

**Somya Priyadarshini**

Senior Associate - Arbitration

## Kompetenz-Kompetenz in light of UAE Federal Arbitration Law

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### Understanding the “Kompetenz-Kompetenz” principle

The *kompetenz-kompetenz* principle, derived from the German phrase for “competence-competence,” is a fundamental principle of international arbitration that grants arbitrators the authority to rule on their own jurisdiction. In other words, if a party challenges the jurisdiction of the arbitral tribunal, the tribunal has the power to decide on the validity of its own jurisdiction. It allows the tribunal to decide on challenges to the validity or existence of the arbitration agreement, including objections regarding its own jurisdiction.

This doctrine's significance lies in its ability to shield the arbitration process from unnecessary court intervention, thereby maintaining the swiftness and efficiency that distinguishes arbitration from litigation. The principle is designed to uphold the autonomy and finality of the arbitration process by empowering the arbitral tribunal to rule on matters of jurisdiction. This concept explains and justifies the tribunal's entitlement, in most cases, to be the first to rule on its own jurisdiction, in accordance with the policy in favour of party autonomy.

The concept of *kompetenz-kompetenz* first emerged in continental Europe during the 19<sup>th</sup> century. Countries like France and Switzerland were among the pioneers in recognizing the principle. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards played a crucial role in promoting the principle on an international scale.

The United Nations Commission on International Trade Law (UNCITRAL) further advanced the recognition of *kompetenz-kompetenz* with the introduction of the UNCITRAL Model Law on International Commercial Arbitration in 1985. The Model Law embodies the principle of *kompetenz-kompetenz* at Article 16. This provision states expressly that the tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The Model Law serves as a template for national arbitration legislation and promotes the use of the *kompetenz-kompetenz* principle.

***Kompetenz-Kompetenz* under the United Arab Emirates (UAE) Federal Arbitration Law (FAL)**

Numerous jurisdictions around the world including the United Arab Emirates have incorporated elements of the Model Law into their domestic arbitration laws. The UAE has emerged as a prominent hub for international arbitration, attracting businesses and investors from across the globe. To maintain its reputation as an arbitration-friendly jurisdiction, the UAE FAL, enacted in 2018 incorporated the essential principles to enhance the efficiency and autonomy of the arbitration process. Among these principles, the concept of *kompetenz-kompetenz*, which grants arbitral tribunals the authority to rule on their own jurisdiction is recognised in the UAE, both in the Arbitration Law and in various institutional rules.

Article 8 of FAL is modelled on corresponding Article 8 UNCITRAL Model Law which deals with the mutual exclusivity of court and arbitration proceedings.

Art 8(1) provides for the arbitration defense, according to which a court before which an action on the merits has been initiated is obligated to dismiss that action in the event that the opponent raises the existence of an obligation to arbitrate unless the underlying arbitration agreement is found to be unenforceable. The proper operation of the arbitration defense in the terms set in the law will assist in managing the disputing parties' legal expectations in pursuing arbitration as a private dispute resolution mechanism and provide legal certainty by securing the enforceability of the obligation to arbitrate under the FAL.

Article 19 of the UAE FAL explicitly recognizes the *kompetenz-kompetenz* principle, providing arbitral tribunals with the power to decide on their own jurisdiction. This decision may be rendered either as a preliminary question or in a final award on the merits.

Article 19(1) emphasizes the essential principle of *kompetenz-kompetenz*, granting the arbitral tribunal the exclusive right to make preliminary decisions on matters of its jurisdiction. The provision confers upon the arbitral tribunal the power to address various aspects of jurisdiction, including its competence to rule on the existence, validity, and scope of the arbitration agreement. This includes ascertaining whether the dispute falls within the ambit of the arbitration agreement and whether the agreement is legally binding between the parties.

**Practice of the UAE Courts**

A crucial issue in arbitration is determining the proper relationship between courts and the arbitration process. The interplay of the *kompetenz-kompetenz* principle under Articles 8 and 19 of the UAE FAL with the Dubai Court System is a critical aspect of the arbitration process in the UAE.

The Dubai Court System plays a crucial role in supporting arbitration and upholding the *kompetenz-kompetenz* principle in practice. However, certain challenges may arise when there is an overlap between the powers of the arbitral tribunal and the courts.

Under Article 8, the UAE courts are required to dismiss any action that falls within the scope of an arbitration agreement. The initiation of court proceedings will not preclude the commencement or continuation of the arbitration proceedings.

When an application is made under Article 8 of the UAE Federal Arbitration Law, it mandates that courts carefully assess the validity of disputed arbitration agreements. These courts are tasked with evaluating whether the asserted agreement truly constitutes an arbitration agreement, if it pertains to a dispute that can be resolved through arbitration, and if it avoids being deemed as "null and void, inoperative, or impossible to execute." These conditions are derived from the language of both Article 8 of the Model Law and Article II of the New York Convention. If the agreement meets these criteria, the court is obligated to reject requests for litigation if they contradict the commitment to arbitration.

The UAE courts have found that for an arbitration defense under Art 8(1) FAL to succeed, it must meet three cumulative conditions: (i) the opponent files a case before the courts in violation of an existing arbitration agreement; (ii) the aggrieved party raises the arbitration defense before arguing the case on the merits; and (iii) the subject arbitration agreement is valid and as such enforceable as between the parties.<sup>1</sup>

At the same time, Article 19 of UAE FAL, which is based on Article 16(1) of UNCITRAL Model Law, expressly grants competence to a tribunal to consider any jurisdictional challenge. Further, Article 8(2) of UAE FAL expressly allows a tribunal to continue with its processes, notwithstanding a conflicting application to a court. Hence, the UAE FAL as derived from the UNCITRAL Model Law expressly allows both courts and tribunals to consider validity, but makes no express stipulations as to methodology or standard of proof, and gives no indication as to whether one such empowered decision-maker should defer to a determination made by the other.

It is imperative for each court to establish a consistent interpretation that harmonizes the Model Law's explicit delegation of jurisdictional authority to a tribunal as outlined in UAE FAL Article 19(1),

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<sup>1</sup> Case No 300/2019 – Real Estate, ruling of the Dubai Court of Cassation of 13 February 2020

reinforced by Article 8(2), with the Model Law's acknowledgment of a court's ability to address specific jurisdictional matters when Article 8(1) becomes relevant.

In this perspective, the goal is to avoid a scenario where both courts and tribunals simultaneously assess all available evidence, potentially arriving at differing conclusions regarding questions of validity.

Instead, the preferred approach is for courts to interpret the Model Law's structure as demanding deference to tribunal authority. Consequently, the responsibility of thoroughly reviewing matters related to annulment and enforcement would lie with annulment and enforcement courts, when requested. Nevertheless, courts still need to fulfill a certain role. The natural result of an approach that prioritizes deference would require courts, acting within the framework of Article 8, to acknowledge arbitration agreements and permit the tribunal to exercise its jurisdiction, unless the evidence presented to the court unequivocally indicates that no reasonable tribunal could consider the agreement as valid. Essentially, Article 8 is predominantly centered on promoting recognition, albeit with a limited exception, and its interpretation should mirror this intent.

When a dissatisfied party approaches a UAE court seeking a declaration of the arbitral tribunal's lack of jurisdiction, it can lead to a potential clash between the court's jurisdiction and the principle of *kompetenz-kompetenz* recognized under Article 19 of the UAE Federal Arbitration Law.

While the law upholds the arbitral tribunal's authority, UAE courts may still conduct a *prima facie* review of jurisdictional challenges. This review is limited to assessing the facial validity of the arbitration agreement and does not delve into the merits of the dispute.

Under Article 19(2), the courts enjoy a comparatively wide margin of discretion. They are invited to review the actual merits of the tribunal's findings on jurisdiction, and to decide the matter of jurisdiction afresh on the basis of the text of and the information provided by the award.

As such one might argue that given that the ultimate power to nullify a tribunal's decision on jurisdiction rests with the courts there would be no risk in deferring the matter to the arbitral tribunal. On the other hand, it could equally be argued that by including the possibility to hear a substantive claim if the arbitration clause is found to be "*null and void, inoperative, or impossible to execute*", Article 8 intends to grant the court pre-emptive powers in addition to those granted under Article 19.

In essence, if this was the intention of legislation then the question that would follow is whether such pre-emptive powers can be exercised if arbitration proceedings are already afoot? Those in support of the latter interpretation of Article 8 may argue that the provision itself does not contain any restricting wording and hence any further reading of the article would be excessive. Whilst this is true, one cannot rule out that the existence of Articles 8 and 19 may call for a more

purposeful interpretation of the legislative intention. Pursuant to such interpretation there could be a third approach to the effect that Article 8 is designed to allow the courts to rule on the validity of arbitration clauses in circumstances where there is no impending decision to be taken by an arbitral tribunal pursuant to Article 19. This would be evident in situations where no party has commenced arbitration proceedings.

It will therefore be interesting to see how the UAE courts will respond to such arguments if presented by litigants in such a manner.

### **Position in other Jurisdictions**

Generally, while entertaining these applications, the civil law jurisdictions tend to decline jurisdiction, while common law jurisdictions tend to stay in judicial proceedings.

As per Section 9 of the English Arbitration Act 1996, the court is obligated to stay legal proceedings initiated in violation of an arbitration agreement between the involved parties. This stay is enforced unless the court is convinced that the arbitration agreement is devoid of validity, non-functional, or impossible to execute. The recent decision of the English Court of Appeal in *Republic of Mozambique v Credit Suisse International and others* reaffirms the arbitration-friendly approach taken by the English courts and the mandatory nature of *stays* under section 9 of the AA 1996.

Section 6 of the Singapore International Arbitration Act provides for a stay in so far as court proceedings relate to "*any matter which is the subject of the [arbitration] agreement*" unless the court "*is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed*". In *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57, a distinguished panel of the Singapore Court of Appeal considered an application to stay court proceedings in favour of arbitration under section 6 of the Singapore International Arbitration Act ("**IAA**"). They confirmed the appropriate standard of review to be adopted in respect of the existence and scope of the arbitration agreement as a *prima facie* standard.

The prevailing stance among most domestic courts is to adopt a deferential strategy, although notable exceptions exist, and a unanimous understanding of the correct interpretation of the Model Law is absent. Even courts that declare their adherence to this deferential approach appear to vary regarding the specific issue they claim to address through such an assessment. Most do not seem to ask the above question as to whether a reasonable tribunal could find validity, but instead, seem to opine as to the validity of the agreement.

**Conclusion**

To conclude, the UAE's integration of the *kompetenz-kompetenz* principle within its arbitration legal framework reinforces its commitment to providing a robust, arbitration-friendly environment. However, the interrelationship between court and tribunal jurisdiction mandates a judicious approach, respecting both the authority of arbitral tribunals and the role of courts in maintaining a harmonious arbitration landscape. As UAE courts encounter nuanced situations arising from these principles, their interpretations will undoubtedly play a pivotal role in shaping the UAE's arbitration jurisprudence further. The *kompetenz-kompetenz* principle remains a dynamic subject of study, contemplation, and dialogue.