally require the courts to 'stay the proceedings'.[12]

[12] See England, Arbitration Act s.9; US, FAA s.3.

These differences are more the result of national traditions than of a different approach to arbitration. While under all laws the court proceedings must be halted when a valid arbitration clause is invoked, differences exist as to the status of the court proceedings.

3.2.2 Special actions to determine jurisdiction

Some national laws expressly provide for special proceedings on preliminary points of jurisdiction. For example, German and English law give the parties the right to apply to the courts for a preliminary ruling on the issue while US law allows for actions compelling arbitration.

In the majority of arbitration laws no special court proceedings for a declaration as to the non-existence or invalidity of the arbitration agreement is possible. As a consequence no declaratory relief can be sought. This is particularly apparent in countries where the arbitration law includes provisions like Article 5 of the Model Law. This provides that on all issues in relation to arbitration, courts only have the powers set out in the arbitration law. Parties have to wait until the tribunal has either rendered a preliminary award on jurisdiction or until the final award is rendered to ask the courts to review the tribunal's decision.

3.2.3 Actions in support of arbitration

Questions on the validity of arbitration agreements also arise in actions in support of arbitration. Refusing to co-operate in the appointment of a tribunal is often based on a party's view that there is no valid arbitration agreement. In court proceedings for the appointment of an arbitrator the defaulting party will invariably:

- invoke the invalidity of the arbitration agreement
- ask the court not to appoint the arbitrator.

Whether, and if so according to which standard, courts will review the arbitrators' jurisdiction in such cases is regulated in certain national arbitration laws. Where the lack of a valid agreement must be 'manifest' the provision only allows for a *prima facie* review of the existence of an arbitration agreement.

Even without an express provision courts have examined the existence and validity of arbitration agreements in actions for appointing arbitrators when it was challenged by one of the parties. It appears that the courts in this respect will engage in a full review of the existence and validity of the arbitration clause. They adopt the same standard of review as applied in proceedings on the merits where the defendant (alleging the existence of a valid arbitration agreement) challenges the jurisdiction of the court. However, in proceedings in support of arbitration there is less need to engage in a full review. Unlike in proceedings on the merits the decision will have no *res judicata* effect which could exclude further proceedings in the court.

Useful further reading

- *** Gotanda, 'An efficient method for determining jurisdiction in international arbitration', 40 *Columbia J Transnat'l L* 11 (2001) – available at WESTLAW.

Reminder of learning outcomes

By this stage you should be able to:

- understand how the jurisdiction of a tribunal is determined and by whom
- understand the importance of an early determination of the tribunal's jurisdiction
- understand how the issue of jurisdiction is raised and treated by tribunals and courts.