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New Competence-Competence in China: A Review of the Draft Revised PRC Arbitration Law

By Patrick Zheng | Charles Qin | Wenying Liu

This article aims to introduce the recent development of the competence-competence doctrine in China. The proposed modification of the PRC Arbitration Law seems to have adopted the UNCITRAL Model Law approach, which will bring about a fundamental change in this regime and make Chinese arbitration practice more consistent with international practice.

Under the competence-competence doctrine (also known as "Kompetenz-Kompetenz" or "jurisdiction to decide jurisdiction"), an arbitral tribunal can render a ruling on its own jurisdiction,[1] which gives rise to a series of intriguing questions critical to the efficacy and efficiency of arbitration, one of which is the extent to which a national court may intervene the arbitral tribunal's competence.

Competence-competence is well established in China. Article 20 of the Arbitration Law of the People's Republic of China (PRC) provides that an arbitral tribunal has the authority to consider a jurisdictional challenge, but if the respondent chooses to turn to court for a decision before the first oral arbitral hearing, the arbitral tribunal (or the arbitral institution) will no longer be vested with jurisdiction to decide its own jurisdiction.

It is interesting to note that Article 20 of the PRC Arbitration Law concerns the "validity of an arbitration clause" rather than the jurisdiction of an arbitral tribunal, which indicates that legislators at that time[2] regarded the "validity of arbitration clause" as equivalent to the jurisdiction of the arbitral tribunal. It is worth noting that the

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[1] Dimolitsa, Antonias, *Separability and Kompetenz-Kompetenz*, in, van den Berg, Albert Jan (Ed.), (1999) ICCA Congress Series No. 9, p. 217.
[2] PRC Arbitration Law was promulgated on October 31, 1994 and came into effect on September 1, 1995.

Supreme People's Court has extended the scope of judicial review to the "existence" of an arbitration clause. [3] But when the "scope" of an arbitration clause is questioned, in practice, Chinese courts are reluctant to intervene and usually defer to the arbitral tribunal's decision.

If the respondent chooses to raise the jurisdictional challenge to the arbitral tribunal, once the tribunal[4] has decided on its own jurisdiction, the parties can no longer apply for judicial review on this issue, either during the conduct of arbitral proceedings or at the stage of annulment or non-enforcement of the arbitral award.[5]

It should also be noted that, unlike many other jurisdictions, once the competent court has accepted the application of judicial review of the jurisdiction of the arbitral tribunal (i.e. validity of the arbitration agreement, in Chinese arbitration terms), the arbitral proceedings will automatically be suspended until the court renders a positive jurisdictional decision, i.e. the arbitral tribunal has jurisdiction (or the arbitration agreement is valid).

Such judicial review over the "validity of an arbitration agreement" is more akin to action for "declaratory relief". In circumstances where procedures are already pending before the arbitral tribunal, or where the commencement of such is imminent, and the party opposing the tribunal's jurisdiction may initiate a court proceeding to obtain a declaration as to the arbitration agreement's (in)validity from the court as defined by the *lex arbitri*[6] or even a foreign court.[7]

On 30 July 2021, the PRC Ministry of Justice issued a Draft Revision of the PRC Arbitration Law (Draft Revision) for public comments. The Draft Revision seeks to make a number of fundamental changes to the current arbitration regime in China including that of competence-competence in China. Although the Draft Revision is still at the consultation stage and is yet to be formally introduced, in general terms it reflects a pro-arbitration stance, aligns with best international practices, and showcases China's ambition to become a modern arbitration hub.

The new competence-competence is enshrined in Article 28 of the Draft Revision, which provides that the parties must raise a jurisdictional challenge to the arbitral tribunal for decision, and without such "pre-judicial review" procedure, the competent court shall not accept such application. Only when the arbitral tribunal has decided

[3] See *Xin Jing Enterprise Co. vs. Shenzhen Zhong Yuan Cheng Commercial Investment Holding Co., Ltd.* (2019) Zui Gao Fa Min Te No. 2.

[4] In China, arbitral insitutions have power to make the jurisdictional rulings, rather than arbitral tribunals. The arbitral insitutions can delegate that authority to the tribunal, but is not required to do so. See, Article 6, CIETAC Arbitration Rules 2015.

[5] In case an interested party applies to the people's court for determining the arbitration agreement as valid or applies for revoking the arbitration institution's decision after an arbitration institution has made a decision on the validity of an arbitration agreement, the application may not be accepted by the people's court. See, Paragraph 2, Article 13, Interpretation of the Supreme People's Court concerning Some Issues on Application of the Arbitration Law of the People's Republic of China.

[6] An intermediate people's court, or a special people's court, in the place where the arbitral institution as stipulated in the arbitration agreement is located, or where the arbitration agreement is entered into, or in the place of domicile of the applicant or the respondent, shall have jurisdiction over the case of recognition of the effect of an arbitration agreement. See, Article 2, Provisions of the Supreme People's Court on Several Issues concerning Trying Cases of Arbitration-Related Judicial Review.

[7] Dadja Eak, *Parallel Proceedings in International Arbitration: a Comparative European Perspective*, Wolters Kluwer Law & Business(2014), p.146.

on jurisdictional issues, could either party file an application for judicial review of the arbitrator's decision with the court.

It is noteworthy that the Draft Revision seems to suggest that the arbitral tribunal rather than the arbitral institution is the right body of competence-competence, bringing Chinese arbitration one step closer to international practice.

The time limit for such application for judicial review is ten days upon receipt of the arbitral tribunal's decision on its own jurisdiction and the competent court is an intermediate court at the seat of the arbitration.[8] Consistent with international practice, during the judicial review, the arbitral proceedings will not be stayed.

Careful reading of Article 28 of the Draft Revision suggests that the positive jurisdictional decision of the court is final and non-appealable, but either party may apply to a higher level court for a second-level review over the negative jurisdictional decision by the arbitral tribunal, i.e. the arbitration agreement in question is held invalid, or the arbitral tribunal is held to have no jurisdiction.

If the approach under Article 28 of the Draft Revision is adopted in the new PRC Arbitration Law, it remains to be seen whether the action for declaratory relief on the validity of the arbitration agreement might come to an end. If so, the dilatory tactics employed by recalcitrant parties accompanied by unnecessary costs could be avoided.

Article 28 of the Draft Revision brings China in conformity with the UNCITRAL Model Law on International Commercial Arbitration (Model Law). Under the Model Law, an arbitral tribunal has the competence to decide its own jurisdiction.[9] In addition, if the tribunal rules as a preliminary question that it has jurisdiction, the party may request, within thirty days after having received notice of that ruling, the competent court to decide the matter.[10]

A review of some major arbitration jurisdictions shows that they take different approaches and attach weights to distinct competing interests in order to give effect to the competence-competence doctrine.

In France, the courts must decline jurisdiction over disputes that have already been submitted to arbitration unless the arbitration agreement is manifestly void or not applicable.[11] The French courts permit only *prima facie* review as to whether there is a valid arbitration agreement prior to the commencement of the arbitration.[12] It follows that it would not be until the post-award stage that the courts may review whether the tribunal has "wrongly upheld or declined jurisdiction."[13]

[8] Article 28, the Draft Revision of the PRC Arbitration Law.
[9] Article 16(1), UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006).
[10] Article 16(3), UNCITRAL Model Law on International Commercial Arbitration (with amendments as adopted in 2006).
[11] Article 1448(1), French Code of Civil Procedure.
[12] *Judgement of 7 June 2006,* 2007 Rev. arb. 945(French Cour de cassation); *Judgement of 15 June 2007,* 2007 Rev. arb. 87(Paris Cour d'appel).
[13] Franco Ferrari, *Limits to Party Autonomy in International Commercial Arbitration*, JurisNet LLC (2016), p. 188.

Unlike the Model Law and the French approach, under German law, the courts are permitted to examine jurisdictional issues before the commencement of the arbitration proceeding.[14] Specifically, it allows the parties to the arbitration agreement to file a request with the court to have it determine the admissibility or inadmissibility of the arbitration proceedings before the constitution of the arbitral tribunal,[15] which is similar to the action for declaratory relief on the validity of an arbitration agreement under PRC Arbitration Law.

Under U.S. law, the Federal Arbitration Act only provides very limited guidance on the competence-competence doctrine. Case law sheds light on the development of this doctrine in the U.S. In short, jurisdictional issues, also called "gateway issues", including disputes over the existence, validity, and scope of the arbitration agreement,[16] shall be determined by courts, and non-jurisdictional issues are subject to resolution by the arbitral tribunal.

However, the allocation of jurisdictional competence is not decisive. The U.S. Supreme Court in *First Options of Chicago, Inc. v. Kaplan* held that where parties agreed to submit a jurisdictional dispute to final resolution by arbitration, then that dispute should be referred to arbitration.[17] It was also ruled in *First Options* that courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so.[18] As a precedent, *First Options* was followed by different U.S. courts in several cases, which confirmed that the agreements between parties to finally resolve gateway issues by arbitration are valid.[19] To conclude, the standard of review for the tribunal's decision on jurisdiction is based on contractual provisions, rather than on legal principles.[20]

The interaction of party autonomy and competence-competence has also been developed in other jurisdictions. Similarly, English courts permit agreements that grant arbitral tribunals the power to make the final jurisdictional decision.[21] In contrast, in Germany[22] and France[23], the parties may not exclude the courts from reviewing the arbitral tribunal's decision on jurisdiction.

Under PRC law, both the PRC Arbitration Law and the Draft Revision are silent on the relationship between party autonomy and the *competent-competence* doctrine, and it remains an issue to be resolved by judicial practice.

Another noteworthy development as regards the competence-competence doctrine in the Draft Revision is the court's review of a negative jurisdiction ruling, i.e. the tribunal decides to decline its own arbitral jurisdiction.

Although many jurisdictions recognise arbitrators' positive competence-competence, the negative jurisdictional ruling is less explored and addressed. There have been debates on whether a judicial review of negative jurisdictional decisions should be allowed.

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[14] Frank-Bernd Weigand, Antje Baumann, *Practitioner's Handbook on International Arbitration*, Oxford University Press(2009), para. 7.43.
[15] Section 1032(2), German Code of Civil Procedure (ZPO).
[16] See, Gary Born, *International Commercial Arbitration*, Kluwer Law International BV (2014), p.1149.
[17] *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (U.S. S.Ct. 1995).
[18] *Ibid.*
[19] See, Gary Born, *International Commercial Arbitration*, Kluwer Law International BV (2014), p.1125.
[20] Franco Ferrari, *Limits to Party Autonomy in International Commercial Arbitration*, JurisNet LLC (2016), p. 193.
[21] See, *LG Galtex Gas Co. v. China Nat'l Petroleum Co.* [2001] EWCA Civ 788 (English Ct. App.).
[22] Stefan Kröll, *Recourse against Negative Decisions on Jurisdiction,* (2004) 20 Arbitration International 1, pp. 55–72.
[23] See, Gary Born, *International Commercial Arbitration*, Kluwer Law International BV (2014), p.1116.

The argument for allowing court review of a negative jurisdictional ruling is that such review helps prevent a party from being denied the right to arbitrate in circumstances where the arbitral tribunal has wrongly decided that it does not have jurisdiction.[24] Moreover, there is something fundamentally unfair about denying claimants entitlement to court review of negative rulings, given the wide acceptance of the right of respondents to challenge positive rulings in court.[25]

The counterargument is that denying recourse against the arbitral tribunal's negative jurisdictional ruling will not leave the aggrieved party's substantive rights and claims in any way extinguished, prejudiced or affected.[26] The parties can still pursue their claims in any other forum where proper jurisdiction can be found.[27]

Some Model Law jurisdictions such as Scotland and New Zealand, by modifying Article 16 (3) of the Model Law when adopting it, deliberately expanded the scope of review allowing a court to review all rulings on jurisdiction made by the tribunal as a preliminary question, whether it is positive or negative.[28] Singapore also revised its arbitration law in 2012, expressly allowing for judicial review of negative jurisdictional rulings.[29] In some non-Model Law jurisdictions such as England and Wales,[30] a jurisdictional ruling (including a preliminary negative one) is defined as an award and subject to appeal.

By contrast, the current PRC Arbitration Law only expressly provides that Chinese courts may determine the arbitral tribunal's jurisdiction where the arbitral tribunal rendered a positive jurisdictional ruling.[31] It is silent on the scope of authority of the courts to review a negative jurisdictional ruling made by the arbitral tribunal.

Nonetheless, in judicial practice, it appears that Chinese courts would be inclined to review negative jurisdictional rulings, despite the absence of express power to do so under the PRC Arbitration Law.

In *Champion Honest (Hong Kong) Limited v Sinopec Group Zhongyuan Oil Prospecting Bureau Foreign Economic and Trade Corporation* (Zhongyuan Case), the dispute concerned whether the court had the power to review the involved CIETAC negative jurisdictional ruling. The Beijing No. 4 Intermediate People's Court held that whilst the ruling was not in the form of an "arbitral award", it had de facto addressed the merits of the case and affected the substantive rights of the parties. Therefore, it fell within the scope of the court's judicial review of an arbitral award.[32]

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[24] Paulo Fohlin, *A case for a right of appeal from negative jurisdictional rulings in international arbitration governed by the UNCITRAL Model Law,* (2008) 10 Asian Dispute Review 113, p.113.
[25] *Ibid,* p. 114.
[26] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA,* [2007]1 SLR 597 (R).
[27] Lawrence G. S. Boo, *Ruling on Arbitral Jurisdiction-Is That an Award*, (2007) 3 Asian International Law Arbitration Journal 125, p. 141.
[28] Rule 21 (1), Arbitration (Scotland) Act (2010); Section 16 (3), New Zealand Arbitration Act (1996).
[29] Section 10, Singapore International Arbitration Act (2012 Amendment).
[30] Section 31 (4) (a), English Arbitration Act (1996); Section 16 (2), Indian Arbitration and Conciliation Act (1996).
[31] Article 58(1)(2), Arbitration Law of the People's Republic of China (2017 Amendment).
[32] *Champion Honest (Hong Kong) Limited v Sinopec Group Zhongyuan Oil Prospecting Bureau Foreign Economic and Trade Corporation*, Beijing No. 4 Intermediate People's Court, (2019) Jing 04 Min Te No.38.

At the time of the Zhongyuan Case, it was unclear whether it was a one-off decision or would provide a back door to challenge a negative jurisdictional ruling. But this was echoed by the Draft Revision which suggests a spearhead of a movement to provide the legal basis for judicial review of negative jurisdictional rulings. Article 28 of the Draft Revision provides that if the competent court renders a negative ruling on jurisdiction, i.e. the arbitration agreement in question is held invalid, or the arbitral tribunal is held to have no jurisdiction, either party may apply to a higher level court for a second-level review. It can be inferred from the wording of Article 28 of the Draft Revision, the competent court has jurisdiction to conduct a judicial review over a negative jurisdictional decision by an arbitral tribunal, which will make China one of the few jurisdictions to address negative jurisdictional decisions in their arbitration laws.

If you would like to know more information about the subjects covered in this publication, please contact:

Patrick Zheng
+86 10 5081 3888
patrick.zheng@llinkslaw.com

Charles Qin
+86 21 3135 8668
charles.qin@llinkslaw.com

SHANGHAI	BEIJING	SHENZHEN
19F, ONE LUJIAZUI 68 Yin Cheng Road Middle Shanghai 200120 P.R.China T: +86 21 3135 8666 F: +86 21 3135 8600	30F, Central Tower, China Overseas Plaza, 8 Guanghuadongli, Chaoyang District Beijing 100020 P.R.China T: +86 10 5081 3888 F: +86 10 5081 3866	18F, China Resources Tower 2666 Keyuan South Road, Nanshan District Shenzhen 518063 P.R.China T: +86 755 3391 7666 F: +86 755 3391 7668
HONG KONG	**LONDON**	
Room 3201, 32/F, Alexandra House 18 Chater Road Central, Hong Kong T: +852 2592 1978 F: +852 2868 0883	1/F, 3 More London Riverside London SE1 2RE United Kingdom T: +44 (0)20 3283 4337 D: +44 (0)20 3283 4323	

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