THE DOCTRINES OF COMPETENCE-COMPETENCE AND SEPARABILITY IN INTERNATIONAL ARBITRATION

by

'Kayode Filani

INTRODUCTION

Arbitration is a dispute resolution mechanism through which, a legal dispute which is based on a contractual or non-contractual relation-ship, is resolved by arbitrators according to the parties' agreement.[1] It is primarily a creature of contract and can take different nomenclatures depending on the nature or subject matter of the dispute and the peculiarities of the parties involved. Therefore, it can be national or domestic[2], commercial[3], trade or investment[4] or an international arbitration. For the purpose of this paper, we shall be considering only international arbitration.

The term "international" is used to mark the difference between arbitrations which are purely national or domestic and those which in some way transcend national boundaries.[5] International arbitration has a plethora of definitions offered by jurist and judicial decisions in addition to various attempts at the definitions by legal dictionaries and as such, there is no one acceptable universal definition for this specie of arbitration.

Article 1 (3) of the UNCITRAL Model Law on International Commercial Arbitration, 2006 (as amended) states that an arbitration is international if the parties have their places of business in different States, or one party is domiciled in another State, or the predetermined place of arbitration and/or the place where the subject matter of the dispute is outside the State where the parties are

[1] S.A. Coker, M.O. Adeleke, O.A. Olaseeni, "An Appraisal of Alternative Dispute Resolution as An Antidote to Delay of Judicial Proceedings in Nigerian Courts", *Essays in Honour of Hon. Justice S.M.A Belgore"*, 1st Ed., 2008, p.103

[2] A domestic arbitration is one concerned with purely national or domestic issues. This means, in general terms, that all aspects of the arbitration proceedings are related to a single jurisdiction.

[3] Arbitration of disputes arising out of business contracts or transactions, whether locally or international.

[4] Investment Arbitration (also referred to as Investor-State Dispute Settlement or ISDS) is a dispute resolution procedure often utilized in resolving disputes between foreign investor and host States.

[5] A. Redfren & M. Hunter, Redfren and Hunter on International Arbitration, 5th Ed., P.8, para. 1.16

domiciled. Further, authors of the book *Comparative International Commercial Arbitration*[6], defined International Arbitration as

> ***"International arbitration is a specially established mechanism for the final and binding determination of disputes concerning a contractual or other relationship with an international element by independent arbitrators in accordance with procedures structures and substantive legal or non-legal standards chosen directly or indirectly by the parties"***

International Arbitration is quite peculiar for the reason of the respective sovereignty of the member States who are signatories to the numerous bilateral and multilateral Treaties that provide for resolution of disputes through the Mechanism. Disputes submitted to International Arbitration are not ordinarily subject to national Court's jurisdiction and as such, questions as to the validity or otherwise of the arbitration agreement, jurisdiction of the Tribunal and other ancillary matter have to be decided one way or the other independent of national Courts. By convention, doctrines and/or principles have been developed to make certain that these issues are sufficiently dealt with when they arise and to also to ensure their recognition, validity and enforceability of the processes. In this regard, the doctrines of Separability and Competence-Competence are quite germane to any arbitration process.

CHALLENGES TO JURISDICTION IN INTERNATIONAL ARBITRATION

A challenge to the jurisdiction of an arbitral tribunal may be partial or total. Where the question is whether certain claims or counter-claims which have been submitted to the arbitral tribunal are within its jurisdiction, the jurisdictional challenge raised is partial; and where the challenge raises questions as to the whole basis upon which the arbitral tribunal is acting, then it is said to be total.[7] Challenges to the jurisdiction of the arbitral tribunal raises the pertinent questions as to who may determine the challenge – the arbitral tribunal or a national court – and whether a ruling on jurisdiction by the arbitral tribunal may be reviewed by a national court and at what stage.

---

[6] Julian D.M. Lew, Mistelis A. Loukas & Stefan Kroll, "Comparative International Commercial Arbitration", *Kluwer Law International*, 2010

[7] Redfren and Hunter on International Arbitration, Op. Cit. P. 342 Paras. 5.86; Note that an arbitral tribunal that derives its authority from a submission agreement is unlikely to face a total challenge to its jurisdiction.

National laws and the international conventions on arbitration in resolving this question have emphasized on the application of the twin doctrines of *competence-competence* and separability or the autonomy of the arbitration clause.

These two doctrines are inextricably linked and are often called the cornerstones of international commercial arbitration[8] and has been included in various international arbitration rules such as the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, 2010; the International Chambers of Commerce (ICC) Arbitration Rules, 2021; and the London Court of Arbitration Rules, 2014. Distinct, but very much related, these two doctrines serve, hand in glove, to maximize the effectiveness of arbitration as an efficient means of resolving international commercial disputes and to minimize the temptation and effect of delay tactics.[9] The said doctrines would now be considered in more detail.

A. COMPETENCE- COMPETENCE

The *competence-competence* doctrine, which recognizes the power of an arbitrator to determine his or her own jurisdiction under an arbitration clause or submission agreement, is widely recognized in most jurisdictions around the world as an inherent power. The doctrine of competence-competence is one of the most fundamental pillars sustaining international arbitration.[10] The history of this doctrine can be traced to Federal Constitutional Court of Germany[11] where it is known as ***Kompetenz Kompetenz*** and to French Jurisprudence where it is known as ***Competence de la Competence***.

The doctrine is enshrined in the UNCITRAL Model Law on International Commercial Arbitration and Arbitration Rules. Article 16 (1) of the Model Law and article 23 (1) of the Arbitration Rules both dictate that the arbitral tribunal shall have the power to rule on its own jurisdiction, including

[8] A. Ogunranti, "Separating the Wheat from the Chaff: Delimiting Public Policy Influence on The Arbitrability of Disputes in Africa", *Afe Law Journal*, Vol. 10:1 2019

[9] International Arbitration and International Commercial Law: Synergy, Convergence and Evolution Chapter 8 – Competence-Competence and Separability-American Style Edited by S. Kroll, L.A. Mistelis, et. al.

[10] Luciano Timm & Isabella P. Morales, "Competence-competence doctrine: an absolute principle?", *International Law Office*, available at https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Brazil/Carvalho-Machado-e-Timm-Advogados/Competence-competence-doctrine-an-absolute-principle

[11] Rakhi, Kompetenz- Kompetenz Principle in Arbitration, available at https://viamediationcentre.org/readnews/MzQx/Kompetenz-Kompetenz-Principle

any objections with respect to the existence or validity of the arbitration agreement. Section 12 (1) of the Arbitration and Conciliation Act (ACA) also provides that:

> ***"An arbitral tribunal shall be competent to rule on questions pertaining to its own jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement."***

Under the ICC Rules, the position is slightly more complex. When any question is raised as to the jurisdiction of the arbitral tribunal a two-stage procedure is followed. At the first stage, if one of the parties raises "one or more pleas concerning the existence, validity or scope of the agreement to arbitrate", the ICC Court must satisfy itself of the *prima facie* existence of such an agreement.[12] If it is satisfied that such an agreement may exist, the ICC Court must allow the arbitration to proceed so that, at the second stage "any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself.[13]

The doctrine comprises two types of effects- positive and negative effects- depending on how it is implemented. The positive effect of the doctrine is that the arbitral tribunal has the power to consider and decide jurisdictional objections. The negative effect of the principle amounts to the lack of authority of the judiciary to determine jurisdictional objections at least until the arbitral tribunal renders an award.[14]

There are certain exceptional situations and grey areas regarding the application and interpretation of this principle, especially with regard to the allocation of jurisdictional competence between arbitral tribunals and state courts. This is particularly true in relation to the negative effect restricting the function of the courts in order to provide the tribunal with the first opportunity to determine its own jurisdiction and the validity of the arbitration agreement. Therefore, the negative effect bars a court from reviewing the merits of the dispute when deciding on the existence or validity of the arbitration agreement prior to the arbitral tribunal.[15]

---

[12] See Article 6 (2) of the ICC Rules
[13] Ibid
[14] Gary Born, International Commercial Arbitration, Second Edition, Chapter 7: International Arbitration Agreements and Competence-Competence, pp. 1069 – 1071
[15] See Article 8(1) of the UNCITRAL Model Law provides that state courts must refer to arbitration a claim that is allegedly subject to arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

Arbitration does not exist in a vacuum and it depends on the courts for its effectiveness. It is essential to have courts playing a supervisory role in arbitration to ensure that arbitration proceedings are conducted properly and effectively.[16] Courts can utilise their coercive powers to issue orders preserving the status quo pending arbitration or compelling the discovery of documents.

B. SEPARABILITY

The doctrine of separability is widely recognized. It means in particular that an arbitration agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by a court, tribunal or panel that the contract is null shall not entail automatically the invalidity of the arbitration agreement. The decision of the Bermuda Court of Appeal in considering an enforcement application for a USSR arbitral award in which the jurisdiction of the Tribunal was questioned because the contract was void *ab initio* is instructive.[17]

The rule was first established in England with the English courts affirming the sanctity of arbitration clauses in an agreement as being distinct from the main agreement in the English case of ***Harbour Assurance Co. Ltd. v. Kansa General International Assurance***.[18] Under the ACA, the doctrine is provided for under section 12 (2), to wit:

> ***"For purposes of sub-section (1) of this section, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause."*** [Emphasis Added]

The doctrine of separability is also reflected in UNCITRAL Rules, Article 23(1), which states that an arbitration clause that forms part of an underlying contract shall be treated as independent of the other terms of the contract. The UNCITRAL Model Law also embodies the principle of separability in Article 16(1).[19] A similar import can be seen in the Lagos Court of International

[16] S. Sattar, "National Courts and International Arbitration: A Double-Edged Sword", 27(1) Journal of International Arbitration, (2010), p. 51; M. L. Livingstone, "Party Autonomy in International Commercial Arbitration: Popular allacy or Proven Fact?", 25 (5) Journal of International Arbitration (2008), p. 534
[17] See *Soujuznefteexport (SNE) v. JOC Oil Ltd (1990) XV Ybk Comm Arb 31.*
[18] [1992] 1 Lloyd's L.Rep. 81
[19] Where it provides that "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause, which forms part of a

Arbitration (LCIA) Rules, Article 23(2) as well. It is noteworthy that the ICC recognized the principle of separability in its 1955 Arbitration Rules and under the ICC Rules amended in 2012, Article 6(8) provides for separability.

The extent to which the doctrine has developed varies and depends upon the legislative and more pertinently, the judicial approach in the relevant jurisdiction. The doctrine of separability does not however prevail against illegality in the contract. Thus, where a contract is tainted with illegality *ab initio* the arbitrator must decline jurisdiction because *ex nihilio nil fit* (nothing comes from nothing) an illegal contract is void *ab initio* and so is an arbitration clause.[20] This was the holding of the English Court in ***Fiona Trust & Holding Corporation & Ors v. Yuri Privalov***[21] where the position of the law was stated to be that an arbitration agreement can be called into question where independent vitiating factors, e.g., bribery, illegality etc. that relate directly to the arbitration agreement exist.[22]

In the ***Fiona Trust*** case, charterparties were made between *inter alia* the Claimants and the Defendants charterers. The Claimants alleged that the charterparties had been procured by bribery and that both the charterparties and the arbitration agreements contained within the term were rescinded as a result of that bribery. The Court of Appeal, confirming the doctrine of separability of the arbitration agreement from the underlying contract, held that the arbitration agreement would continue to apply unless it was directly impeached for some specific reason. On the facts of the case, there was no special reason indicating that the bribery impeached the arbitration clause in particular. The House of Lords upheld the decision of the Court of Appeal concluding that 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.[23] 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. Thus, this principle succinctly posits that the validity, existence or effectiveness of the arbitration agreement is not dependent upon the

contract, shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

[20] David Taylor v. Bernet (1953) All E.R 843

[21] [2007] UKHL 40

[22] See Section 35 of ACA; Esso Exploration & Production Nigeria Ltd. v. Nigerian National Petroleum Corporation Unreported Appeal No. CA/A/507/2012; Judgment delivered on 22nd July 2016

[23] ***Fiona Trust & Holding Corporation & Ors v. Yuri Privalov*** (Supra) @ para 17

effectiveness, existence or validity of the underlying substantive contract unless the parties have agreed to it.

CONCLUSION

While the doctrine of competence-competence gives the tribunal the right to decide the competence of the tribunal, the doctrine of separability protects the competence of the tribunal by keeping the arbitration clause valid even when ruling the main agreement invalid or terminated. It can be said that the doctrine of separability gives a material base for the tribunal's competence and the doctrine of competence-competence gives a procedural base for the tribunal to decide on its competence.

These two doctrines are important features of international arbitration because of their significance to the jurisdictional power or otherwise and the validity of the process conducted by an arbitral tribunal in resolution of international and/or commercial disputes submitted for resolution through arbitration.