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TABLE OF CONTENTS

1	ADMISSIBILITY OF CONFIDENTIAL STATEMENTS UNDER NIGERIAN LAW: A CONTEMPORARY PERSPECTIVE * A.O. ALUBO, (Ph.D) UBALÉ, C. Esq	1 - 14
2	THE UNITED NATIONS AND THE CHALLENGES OF A CHANGING ENVIRONMENT * OWOLABI, F	15 - 28
3	NOISE POLLUTION REGULATORY MEASURES FOR PROTECTION OF ECOSYSTEM * HAMZAH ADESOLO DAWOOD	29 - 43
4	OWNERSHIP OF CRUDE OIL UNDER NIGERIAN LEGISLATIONS - WHICH WAY FORWARD * BOSE LAWAL	44 - 56
5	DETERMINING THE JURISDICTION OF THE ARBITRAL TRIBUNAL AND THE ISSUE OF PARALLEL JUDICIAL PROCEEDINGS IN INTERNATIONAL COMMERCIAL ARBITRATION * A.B. ABDULKADIR & A.O. SAMBO	57 - 72
6	ELECTION PETITIONS UNDER THE ELECTORAL ACT 2006: AN APPRAISAL * JESU OROBO E. I. Esq.	73 - 82
7	AN APPRAISAL OF THE SUPREME COURT DECISION IN INAKOJU VS ADELEKE AND ITS IMPACT ON POLITICAL STABILITY IN NIGERIA * M.T. ADEKILEKUN	83 - 93
8	EXTENDING INTERNATIONAL CORPORATE PERSONALITY TO TRANSNATIONAL COMPANIES * KHAIRAT OLUWAKEMI AKANBI	94 - 103
9	THE DELIMITATION OF CRIMINAL RESPONSIBILITY IN CULTURE BASED CRIMES IN NIGERIA: EVOLVING A NEW THEORY OF BLAME * MUHTAR A. ETUDAIYE	104 - 123
10	CONSTRAINTS IN THE APPLICATION OF ISLAMIC LAW OF INHERITANCE IN NIGERIA * RAZAQ JUSTICE ADEBIMPE	124 - 130
11	DELEGATION OF POWERS TO GRANT CONSENT BY GOVERNOR UNDER THE LAND USE ACT: AN OVERVIEW * OLUGBENGA Esq.	131 - 152
12	CUSTODY OF CHILDREN IN NIGERIA: A COMPARATIVE ANALYSIS OF THE RELEVANT LAWS * F.F. ABDULRAZAQ	153 - 163
13	CONSTITUTIONALITY OF THE TAX APPEAL TRIBUNAL IN NIGERIA * GRACE ABOSEDE OLADELE (Mrs)	164 - 173
14	THE ROLE OF STATE ENTERPRISES IN MINERAL DEVELOPMENT * G.M. OLATOKUN (Mrs)	179 - 187
15	PROTECTION OF THE RIGHTS OF THE CHILD UNDER THE AFRICAN HUMAN RIGHTS SYSTEM * TIMOTHY F. YERIMA	188 - 198
16	CONTRACT OF KAFALAH (GUARANTEE): A VERITABLE PRODUCT OF ISLAMIC FINANCING? * ABDULQADIR IBRAHIM ABIKAN, (Ph.D)	199 - 216
17	WRONG PLACEMENT OF THE MODIFIER "ONLY": A SOURCE OF AMBIGUITY IN LEGAL DOCUMENTATIONS * OYEDOKUN-ALLI, W. ADEMOLA & OLOKOGBA S.M	217 - 224

DETERMINING THE JURISDICTION OF THE ARBITRAL TRIBUNAL AND THE ISSUE OF PARALLEL JUDICIAL PROCEEDINGS IN INTERNATIONAL COMMERCIAL ARBITRATION

BY

*** A.B. ABDULKADIR & A.O. SAMBO**

1.0 INTRODUCTION

Competence-competence addresses the issue of allocation of authority between arbitral tribunals and domestic courts to decide disputes over the existence and enforceability of arbitration agreements.¹ It seeks to ensure that arbitrators (as opposed to domestic courts) are given the first opportunity to rule on challenges to their jurisdiction and enable them to continue with arbitration even if the validity or existence of the underlying arbitration agreement is in disputes.² So far so good, the problem arises when parties approach domestic courts and challenge the jurisdiction of the arbitral tribunal by questioning the existence or validity of the underlying arbitration agreements.³ This presents the courts with a dilemma. Should they conduct a *premafacie* or a full court merit based reviews of the arbitration agreement? A strict interpretation of competence-competence would dictate that courts limit themselves to establishing the *premafacie* existence of an arbitration agreement.⁴ The

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2. Christer Soderland, *Lispendens, Resjudicata and the issue of parallel judicial proceedings*, *Journal of international Arbitration* 22(4): 301-322, 2005. Matthias A Scherer, *when should an arbitral tribunal sitting in Switzerland confronted with parallel litigation Abroad stay the Arbitration?* *ASA Bulletin*, vol. 19 No 3 (2001) 451-457.
3. Christian Oetiker, *The principle of Lispendens in international Arbitration*, *The Swiss Decision in Fomento v colon*, *Arbitration International*, vol. 18, No 2, 137; Manuel Liatowitsch, *Die Ansetzung der lispendenz enreghe von Art. 91RPG durch Schweizerischer Schiedsgerichte: Ein paradoxon? Überlegungen zu einem Bundesgericht entschieden vom 14. Mai 2001 im Lichte von BGE 124 11183*, *ASA Bulletin*, Vol. 19 No 3 (2001), 422-438.
4. Howard m. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model law on international commercial arbitration: Legislative History and Commentary* at 33.
5. See John J. Barceló, *Who decides the Arbitrators jurisdiction? Seperability and competence- competence in a transnational perspective*, 36 *vanderboth journal of transnational law* 1115, at 1125.

answer to this question varies from jurisdiction to jurisdiction. This paper is divided into three major parts. The first part looks at the question who decides what? The second part examines the position of competence principle in different legal system while the third part gives an over view of the main approaches to the problem question of who stays for whom in case of parallel proceeding (that is, the court or the arbitral tribunal).

12.0 WHO DECIDES WHAT?

Where a party files objections concerning the arbitration tribunal jurisdiction, the question will be: whether the tribunal has power to rule on its own jurisdiction or whether the power of the tribunal to assume jurisdiction in respect of a matter is to be determined by the court? Assuming that the former is answered in affirmative, the next question will be whether such power is exclusive,⁶ therefore, who decides what?

The principle of competence-competence authorizes arbitrators to rule on challenges to their jurisdiction and to continue with arbitration even if the validity or existence of the underlying arbitration agreement is in dispute.⁷

However, no international consensus exists as to whether domestic courts should apply a *prima facie* or a full merits-based review when parties to arbitration challenge the jurisdiction of an arbitral tribunal.⁸

In Germany, it is referred to as the concept of *Kompetenz-Kompetenz*. It is called competence sur la competence in France. *Kompetenz-kompetenz* means an arbitral tribunal is allowed to make a decision on whether it has jurisdiction over an issue that needs to be settled and whether an arbitration agreement is valid.⁹ The doctrine of competence-competence which holds that an arbitral tribunal may determine question as to its own jurisdiction is an important aspect of arbitration law. It is observed that if arbitrators could not determine question as to their own jurisdiction, a recalcitrant respondent could easily frustrate the

6. Jean-François Pouchet, *Le tribunal federal Suisse opte pour le renvoi de la l'ispendence entre le juge et l'arbitre* Note-tribunal federal Suisse, 14 mai 2001, *Revue de l'arbitrage*, 2001- No 4 842-854

7. Stephen Bertl, *International arbitration in Switzerland: an introduction to and a commentary on Article 176-194 of the Swiss private international law statute* (2000) 5, at 462

8. Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model law on international commercial arbitration: Legislative History and Commentary* at 33.

9. See generally article 16 of the UNCITRAL Model law 1985. See also article 21 sub1 of the UNCITRAL Arbitration Rules (1976)

DETERMINING THE JURISDICTION OF THE ARBITRAL

parties' agreement to have their dispute decided by arbitration or at least create considerable delay by merely contesting the validity of arbitration agreement in court.¹⁰ Further observation shows that such a situation would undermine arbitration as an effective means of private dispute resolution and deprive it of its attractive.¹¹

Competence-competence in its lay man terms simply means nothing more than arbitrators could, subject to later review, looking into their jurisdiction without waiting for a court to do so; and need not stop arbitral proceedings to refer to jurisdictional issue to judges.¹²

The exact role of the competence-competence is to restrict the time and conditions for the court to intervene with the arbitration proceedings and to raise the efficiency of the arbitration tribunal's hearing. The power of the tribunal to determine the objection concerning its own jurisdiction is typically assigned by the parties.¹³

10. UNCITRAL Model law 1985, article 16(3).

11. Christian Oetiker, *The principle of lispendens in international Arbitration: The Swiss Decision in foment v. Colon*, *Arbitration international*, vol. 8, No 2, 137, at 144

12. UNCITRAL Model law n8 article 16(3).

13. The concepts of competence-competence concerns the degree to which an arbitral tribunal may rule on its own jurisdiction as defined by the arbitration agreement. It does not imply the power of arbitral tribunal to take final and binding decision as to its own jurisdiction. It rather denotes a tribunal's power to adopt an initial ruling as to its jurisdiction. The issue is not the finality of the arbitrators decision on their jurisdiction and the consequence ouster of the jurisdiction of the courts, but rather the time at which and the conditions under which the courts may play their role as the final authority on the question of arbitral jurisdiction. It is therefore an issue which is to be resolved on the basis of practical rather than doctrinal considerations. The basic problem is how to reconcile the realization of the objectives of commercial arbitration, which would be defeated if an arbitral tribunal would have to suspend or terminate its proceedings each time a party pleaded invalidity of the arbitration agreement, with an effective measure of court supervision to ensure that the arbitral does not finally confer on itself a jurisdiction which by reason of the consensual nature of arbitration can only derive from the agreement of the parties. The power to investigate its own jurisdiction is inherent in the appointment of an arbitral tribunal and is now generally accepted. Notwithstanding its essential role in the discharge of an arbitral tribunal's task, it has in the past not been explicitly stated. The tendency over the last few decades has however been to set this power of arbitral tribunal forth in express terms. The explicit recognition of competence-competence in the model law is in accordance with this tendency.

The United Nations Commission on International Trade Law Arbitration Rules adopted the kompetenz-kompetenz principle and provides that

The Tribunal shall have power to rule on the objection that it has no jurisdiction, including any objection with respect to the existence or validity of the arbitration clause or the separate arbitration agreement¹⁴

Objection to the arbitral tribunal are not infrequent in international commercial arbitration. Such objection can be based, inter alia on the fact that there is no arbitration agreement, that the arbitration agreement is invalid or that the dispute is not covered by an otherwise valid arbitration agreement. It is important that the statutory framework ensure that any jurisdictional objections are required to be raised as early as possible in the arbitration. This is necessary in order to allow jurisdictional issues to be resolved before time and money is lost with proceedings that may not have proper jurisdictional basis, as well as to ensure that by raising early jurisdictional objection a party is not able to unduly delay the proceedings.

The Model law on International Arbitration (Model law) adopted by United Nations Commission on International Trade Law also contains similar provision. The doctrine of competence-competence is largely based on Article 16(1) of the UNCITRAL Model law.¹⁵

Article 16(2) of the Model law contains a special provision regarding the timing of jurisdictional objections. The provision provides that:

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not Precluded from raising such a plea by the fact that he has appointed or Participated in the appointment of an arbitrator. A plea that the arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may in either case admit a later plea if it considers the delay justified.¹⁶

14 See Article 21 section 1 of the UNCITRAL Arbitration Rules 1976

15 UNCITRAL Model law 1985, Article 16(1) of the law provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with to the existence or validity of the arbitration agreement for the purpose of an arbitration clause which forms part of a contract shall be treated as agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not ipso jure the invalidity of the arbitration clause.

16. UNCITRAL (Model) law. 1985

DETERMINING THE JURISDICTIONS OF THE ARBITRAL

The effect of this provision is that if a party does not object to the jurisdiction of the tribunal in a timely manner, the party will be precluded from presenting such objections to the arbitral tribunal and presumably also in later court proceedings. However, the tribunal has a discretionary right to admit a later plea where tribunal finds that the party should be excused.¹⁷

Therefore one can conclude that the Model law extensively dealt with the issue of competence-competence as it does not only confer power on the tribunal to decide on its own jurisdiction,¹⁸ but also gives the tribunal the power to continue proceedings notwithstanding any application to the court challenging the ruling of the tribunal on any preliminary issues.¹⁹

2.1 Jurisdictional issue in Different jurisdiction

It has been noted that most national laws contain provision identical or comparable to the one of model law.²⁰ For example, the Brazil Arbitration Law empower the arbitrators to decide before state courts any objection raised by the parties over the existence, validity or efficacy of the arbitration agreement and the contract containing it.²¹

17. See Holtzmann/Neuhaus, *A Guide to the UNCITRAL Model law on International commercial Arbitration* P 482-483. Court decisions have provided that if a party does not raise objections timely, he will be deemed to have waived its right to object. See CLOUT case No 148, Russia Federation, 10 February 1995.

18. Christopher Brown case (1954) 1QB at 12 and 13 where Derlin J. (as he then was) said: "it is not the law that arbitrators, if their jurisdiction is challenge or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merit of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had the power to determine it. They might then be merely wasting their time and every body's else. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties because they cannot do but for the purpose of satisfying themselves as the preliminary matter whether they ought to go on with the arbitration or Not.

19. Article 16(3) of the UNCITRAL Model law 1985 provides that If the arbitration tribunal rules as a preliminary question that it has jurisdiction, any party may request within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to appeal; while such a request is pending, the arbitration tribunal may continue the arbitral proceedings and make a ruling.

20. UNCITRAL Model law, 1985.

21. Section 8 of the Brazil Arbitration law

In France, the French Law specifically provides that if a party challenges the basis or the scope of the tribunal's jurisdiction, the tribunal is under a duty to rule on the validity or the limits of its jurisdiction.²² The competence competence principle is one of the best established rules of French arbitration law.²³

Very recently the commercial court in London had a cause to consider the very scope of separability principle under English law. In Harbour Assurance company (UK) Ltd. V. Kausa General International Insurance company Ltd.²⁴ Steyn J. (as he then was) delivered judgement on the principle of separability of the arbitration clause in an integral written contract. At the outset of his judgement he referred to question whether the arbitrators could under English law decide a question as to their own jurisdiction. He summed up the position thus:

The approach in English law is simple, straight forward and practical. As a matter of convenience arbitrators may consider, and decide whether they have jurisdiction or not, they may decide to assume or decline jurisdiction. But it is well settled in English law that the result of such preliminary decision has no effect whatsoever on the legal right of the parties. Only the court can definitively rule on issues relating to the jurisdiction of the arbitrators. And it is possible to obtain a speedy declaratory judgement from the commercial court as to the validity of an arbitration agreement before or during the arbitration proceedings.

In Sweden, the applicable Arbitration Act²⁵ also gives the arbitrators the power to rule on their own jurisdiction though the Swedish law provides that such decision of arbitrators concerning its jurisdiction is not binding on the parties; (that is it can be review by court.)

In Nigeria, the decision of the arbitral tribunal on its own jurisdiction is considered to be final and binding. Section 12 (1) provides:

22 See Article 1446 of the French code of civil procedure. However, Article 1458 provides for an exception in this regard. Before arbitral proceedings have commenced, a party can indeed apply to the court to have the arbitration clause declared manifestly null and void, see *courde cassation, uniked v. Ouralkali* 30 march 2004; *societe American Bureau of shipping (ABS) v. copropriete maritime Jules verne et autres* Revue de l'arbitrage 2001- No 3, 529-530.

23 Ibid.

24 Judgement given on 31 July 1991 (unreported.)

25 See section 2 (1&2) of the Sweden Arbitration Act. Sub section 2 provides that decision that tribunal has a jurisdiction in respect of a matter is not binding.

An arbitral tribunal shall be competent to rule on question pertaining to its own jurisdiction and on any objection with respect to the existence or validity of an arbitration agreement.²⁶

Section 12 (4) provides:

The arbitral tribunal may rule on any plea referred to it under sub-section (3) of this section, either as a preliminary question or in an award on the merit; and such ruling shall be final and binding.²⁷

Going by the above provision and in contrast with other jurisdiction, the word final and binding not only did it not contain in the model law but also rarely found in arbitration law of other jurisdiction. However, the mere fact that the Act used the word final and binding does not mean that the decision of the arbitral tribunal on its own jurisdiction cannot be reviewed by the court. The only logical conclusion one can draw from the latter provision is to hold that the Act recognises the power of the arbitrators to rule on its own jurisdiction.

The situation is purely different in South Africa. The South African arbitral tribunals do not have jurisdiction to adjudicate over issues directly relating to its own jurisdiction,²⁸ or to the initial invalidity of the arbitration agreement or the main agreement to which the arbitration agreement related.²⁹ This is because the detrimental aspects of the act as

26. See the Arbitration and conciliation act cap A18 laws of federation of Nigeria 2004

27. Ibid.

28. The south African law commission has in a recent report, recommended that south Africa adopt the Model law in order to reform the law relating to international commercial arbitration. (South African commission report project 94, Arbitration. An international Arbitration Act for South African. July 1998) The law commission stated in its report that the current state of the law on international commercial arbitral in south African is lagging behind most other international jurisdiction, and that reforms is necessary in order to bring South African law in line with the legal system of international jurisdiction, and thus to make South African an attractive venue of its trading partners

29. The South African law on arbitration is regulated by the Arbitration Act 42 of 1965, which governs all arbitration held within the jurisdiction of the South African legal system, both domestic and international. The Act was greatly influenced by the English Arbitration Act 1889, and the English Arbitration Act of 1950, and has accordingly followed the legal tradition of English law as it stood in 1965. However, the English has replaced the Arbitration Act of 1950 with the Arbitration Act of 1996 but the South African who followed the 1950 Act to the letter has not deemed it fit to amend its Arbitration Act to bring it in conformity with that of Arbitration Act of 1996.

it stand is the fact that it allows a wide and discretionary power of the intervention to the South African judiciary.³⁰ Essentially, South African courts are entitled to intervene in arbitral proceedings on application by one of the parties. Furthermore, the Act also provides that the courts are not obliged to enforce referrals to arbitration tribunals,³¹ if either of the parties can show that sufficient reasons exist as to why the matter should not be referred to Arbitration.³²

Finally, in jurisdiction where the provision of the Model law has been adopted wholesomely,³³ the issue of competence-competence would seem to be a settled one³⁴ compare to jurisdiction where the model law has legal relevance.

3.0 ISSUE OF PARALLEL JUDICIAL PROCEEDING?

The commencement of proceedings before more than one forum inevitably give rise to a practical and legal complications:³⁵ the burden of carrying out parallel proceeding before several tribunals and most importantly the possibility of rendering different decisions on the same issues between the same parties.³⁶ The question may arise as to what the court should do when the respondent at the beginning of the proceedings invoke the existence of an arbitration agreement and the request that the case to be referred to arbitration, while the claimant alleges that the arbitration agreement is null and void, inoperative or incapable of being performed.³⁷

30. See section 3 (2) of the Act 42 of 1965. See also section 5 of the Act as well. For more detail view see David Butler, "South African arbitration legislation: the need for reform" in XVII CILSA (1994).

31. See Section 6 of the Act, n. 33.

32. See the law Commission report paragraph 1.10 n.31.

33. Zimbabwe Arbitration Act of 1996 adopts model law wholesomely. Others countries that have adopted the model law include Kenya, India, Scotland, Australia, and Singapore.

34. See Hwang M. & Muttath R.C. The Role of courts in the course of Arbitral proceedings: Singapore and others Asian perspectives - Journal of the chartered institute of Arbitrators, Vol. 68 No 3, August 2002 pp. 223-237.

35. Christer Soderlund, *Lispendens, Resjudicata, and the issue of parallel judicial proceedings*, journal of international Arbitration, 22(4) 301-322, 2005, at 301.

36. See Hwang M. & Muttath R.C. The Role of courts in the course of Arbitral proceedings: Singapore and others Asian perspectives - Journal of the chartered institute of Arbitrators, Vol. 68 No 3, August 2002 pp. 223-237.

37. See for example article 8 of the model law and section 4 and 49 of the Sweden Arbitration Act 1996.

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. Should courts engage in a complete review of the existence and validity of the arbitration clause agreement at any time, irrespective of whether the arbitration tribunal has already determined the issue, thus not staying the proceeding in favour of the arbitration?³⁸ Or should the court only be able to review the validity of the arbitration clause at the post award stage, when either an appeal or challenge against the award is filed?³⁹ Or perhaps the court should be able to review the validity of the agreement when the arbitral proceedings are pending, but only on a *prima facie* basis?⁴⁰ The answers to these questions varies from jurisdiction to jurisdiction depending to a large extent on how the nature of international arbitration is understood: is it a mere concession from the monopoly of state courts in dispute resolution, or is it a contractually established dispute resolution in its own right that does not owe its existence to the bodies of the state.⁴¹

There is a general understanding that parallel proceedings are undesirable for three main reasons. The risk of contradictory decisions, the waste of resources due to duplication of proceedings, and the potential for harassment.⁴² In addressing this topic, two main factors must be borne in mind:

A situation where both the seat of arbitration and the court are in the same state. Situation where the court is in foreign state and the seat of arbitration in another state. In either way, national approaches are of prevailing importance for the question of who stay for whom in arbitration.

38. Julian D M, Loukas A Mistelis, & Stefan Kroll, *Comparative international commercial Arbitration* § 14-35 at 340 (2005). See also Werner Wegner, art 186, in Stephen Berti, *international arbitration in Switzerland: an introduction to and a commentary on Article 176-194 of the Swiss private international law statute* (2005), 5 at 462.

39. *Ibid.* 6 at 462.

40. See Holtzmann/Neuhaus, *A Guide to the UNCITRAL Model law on international commercial Arbitration*, P. 482-483.

41. See Briggs & Rees, *Civil jurisdiction and judgement* (4th ed) 2005, Para. 4.19 at 322-324; The principle of parallel proceeding is enshrined in article 27-30 of the Brussels Regulation (council Regulation (EC) No 44/2001 of December 2000 on jurisdiction and the Recognition and Enforcement of judgement in Civil and commercial matters.

42. Christer Sunderlund, n.38.

3.1 Approaches to Parallel Judicial Proceedings in Different Legal Systems

It has been noted that most national laws contain provisions identical or comparable to that of the Model law.⁴³ For example, the UNCITRAL Model law reads in art. 8(1):

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed

Going by this provision, the court is faced with a dilemma. Should they conduct a premafacie or a full court merit based reviews of the arbitration agreement? If in such a situation, the court engage in a full consideration of the validity of the arbitration agreement and comes to a conclusion that the agreement is indeed invalid, inoperative or incapable of being performed and as a result does not refer the parties to arbitration, the operation of the principle of competence - competence will be thwarted, since the arbitral tribunal may never have the opportunity to consider its own contested jurisdiction and that would seriously undermine arbitration as an effective means of private dispute resolution and deprive it of its attraction.⁴⁴

It has therefore been suggested that in such a situation the court should engage in a premafacie consideration of the controversy as to the validity of the arbitration agreement and should refer the parties to arbitration if the agreement is premafacie valid, operative and capable of being performed since the court would in any case have the ultimate opportunity to decide on the validity of the arbitration agreement either in the context of the proceedings for the setting aside or the enforcement of the award or under the model law.⁴⁵

43. Zimbabwe, Kenya, India, Scotland, Australia, Singapore and Nigeria have adopted the model law.

44. See Christian Oetiker, *The principle of lispendens in international Arbitration: The Swiss Decision in Fomento v. colon*, *Arbitration international* vol. 8, No 2, 137 at 144.

45. Some model law jurisdiction (Egypt, India, Oman, Sri Lanka and California) have deleted this exception in article 8, which could imply that in these jurisdiction, the court should refer a matter to arbitration irrespective of the court's opinion on the validity or applicability of the arbitration agreement.

According to some decisions, for a court to refer a matter to arbitration under article 8, it is sufficient that *prima facie*, there exists an arbitration agreement that is binding upon the parties.⁴⁶ Also, courts decision have indicated that the court is only to be concerned with determining whether there is *prima facie* evidence that the arbitration agreement existed and whether the dispute falls within the scope of the arbitration agreement.⁴⁷

Some have argued that regarding the extent of the court's determination of the validity or applicability of the arbitration agreement within the context of whether such an arbitration agreement constitute a bar to court proceedings,⁴⁸ the principle of competence-competence is not to imply that it is for arbitral tribunal in the first instance to decide on its own jurisdiction. The principle merely signifies that the arbitrators *defacto* have the competence to rule on their own jurisdiction if they are faced with an objection there to. To them, since under all circumstances the court always may make a full review of the jurisdiction of the arbitral tribunal after the issue has been determined by the tribunal, it would be a waste of the parties time and money if the court would not be allowed to

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46. See for example (High court, Hong Kong, *Nanchiwest Shipping CO. V Hong Kong united Dockyards Ltd*, 11 December 1996, *Hong Kong puladin Agricultural Ltd v. Excelsior Hotel (Hong Kong) Ltd* 28 February 2001). According to this court decision it is the arbitral tribunal that should determine in the first instance the existence of an arbitration agreement between the parties in accordance with article 16 of the Model law
47. Alberta court of Appeal, Canada, *Koverit Steel & crane Ltd v Kone corp.*, 16 January 19992 (in an action involving several different claims, the courts found that only such claim that were within the scope of the arbitration agreement should be refer to arbitration). High court Singapore *coop International pte ltd v. Ebel SA*, 4 marches 1998 (the court did not refer the matter to arbitration since the court after a final determination of the issued found that the dispute did not fall within the scope of the arbitration agreement). High court, Hong Kong *chung v prim equine corp* 28 September 1999 (the court referred the matter to arbitration since the court had no doubt that all matters under dispute were within the scope of the arbitration agreement) *Luuman wai and another v Chevalier (Hong Kong Ltd)*, 29 January 2002, (the court found that before the court can refer a matter to arbitration under article 8, it must first be satisfied that court proceedings have been brought in respect of a matter which is the subject of arbitration agreement. It goes without saying that if cannot be shown that the dispute between the parties comes within the arbitration agreement, there is nothing refers to the arbitration and a stay will not be granted. The decision was upheld on appeal. See high court of the Hong Kong special administrative Region court of Appeal, *Hong Kong, Luuman wai and another v chevalier (Hong Kong) Ltd* 26 June 2002.
48. Christian Oetiker, n 3

make such a full consideration of the validity of the arbitration agreement already at the stage when the question as to whether the arbitration agreement constitute a bar to court proceedings arises before the court.⁴⁹

The Arbitration Act of Sweden is based on this latter view.⁵⁰ The court may and should already at this stage engage in a full consideration of the validity and scope of the arbitration agreement, irrespective of whether the arbitral tribunal had any opportunity to determine the question or not. A decision finding that the arbitration agreement is invalid will be binding the arbitral tribunal and the same should probably be the case with a decision by the court to refer the parties to arbitration.

In India, under the 1940 Act,⁵¹ a court had discretion to stay court proceedings and refer parties to arbitration. This court discretion has been eliminated under the 1996 Act⁵² which is based on the UNCITRAL Model law. The 1996 Act require a court before which an action is brought in a matter which is subject to arbitration agreement to refer the parties to arbitration thereby staying the court proceeding pending the outcome of the arbitral tribunal.⁵³

The most pro- arbitration approach to issue of parallel proceedings is taken in France, where the standards of pre- award court review are the most restrictive. Article 1458 of the French code of civil procedure provides:

Where a dispute referred to arbitration tribunal pursuant to an arbitration agreement, is brought before a court of law of the state, the latter must decline jurisdiction. Where the case has not yet been brought before arbitration tribunal, the court must also decline jurisdiction save where the arbitration agreement is manifestly null. In both cases, the court may not raise sua sponte its lack of jurisdiction.

49. Christer Sunderlund, n. 38

50. See the Arbitration Act of Sweden 1996. See also section 2 (1&2) of the Act

51. See section 34 of 1940 Act.

52. See section 8 of the 1996 act.

53. *Ibid*; for more detail view see the following cases reported in Indian. *Shin-etsu chemical co. v. Aksh optifibre ltd* (2000) 7 SCC 23, (*shin- etsu*) *SBP & co. v. Patel engineering* (2000) 8 SCC 68; (*Patel engineering*) and *Agri Gold Exims Ltd v. Lakshmi Knits and Worens*. (Civil Appeal No 326 January 23, 2007). All these cases show that India courts are inching towards a less interventionist, pro- arbitration stance.

DETERMINING THE JURISDICTION OF THE ARBITRAL TRIBUNAL

This provision has been interpreted strictly in French cases in the case of already pending arbitration proceedings, even *prematrice* review of the existence of the arbitration clause by courts is not possible, and when the proceedings are not yet pending a very strict standard is adopted as to the interpretation of manifestly null and void. Article 1458 is to accord to the principle of competence-competence, whereby a tribunal is free to determine itself whether it has jurisdiction to hear a dispute, a "negative effect", as it acts automatically to preclude the jurisdiction of municipal courts and not only pronounce on its jurisdiction, but to be first to do so.

At the opposite end of the spectrum is the Swiss approach. Article 7(b) of the Swiss Private International Law Code provides as follows:

If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless, the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Despite the arbitral tribunal's prerogative to determine its own jurisdiction, there are cases where a state court can rule on aspects relating to the arbitral tribunal's jurisdiction before the latter had the chance to do so.⁵⁴ The question would thus arise whether the state court's decision is binding on the tribunal when it in turn decides on its own jurisdiction and whether, therefore, the arbitral tribunal should suspend its own proceedings pending a decision of the state courts on the matter?

The answer to the question depends on both the seat of the arbitral tribunal and the court seized. Where the arbitral tribunal and the court seized are within the same jurisdiction, it is suggested that based on the principle of competence-competence, the arbitral tribunal be given priority to determine its own jurisdiction in view of the possibility of a subsequent motion to a state court set aside the ruling. However, where the seat of the arbitration and the court seized are in different jurisdiction

54. See e.g. *courde cassation (2e ch. Civ.) 10 mai 1995- societe eprodag et autre v. dame bohin*, *Revue de l'arbitrage*, 1995- No 4, p. 617, noted by Gillard, *Revue de l'arbitrage*, 1995- No 4, 618-621; *courde cassation (1re ch. Civ.) 21 mai 1997. Renault v. Societe V2000 (Jaguar France)*, *Revue de l'arbitrage*, 1997- No 4, p. 537; *courde cassation (1 ch. Civile), 6 Juin 2001- societe American Bureau of shipping (ABS) v. Copropriete maritime Jules verne et autres*, *Revue de l'arbitrage*, 2001- No 3, 529-530 noted by Gillard, *Revue de l'arbitrage*, 2001- No 3, 529-534.

55. See Werner Wegner, art 186, in Stephen Bertl *International arbitration in Switzerland: an introduction to and a commentary on Article 176-196 of the Swiss private international statute (2000)* 5 at 462.

56. For instance, when the validity of the arbitration agreement is contested. See also Werner Wegner, n 57.

and the matter is already pending before the court, the issue would be whether the decision of such court is capable of being enforced in the state of the seat of the arbitration. Then the arbitral tribunal should be given the opportunity to decide first on its own jurisdiction based on the principle of competence-competence subject to any subsequent challenge to set aside the ruling before the court in another jurisdiction.

A similar pattern was under consideration in the controversial *Fomento*⁵⁷ decision of the Swiss Federal Tribunal (SFT) which had to decide the question whether, by not suspending the proceedings pending the decision by courts in Panama as to the existence of an agreement of the Parties to arbitrate, the arbitral tribunal sitting in Switzerland acted without jurisdiction.⁵⁸

The SFT noted that the rule that two conflicting decisions exist on the same subject matter and with respect to the same parties is a principle of public policy. Given that the decision of the Panamanian court was capable of being enforced in Switzerland, there was possibility of such a conflict of decision.

While recognising the right of the arbitral tribunal to decide the question of its own jurisdiction by virtue of the competence-competence principle, the SFT opined that this principle did not operate to deprive the state court

57. *The circumstances of the case were as follows: Colon Terminal (CCT) a Panamanian company, concluded a contract with foment de construcciones y contrastas SA (FCC) a Spanish company for engineering works to be performed in Panama, providing for the arbitration of dispute arising out of it under the rules of Arbitration of the International Chamber of Commerce. On 12 March 1998, FCC lodged a claim against CCT with a Panamanian court, CCT invoked the arbitration clause as precluding the jurisdiction of the state court, and however, the court on 26 June 1998 held that the arbitral clause had not been invoked in the prescribed time limits. Without waiting for the exhaustion of local remedies, CCT initiated arbitration proceedings on 30 September 1998, Geneva was established as the seat of the arbitration. FCC challenged the jurisdiction of the arbitral tribunal, arguing that CCT, by not making a timely invocation of the arbitration clause, had waived its right to arbitrate and had accepted the jurisdiction of the municipal court. In the mean while, a Panamanian court of higher instance stated, acting on appeal, that the invocation of arbitration clause had been timely. Referring to this decision and without waiting for the outcome of a further appeal the arbitral tribunal rendered award on 30 November 2000 established its own jurisdiction. Subsequently, on 22 January 2001, the supreme court of Panama held that the arbitration clause had been invoked too late and that the case was to be held by Panamanian courts. FCC therefore challenge the arbitral tribunal's award before the Swiss Federal Tribunal arguing that the arbitral tribunal had acted in breach of the lis pendens rule and that it had no jurisdiction over the dispute.*
58. See Christian o. "The principle of Lis pendens in international Arbitration": *The Swiss Decision in Fomento v. Colon, Arbitration International* vol. 18, No 2, 137 at 144.

IN DETERMINING THE JURISDICTION OF THE ARBITRAL
of the right to decide the question of its own jurisdiction as well. In the
SFT's view there is no basis in Swiss law for granting the arbitral tribunal
priority in deciding the question of validity of the arbitration clause and
that it is the forum first seized that should decide the issue in accordance
with the rule of *lis pendens* contained in art 9 of the Swiss Private
International law code.⁵⁹

These authors were unable to accord with the SFT in the *formento*
decision. This is because, if the question has to be based on who first
seized of a matter and the court rule that the arbitral tribunal lacks
jurisdiction, the implication is that the arbitral tribunal may not have the
opportunity to rule on its own jurisdiction and that would also negate the
practicability of the principle of competence-competence. We think in
the interpretation of a statute, the provision of a statute must be
interpreted in a way that will give meanings to it and not otherwise. The
persuasive view therefore will be to suggest that the arbitral tribunal
should be given priority to decide first on its own jurisdiction in order not
to rubbish the principle of competence-competence.

In Germany, even though section 1032 (2) ZPO which is the German
equivalent of Art. 8(1) of the model law⁶⁰ provides additionally that a
German court may only decide the arbitrators' jurisdiction if requested to
do so before the arbitral tribunal is constituted. Once the court is properly
seized of the jurisdictional issue, it is to make a full determination, not
just *prema facie* one, as per French law.

In England, section 9(1) of the English Arbitration Act⁶¹ provides for stay
of proceedings by the court in case an arbitration agreement is invoked
unless satisfied that the arbitration agreement is null and void,
inoperative, or incapable of being performed.⁶²

In Nigeria, arbitration proceedings is governed and regulated by

59 Article 9 of the Swiss private international law code reads as follows

1 If the same parties are engaged in proceedings abroad based on the same cause
of action, the Swiss court shall stay the proceeding, if it may be expected that
the foreign court will, within a reasonable time, render a decision that will be
recognizable in Switzerland

2 To determine when a court in Switzerland is seized, the date of the first act
necessary to institute the action shall be decisive. The initiation of the
conciliation proceedings shall suffice

3 The Swiss court shall dismiss the action as soon as a foreign decision is
submitted to it which can be recognized in Switzerland

60 See the provision of article 8(1) of the UNCITRAL Model law 1985.

61 See the Arbitration Act 1996.

62 Ibid.

Arbitration and Conciliation Act.⁶³ It gives the tribunal the right to hear matter affecting the validity of arbitration agreement and require the court to stay its proceedings once certain conditions are satisfied.

The position is very clear in Nigeria. The court would always give effect to arbitration clause in an arbitration agreement by referring such matter to an arbitrator and stay its proceeding pending the outcome of the arbitral tribunal since the court in all cases reserved the power to review and overturn the decision of arbitral tribunal.

The question of whether state courts and International arbitral tribunals should defer to each other on the basis of *lis pendens* rule when deciding the question whether an arbitral tribunal has jurisdiction to hear a dispute is one of the aspects of the problem of the relationship between state courts and arbitral tribunal. How this question is answered in different jurisdiction is a good illustration of extent to which a state is prepared to go in derogating from its monopoly in resolving dispute in order to honour the parties' agreement.

CONCLUSIONS

The standard of review to be applied by domestic court when determining the existence and validity of an arbitration agreement has been one of the more problematic issues in international arbitration. Although the genetic principle that court refer parties to arbitration if they have entered into arbitration agreement is enunciated in a number of international instrument, there is no international consensus as to whether courts should apply a *prima facie* or a full merit- based review to ascertain the tribunal's jurisdiction. It submitted that the readiness to allow the arbitral tribunal to be fully the master of its own jurisdiction and not to require it to stay the proceedings pending the outcome of proceedings in a state court is a mark of a genuinely arbitration and the preferable way for arbitration law practice to develop in the future.

63 See the Arbitration and conciliation Act CAP A18 Laws of federation of Nigeria 2004

64 Section 5 of the Act provides as follow:

1. If any party to an arbitration agreement commences any action in any court with respect any matter which is a subject of an arbitration agreement, any Party to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other step in the proceedings apply to the court to stay the proceedings
2. A court to which an application is made under subsection (1) of this section May if is satisfied (a) That there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement (b) That the applicant was at time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration Make an order staying the proceedings.

65 See the following cases. *M v panormos Bay v Olan (Nig) plc* (2004) 5 NWLR pt. 865 1 C.A; *M.F. Lupex v N.O.C. & S Ltd* (2003) 15NWLR pt.844 p.469 S.C; *O.S.H.C v.Ogunsola* (2000) 14NWLR pt. 687 p.431 S.C; *City Eng. (ltd) v NAIH* (1999) 11NWLR pt. 625 p.76.S.C.