The Role Of The Judiciary In Developing The Arbitration System

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Abstract:

Arbitration has witnessed significant development in recent years, and the judiciary has played an active role in its advancement through innovative interpretations, flexible reasoning, and the recognition of principles that helped fill gaps faced by arbitration bodies.

The role of the judiciary has been evident in defining the scope of arbitration agreements. Judicial precedents have allowed the extension of the effects of arbitration agreements to non-signatories in specific circumstances. The judiciary has embraced interpretations that permit arbitration to operate outside of specific domestic laws, expanding the realm of commercial arbitration beyond the confines established by national legislation. It has adopted a broad understanding of commercial activity to include actions that may not be considered commercial under national laws.

Notable contributions by the judiciary include laying the groundwork for the principle of the independence of the arbitration clause and the doctrine of kompetenz-kompetenz (the competence of the tribunal to determine its own jurisdiction). These developments were responses to practical justifications aimed at preventing the nullification or collapse of the arbitration process when the agreement containing the arbitration clause is deemed invalid.

The doctrine of kompetenz-kompetenz has also helped prevent delay tactics and achieve expeditious resolution. This has been reinforced by the adoption of the Estoppel Rule, which gives power to waste the objector's defenses if a blatant contradiction is found in their position: participating seriously in the arbitration proceedings for a long time and then invoking the invalidity of the arbitration agreement.

Keywords: Arbitration clause independence, jurisdiction over jurisdiction, arbitration, jurisprudence, implementation of the arbitration decision

I. Introduction

The law, international agreements, and contracts concluded between the parties are among the primary sources guiding arbitral tribunals' functions. However, when putting them into practice, it has been revealed that arbitral tribunals at times encounter issues that no solutions could be found in such sources.

Although laws are nearly perfect, gaps inevitably appear in their provisions after they enter into force, considering that life's actual facts and events are evolving endlessly. Moreover, time and development may bring up new issues that have yet to be experienced by legislators, particularly the rapid growth of knowledge and science in recent years. Therefore, the role of legal jurisprudence and the judiciary becomes indispensable in filling the gaps that stand out noticeably in laws because it provides the opportunity to achieve compatibility between the provisions of the law and reality. This would make laws respond to the renewed needs of society.

The role of legal jurisprudence and judiciary seems more difficult in light of the information age resulting from the massive acceleration of innovations in the era of the Fourth Industrial Revolution.

The role mentioned above is evident in many areas, especially those related to drawing the limits and scope of the impact of arbitration agreements. For example, although the proportionality clause of the contracts' effect necessitates that the effect of the arbitration agreement shall not extend to other than the parties thereof, certain jurisprudences allowed the extension of the impact of the arbitration agreement to third parties in certain circumstances.

In this regard, the French judiciary adopted the idea that the group of companies that constitute an economic unit is bound by the arbitration agreement one of the companies signed. Additionally, the parent company is bound by the arbitration agreement signed by the subsidiary company.

Regarding the flexible opinions and jurisprudence on not subject arbitration to a specific national law as in the case of amicable arbitration. In this case, it is found that the judiciary system in certain countries has adopted the idea of non-restricting the commercial arbitration by a specific national law, the concept of international physical rules, bypassing the rigid restrictions in national laws, and has concluded that arbitration has an independent subjectivity and that the specificity of its rules develops independently in the manner that matches its characteristics.

In addition, jurisprudence expanded the scope of commercial arbitration when it went beyond the frameworks provided for by internal laws in limiting commercial business within specific criteria. On the contrary, it adopted a broad commercial business concept to include various economic relationships. Such economic relationships may not be considered commercial businesses in national laws; instead, they are civil. On the other hand, the judiciary was not content with adopting a narrow interpretation of the reasons for the invalidity of the arbitral award; on the contrary, the court tried to find the means to address these causes and their consequences. These matters were necessary to develop arbitration rules and make them more effective.

Perhaps one of the most important topics in which the unmistakable imprints of jurisprudence and judiciary are materialized, and to which the scope of the research will be limited, was the introduction and establishment of the principle of the independence of the arbitration clause and the rule of competence-competence.

The actual implementation revealed that one of the litigants might try to plead the invalidity of the original contract, which included the arbitration clause. Thus, undermining the arbitral tribunal's jurisdiction and returning the dispute to the courts. This is done on the basis that the invalidity of the original contract necessarily entails the invalidity of the arbitration clause, referring to the rule that every derivative of mendacity is equally mendacious. In other cases, a litigant may contest that the arbitral tribunal has no jurisdiction to rule on the case. Again, this raises the question about the jurisdiction of the arbitration tribunal to decide on cases that lie within its jurisdiction and whether it has to suspend examining the dispute until the court determines that.

In the face of these dilemmas, the judiciary departments in various countries expressed their opinions and specialists in law interpretation played their roles. Consequently, this paved the way for the emergence of the principle of the independence of the arbitration clause and the rule of competence-competence.

In this research, we will shed light on the root causes that led to the emergence of these theories and then show how those ideas crystallized in current laws.

II. The Independence of the Arbitration Clause

1. The concept of the Independence of the Arbitration Clause:

The principle of the independence of the arbitration clause is one of the basic principles of arbitration. It means that the arbitration clause remains valid and independent of the original contract so that it is not affected by the invalidity of the last version of the contract. The judiciary is credited with protecting the principle of the independence of the arbitration clause. Legal jurisprudence was the first to interact with this principle.[1]Through searching for the legal basis for this principle to consolidate it until it became prevalent in international and domestic arbitration. Hence, many laws have subsequently adopted the same to legalize it. This principle is consistent with logic because the arbitration clause is procedural and therefore differs in nature from the content of the original contract, which includes substantive provisions related to the rights and obligations of the two parties. The arbitration clause itself includes latent elements of its independence.

If we follow the first steps of adopting the principle of the independence of the arbitration clause, we will find that the decision of the French Court of Cassation in the case of Gosset Vs. Carapelli, issued on May 7, 1963, laid the foundation and the first building block for this principle, with the French judiciary acknowledging the independence of the arbitration agreement from the original contract. It was stated in the grounds of the judgment, "The international arbitration agreement concluded independently or based on a condition stated in an agreement, shall enjoy, except for certain exceptional circumstances, complete independence from that conduct, and shall not be affected by the invalidity of the conduct aside from extraordinary cases.[2]." This ruling was issued in a dispute related to an export contract. The court affirmed that the arbitration clause included in the agreement remains valid, even if the export agreement was void in light of the defendant's plea motion.

Although the judgment described above was issued regarding international arbitration, the scope of its application extended and prevailed to include domestic arbitration for the phrase stated in the

[1] Adam Samuel, Separability of arbitration clauses - some awkward questions about the law on contracts, conflict of laws and the administration of justice, [2000] ADRLJ 36, p5 ؛

Ahmad Makhlouf, The Concept of the Independence of the Arbitration Clause in the International Trade Contract, A Legal Study in International Commercial Arbitration, Dar Al-Nahda Al-Arabiya, Cairo, 2002, p. 214 and onward.

[2] Cass. 1re civ., 7 mai 1963, Gosset, Juris-Classeur Périodique, 1963.II.13405, note B. Goldman; Journal de Droit International, 1964,82.

judgment, “aside from exceptional cases," it was meant to show conservative measures accompanying the approval of any new legal principle. It is also noted that the judgments issued by the French Court of Cassation admitted the same principle without conservation to become a principle firmly rooted in the case law. In the Hecht case in 1972, the French Court of Cassation affirmed the complete legal independence of the arbitration clause vis-à-vis the original contract with no restrictions.[3].

Among the most significant decisions issued by the French Court of Cassation related to the independence of the arbitration clause is the one issued by Civil Chamber 2 on March 20, 2003. The dispute concerned a subcontracting contract incorporating an arbitration clause (condition). The Court of First Instance decided that “The arbitral tribunal has the jurisdiction to adjudicate the dispute. However, when appealing the case, one of the contracting parties argued that the arbitration clause was invalid due to the lack of a financial guarantee to be provided to the leading company. Therefore, the Court of Appeal decided that the arbitration clause becomes null and void if the contract that incorporated such a clause is revoked. Meanwhile, the Court of Cassation quashed the contested judgment and established that the arbitration clause has legal independence, in line with the main contract that states the same, from any defect that may occur in this contract, unless the parties agree otherwise, and decided to refer the two parties to the arbitration.

On February 10, 2016, the French Legislator made amendments to the Civil Code; the French Law adopted the principle of the independence of the arbitral clause in Article 1230, which stipulates that: “The dissolution of the contract shall not have an impact on the provisions related to the settlement of disputes, nor those that are intended to become valid even in dissolution status, such as confidentiality and non-compete clauses."

In addition, the French legislator considers the arbitration agreement independent of its subject matter contract or the contract in dispute and is not affected if this contract is null and void in line with Article 1447 of the Code of Civil Procedure.[4].

Since 1942, the English judiciary has adopted the principle of the independence of the arbitration clause and that its validity is not affected

[3] L'arrêt Hecht, Civ. I, 4 Juillet 1972 (Rev. crit. 1974 p. 82, note Level; JDI1972, p.843 note Oppettit.

[4] Hafida Al Haddad, Contemporary Trends Concerning the Arbitration Agreement, Dar Al Fikr Al Jami`, Alexandria, 1996, p. 25.

by the defects of the original contract in the case (Heyman v Darwins)[5] . However, in the case of Harbor Assurance Co, the English judiciary did not explicitly use the term independence of the arbitration clause until 1994.[6]. In that case, the Court of Appeal in London ruled that "The arbitration clause remains valid unless it is in itself unlawful … and that it is necessary to expand the scope of the independence of the arbitration clause to include contracts that are claimed to be null and void, out of respect for the authority of the will of the parties[7]." One of the critical cases that tackled this issue is the case of (DST V RAKOIL) in 1987. It was stated in the merits of the ruling that "The arbitration clause is itself a contract and shall be independent of the original agreement[8]." Thus, courts in the United Kingdom acknowledged the independence of the arbitration clause, provided that the arbitration clause itself is valid and not affected by the nullity of the original contract.

This principle was endorsed in the Fiona Trust & Holding Corp. v. Yuri Privalov case. In this case, the English House of Lords decided that the issue of invalidity of the underlying contract shall be subject to arbitration so long as the allegation of bribery does not relate to the arbitration agreement itself.[9].

[5] *Heyman v Darwins Ltd* [1942] AC 356, available at: https://uk.practicallaw.thomsonreuters.com/D-016-8302?transitionType=Default&contextData=(sc.Default).

[6] Harbour Assurance Co. Ltd. V. Kansa General International Insurance Co. Ltd., [1992] 1 Lloyd's L.Rep, 81.Available at: https://www.trans-lex.org/302700/_/harbour-assurance-co-ltd-v-kansa-general-international-insurance-co-ltd-[1992]-1-lloyds-lrep-81/.

[7] Lloyd's Law Reports, Lloyd's of London Press, Volume 2, Limited, 1997, p.738.

[8]Judgment of the Court of Appeal of England and Wales [1986 D No. 2196] [1987 R No. 273], cf. Ahmad Makhloof

Previous reference, pp. 228-229; Al Aboudi, Alaa Farhan Karim. Arbitration As a Means of Resolving Disputes in Oil Licensing Contracts: Halfaya Oilfield Contract as a Model. The National Center for Legal Publications, 2021, p. 127.

[9] Fiona Trust & Holding Corp v. Privalov, [2007] UKHL 40. Available at: https://www.trans-lex.org/312142/_/fiona-trust-holding-corp-v-privalov-%5B2007%5D-ukhl-40/.

"was endorsed in the well-known decision *Fiona Trust & Holding Corp v. Yuri Privalov*, in which the English House of Lords decided that the issue of invalidity of the underlying contract is arbitrable so long as the allegation of bribery does not relate to the arbitration agreement itself ".

Many Arab and foreign laws have adopted this principle.[10]. The provisions of these laws include explicit clauses legalizing this principle.

In the United Arab Emirates (UAE), the judiciary departments are credited with establishing the principle of the independence of the arbitration clause. Although the UAE law neglected this principle before issuing Arbitration Law No. 6 of 2018, the UAE judiciary has established and applied this principle since then.

The Federal Supreme Court adopted the principle of the independence of the arbitration clause in its decision dated 1/2/2010. The grounds of the decision stated that "Article 203 of the Civil Procedure Law indicates the intention of the legislator to consider that the arbitration agreement between the two parties is independent of the main contract, and that viewing it as one of its conditions and terms does not negate its autonomy and independence. The arbitration clause tackles a particular aspect that stipulates excluding the dispute that is required to be arbitrated from the jurisdiction of the courts and assigns the mandate to rule on it to the arbitral tribunal. Therefore, there will be two agreements; one identifies the competent authority with jurisdiction to adjudicate the dispute subject to the arbitration condition. Based on that, if the arbitration clause is excluded, it will be invalid. As for the invalidity, annulment, rescission, or termination of the main contract that includes the arbitration clause does not disqualify the arbitration clause from remaining valid and render its legal consequences. Moreover, the legal principles established a rule that the mere invalidity of the main contract does not entail the invalidity of the arbitration clause merely because it is independent of the contract, i.e., it does not adhere to it whether or not it exists.

The Court of Cassation- Abu Dhabi also ruled that "The arbitration clause is considered an agreement independent of the other terms of the contract. Therefore, its validity or nullity does not depend on the invalidity, nullity, rescission, or termination of the original contract unless this

[10] Mahmoud Samir El Sharqawi, International Commercial Arbitration, Dar Al Nahda Al Arabiya, Cairo, 2011, p. 100; Fawzi Mohamed Sami, International Commercial Arbitration, A Comparative Study of International Commercial Arbitration Rulings, Dar Al Thaqafa for Publishing and Distribution, 2012 edition, p. 200.

Mahmoud Samir Al Sharqawi, International Commercial Arbitration, Dar Al Nahda Al Arabiya, Cairo, 2011, p. 100; Fawzi Mohammed Sami, International Commercial Arbitration, A Comparative Study of International Commercial Arbitration Rulings, Dar Al Thaqafa for Publishing and Distribution, 2012 edition, p. 200.

condition is null on grounds like that an incapacitated person issued it or lacks legal competence because each of the states and the contract has a different subject matter from the other. Therefore, if the appealed judgment dismissed the appellant's defense based on the condition's independence from the contract, it would not have violated what is legally valid, and the appeal shall be rendered groundless.[11].

In another decision, the Court of Cassation- Abu Dhabi ruled[12], "This challenge is not appropriate because it is established that the arbitration clause is considered an agreement independent of the other terms of the contract. This means that the contract's invalidity, rescission ,or termination does not affect the arbitration clause stated in the contract if that clause is valid. Since that was the case, and the arbitration contract was one of the nominated contracts, it is the result of the will of the litigants to implement its effect, which means that the will of the litigants must be unblemished and decisive in referring to arbitration. Furthermore, the arbitration agreement is a stand-alone contract, even if mentioned as a clause of the original contract. This means we have two different contracts, i.e., the original contract with its various clauses and the arbitration contract incorporated in the same contract as one of its clauses. The jurisprudence and judiciary tended to consider both of them to be independent. The principle of the independence of the arbitration clause has become rooted in the precedents.[13].

It is clear that this issue was not limited to precedents in approving and consolidating the principle of the independence of the arbitration clause, as jurisprudence in various countries got a move on to support this tendency and provide their relevant comments, and further identify the deed of its legal grounds and advantages. Indeed, the contribution of jurisprudence was of a significant impact and not less than the

[11] Court of Cassation- Civil and Commercial Judgments- Appeal No. 477 of 2014 Judicial- Commercial Circuit- on 03-19-2014 Technical Office 8 Part No. 2 Page No. 548 [Rejection] Rule No. 75. See also Court of Cassation ruling- Civil and Commercial Provisions- Appeal No. 135 of 2019 Judicail on 03-14-2019 Technical Office 13 Part No. 1 Page No. 381 [rejection] Rule No. 47.

[12] Court of Cassation- Civil and Commercial Provisions- Appeal No. 321 of 2018 Judicial - Commercial Department- on 05-08-2018 Technical Office 12 Part No. 2 Page No. 1049 [Appeal rejected] Rule No. 135

[13] par X. Delpech, Approfondissement du principe de l'autonomie de la clause compromissoire en matière d'arbitrage international, le 5 août 2006,

contribution of the judiciary in establishing a legal system that made an attractive and effective system of international commercial arbitration.[14].

Most of them tended to legalize to shed light on this principle and draw the attention of comparative law to its importance. Among these are the UAE laws, particularly the UAE Arbitration Law No. 6 of 2018, as Article (6) stipulates, "An arbitration clause shall be treated as an agreement independent from the other terms of the contract. Accordingly, the contract's nullity, rescission, or termination shall not affect the arbitration clause if it is valid unless it relates to an incapacity among the Parties. 2. A plea that a contract containing an arbitration clause is null or has been rescinded or terminated shall not stay the arbitration proceedings, and the Arbitral Tribunal may rule on the validity of such contract."

Moreover, many international institutions and agencies have adopted this principle, stipulated in Article (16) of the International Commercial Arbitration Model Law.[15], and the London Court of International Arbitration LCIA rules in 2014. These rules are widely used in resolving commercial and investment disputes worldwide. They were amended several times over the years to acclimate to changing legal and technological developments until we have a final draft of Article 23, which stipulates in its first paragraph that "The Arbitral Tribunal shall have the power to rule upon its jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement."

We also find that this principle was explicitly stated in Article 6/ Para 9 of the ICC Rules of 2021. It stipulates that "Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction because of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The

14Arthur Taylor von Mehren, International Commercial Arbitration: The Contribution of the French Jurisprudence, 46 La. L. Rev. (1986) Available at: https://digitalcommons.law.lsu.edu/lalrev/vol46/iss5/2. P.1056

Al Shihabi Al Sharqawi, commenting on the ruling of the Federal Supreme Court in Appeal No. 166 of 2008, "commercial cassation," a paper published in the book "The Latest Rulings of the Federal Supreme Court commented on by the judges, lawyers and university professors" special edition on the occasion of the celebration of the forty years since the establishment of the court, 2013 AD.

15 The amended UNCITRAL Model Law of 1985.

arbitral tribunal shall continue to have jurisdiction to determine the parties respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void." [16]

Due to the rule of the independence of the arbitration clause and its severability, if the dispute arose during the contract's validity, the parties filed a lawsuit after the end of the primary contract term. This does not affect the validity or legitimacy of the existence of the arbitration agreement. Additionally, it does not prevent the settlement of the dispute by the arbitral tribunal. It is widely accepted that the termination of the main contract does not affect the arbitration clause in respect of disputes that have arisen during the course of the contract, where otherwise agreed.[17]. This is a practical and logical issue arising from the principle of the independence of the arbitration clause to realize the severability of the parties' disputes and be settled through arbitration, even after the expiry of the original contract term. Noteworthy, the arbitration agreement may have an expiry term.[18]. It should be known that when arbitral tribunals apply the principle of the independence of the arbitration clause, they usually refer to it as a general principle in international arbitration without referring to any national law in this field[19].

2. The Legal Ground for the Principle of the Independence of the Arbitration Clause:

[16] . "Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction because of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void".

[17] US Supreme Court, Nolde Bros., Inc. v. Bakery Workers, 430 US 243 (1977) .Available at https://supreme.justia.com/cases/federal/us/430/243/

[18] Muhyiddin Alamuddin, The Arbitration Agreement: Its Independence and Drafting, International Arbitration Journal, Issue 8, Supplement to Issue 8, October 2010, p. 338.

[19] of international arbitration. Does the arbitration clause survive the termination of the contract on 08/15/2020? Available at: https://www.international-arbitration-attorney.com/ar/does-an-arbitration-clause-survive-the-termination-of-a-contract/

Jurisprudence sought to establish this principle and search for its legal ground. We find that Robert, in his comment on the ruling of the French Court of Cassation issued on May 7, 1963, attributed the legal ground to the difference of subject and cause and that each of the condition and the original contract has a different subject and cause[20]. Therefore, the arbitration agreement constitutes an independent contract equivalent to the original one.[21].

Another aspect of jurisprudence attributed this principle to the theory of partial nullification of the contract, which stipulates that if the contract in one part is invalid, this aspect is invalid. If the agreement stated in the arbitration clause is null and void, then this nullity does not affect or extend to include the arbitration clause, which remains in force.[22].

While others believe that the principle of the independence of the arbitration clause is not associated with the will of the parties but rather "stems from a general policy to encourage parties of any contract to refer to arbitration, and imposes on the parties objective rules that are meant to realize the objectives of this policy[23]." others believe that the legal basis for this principle is due to practical necessities and showing respect for the will of the parties in resolving the dispute through arbitration[24]This is based on the belief that arbitration enables the parties to ensure that their disputes are resolved through arbitrators nominated for their valid expertise in the subject matter of the dispute.

The legal jurisprudence in Britain tended to adopt the idea that the principle of the independence of the arbitration clause finds its grounds in law in the rules of common law. However, these rules were well established before the adoption of this principle by the judiciary.[25].

The independence of the arbitration clause is one of the international material rules.[26], which consist of stable principles and customs. The

[20] Arthur Taylor von Mehren,OP.CIT, 1056.

[21] Abdel Hamid Al Ahdab, Encyclopedia of Arbitration and International Arbitration, Part Two, Cairo, Dar Al Maarif, 1998, 153.

[22] Fawzi Mohammed Sami, ibid pp. 206-207.

[23] Ahmad Abdel Fattah Saqr, Alexandria, 1st edition, 2019, p. 240.

[24] Fawzi Mohammed Sami, ibid p 205.

[25] Martin Hunter and Toby Landu, *The English Arbitration Act 1996: Text and Notes*, *Kluwer*, *London* (*1998)* p.15, footnote (21) .

[26] In this sense: Ahmad Saqr, ibid, p. 230.

justification for implementing these material rules is to avoid challenges and complications related to national laws, which may lead to the invalidation of the arbitration agreement for matters pertaining to a particular individual country or for any reason that may prevent the parties from avoiding being subject to the provisions of a specific law.

3. **The Significance of the Independence of the Arbitration Clause**: The importance of acknowledging the independence of the arbitration clause from the original contract appears in two themes. The first is to prevent the collapse of the entire arbitration process. It has been proven that by approving this principle, the arbitral tribunal could convene or proceed in the arbitration process when the original action is valid. Any party could invoke the invalidity of the original disposition, paralyze the arbitration process, and return the dispute to the judiciary.

The second theme is "the independence of the arbitration clause from all national laws."[27]. This leads to the fact that "the applicable law to the original contract may not necessarily be the same law that will be applicable to the arbitration agreement; instead, there is the possibility of excluding arbitration from being subject to any other law.[28]," as is the case in amicable arbitration. This is based on the fact that the parties have the right to freely settle the dispute between them according to any conditions and terms they acknowledge and that whoever spoils something is more capable of fixing it. Therefore, this leads us to wonder if these parties can authorize the arbitral tribunal to decide on the dispute in light of the rules of justice and fairness or customs consistent with the mechanisms of international trade without referring to a specific law.[29]. Had it not been for adopting this principle, arbitration would have remained confined to an individual law.

[27] Dr. Mahmoud Samir Al Sharqawi, International Commercial Arbitration, Dar Al Nahda Al Arabiya, Cairo, 2011, p. 100.

[28] Fawzi Mohammad Sami, International Commercial Arbitration, Dar Al Thaqafa for Publishing and Distribution, Jordan, Sixth Edition, 2012, p. 200.

[29] We find, for example, that the parties to the conflict can resort to mediation to resolve their disputes while they are not subject, as a rule, to the control of the judiciary (see Dr. Moataz Jamdan Badr, Mediation and its Role in Settling International Trade Disputes, New University House, Alexandria, 2018, p. 68) Therefore, they can refer the matter of deciding their dispute to an arbitration tribunal to adjudicate between them according to the principles of justice and fairness, away from any law.; Dr. Ahmad Abdel Karim Salama, The General Theory of Amicable Systems for Dispute Settlement, Dar Al Nahda Al Arabiya/ Cairo, 1st Edition, 2013, p. 5 and p. 367 et seq.

It is possible to add a third theme to the significance of the independence of the arbitration clause within the international scope, precisely when foreign investment companies or multinational companies panic about being subject to national laws.[30]. Add to these companies the holding companies, which despite the independence of the legal personality of the parent company from its subsidiaries, are financial. Independent, the parent company (the holding) controls the economic decision issued by the subsidiaries and dominates the management of these subsidiaries and their various decisions, including the dispute submitted to the arbitral tribunals.[31].

The national jurisprudence partially added that despite the legal independence of the subsidiaries, this does not preclude considering the holding company's controlling role over its subsidiaries. Add to that, the presumption of the integrated economic unit is appropriate evidence of the commitment of the holding company to specific actions of its companies under its control, including the arbitration agreement.

The principle of the independence of the arbitration clause provides the legal basis for the parties who have the freedom to refer to arbitration to settle their disputes and not be subject to national law. Consequently, the validity of the arbitration clause is not affected by the invalidity of the original contract.

It is taken for granted that foreign investors have specific concerns when they should refer to the national judiciary to settle any disputes. As a result, they often prefer to resort to arbitration, which allows the disputed parties to design and develop dispute resolution procedures that suit them.[32].

III. The Rule of Competence-Competence:

[30] The Washington Convention of 1965 for the Settlement of Investment Disputes between States and Nationals of Other States indicates that resolving disputes through international arbitration is, in some instances, more appropriate than subjecting them to domestic legal procedures.

[31] Mustafa Al Bandari Abu Saada, UAE Commercial Companies Law, Bright Horizons Publishers, 3rd edition, 2017, p. 671

[32] Amal Ammar Salama Al Ghariani, Arbitration, and Settlement of Oil Contract Disputes, Al Manara Journal for Legal and Administrative Studies, Vol. 35, June 2021, p. 42.

1. **The Concept of the Rule of Competence-Competence**. This rule is among the basic rules that govern the arbitration process. It refers to the arbitral tribunal's jurisdiction to examine the case and to decide over it with sights set on achieving the desired goal of arbitration efficiently and effectively. The summary of the rule of competence-competence is that if one of the parties to the dispute argues that the arbitral tribunal does not have jurisdiction to decide over the care, this does not negate the jurisdiction of this tribunal if the arbitration agreement is valid[33]. Under the rule of competence- competence in arbitration, the arbitral tribunal has the right to decide on defenses challenging the jurisdiction, the absence of an arbitration agreement, its invalidity, or the subject matter of the dispute is not included in the arbitration clause. The arbitral tribunal has the jurisdiction to decide whether it has the jurisdiction to examine the dispute once it is evident that the arbitration agreement is valid and that the subject matter dispute falls under its jurisdiction. Moreover, the arbitral tribunal can rule on cases within its jurisdiction and settle the dispute without referring to the national judiciary.

Without the acknowledgment of the judicial departments of this rule and in the absence of any legal provisions endorsing it, many arbitration agreements lose their effectiveness, and their advantages quickly fade away once the dispute is referred to the judiciary to decide on the subject of jurisdiction and the consequences of wasting time, effort and expenses.

The judiciary is credited for addressing this gap. The endorsement of the rule helps to speed up the process of adjudicating disputes that are subject to arbitration and not give a chance to those who try to obstruct the work of the arbitral tribunal by presenting defenses focused on challenging the arbitration agreement. Indeed, implementing this rule is necessary for the dispute to be reverted to the courts, with the consequences of entering into the usual cycle of litigation.34. However, this rule grants the exclusive jurisdiction to the arbitral tribunal to have adequate authority to settle all cases related to the dispute and to take all necessary measures, including

[33] Jean-François Poudret, Sébastien Besson, Comparative Law of International Arbitration, 2007, Sweet & Maxwell,p.416.
[34] See: Mahmoud Sharkawy, ibid, p. 99 et seq.

taking precautionary and temporary measures within the limits of the dispute35. This is what is called the positive effect of this rule.36.

In contrast to the positive effect of the competence-competence rule, it also has a negative consequence, specifically when filing a lawsuit before the national courts regarding a dispute over the jurisdiction of the arbitral tribunal to settle the dispute.37. The court may not examine the issue of the arbitral tribunal's jurisdiction to rule on a certain case; on the contrary, the latter would dismiss the case unless the parties agree otherwise, expressly or implicitly. This implies that the judiciary's role in such cases is limited to ascertaining the existence of the arbitration agreement at first glance or prima facie only.

Although the competence-competence rule is of recent origin in terms of the label, its resonance and impacts are dated back to an ancient Roman law established on the basis that each judge has their jurisdiction. 38.

For a certain time now, the scope and limits of arbitrators' powers in France have been interpreted based on the principle of competence-competence, which is routinely applied in conjunction with the development of a wide range of precedents by the French courts. Nevertheless, certain arbitral tribunals adopted the principle of competence- competence on the grounds that it is a material rule derived from the complete independence of the arbitration agreement.[39].

[35] Except for those measures that require coercive executive power, as this is at the heart of the judiciary's work.

[36] Laurent-Fabrice Zengue, NOUVEL IMPACT DU PRINCIPE COMPÉTENCE-COMPÉTENCE SUR L'ARBITRABILITÉ CONSUMÉRISTE CONCERNANT LE MARCHÉ DE L'UE,Available at : https://www.village-justice.com/articles/nouvel-impact-principe-competence-competence-sur-arbitrabilite-consumeriste,40946.html

[37] Jean-François Poudret, Sébastien Besson, op.cit ,p.416.

[38] Cf. par ex. J. FOURGOUS, L'arbitrage dans le droit français aux XIIIe et XIVe siècles, thèse, Toulouse, Privat, 1906 ; F. DE MENTHON, Le rôle de l'arbitrage dans l'évolution judiciaire, thèse, Paris, 1926. mentionné dans: mentionné dans: Magali BOUCARON, LE PRINCIPE COMPÉTENCE-COMPÉTENCE, EN DROIT DE L'ARBITRAGE, FACULTÉ DE DROIT ET SCIENCE POLITIQUE ÉCOL,2011,p.13.

[39]J. Robert « L'Arbitrage droit interne , droit international privé , avec la collaboration de B.Morceau D.6ème éd . 1993, P.138؛ ICC case no 3572 of 1982 (1989) XIV Ybk Commercial Arbitration 111; ICC case number 5721 of 1990 (1990) 117 Jounal du Droit Intl 1026.

The competence-competence rule is distinct from the principle of the independence of the arbitration clause. Nevertheless, it could be justified as this clause comes at a stage before the stage of determining the legitimacy or invalidity of the contract that includes the arbitration clause.[40]. The French legislator, in response to the calls of legal jurisprudence, adopted the competence-competence rule and legalized it in Article (1148), which stipulates: "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable."

In England, before issuing the Arbitration Act of 1996, the arbitral tribunals had no power to determine their jurisdiction; conversely, the courts had exclusive jurisdiction to examine the subject of jurisdiction and the final word in this matter. This issue influenced the core fundamentals of referring cases to alternative settlement methods at that time.[41]. It was "generally believed that arbitrators have no power to do more than express an opinion on whether they have jurisdiction over a specific case. [42]".

Nevertheless, the competence-competence rule had been put into effect in England in 1796 to rule on a dispute that arose between the United States of America and Britain. The British authorities confiscated a boat owned by an American citizen. The arbitral tribunal ruled that it had the jurisdiction to decide on that case.[43]. In another precedent, it was indicated that the arbitral tribunal is entrusted to examine the case and determine whether it has the jurisdiction to hear the dispute. In practice,

[40] Ahmed Makhlouf, ibid p. 147; Boulahia Souad, The Independence of the Arbitration Agreement as a Method for the Settlement of International Commercial Disputes, a Master's Thesis submitted to the Faculty of Law, University of Algiers, p. 103; Arbitration Case No. 5721/1990, International Chamber of Commerce, Paris, Journal of International Law in 1990, Volume 117, p. 1026.

[41] *Johana George,* All you need to know about the doctrine of Kompetenz-Kompetenz, available at: https://blog.ipleaders.in/all-you-need-to-know-about-the-doctrine-of-kompetenz-kompetenz/

[42] DEPARTMENTAL ADVISORY COMMITTEE, PARLIAMENT OF UNITED KINGDOM, REPORT ON THE ARBITRATION ACT 1996 9 (2006) [hereinafter DAC REPORT].

[43] King ،Henry T. ،Graham ،James D. ،Origins of Modern International Arbitration in AAA (ed.) Dispute Resolution Journal ،January-March 1996 ،at 42 et seq.

the issue of jurisdiction is a preliminary one that the arbitral tribunal must decide first.

Following that step, consistent with the Model Law, the principle of competence- competence as stipulated in Article 30 of The 1996 Arbitration Act of England concerning its reservation in implementing such a rule being limited if there is no agreement between the parties otherwise.

"The arbitral tribunal may decide on its subject matter jurisdiction as an expression of jurisdiction - jurisdiction of principle. Therefore, unless the parties agree otherwise…"

The UAE judiciary has established the rule of competence- competence in many of its judgments. For example, in Case No. 458 of 2009, the Court of Cassation - Abu Dhabi affirmed[44]That the principle of competence-competence should be applicable. It was ruled that "the positive impact of the arbitration agreement is embodied in the transfer of jurisdiction from the State's judiciary to the arbitration judiciary- the amicable judiciary that the parties sought after and accepted- so that the arbitral tribunal becomes the authority with the jurisdiction in settling the dispute," in respect of which the arbitration agreement was concluded, so the arbitral tribunal on its own has the authority to rule on the dispute without the State's judiciary interference. Consequently, the State's judiciary is prohibited from examining the jurisdiction of the arbitral tribunal before it decides on the same. Nevertheless, this does not prevent the State's judiciary from addressing the arbitral tribunal's jurisdiction later on when endorsing the arbitrators' award or when there is a request claiming the annulment of the award."

In Law No. 6 of 2018 concerning arbitration, the Emirati legislator legalized the rule of competence- competence in Article (19), which stipulates the following: "The Arbitral Tribunal may rule on its jurisdiction, including any objections with respect to the existence or validity of the Arbitration Agreement or its inclusion of the subject-matter of the dispute. The Arbitral Tribunal shall rule on the plea as a preliminary question or in a final arbitral award on the merits." Furthermore, Article (20/1) of the same law stipulates, "A plea to the jurisdiction of the Arbitral Tribunal shall be

[44] Court of Cassation - Civil and Commercial Provisions - Appeal No. 458 of 2009 Judicial - Commercial Circuit- On 07-26-2009 Technical Office 3 Part No. 2 Page No. 973 [Cassive judgment and addressing the subject] Rule No. 162

raised not later than the submission of the respondent's statement of defense under Article 30 of this Law. A plea that issues raised by the other party during the proceedings are beyond the scope of the Arbitration Agreement shall be submitted by the next hearing after the plea was raised; otherwise, the right to such plea shall be waived. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.

We should hail the position of the Emirati legislator for adopting these two articles for setting unified solutions for the two types of international arbitration. This resulted in keeping the courts away from describing arbitration as whether it is domestic or international.

This principle has been adopted in the international legal system and many countries on the basis that it is a principle that it is crossing the borders of national laws, noting that the rule of competence- competence resonates before international courts and is mentioned in most international covenants.[45].

This rule was adopted by the Amman Arab Convention on Commercial Arbitration of 1987 in Article (24), which stipulates: “A plea for lack of jurisdiction as well as other pleas must be raised before the first hearing. The arbitral tribunal must settle these points before going into the substance of the dispute, and its decision in this respect is final..”

Perhaps the best way to express the rule of competence- competence is Article 23/1 of the rules of the London Court of International Arbitration LCIA / of 1998, which stipulated the following:
“The Arbitral Tribunal shall have the power to rule upon its jurisdiction and authority, including any objection to the initial or continuing existence validity, effectiveness or scope of the Arbitration Agreement."

Although the rule of competence- competence requires the courts, when a dispute is referred to them concerning the arbitration agreement, to decide to dismiss the case on grounds of not having jurisdiction to examine such a dispute if it appears at first glance that there is an arbitration agreement governing the dispute. However, it must be emphasized that if the arbitration agreement is manifestly invalid or impossible to enforce, the court does not give up its mandate to rule on the dispute just because one of the parties refers to the existence of an arbitration agreement.

[45] See, for example, Paragraph (6) of Article 36 of the Statute of the International Court of Justice.

The rule of competence- competence has recently gained special attention from experts in consumer protection laws, labor laws, and social insurance related to the public interest. The French judiciary showed certain aspects of flexibility to the rule of competence- competence in response to the issues associated with the public interest. The French court is no longer satisfied by the prima facie of the arbitration agreement; instead, we find that it has expanded its jurisdiction to include the evaluation of these agreements in an attempt by the courts to achieve harmonization between the rights of consumers and labor established by the laws, and between the rule of competence- competence so that the latter is not exploited to have loopholes to circumvent the rights of consumers and labor by imposing arbitrary conditions that require resort to arbitration. The French courts tended to assert that the court must ascertain the arbitration agreement's validity and integrity before deciding to dismiss the case. This process succeeded in harmonizing the rule of competence-competence and the rights of consumers and labor protected by law. In this regard, we refer to a recent French Court of Cassation ruling that attained such compatibility. It was issued in the (Jaguar et Rado) case, in which the court outlined the method of implementing the rule of competence- competence per consumer protection principles.

The second instance came to the French Court of Cassation to announce this new position on the rule of competence- competence when it ruled on a dispute that arose between brothers over the will of their deceased father. In summary, one of the heirs, Nanterre TGI, filed a case against her brother before the French court, claiming that his brother wasted the family's wealth and requesting to undertake his civil liability. Additionally, she requested the court to act against the Notary Public tasked with executing the will, charging him with tort liability. Later, she filed a lawsuit before the same court against the Spanish law firm PWC Landwell, which she had previously contracted with to advise her on issues related to her deceased father's wealth in Spain. In sum, all these factors played a role in considering this contract as one concluded between a professional and a consumer. Therefore, it was subject to the consumer protection provisions. Although the contract between the plaintiff and the law firm included an arbitration clause, the French Court of First Instance proceeded with its actions in the case, and the Court of Appeal endorsed the Court of First Instance ruling.

The law firm challenged the ruling of the Court of Appeal before the French Court of Cassation on the grounds of the rule of competence- competence. In addition, the law firm referred to the provisions of Article 1448 of the Code of Civil Procedure that stipulate, "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the

dispute and if the arbitration agreement is manifestly void or manifestly not applicable."

The Court of Cassation overruled such an argument claimed by the law firm and upheld the ruling of the Court of Appeal. The Court of Cassation justified its ruling by saying that the procedural rule stipulated in Article 1448 cannot lead to placing the consumer in a position where they cannot exercise their rights granted to them under the European laws that protect them, and which the national courts of state members must respect it and be keen to enforce them.

The Court of Cassation based this justification on provisions of Article 6 of the European Directive concerning unfair terms in consumer contracts issued by the European Council in 1993. It confirms that arbitrary conditions included in contracts with consumers are not binding on them, and contracts that include such conditions remain valid if the arbitrary conditions can be omitted. The Court of Cassation also affirmed that the jurisprudence of the European Court of Justice considers what is stated in this Article of the European Directive, given the public interest that it protects, as fundamental principles equal in legal value to the legal principles that are part of the public order in the local laws of the European Union countries.[46].

The Court of Cassation also added that this European Directive requires the Member States, per Article 7, to take the necessary sufficient and effective means to an end abusive terms in contracts concluded with consumers by a subject matter expert.[47]. The court endorsed the ruling that granted the national judge jurisdiction over the dispute and declined to apply the arbitration clause due to its arbitrary nature.[48].

If the prima facie of this ruling apparently contradicts the judicial precedents of the French Court of Cassation in terms of enforcing the rule of competence- competence, it should not be interpreted as weakening such a rule in an absolute manner. It instead introduces flexibility in the scope of its application in specific cases related to the public interest, and

[46] arrêt du 20 septembre 2018, *OTP Bank et OTP Faktoring, C-51/17*, EU:C:2018:750, point 89.

[47] Cour de cassation, civile, Chambre civile 1, 30 septembre 2020, 18-19.241, Publié au bulletin. Available at: https://www.courdecassation.fr/decision/5fca327f89bc1fbc73ddc705

[48] It seems clear from this ruling that the court was not satisfied with the prima facie of the arbitration agreement; Rather, it expanded on the matter and evaluated it, with which it found that this agreement was invalid because it was based on an arbitrary condition.

this is justified action, given that these cases are related to consumer protection.

2. The Significance of the Rule of Competence- Competence:

The importance of the rule of competence- competence becomes visible as it seeks to settle the dispute in the short term, limiting malicious allegations and closing the way for litigants to maneuver to challenge jurisdiction and refer the dispute to the national courts. There is also a goal no less critical than the above, that this rule grants integration to the arbitration system and guarantees the principle of arbitral tribunal independence.

The rule of competence- competence furnishes solutions appropriate for international trade and corresponds to the will of the relevant parties to that trade. One of the most important goals pursued by the will of the parties is to avoid referring disputes to the national courts. This is accomplished by the rule of competence- competence, which guarantees independence and immunity to the work of arbitral tribunals, especially for investment companies and multinational companies. Moreover, this rule has excellent practical value considering it prevents the disobedient party from stalling and hindering the arbitration procedures by simply arguing that the arbitral tribunal does not have jurisdiction over the dispute.[49], and using such a plea as an alleged reason to threaten the other party and halt the arbitration procedures.

3. The Legal Basis for the Rule of Competence- Competence

If we tried to search for the legal basis for the competence-competence rule, we would find that it is imposed by sound legal logic even if the legislator did not explicitly stipulate it in the provisions of laws. With the proviso that the will of the parties is the constitution of the arbitration, and the parties put their trust in the arbitral tribunal to decide on all aspects of the dispute, it is a matter of priority that their confidence extends to the decision that the tribunal will take regarding the issue of its jurisdiction.[50]. With reference to the fact that this rule has been

[49] William W. Park, The Arbitrator's Jurisdiction to Determine Jurisdiction, in Boston University School of Law Public Law & Legal Theory Paper Series 2007, p.24.

[50] In this sense: Ahmad Abdel Karim Salama, International, and Domestic Commercial Arbitration Law, 2004, Dar Al Nahda Al Arabia, p. 531; Siraj Hussein Mohammad Abu Zaid, Arbitration in Petroleum Contracts, Dar Al Nahda Al Arabiya for Publishing and Distribution, 2010; Anwar Ali Ahmad

established in international custom and that arbitral tribunals consider it, regardless of whether it is stipulated in national laws or not. The arbitral tribunals often enforce the principles rooted in common and sound sense and customs among nations. This evident in many arbitration rulings[51].

Deciding on the jurisdiction of the arbitral tribunal, which is supposed to be agreed upon at the start of the arbitral proceedings, is at the heart of the judicial tasks entrusted to it to settle the dispute. Indeed, whoever exercises judicial tasks have the power to decide on their jurisdiction without the need to cease the procedures for the national courts to decide over the jurisdiction of the arbitral tribunal.

This was expressed flawlessly by the International Court of Justice in its ruling issued on 28th August 1928 stating: "Whoever possesses a judicial capacity has the right to decide over a preliminary matter and it shall be within its jurisdiction to examine the dispute[52]."

This rule has been approved in the international legal system and many countries worldwide on the basis that it is a legal rule that transcends the borders of national laws.

4. Appeal Against Decisions of Arbitral Tribunals Related to Jurisdiction.

The right to appeal is undoubtedly one of the guarantees of litigation. However, on the issue of appealing the decision of arbitral tribunals related to jurisdiction, there are various positions between national laws and international agreements. In this regard, two different camps are working in two different directions. Both of them give the litigants the right to appeal, but they differ in the timing of the intervention of the courts to settle a dispute.

Al Tashi, The Principle of Specialization in the Field of Arbitration, Dar Al Nahda Al Arabiya for Publishing and Distribution, 2009, p. 52.

[51] For example: see the arbitral award between Liamco and the Libyan government on 12/4/1977 and in the case of Aminol in the dispute with the government of Kuwait.

- [52] la CPJI, s'était également reconnu le pouvoir de juger de sa compétence : CPJI, Interprétation de l'accord gréco-turc du 1er décembre 1926Avis consultatif - 28 août 1928
- , série B, n° 16, p. 20. available at: https://jusmundi.com/fr/document/decision/fr-interpretation-de-laccord-greco-turc-du-1er-decembre-1926-protocole-final-article-iv-avis-consultatif-tuesday-28th-august-1928

One of the advocates of this approach defers this right and limits the right to challenge jurisdiction to one stage: when the arbitration lawsuit is settled, and the challenge to jurisdiction is part of the nullity lawsuit.[53]. This is called a delayed or ex-post review. An advantage of such an approach is that the right of one of the parties to challenge the jurisdiction remains valid when filing a case for the nullity of the arbitral award. Whereas in the cases in which one of the parties is granted the right to directly appeal against the decision of the arbitral tribunal on jurisdiction grounds and the competent court has decided on the subject matter of the case, the judgment related to jurisdiction shall have res judicata and it is illegal to uphold it when filing the case of nullity of the arbitral award. The seriousness of this result becomes evident when the plaintiff has no reason for invalidity other than the reason related to the jurisdiction of the arbitral tribunal, which will make it impossible for the plaintiff to file a nullity suit.

Whereas most laws tend to grant the right of immediate appeal against the decision, each of the two directions has advantages and justifications.

Because the strict application of the competence-competence rule requires that the litigants not be given any opportunity to challenge the decision related to jurisdiction except within the framework of the appeal against the final judgment through filing the nullity suit, this is adopted not to allow the litigants to maneuver to delay the arbitration processes. Indeed, such an action is consistent with the general approach adopted by the majority of laws by limiting the methods of appeal against the arbitral award by filing one case, i.e., the nullity case, given that the most significant advantage of arbitration is the short time to rule on a dispute, and that the attempt to achieve effective speedy justice necessitated the lessening of procedures and identification of the methods of appeal. However, this may lead to questioning the extent to which such strictness is compatible with the guarantees of the traditional litigation approaches and the multiplicity of appeals.

However, practical necessities have dictated opening the door to appeal against the arbitral tribunal's decisions, including the appeal against the preliminary decision regarding its jurisdiction. The majority of laws adopt

[53] See Article (26) of Law No. 42 of 1993 regarding the issuance of the Arbitration Magazine Article 26/ Para 1 that stipulates: “If an issue related to the jurisdiction of the arbitral tribunal in the dispute presented to it, then the arbitral tribunal shall rule on such an issue and their decision shall be non-appealable, except with the original."

the UNCITRAL Model Law on International Commercial Arbitration, which legalizes the appeal against the arbitral tribunal's decision on jurisdiction in Article (16) that stipulates "(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea because 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. (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article as a preliminary question or in an award on the merits. If the arbitral 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 no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

This position is a logical trend based on the fact that jurisdiction is a pivotal issue, and issuing a final decision in this regard allows the parties to avoid entering into the labyrinths of arbitral litigation procedures. Then everything evaporates when it turns out that the arbitral tribunal has no jurisdiction to consider the dispute. However, the Model Law left specific windows of flexibility by granting the arbitral tribunal the jurisdiction to carry on or stop the arbitral procedures. The arbitral tribunal will have two possibilities, that are, either it is confident of its jurisdiction, so it proceeds in the lawsuit procedures at ease, or if it has doubts about the issue of its jurisdiction over the dispute, then it will wait until the court decides on the issue of its jurisdiction.

In this context, the Emirati legislator has taken a distinct position with specificity. Although their position is consistent with the Model Law in granting the litigants the right to challenge the decision of the arbitral tribunal on the arbitral tribune's jurisdiction, and that they authorized the arbitral tribunal after appealing its jurisdiction before the courts to halt the procedures or continue them, the Emirati legislator excels by deciding to suspend the authority of the arbitral tribunal to proceed in its functions based on a request of one of the litigants. This means that the arbitral tribunal must discontinue the procedures if none of the litigants submitted a request to proceed with the arbitration case.

In their commentary on the position of the UAE legislation, specific experts in legal jurisprudence[54], see it as a praiseworthy direction, particularly in restraining the appeal period to 15 days, which enhances procedural efficiency. Likewise, the same applies to the necessity that the competent court decides on the appeal within 30 days.

Obliging one of the parties requesting to proceed with arbitration procedures and to bear the arbitration costs will force the parties of the agreement to comply with the agreed-upon terms. They will not risk and request to proceed with the arbitral procedures when the party's request is invalid because they will bear the costs of the arbitration processes alone, which may be prohibitive in most cases. The cost of arbitration may reach certain cases up to one million dirhams, exceeding more than a quarter of a million US dollars.

The direction adopted by the UAE Arbitration Law is renowned compared to the Model Law by leaving the decision to proceed or cease the case procedures to the absolute discretion of the arbitral tribunal, even if one of the parties does not request it. In comparison, the UAE legislator asked the arbitral tribunal to leave the decision to proceed with the arbitration procedures in the hands of the parties of the dispute for the reason that the judgment adopted by the Model Law will result in the fact that the two parties will bear the costs of arbitration if the arbitral tribunal decides to continue considering the subject matter of the dispute. However, the subject matter of the dispute has been challenged. Then it turns out later that the arbitral tribune has no jurisdiction to examine the case. This definitely will have some unfair consequences to be borne by the right holder. Conversely, the position of the UAE law will bring about a fair result, i.e., the party who requests to proceed with the arbitration procedures will bear alone the costs of arbitration if it turns out that the case does not fall within the jurisdiction of the arbitral tribunal.

On the other hand, it is noted that the timeframes specified by the UAE Arbitration Law are quite long in light of the modern means provided by the UAE legislator when filing the claims and challenging judgments by means of electronic registration, which gives ample time to the appellant. The researcher calls on the federal legislator, in line with this policy, to reduce the appeal term to 10 days and to decide on the appeal within 15 days, simply because the effort of the competent court will be confined to a limited procedural issue, which is the jurisdiction of the arbitral tribune.

54 Gordon Blanke, Article 19 of the UAE Federal Arbitration Law, 2020, Available at: http://arbitrationblog.practicallaw.com/article-19-of-the-uae-federal-arbitration-law-a-first-test/

Such cases can be settled swiftly per the general direction of the UAE legislation calling for speedy decisions to the extent we have the one-day courts to expedite minor cases in the country.

IV. Conclusion

After the research, we come up with the following results and recommendations:

1. Results

A. It was found that courts and legal jurisprudence play essential roles in supporting and developing the arbitration system. The courts had a clear role in bridging legislative gaps and in interpreting legal provisions and agreements openly that meet the needs of arbitration in many perspectives of the arbitration system. Additionally, the courts established various legal principles that enhanced the effectiveness of the arbitration system. On the other hand, legal jurisprudence has supported the courts' directions by searching for the legal basis for jurisprudence, explaining the advantages and justifications that prompted the adoption of these principles, and presenting innovative opinions that aim to develop the arbitration system in line with the technological revolution. One of the most central fields where the role of the courts became apparent was extending the impact of arbitration agreements to include third parties who were not part of those agreements. The courts also contributed to the approval of new-fangled principles that set arbitration free from being subject to a specific law, in addition to expanding the concept of the commercial nature of economic activities. Hence, it goes beyond national standards for business.

B. It was found that one of the most notable contributions of the courts to the arbitration system was approving the principle of "independence of the arbitration clause" and the rule of "competence- competence." The adoption of this principle and rule granted the arbitration system the required flexibility and vitality to the work of the arbitral tribunals, helped them to reach prompt and effective justice, and closed the door to the polemics of the litigants and their malicious defenses that aim to thwart or obstruct arbitration processes. Such a contribution was necessary to develop the arbitration system and make it more effective.

C. Many national laws and international covenants have legalized the principle of the independence of the arbitration clause and the rule of competence-competence. However, some of them imposed specific directives on enforcing that principle and rule, which may result in

referring the dispute to the courts or may cause a delay in dispute settlement.

D. Although the rule of competence-competence has become rooted in countless legal systems, and the wide-ranging implementation of it boosts the effectiveness and vitality of the arbitration system and achieves its most important objective, i.e., the speedy settlement of disputes, it was found during the enforcement of the rule that there are issues related to the public interest, such as issues of consumer and labor protection that should be considered when implementing the rule of competence-competence. Therefore, the French judiciary adopted flexibility when implementing this rule and expanded its jurisdiction to include the evaluation of arbitration agreements and verification that they do not have any arbitrary conditions that affect such rights. If the judiciary is confident of the unfairness of the arbitration agreement, it refrains from implementing the rule of competence-competence and refers the dispute to the court by means of nullifying the arbitrary clause.

2. Recommendations:

A. Calling on the UAE federal legislator to amend Article (19) of the UAE Arbitration Law, lessen the appeal term to 10 days, and decrease the appeal decision term to 15 days. This is to be consistent with the principle of swiftness required by the arbitration process.

B. It is recommended that comparative laws expand the powers of arbitral tribunals to decide on their jurisdiction and to avoid placing restrictive provisions. It may result in curbing the developments witnessed by the arbitration system in its response and dealing with rapid developments, particularly in international trade, information technology, and artificial intelligence.

C. It is recommended that the arbitral tribunals give that subject matter a great deal of attention when deciding on their jurisdiction. Their decision to prove their jurisdiction should be convincing and prevailing to avoid any loss of time, effort, and expenses if the arbitral tribunal does not have jurisdiction to hear the dispute.

D. When deciding on their jurisdictions, the arbitral tribunals shall consider the provisions of Article 5/ Para. 2 of the New York Convention on the peremptory provisions in the country of implementation. This is to be done to avoid hindrance while enforcing the rulings they issue. In addition, the arbitral tribunals should ensure that their rulings are subject to ratification and execution

English references

1- Abdel Hamid Al Ahdab, 1998, Encyclopedia of Arbitration and International Arbitration, Part Two, Cairo, Dar Al Maarif,.

2- Adam Samuel, 2000, Separability of arbitration clauses - some awkward questions about the law on contracts, conflict of laws and the administration of justice, ADRLJ 36
3- Ahmad Abdel Fattah Saqr, 2019, International Arbitration Dispute Resolution, Alexandria, 1st edition.
4- Ahmad Abdel Karim Salama, 2013,The General Theory of Amicable Systems for Dispute Settlement, Dar Al Nahda Al Arabiya/ Cairo, 1st Edition
5- Ahmad Abdel Karim Salama2004, International, and Domestic Commercial Arbitration Law, Dar Al Nahda Al Arabia.
6- Ahmad Makhlouf, 2002, The Concept of the Independence of the Arbitration Clause in the International Trade Contract, A Legal Study in International Commercial Arbitration, Dar Al-Nahda Al-Arabiya, Cairo
7- Al Aboudi, Alaa Farhan Karim. 2021 Arbitration As a Means of Resolving Disputes in Oil Licensing Contracts: Halfaya Oilfield Contract as a Model. The National Center for Legal Publications
8- Al Shihabi Al Sharqawi, , 2013, commenting on the ruling of the Federal Supreme Court in Appeal No. 166 of 2008, "commercial cassation," a paper published in the book "The Latest Rulings of the Federal Supreme Court commented on by the judges, lawyers and university professors" special edition on the occasion of the celebration of the forty years since the establishment of the courtAD.
9- Anwar Ali Ahmad Al Tashi, 2009, The Principle of Specialization in the Field of Arbitration, Dar Al Nahda Al Arabiya for Publishing and Distribution
10- Amal Ammar Salama Al Ghariani, 2021, Arbitration, and Settlement of Oil Contract Disputes, Al Manara Journal for Legal and Administrative Studies, Vol. 35.
11- Arthur Taylor von Mehren, 1986, International Commercial Arbitration: The Contribution of the French Jurisprudence, 46 La. L. Rev. () Available at: https://digitalcommons.law.lsu.edu/lalrev/vol46/iss5/2.
12- B.Goldman; Journal de Droit International, 1964
13- Boulahia Souad, 1990, The Independence of the Arbitration Agreement as a Method for the Settlement of International Commercial Disputes, a Master's Thesis submitted to the Faculty of Law, University of Algiers.
14- Gordon Blanke,2020, Article 19 of the UAE Federal Arbitration Law, Available at: http://arbitrationblog.practicallaw.com/article-19-of-the-uae-federal-arbitration-law-a-first-test/
15- Johana George, 1996, All you need to know about the doctrine of Kompetenz-Kompetenz, available at: https://blog.ipleaders.in/all-you-need-to-know-about-the-doctrine-of-kompetenz-kompetenz/
16- Heyman v Darwins Ltd [1942] AC 356, available at: https://uk.practicallaw.thomsonreuters.com/D-016-8302?transitionType=Default&contextData=(sc.Default).
17- Fawzi Mohamed Sami, 2012, International Commercial Arbitration, A Comparative Study of International Commercial Arbitration Rulings, Dar Al Thaqafa for Publishing and Distribution,
18- Fiona Trust & Holding Corp v. Privalov, [2007] UKHL 40. Available at: https://www.trans-lex.org/312142/_/fiona-trust-holding-corp-v-privalov-%5B2007%5D-ukhl-40/.

19- King ،Henry T. ،Graham ،James D,1996. ،Origins of Modern International Arbitration in AAA (ed.) Dispute Resolution Journal.
20- Martin Hunter and Toby Landu, 1998, The English Arbitration Act 1996: Text and Notes, Kluwer, London
21- Mahmoud Samir El Sharqawi, 2011, International Commercial Arbitration, Dar Al Nahda Al Arabiya, Cairo.
22- Moataz Jamdan Badr, 2018, Mediation and its Role in Settling International Trade Disputes, New University House, Alexandria.
23- Mustafa Al Bandari Abu Saada, 2017, UAE Commercial Companies Law, Bright Horizons Publishers, 3rd edition.
24- 27- Muhyiddin Alamuddin, 2010, The Arbitration Agreement: Its Independence and Drafting, International Arbitration Journal, Issue 8, Supplement to Issue 8.
25- 28- Siraj Hussein Mohammad Abu Zaid, 2010, Arbitration in Petroleum Contracts, Dar Al Nahda Al Arabiya for Publishing and Distribution.
26- 29- William W. Park, 2007, The Arbitrator's Jurisdiction to Determine Jurisdiction, in Boston University School of Law Public Law & Legal Theory Paper Series
27- 30 -Law No. 42 of 1993 regarding the issuance of the Arbitration Magazine
28- 31-The amended UNCITRAL Model Law of 1985

French references

1- Delpech, 2006, Approfondissement du principe de l'autonomie de la clause compromissoire en matière d'arbitrage international, le 5 août

2- Jean-François Poudret, Sébastien Besson, 2007, Comparative Law of International Arbitration

3- J. FOURGOUS, 1906, L'arbitrage dans le droit français aux XIIIe et XIVe siècles, thèse, Toulouse, Privat.

4- J. Robert 1993, L'Arbitrage droit interne , droit international privé , avec la collaboration de B.Morceau D.6ème éd .

5- Laurent-Fabrice Zengue, NOUVEL IMPACT DU PRINCIPE COMPÉTENCE-COMPÉTENCE SUR L'ARBITRABILITÉ CONSUMÉRISTE CONCERNANT LE MARCHÉ DE L'UE,Available at : https://www.village-justice.com/articles/nouvel-impact-principe-competence-competence-sur-arbitrabilite-consumeriste,40946.html

6- L'arrêt Hecht, Civ. I, 4 Juillet 1972 (Rev. crit. 1974 note Level; JDI1972

7- Magali BOUCARON, 2011, LE PRINCIPE COMPÉTENCE-COMPÉTENCE, EN DROIT DE L'ARBITRAGE, FACULTÉ DE DROIT ET SCIENCE POLITIQUE ÉCOL.