The Doctrine of *Kompetenz-Kompetenz*: A Sino-French Comparative Perspective

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Panfeng Fu[*]

Kompetenz-kompetenz *is widely recognised as a fundamental principle of law in arbitration. However, different countries take different approaches to it. Under the French model of* kompetenz-kompetenz*, the arbitral tribunal has priority to rule on its own jurisdiction and courts may not intervene in the arbitral process, unless the arbitral tribunal has not been properly constituted and the arbitration agreement is "manifestly void" or "manifestly inapplicable". In contrast, under the current 1994 PRC Arbitration Law, the role of the arbitral tribunal to decide its own jurisdiction is undertaken by Chinese arbitration institutions. Chinese courts have priority in reviewing arbitral jurisdiction at the outset of the arbitral process. This article suggests that China should look to France for reference when revising its rules on* kompetenz-kompetenz *in the upcoming reforms of the PRC Arbitration Law.*

1. Introduction

In contrast to court litigation, the arbitration agreement is the only basis on which the arbitral tribunal exercises its jurisdiction.[1] The arbitral tribunal's jurisdiction depends on the fact that there is a valid arbitration agreement. The problem is, when a party objects to arbitral jurisdiction by questioning the existence or validity of the arbitration agreement, who is the best positioned to decide on this issue? This is a question that any national arbitration law must address. From a natural law perspective, it does not seem appropriate for the arbitral tribunal to rule on its own jurisdiction. However, submitting jurisdictional disputes to the court at the beginning of the arbitral process would translate into a delay in the issuance of the arbitral award.[2] It is not unusual that as soon as the claimant

[*] Assistant Professor, Institute of International Law, Chinese Academy of Social Sciences, Beijing, China. I am grateful to Bernard Hanotiau, Susan Finder and Thomas Manson for reviewing multiple drafts of this article. All errors are my own.

[1] Except for cases where an arbitration is based on statutory laws or international treaties.

[2] Given that it may take a substantial amount of time to constitute an arbitral tribunal at the beginning of the arbitral process, which has attracted considerable complaint in recent years, the court's intervention at this stage would only compound the delay in arbitration. On the delay caused by the constitution of arbitral tribunals, see Nigel Blackaby, Constantine Partasides, Alan

has requested arbitration, or as soon as the arbitrator has been appointed, the respondent raises a jurisdictional objection with the sole purpose of delaying the arbitration or avoiding it.[3] That is very roughly why the doctrine of *kompetenz-kompetenz* ("*kompetenz-kompetenz*") has been widely accepted, to different degrees, by many countries in their arbitration laws.

As a legal fiction, *kompetenz-kompetenz* allows an arbitral tribunal to decide its own jurisdiction at the outset of the arbitral process, while restraining courts from intervening at this stage. There are both positive and negative dimensions to it. Positive *kompetenz-kompetenz* recognises the authority of the arbitral tribunal to determine its own jurisdiction. Negative *kompetenz-kompetenz* requires the court to forfeit its judicial authority to hear a dispute regarding arbitral jurisdiction until the post-award stage.

On the international level, both positive and negative *kompetenz-kompetenz* are reflected in the UNCITRAL Model Law:

> "Article 16 Competence of arbitral tribunal to rule on its jurisdiction
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.
>
> Article 8 Arbitration agreement and substantive claim before court
>
> (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."

It is clear from the UNCITRAL Model Law text that the arbitral tribunal has the power to rule on its own jurisdiction. However, as to negative *kompetenz-kompetenz,* it is unclear whether the court should use a full or *prima facie* test when it reviews the validity of an arbitration agreement. Those relying on the early legislative history of the UNCITRAL Model Law argue that the drafters rejected a *prima facie* test by refusing a proposal to add "manifestly" to art 8(1).[4] Other commentators argue the opposite.[5] Given its status as an international instrument, it is perhaps

Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2015) p 1. 126.

3 See Sigvard Jarvin and Alexander G Leventhal, "Objections to Jurisdiction" in Lawrence W Newman *et al.* (eds), *The Leading Arbitrator's Guide to International Arbitration* (Juris, 2014) p 507.

4 See Julian D M Lew, Lukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) p 349.

5 For example, Frédéric Bachand argues that:

> "an analysis of the Model Law's travaux préparatoires, basic structure and underlying principles reveals that the drafters considered the prevention of dilatory jurisdictional objections to be a more important objective and, consequently, that article 8(1) ought to be interpreted

appropriate to interpret the UNCITRAL Model Law as being inclusive of negative *kompetenz-kompetenz*, recognising the possibility of a variety of approaches to be taken by different countries.[6]

Accordingly, if the UNCITRAL Model Law is to be taken as a neutral approach to *kompetenz-kompetenz*, the Chinese and French approaches to *kompetenz-kompetenz* sharply contrast with each other, both differing from that of the UNCITRAL Model Law.

Although Chinese and French arbitration laws have not interacted a great deal, comparing French and Chinese approaches to *kompetenz-kompetenz* is both practicable and meaningful. The current French arbitration law is incorporated into the French Code of Civil Procedure. It has long been regarded as an arbitration-friendly law. As many international arbitration cases are seated in Paris, the French arbitration law and the French arbitration-related judicial cases have a considerable influence on contemporary international arbitration at the global level. The current PRC Arbitration Law was promulgated in 1994 ("the 1994 PRC Arbitration Law"). By restructuring the then chaotic and bureaucratic-oriented Chinese arbitration institutions and providing a basic regulatory framework for arbitration,[7] the 1994 PRC Arbitration Law contributed to the modernisation of Chinese arbitration legal regime. However, the inadequacies of the 1994 PRC Arbitration Law, including provisions relating to *kompetenz-kompetenz*, are increasingly becoming an obstacle to the development and internationalisation of arbitration in China.[8] In contrast, French arbitration law and judicial cases have made a significant contribution to the establishment of *kompetenz-kompetenz* as an important doctrine for modern international arbitration. This is especially true as to negative *kompetenz-kompetenz*, which is increasingly accepted by different countries in different regions of the world, albeit in different manners, with France playing a leading role in its doctrinal development.[9]

as requiring courts seized of referral applications to apply a *prima facie* standard while reviewing the tribunal's jurisdiction."

Frédéric Bachand, "Does Article 8 of the Model Law Call for Full or *Prima Facie* Review of the Arbitral Tribunal's Jurisdiction?" (2006) 22 (3) *Arbitration International* 476.

6 See John J Barceló III, "*Kompetenz-Kompetenz* and Its Negative Effect—A Comparative View" Cornell Legal Studies Research Paper No. 17–40 (11 September 2017), available at SSRN: https://ssrn.com/abstract=3035485 (visited 15 September 2021).

7 See Wang Hongsong, "Challenges and Opportunities for Arbitration in China" (Zhongguo Zhongcai Mianlin De Jiyu Yu Tiaozhan) (2008) 1 *Beijing Arbitration Quarterly (Beijing Zhongcai)* 4.

8 Some of the inadequacies of the 1994 PRC Arbitration Law have been remedied by the Supreme People's Court and Chinese arbitration institutions. However, "the lack of official legislative support has left the judicial and institutional initiatives (the informal patterns of reform and more piecemeal developments) with many uncertainties". See Gu Weixia, "Piercing the Veil of Arbitration Reform in China: Promises, Pitfalls, Patterns, Prognoses, and Prospects" (2017) 65(4) *The American Journal of Comparative Law* 839.

9 See Emmanuel Gaillard, "La jurisprudence de la Cour de cassation en matière d'arbitrage international" (2007) 4 *Revue de l'arbitrage* 709.

Therefore, French arbitration law can provide an alternative approach to *kompetenz-kompetenz* that China can consider when considering how to best amend its arbitration legislation to make China a popular destination for international arbitration. Additionally, both countries have a statute law tradition and their supreme courts play a pivotal role in the development of their arbitration legal regimes, such a comparative study is more workable than one between two countries with totally different legal traditions. Also, as national arbitration laws have to cater to international arbitration practice and increasingly share a common framework as to different aspects of the arbitration proceedings, they lend themselves to a comparative study.

This article argues that China should look to French law and practice when revising its legal rules on *kompetenz-kompetenz*. It will first clarify its seemingly paradoxical origin and its confusing relationship with the doctrine of separability. It then will analyse both positive and negative *kompetenz-kompetenz*, respectively, before examining the exceptions to it under both French and Chinese laws.

2. Some Clarifications Regarding *Kompetenz-Kompetenz*

(a) The German Origin of Kompetenz-Kompetenz*: A Paradox*

Although the UNCITRAL documents on arbitration employ the German phrase *kompetenz-kompetenz*[10] and scholars in many European countries, including France,[11] also prefer this phrase as is the case in China,[12] the substance of this still developing doctrine as it is commonly understood owes more to French legal thought and jurisprudence.[13]

[10] According to the "Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006", *kompetenz-kompetenz* means that the arbitral tribunal may independently rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement, without having to resort to a court.

[11] See Philippe Fouchard, Berthold Goldman and Emmanuel Gaillard, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) p 396.

[12] In China, "*kompetenz-kompetenz*" is more often seen in academic works than "competence-competence".

[13] As Emmanuel Gaillard remarked:

> "[I]f we try to understand what contemporary international arbitration, which has become greatly standardized, owes to whichever legal tradition, we can say, at the risk of over-generalization, that the French legal tradition has exported rules of law and that the Anglo-American tradition has exported practices."

According to Gaillard, the *kompetenz-kompetenz* rules are apparently among those rules of law exported by the French legal tradition. See Emmanuel Gaillard, "L'apport de la pensée juridique française à l'arbitrage international" (2017) 2 *Journal du droit international (Clunet)* 533.

Kompetenz-kompetenz first appeared in German constitutional law.[14] However, such *kompetenz-kompetenz* is substantially different from that in international arbitration. *Kompetenz-kompetenz* in German constitutional law denotes that judges have the final say on disputes over their own jurisdiction, whereas in international arbitration, while it is true that the arbitral tribunal has the power to decide its own jurisdiction, it does not have the final say.[15] Ultimately after the arbitral award has been rendered, the court will decide if the arbitral tribunal has jurisdiction.[16]

In fact, until its arbitration law reform in 1997, Germany had not recognised *kompetenz-kompetenz*. In France, since *Impex* in 1971, the doctrine has been firmly established and later was codified in French arbitration law reforms both in the early 1980s and in 2011.[17] What distinguishes France from other countries is that negative *kompetenz-kompetenz* has long been recognised and unequivocally expounded by French courts.[18] French scholars most strongly advocate the merits of negative *kompetenz-kompetenz* through academic publications.[19]

(b) The Relationship between Separability and Kompetenz-Kompetenz

Although separability and *kompetenz-kompetenz* are intertwined, they are two different concepts. Separability assumes that the arbitration agreement, most often in the form of a clause inserted into a contract, is separable from the remainder of the contract. Similar to *kompetenz-kompetenz*, separability is also a legal fiction serving to prevent early judicial intervention in the arbitral process.

Separability is endorsed by international and institutional rules of arbitration, including the UNCITRAL Model Law,[20] the ICC Arbitration Rules[21] and the CIETAC Arbitration Rules.[22] In France, the notion of separability is more often referred to as the autonomy of the arbitration agreement. French courts are widely regarded as a primary contributor to

[14] See Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, U.S. and West German Law* (Schulthess Polygraphischer Verlag, 1989) pp 179, 180.

[15] See Fouchard, Goldman and Gaillard (n 11 above) p 396.

[16] Should the arbitral tribunal deny its own jurisdiction, which does occur in practice, the court also has the power to review the arbitral tribunal's decision.

[17] See Emmanuel Gaillard, "L'effet négatif de la compétence-compétence" in J Haldy, J-M Rapp and Ph Ferrari (eds), *Études de procédure et d'arbitrage en l'honneur de Jean-François Poudret* (Lausanne, 1999) p 391.

[18] *Ibid*.

[19] *Ibid*.

[20] See UNCITRAL Model Law art 16 (1).

[21] See ICC Arbitration Rules (2017) art 6 (9).

[22] See CIETAC Arbitration Rules (2015) art 5 (4).

the development of separability into a principle in arbitration law.[23] *Gosset* is a leading case in 1963, in which the French Supreme Court (Cour de cassation) famously held as follows:

> "The arbitration agreement, be it separately concluded or inserted into the contract with which it is connected, invariably enjoys a complete legal autonomy unless there exist exceptional circumstances, so that it will not be affected by the prospective invalidity of the contract."[24]

China also recognises separability. In the context of international arbitration, not only is the arbitration agreement independent of the underlying contract in terms of their validity, but their governing laws are also independent of each other.

Article 19 of the 1994 PRC Arbitration Law reads as follows:

> "An arbitration agreement shall exist independently. Any changes to, rescission, termination or invalidity of the contract shall not affect the validity of the arbitration agreement."

A judicial interpretation issued by the Supreme People's Court ("the SPC") in 2017 explaining this provision states:

> "Parties shall make an express declaration of will when choosing by agreement the law applicable to the validity of an arbitration agreement, and the law applicable solely to the contract as agreed upon may not be invoked as the law applicable to the validity of the arbitration clause of the contract".[25]

China and France take different approaches in determining the governing law of the arbitration agreement. The Chinese approach remains conventional in that it relies on conflict-of-laws theory. According to Chinese private international law rules, the parties may choose the law applicable to the arbitration agreement by agreement. Absent the parties' choice, the law of the location of the arbitral institution or the law at the seat shall apply.[26] In contrast, France has developed a substantive approach by which courts are not bound by any national laws when reviewing the

[23] See Gaillard (n 13) pp 533–534.

[24] Cour de cassation, Chambre civile 1, du 7 mai 1963, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000006962522/ (visited 15 September 2021).

[25] Article 13 of the Provisions of the Supreme People's Court on Several Issues concerning Trying Cases of Arbitration-Related Judicial Review (2017).

[26] See art 18 of the Law of the PRC on Application of Laws to Foreign-related Civil Relations (China's private international law which came into force in 2011). Further to this provision, art 14 of the Interpretations of the SPC on Several Issues Concerning the Application of the Law of the PRC on Application of Laws to Foreign-Related Civil Relations provides that

> "where the parties make no choice of law applicable to the foreign-related arbitration agreement, nor agree on the arbitration institution or the seat of arbitration, or they make no explicit agreement thereon, the people's courts may apply the laws of the People's Republic of China to determine the validity of such arbitration agreement."

validity of the arbitration agreement, thus abandoning the traditional conflict-of-laws approach. In *Dalico*, the French Supreme Court held:

> "By virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and validity of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international policy, on the basis of the parties' common intention, there being no need to refer to any national law."[27]

Separability is a precondition for *kompetenz-kompetenz* to function properly. Without separability, even if an arbitral tribunal is given the power to decide its own jurisdiction, the decision-making process would not be as streamlined because the arbitral tribunal would otherwise need to examine the validity of the underlying contract, which would entail far more work.[28]

However, unlike separability, *kompetenz-kompetenz* remains controversial internationally and is subject to different national responses as far as its negative dimension is concerned.[29] The chief reason for the controversy is that an allocation of jurisdictional powers between the court and the arbitral tribunal is at stake. In some jurisdictions, including France, an arbitral tribunal is generally competent to initially decide virtually all jurisdictional disputes, subject to eventual judicial review at the post-award stage. Furthermore, courts in these jurisdictions are generally not permitted to consider jurisdictional objections on an interlocutory basis but must await the arbitral tribunal's initial jurisdictional decisions.[30] In some other jurisdictions, including China, courts are generally permitted by law to review arbitral jurisdiction even at the outset of the arbitral process.[31]

3. The Positive Dimension of *Kompetenz-Kompetenz*

(a) Arbitral Tribunal's Power to Decide Its Own Jurisdiction

Positive *kompetenz-kompetenz* grants an arbitral tribunal the power to determine its own jurisdiction. Authority in sources such as international

[27] Arrêt Dalico Cour de cassation, Chambre civile 1, du 20 décembre 1993.

[28] Recognising the importance of the separability to *kompetenz-kompetenz*, the UNCITRAL Model Law provides that:

> "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. . . . "

[29] See Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2014) pp 1049, 1050.

[30] *Ibid*., p 1049.

[31] *Ibid*.

arbitration conventions, national legislation, judicial decisions and institutional rules unanimously recognises positive *kompetenz-kompetenz*.[32] Consequently, as Gary Born noted, "the basic proposition that an international arbitral tribunal presumptively possesses jurisdiction to consider and decide on its own jurisdiction must be considered a universally-recognized principle of international arbitration law".[33] While French arbitration law represents such global acceptance of positive *kompetenz-kompetenz*, Chinese arbitration law adopts a different approach.

French courts and arbitration law have long recognised positive *kompetenz-kompetenz*. Early in 1968, in *Impex*, the Colmar Court of Appeals declared:

> "The principle is that the judge hearing a dispute has jurisdiction to determine his own jurisdiction. This necessarily implies that when that judge is an arbitrator, whose powers derive from the agreement of the parties, he has jurisdiction to examine the existence and validity of such agreement".[34]

This opinion was later affirmed by the French Supreme Court in 1971.[35]

In the early 1980s, France launched a massive reform of its arbitration law, which initiated a wave of modernisation of national arbitration laws across the world.[36] In that reform, *kompetenz-kompetenz* was codified in Book IV of the French Code of Civil Procedure, the primary arbitration-related legal source in France ("French Arbitration Law (1980s)").[37] Regarding positive *kompetenz-kompetenz*, art 1466 of the French Arbitration Law (1980s) states:

> "If one of the parties contests, before the arbitral tribunal, the principle or scope of the tribunal's jurisdictional authority, the tribunal has the power to rule upon the validity or the limits of its investiture."[38]

In 2011, France launched another reform of its arbitration law, leading to a revised Book IV of the French Code of Civil Procedure ("French

[32] For example, art v (3) of the European Convention on International Commercial Arbitration states:

> "Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part."

Article 41(1) of the ICSID Convention states: "The Tribunal shall be the judge of its own competence". For a detailed examination of the multiple sources that recognise positive *kompetenz-kompetenz*, see Born (n 29 above) pp 1052–1068.

[33] *Ibid.*, 1051.

[34] Cour d'appel Colmar, decision as of 29 November 1968 (translation from Born (n 29 above) p 1062).

[35] Cour de Cassation, Chambre civile 1, du 18 mai 1971, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000006985190/ (visited 15 September 2021).

[36] See Karl-Heinz Böckstiegel, "Past, Present, and Future Perspectives of Arbitration" (2009) 3 *Arbitration International* 294.

[37] See French Code of Civil Procedure before 2011 arts 1442–1507.

[38] See French Code of Civil Procedure before 2011 art 1466.

Arbitration Law (2011)").[39] The French Arbitration Law (2011), while inheriting the old rules, clarified that the arbitral tribunal is fully competent to decide all issues related to its jurisdiction. Article 1465 of the French Arbitration Law (2011) states: "[T]he arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction". This means that an arbitral tribunal will be empowered to decide not only its own jurisdiction in the ordinary sense of *kompetenz-kompetenz* including issues concerning its appointment as the concept "contrat d'arbitre" (arbitrator's contract) denotes but also all questions related to its jurisdiction.[40] This is a move to centralise all issues related to arbitral jurisdiction in the hands of the arbitral tribunal.

The 1994 PRC Arbitration Law does not permit an arbitral tribunal to decide its own jurisdiction. Instead, it allows the arbitration commission that administers the arbitration case to rule on arbitral jurisdiction. According to the 1994 PRC Arbitration Law, if a party objects to the validity of the arbitration agreement, they may apply to the arbitration commission for a decision or to the court for a ruling.[41] As arbitration institutions are supposed to only provide case-management services, this arrangement has attracted fierce criticism from Chinese arbitration practitioners as well as academics. However, this arrangement has its historical roots back at the time when the 1994 PRC Arbitration Law was promulgated over 25 years ago.[42]

In China, arbitration commissions monopolise the arbitration market as a matter of both law and fact. The 1994 PRC Arbitration Law prohibits *ad-hoc* arbitration in an implied manner because it requires the arbitration agreement to specify an arbitration commission.[43] In practice, many Chinese arbitration practitioners are not familiar with *ad-hoc* arbitration even though recent years have witnessed a tentative plan by the SPC to experiment with *ad-hoc* arbitration on a limited scale within China's Free Trade Zone areas.[44] Therefore, if the parties cannot, as is quite often the

[39] See French Code of Civil Procedure arts 1442–1527 currently in effect.

[40] A distinction should be drawn between the appointment (*l'investiture*) of arbitrators and their jurisdiction. The appointment of arbitrators is the act of conferring on the arbitral tribunal the power to resolve disputes while their jurisdiction is the extent of that power. See Fouchard, Goldman and Gaillard (n 11 above) p 394.

[41] See the first sentence of 1994 PRC Arbitration Law art 20.

[42] The PRC Arbitration Law as currently in effect was promulgated in 1994 and took effect in 1995.

[43] The prohibition can be deduced from the wording of two articles of the PRC Arbitration Law. Article 16 provides that "an arbitration agreement shall contain the following particulars:. . .(3) a designated arbitration commission. . . . " Art 18 provides a remedy for or sanctions arbitration agreements that do not comply with the aforementioned article by stipulating that "if an arbitration agreement contains no or unclear provisions concerning . . . the arbitration commission, the parties may reach a supplementary agreement. If no such supplementary agreement can be reached, the arbitration agreement shall be null and void".

[44] Supreme People's Court Opinions on the Provision of Judicial Safeguards for the Construction of Pilot Free Trade Zones (Zuigao Renmin Fayuan Guanyu Wei Ziyou Maoyi Shiyanqu Jianshe Tigong Sifa Baozhang De Yijian) (2016).

case,[45] reach a supplementary agreement selecting an arbitration commission to administer their case, the 1994 PRC Arbitration Law leaves no room for the validity of the arbitration agreement that does not specify an arbitration commission.[46] In other words, the validity of the arbitration agreement depends on, *inter alia*, the scenario that it will be an institutional arbitration.

The entrenched tradition and the monopolistic market position of institutional arbitration in China has led to an expansion of legal functions of arbitration commissions.[47] For example, the nationality of arbitral awards can be determined by the place where the corresponding arbitration institution is headquartered in contrast to the widely accepted international standard by which the seat determines the nationality of arbitral awards.[48] The law of the place where the arbitration institution is based can determine the validity of arbitration agreements.[49] Also, arbitration institutions are permitted to undertake the responsibility of ascertaining the content of foreign law if the law of a country other than China will apply.[50] Most importantly, besides the court, it is arbitration commissions rather than arbitral tribunals that have the power to rule on jurisdictional objections.[51]

The arrangement for arbitration commissions rather than arbitral tribunals to rule on arbitral jurisdiction certainly goes against international common practice of *kompetenz-kompetenz*.[52] It substantially expands arbitration commissions' power, enabling their leadership to interfere in specific cases on occasion. Worse still, in the Chinese context, the

[45] See, eg, Lianbin Song, Hui Lin and Helena Chen, "Annual Reivew on Commerical Arbitration in China (2017)" in Beijing Arbitration Commission (ed), *Commercial Dispute Resolution in China: An Annual Review and Preview (2017)* (Wolters Kluwer Hong Kong Limited, 2017) pp 38, 39.

[46] It is worth noting that the nomenclature "arbitration commission" adopted by the legislature, while reflecting the fact that every arbitration institution based in China is called "XX arbitration commission", is hardly able to cover non-Chinese arbitration institutions which are striving to grab a share of China's huge arbitration market. As a result, this nomenclature has caused confusion about legal access to Chinese market of non-Chinese arbitration institutions which mostly are not called "XX arbitration commission".

[47] As Fan Kun observes, "[T]he starting point of institutional arbitration in China is the role of the institution, which acts as the guardian of rights and the quality control of the arbitration". Fan Kun, "Salient Features of International Commercial Arbitration in East Asia: A Comparative Study of China and Japan" (2018) 3 *American University Business Law Review* 476.

[48] See Yang Ling, "A Critique of Legal Functions of Arbitration Institutions" (Zhongcai Jigou Falv Gongneng Pipan) (2016) 2 *Science of Law* (*Falv Kexue*) 176.

[49] *Ibid.*, 177.

[50] Article 10 of the Law of the PRC on Application of Laws to Foreign-related Civil Relations provides that "foreign laws applicable to foreign-related civil relations shall be ascertained by the people's court, arbitral institution or administrative organ. . . . "

[51] According to PRC Arbitration Law art 20, State courts and arbitration institutions jointly share the power to rule on arbitral jurisdiction when a party raises such a dispute, excluding any possibility that arbitral tribunals themselves decide their own jurisdiction prior to the award being rendered.

[52] Represented by the UNCITRAL Model Law.

expansion of arbitration commissions' power creates a vicious circle: the more power domestic arbitration commissions wield as a matter of law, the less likely it will be for them to voluntarily give it up.

Fortunately, recent years have witnessed the emergence and wide acceptance of an innovation made by China's leading arbitration institutions, starting from the Beijing Arbitration Commission ("the BAC") in 2005 to authorise an arbitral tribunal to decide its own jurisdiction. The BAC Arbitration Rules provide that the BAC, or the arbitral tribunal as authorised by the BAC, may rule on jurisdictional objections.[53] The CIETAC Arbitration Rules, borrowing the BAC's practice, have a similar provision.[54] It can also be found in the arbitration rules of other arbitration commissions, such as the Wuhan Arbitration Commission.[55]

This innovation initiated by Chinese institutional arbitration rules is regarded as a celebrated move to erase the incompatibility of the 1994 PRC Arbitration Law with international common practice and to highlight arbitral efficiency.[56] But it is also controversial.[57] First, nowhere in the law is there a provision by which arbitration commissions can delegate such power to arbitral tribunals.[58] Second, the power to rule on arbitral jurisdiction is in large part still in the hands of arbitration commissions.[59]

Nevertheless, such an innovation, in a *de-facto* manner, brings China's arbitration legal regime closer to international common practice and serves as a prelude to a legislative amendment on this point. On 30 July 2021, the PRC Ministry of Justice published a draft of revisions to the PRC Arbitration Law ("the draft revised PRC Arbitration Law" or "the draft").[60] Although the draft still needs to be submitted to the National People's Congress or its Standing Committee for deliberation and approval, Chinese and foreign observers regard it as an important

[53] See BAC Arbitration Rules (2019) art 6.
[54] See CIETAC Arbitration Rules (2015) art 6.
[55] See Wuhan Arbitration Commission Arbitration Rules (2018) art 11.
[56] See Song Lianbin, "New Developments of Chinese Arbitration After the Implementation of the PRC Arbitration Law" (Zhongcaifa Shishi Hou Zhongguo Zhongcai Zhidu De Xinfazhan) (2010) 3 *Beijing Arbitration Quarterly* (*Beijing Zhongcai*) 36.
[57] See Zhang Yuqin, "*Kompetenz-Kompetenz* in Commercial Arbitration and China's Improvement" (Shilun Shangshi Zhongcai Zicai Guanxiaquan De Xianzhuang Yu Zhongguo De Gaijin) (2018) 1 *Journal of International Economic Law* (*Guoji Jingjifa Xuekan*) 125.
[58] *Ibid*.
[59] *Ibid*.
[60] The draft revised PRC Arbitration Law published by the PRC Ministry of Justice on 30th July is available at http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html (visited 15 September 2021).

reform intended to liberalise China's arbitration legal framework.[61] Article 28 of the draft states:

> "Where a party objects to the existence or validity of the arbitration agreement or to the arbitral tribunal's jurisdiction over the case, such objection shall be raised within the time limit for defense as prescribed by the arbitration rules and decided by the arbitral tribunal."

Obviously, the draft has recognised the arbitral tribunal's power to rule on its own jurisdiction. This is an important breakthrough to the current 1994 PRC Arbitration Law. Hopefully, China's legislature will reaffirm this improvement in its amendments to the PRC Arbitration Law.

(b) Arbitral Tribunal's Decision to Decline Its Own Jurisdiction

The situation where an arbitral tribunal declines its own jurisdiction also deserves a comparative study. While the current French arbitration law addresses this situation, Chinese arbitration law is silent on it.

The French Arbitration Law (1980s) did not deal with an arbitral tribunal's decision to decline jurisdiction.[62] However, such decisions later arose from practice frequently,[63] leading the courts to address the question. Should it be under the same judicial control as an arbitral tribunal's decision to uphold its own jurisdiction? In *Abela*, in 2010, the French Supreme Court clarified that "the annulment judge reviews the decision of the arbitral tribunal on its own jurisdiction, whether it has declared itself competent or incompetent. . .".[64] Along this line, the French Arbitration Law (2011) takes into account the situation where an arbitral tribunal declines its own jurisdiction. According to art 1492 of the French Arbitration Law (2011), if an arbitral tribunal wrongly upheld or declined jurisdiction, the disappointed party can apply to have the award in question annulled.

Like the French Arbitration Law (1980s), the 1994 PRC Arbitration Law did not address an arbitral tribunal's decision to decline jurisdiction. Arbitration rules of Chinese arbitration institutions, however, do take it into account. For example, the CIETAC Arbitration Rules provide that

[61] See Lin Yanhua and Matthew Townsend, "China Publishes Draft Revised Law" *Global Arbitration Review* (9 August 2021), available at https://globalarbitrationreview.com/china-publishes-draft-revised-law (visited 2 September 2021).

[62] It only provided a remedy for the situation where an arbitral tribunal upholds its jurisdiction and decides the case even though there is no arbitration agreement or the arbitration agreement in question is invalid or has expired. In this case, the action for setting aside is possible. See art 1484 of the French Code of Civil Procedure before 2011.

[63] See Jean-Baptiste Racine, "La sentence d'incompétence" (2010) 4 *Revue de l'arbitrage* 729.

[64] Cour de cassation, civile, Chambre civile 1, 6 octobre 2010, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000022903476/ (visited 15 September 2021).

the CIETAC or its authorised arbitral tribunal shall decide to dismiss the case upon finding that the CIETAC has no jurisdiction.[65] The CIETAC Arbitration Rules have established a clear division in this regard of responsibilities between the CIETAC and its authorised arbitral tribunal. Where the case is to be dismissed prior to the constitution of the arbitral tribunal, the President of the Arbitration Court of the CIETAC shall make the decision. Once an arbitral tribunal is constituted, the arbitral tribunal shall make the decision.[66] A similar provision[67] appears in the BAC Arbitration Rules.

However, the author was not able to find arbitration rules of a single Chinese arbitration institution which provided a remedy, even if an internal one, for the situation where arbitral jurisdiction is declined by the arbitration institution or its authorised arbitral tribunal. The consequence of arbitral jurisdiction being declined is invariably a withdrawal of the case. Such is the case with not only the CIETAC Arbitration Rules (2015) and the BAC Arbitration Rules (2019)[68] but also the Shanghai Arbitration Commission Arbitration Rules (2018) and the Arbitration Rules of the Shenzhen Court of International Arbitration (2020).[69]

In 2001, a senior CIETAC official conducted an interview with XIAO Yang, the then president of the SPC.[70] One of the questions asked during the interview was, if an arbitration commission declines arbitral jurisdiction based on the finding that the arbitration agreement in question is invalid, does the party have the right to bring the claim directly to the court? XIAO Yang gave an affirmative answer,[71] although his answer has no legal force. In other words, once an arbitration commission refuses to administer a case after declining arbitral jurisdiction, the party can refer to litigation the dispute which could otherwise have been referred to arbitration. However, the question asked was obviously not about the possibility of disputing and rectifying the arbitration commission's decision to

[65] See the first sentence of CIETAC Arbitration Rules (2015) art 6 (7).

[66] See the second sentence of CIETAC Arbitration Rules (2015) art 6 (7).

[67] BAC Arbitration Rules (2019) art 6 (5) states as follows:

> "[W]here the BAC, or the arbitral tribunal as authorized by the BAC, determines that it has no jurisdiction, an order for dismissal of the case shall be made by the arbitral tribunal, or if no arbitral tribunal has been constituted, by the BAC."

[68] See CIETAC Arbitration Rules (2015) art 6 (7); BAC Arbitration Rules art 6 (5).

[69] See Shanghai Arbitration Commission Arbitration Rules (2018) art 8 (4); Arbitration Rules of Shenzhen Court of International Arbitration (2020) art 10 (5).

[70] See Gao Fei, "China's Judicial Support and Supervision of Arbitration: An Interview with the Supreme People's Court President Xiao Yang" (Zhongguo Fayuan Dui Zhongcai De Zhichi Yu Jiandu: Fang Zuigao Renmin Fayuan Yuanzhang Xiaoyang) (2001) 6 *China's Foreign Trade (Zhongguo Duiwai Maoyi)* 6–8.

[71] Here is Xiao Yang's answer: "[I]f the arbitration commission has made such a decision and the parties cannot reach a new arbitration agreement, the party can bring the claim to the court". *Ibid.*, 7–8.

decline arbitral jurisdiction. And XIAO missed an opportunity to clarify this interesting issue.

The 2006 Interpretation of the SPC on Certain Issues Concerning the Application of the 1994 PRC Arbitration Law ("the 2006 Judicial Interpretation")[72] seems to deny the parties an opportunity to dispute the arbitration commission's decision to refuse to administer the case for lack of arbitral jurisdiction. Article 13 of the 2006 Judicial Interpretation provides that if a party applies to the court to vacate the arbitration institution's decision on the validity of the arbitration agreement, the court shall not entertain such application. While this provision reiterates the arbitration institution's power to rule on arbitral jurisdiction, it does not seem to have envisaged the situation where the arbitration institution could decline arbitral jurisdiction.

Until now, the SPC has not had an opportunity to address this issue. Yet a recent case[73] from the Beijing Fourth Intermediate People's Court is worth noting. In that case, the court held that the CIETAC's decision to dismiss the case is comparable to an arbitral award and falls within the same scope of judicial review as applicable to setting aside of arbitral awards. In other words, the party who disputes the decision by the CIETAC or its authorised arbitral tribunal to decline its own jurisdiction can apply to the court with a view to having it set aside. However, it remains to be seen whether other courts will follow suit, absent a clarification from the SPC.

It is noteworthy that the draft revised PRC Arbitration Law has not only taken into account the situation where the arbitral tribunal declines its own jurisdiction, but it has also provided a double-layered remedy for the party who wishes to arbitrate the dispute. Article 28 of the draft provides as follows:

> "Where a party objects to the arbitral tribunal's decision on the validity of the arbitration agreement or the arbitral tribunal's jurisdiction, an application may be submitted to the intermediate people's court at the seat of arbitration for review within 10 days of receipt of the decision. Where a party objects to the court ruling that the arbitration agreement is invalid or that the arbitral tribunal has no jurisdiction over the case, an application may be made to the people's court of a higher level for reconsideration within 10 days of receipt of the ruling."

This provision clearly provides the parties with a recourse to challenge the arbitral tribunal's jurisdictional decision, including a decision to decline its own jurisdiction. The intermediate people's court at the

[72] Zuigao Renmin Fayuan Guanyu Shiyong "Zhonghua Renmin Gongheguo Zhongcaifa" Ruogan Wenti De Jieshi (2006).

[73] Beijing Fourth Intermediate People's Court (2019) Civil Verdict No. 38 (Beijingshi Disi Zhongji Renmin Fayuan (2019) Jing 04 Min Te 38 Hao).

seat is charged with the responsibility to review such a decision by the arbitral tribunal. Furthermore, where the intermediate people's court at the seat denies arbitral jurisdiction in its ruling, such a ruling is even subject to further review by a superior court.

4. The Negative Dimension of *Kompetenz-Kompetenz*

Negative *kompetenz-kompetenz* is much more complicated. It involves subtle issues concerning the dynamic relationship between an arbitral tribunal and courts. It prevents courts from intervening when a party raises jurisdictional objections, preserving the arbitral tribunal's priority to handle it itself. However, it should be noted that the court reserves the power to review arbitral jurisdiction at the post-award stage. And when the court does, it applies a *de novo* standard, assessing all relevant elements of law or fact. In short, it is ultimately the court that will decide whether or not an arbitral tribunal does have jurisdiction over the case. Therefore, the essence of negative *kompetenz-kompetenz* lies not in an arbitral tribunal's exclusivity to decide its own jurisdiction but in its priority to do so.

(a) *Key Considerations for Negative* Kompetenz-Kompetenz

Negative *kompetenz-kompetenz* is first and foremost a matter of arbitral efficiency. In practice, parties often raise objections to the existence or validity of the arbitration agreement, sometimes with the goal of delaying the arbitral process. Without negative *kompetenz-kompetenz* precluding early judicial intervention in arbitral jurisdiction, parallel proceedings can arise where the arbitral tribunal decides the objections to the existence or validity of the arbitration agreement itself, on one hand, and the court seized of the matter decides the same objections, on the other. As the court always has the last word on arbitral jurisdiction, denial of negative *kompetenz-kompetenz* effectively leads to the arbitral tribunal yielding to the court in the coordination of parallel proceedings. A bold arbitral tribunal would go on deciding its own jurisdiction despite the court proceedings. But normally the arbitral tribunal will have to suspend the arbitration proceedings awaiting the outcome from the court, which can cause substantial damage to arbitral efficiency.

Negative *kompetenz-kompetenz* can also be a matter of arbitral justice. Justice delayed is justice denied.[74] A late favourable arbitral award serves

[74] William E Gladstone, former British Statesman and Prime Minister in the late 1800s, was considered to have formulated this famous legal maxim. However, such a notion can be traced back

little or no interest to the winning party to whom a timely award is of paramount importance. Oftentimes it is difficult to rule on arbitral jurisdiction without delving into the substantive part of the case, in particular issues concerning arbitrability, *res judicata* of former judgments and terms of reference.[75] Assuming that the arbitral tribunal has *prima facie* jurisdiction over the dispute which the parties have agreed to submit for arbitration, it will proceed to examine all the relevant facts and laws to make a final award. In this process, if the arbitral tribunal finds that its own jurisdiction is untenable, it can simply make an award to decline jurisdiction. And if the parties are able to reach a settlement, judicial resources may be totally conserved.[76]

The arbitral tribunal's priority to rule on its own jurisdiction can also be justified by the principle of party autonomy. Since the parties have agreed to submit their present or future disputes to arbitration, one can well argue that the parties intend to exclude any recourse to the court at the outset of the arbitral process, including as to the dispute over the arbitral tribunal's own jurisdiction. This argument is only reinforced by the wording "all disputes arising out of or in connection to the present contract shall be finally settled by one or more arbitrators".[77]

Furthermore, negative *kompetenz-kompetenz* fits seamlessly together with centralisation of courts' jurisdiction over arbitration-related matters. Along the lines of such centralisation efforts by different countries, jurisdiction to review arbitral jurisdiction would remain with the court having jurisdiction to review arbitral awards rather than being dispersed, depending on the parties' particular procedural choices, among commercial or civil courts which would normally have jurisdiction in the absence of an arbitration agreement.[78]

China and France have made similar efforts to centralise courts' jurisdiction over arbitration-related matters, although no sign indicates that China has borrowed from France in this regard. In France, such efforts have long been valued and have led to marked developments in French arbitration law. For example, the setting aside cases are under

to ancient times. See Tania Sourdin and Naomi Burstyner, "Justice Delayed is Justice Denied" (2014) 4 *Victoria University Law & Justice Journal* 46.

75 See Ning Min and Song Lianbin, "A Comment on the Doctrine of *Kompetenz-Kompetenz* in International Commercial Arbitration" (Ping Guoji Shangshi Zhongcai Zhong De GuanxiaquanYuanze) (2000) 2 *Law Review* (*Faxue Pinglun*) 101.

76 See William Park, "Determining An Arbitrator's Jurisdiction: Timing and Finality in American Law" (2007) 8 *Nevada Law Journal* 144.

77 See Yuqing (n 57 above) p 122.

78 See Emmanuel Gaillard and Yas Banifatemi, "Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators" in E Gaillard and D Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention in Practice* (Cameron May, 2008) pp 260, 261.

the centralised jurisdiction of the court of appeal at the seat.[79] Cases related to the recognition and enforcement of foreign arbitral awards are essentially under the centralised jurisdiction of the Paris Court of Appeal (Cour d'appel de Paris).[80]

China has also made efforts in this respect. For example, the intermediate people's court at the location of the arbitration institution has centralised jurisdiction over the setting aside cases.[81] Recent years have even witnessed China's efforts to centralise arbitration-related jurisdiction within a court. Since 2017, a setting aside case shall not only be handled by the intermediate people's court at the location of the arbitration institution, but it shall also be handled by the special business division within the same court.[82]

(b) *The French Pioneering Role in Enshrining Negative* Kompetenz-Kompetenz

While many countries across the world still hesitate at negative *kompetenz-kompetenz*, France has long recognised it. Early in 1972, the Paris Court of Appeal was faced with a domestic case in which it was requested to adjudicate a dispute over petroleum product supplies, although the contract contained an arbitration clause which the requesting party claimed to be null. The court rejected the case not only based on the principle that an arbitration clause is separable from the main contract that includes it but also because "just like any forum, the arbitrators are judges of their own jurisdiction and it belongs to them to rule on the existence and validity of the arbitration clause" and "the examination of the alleged irregularity shall never be conducted solely by State courts as a preliminary question".[83]

Negative *kompetenz-kompetenz* is regarded as one of the most salient features of the French arbitration law.[84] Both the French statutory law and case law have confirmed this principle over the years.

[79] See French Code of Civil Procedure currently in effect art 1505.

[80] *Ibid.*, art 1522.

[81] See PRC Arbitration Law art 58. Noteworthy is that the concept of "seat" has unfortunately not been accepted by China as the connecting point to establish court jurisdiction over arbitration-related matters.

[82] See the "Notice of the Supreme People's Court on the Centralized Handling of Relevant Issues in Arbitration Judicial Review Cases" (Zuigao Renmin Fayuan Guanyu Zhongcai Sifa Shencha Anjian Guikou Banli Youguan Wenti De Tongzhi) issued by the SPC in 2017.

[83] Gaillard (n 17 above) p 393, citing the case: CA Paris, 9 mars 1972, Lefrère c/ SA lespétroles pursan (note by M Boitard, J-C Dubarry) (1972) *Revue trimestrielle de droit commercial* 344.

[84] See Ina C Popova, P Taylor and R Zamour, "France" in *The European Arbitration Review* 2020 (A Global Arbitration Review Special Report) p 33.

First, negative *kompetenz-kompetenz* was codified in the French Arbitration Law (1980s), which provides that, if a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a court, it shall declare itself incompetent.[85] The French Arbitration Law (2011) inherited this rule without substantial modification except that the wording has become clearer.[86]

Under the academic influence of Emmanuel Gaillard, the notion of negative *kompetenz-kompetenz* received enormous attention from the international arbitration community in the 1990s and developed into a fundamental rule of arbitration law.[87]

Second, the French Supreme Court repeatedly confirmed this rule. For example, in a case in 2001, the French Supreme Court says *kompetenz-kompetenz* "establishes the priority of the arbitral tribunal to rule on the existence, validity and scope of the arbitration agreement".[88] In another case in 2006, the French Supreme Court for the first time employed the term *l'effet négatif du principe de compétence-compétence* (the negative effect of *kompetenz-kompetenz*), which until then had only been used in scholarly works.[89]

Different chambers within the French Supreme Court initially took different approaches towards *kompetenz-kompetenz*. For example, regarding the application of *kompetenz-kompetenz* to maritime arbitration-related matters, the First Civil Chamber and the Commercial Chamber of the French Supreme Court had had divergent points of view.[90] The Commercial Chamber required, for maritime matters, a special consent to the arbitration agreement from the recipient of the goods, while the First Civil Chamber tended to assume such a consent.[91] In particular, the Commercial Chamber tended to think that it is incumbent upon courts to review the

[85] See French Code of Civil Procedure before 2011, art 1458.

[86] French Code of Civil Procedure art 1448 currently in effect provides that when a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction.

[87] See Thomas Clay, "Liberté, égalité, efficacité: La devise du nouveau droit français de l'arbitrage—Commentaire article par article (première partie)" (2012) 2 *Journal du droit international (Clunet)* 473. Originally suggested by Emmanuel Gaillard in 1994, such a term as "the negative effect of the *kompetenz-kompetenz*" is increasingly used by commentators. It was even used by the Documentation and Studies Department of the French Court of Cassation in a bulletin in July 2006. However, rarely do Chinese commentators use this term. They prefer the term "the preclusive effect of the arbitration agreement". See Gaillard and Banifatemi (n 78 above) p 259; Long Weidi, "The Preclusive Effect of International Commercial Arbitration Agreement—A Discussion Centering Around China's Legislation" (Guoji Shangshi Zhongcai De Fangsu Xiaoli—Yi Woguo Lifa Sifa Shijian Wei Zhongxin) (2010) 10 *Political Science and Law* (*Zhengzhi Yu Falv*) 33–40.

[88] Cour de Cassation, Chambre civile 1, 26 juin 2001, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007046100 (visited 15 September 2021).

[89] Cour de Cassation, Chambre civile 1, 28 November 2006, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007053765 (visited 15 September 2021).

[90] See Gaillard (n 9 above) p 710.

[91] *Ibid.*, pp 710, 711.

scope of the arbitration agreement stipulated in the charter party, while the First Civil Chamber considered that, by applying *kompetenz-kompetenz*, it is the arbitrators themselves who have the power to do so.[92]

The split in judicial approaches was put to an end by *Belmarine* in 2006, in which the Commercial Chamber aligned itself with the jurisprudence of the First Civil Chamber.[93] The Commercial Chamber held as follows:

> "By considering that there was no cause of manifest nullity or inapplicability of the arbitration clause and without having to examine the alleged unenforceability of this stipulation, the Court of Appeal, which declared itself incompetent with regard to the principle according to which it is for the arbitrator, as a priority, to rule on his own jurisdiction, did not commit the errors claimed in appeal."[94]

The saga of the Commercial Chamber's final acceptance of *kompetenz-kompetenz* regarding maritime matters is testimony to the vitality of this principle and the French courts' open-mindedness towards rules fundamental to modern arbitration practice.[95]

(c) *China's Cautious Yet Evolving Approach to Negative* Kompetenz-Kompetenz

In contrast to the French approach to negative *kompetenz-kompetenz*, Chinese courts have priority to rule on arbitral jurisdiction under the 1994 PRC Arbitration Law. If the parties challenge the validity of the arbitration agreement, the 1994 PRC Arbitration Law offers them two options. Either they apply to the arbitration commission for a decision or to the court for a ruling.[96] The question is what happens if one party goes to the court to challenge the validity of the arbitration agreement[97] while the other raises the issue before the arbitration commission? To this

[92] *Ibid.*, 711.
[93] *Ibid.*
[94] Cour de cassation, Chambre commerciale, 21 février 2006, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007049984 (visited 15 September 2021).
[95] Except for labour-related matters. The Social Chamber of the French Supreme Court ruled out the application of *kompetenz-kompetenz* when the arbitration agreement is part of a domestic labour contract. Cour de cassation, Chambre sociale, 30 novembre 2011, available at https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024916205&fastReqId=1103459723 (visited 15 September 2021).
[96] See the first sentence of PRC Arbitration Law art 20.
[97] The application to confirm the validity (most often the invalidity) of the arbitration agreement, as an independent form of cause of action, has long existed in China. It is among the 424 causes of action listed by the "Decision of the Supreme People's Court on Amending the Provisions on Causes of Action in Civil Cases" (Zuigao Renmin Fayuan Guanyu Xiugai "Minshi Anjian Anyou Guiding" De Jueding) (2011).

problem, the 1994 PRC Arbitration Law provides a solution according to which the court shall give the ruling.[98]

This solution goes against negative *kompetenz-kompetenz*. If the latter were adopted, the solution would have been for the arbitral tribunal, rather than the court nor the arbitration commission, to decide the validity of the arbitration agreement, the result of which most often determines whether or not arbitral jurisdiction stands.

Nevertheless, the SPC later qualified the courts' priority to rule on arbitral jurisdiction in its interpretation of the 1994 PRC Arbitration Law. In 1998, at the request of the High People's Court of Shandong Province, the SPC issued the "Reply of the SPC on the Confirmation of the Validity of Arbitration Agreements" ("the 1998 Reply").[99] The 1998 Reply contains four points. Point 3, which contains two parts, states as follows:

> "1. If one party requests the arbitration institution to confirm the validity of the arbitration agreement while the other party requests the people's court to declare the arbitration agreement invalid, the people's court shall reject the party's request provided that the arbitration institution has already ruled on the validity of the arbitration agreement. 2. If the arbitration institution has not yet made a ruling, the people's court shall accept the request and order the arbitration institution to terminate the arbitration."

Although the second part of Pt 3 favours the court, the first part of Pt 3 imposes restrictions on the court's priority to rule on arbitral jurisdiction. In other words, if the arbitration institution is fast enough to overtake the court in making a decision on the validity of the arbitration agreement, the latter would be precluded from addressing the same issue before the arbitral award is rendered.

Moreover, the SPC later made further arrangements to support arbitral jurisdiction. While art 20 of the 1994 PRC Arbitration Law provides that "if a party objects to the validity of the arbitration agreement, the objection should be raised before the arbitral tribunal holds its first hearing", it does not specify the consequences of an objection raised later than that time. The 2006 Judicial Interpretation clarified this issue. According to art 13 of the 2006 Judicial Interpretation, if the party concerned fails to

[98] See the second sentence of PRC Arbitration Law art 20.

[99] The SPC received from the High People's Court of Shandong Province a request for clarification on how to decide cases concerning the validity of the arbitration agreements reached before the reshuffling of Chinese arbitration institutions brought about by the PRC Arbitration Law. See "the Reply of the Supreme People's Court Regarding Several Issues Relating to the Validity of Arbitration Agreements" (Zuigao Renmin Fayuan Guanyu Queren Zhongcai Xieyi Xiaoli Jige Wenti De Pifu) (1998), which contains four points and was adopted by the Judicial Committee of the SPC in 1998, available at http://cicc.court.gov.cn/html/1/219/199/201/708.html (visited 15 September 2021).

raise an objection to the validity of the arbitration agreement before the arbitral tribunal holds its first hearing, and later applies to the court to raise such an objection, the court shall not entertain such application.[100] This arrangement must be read as arbitration-friendly. By prohibiting judicial interference with arbitral jurisdiction after the arbitral tribunal has held its first hearing, it serves to facilitate and protect the integrity of the arbitral process.

The draft revised PRC Arbitration Law goes further in supporting arbitral jurisdiction. Article 28 of the draft requires the court to reject a party's objection to arbitral jurisdiction if the arbitration institution has not yet made a *prima facie* decision on it prior to the constitution of the arbitral tribunal. If the arbitration institution decides to continue the arbitration proceedings based on its *prima facie* finding that there is a valid arbitration agreement, an arbitral tribunal will be constituted and it is up to the arbitral tribunal to rule on its own jurisdiction by reviewing all the elements that could impact its own jurisdiction. Although art 28 of the draft permits a party to challenge the jurisdictional decision made by the arbitral tribunal before the court at the seat, the court's review of the jurisdictional decision does not affect the arbitration proceedings. In other words, the court intervention under such circumstances does not lead to the arbitration proceedings being stayed, which essentially means that the arbitral tribunal's priority to rule on its own jurisdiction is practically upheld.

5. Exceptions to *Kompetenz-Kompetenz*

As a popular proverb goes, there is an exception to every rule. This is also true with *kompetenz-kompetenz*. When one examines exceptions to *kompetenz-kompetenz* in a particular country, it should be presupposed that *kompetenz-kompetenz* is accepted by that country as a matter of principle. This is what we have seen from the above analysis as far as France is concerned. France is not only a country that takes an early role in establishing and codifying *kompetenz-kompetenz*, but it also takes a pioneering role in refining and advocating this doctrine while many countries are still hesitating to accept its negative dimension.[101] As far as China is concerned, it is very clear from the above analysis that the exceptions to *kompetenz-kompetenz* under Chinese law are so

[100] See the first sentence of 2006 Judicial Interpretation art 13.

[101] For example, in the United States, "courts may engage in full examination of arbitral power regardless of whether the arbitration has begun, and irrespective of whether they are being asked to hear the merits of the claims". See Park (n 76 above) p 141.

substantial that it might be more accurate to characterise the Chinese case as China's "rejection" of *kompetenz-kompetenz*. In short, it can be reasonably argued as a contrast in comparative law that the French exceptions to *kompetenz-kompetenz* prove the rule while the Chinese ones reject it.

(a) The French Exceptions to Kompetenz-Kompetenz

The French exceptions to *kompetenz-kompetenz* are codified and included in the French Arbitration Law (2011), which provides that "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".[102]

Clearly, French law sets a very high threshold for the exceptions to be supported. Only two circumstances justify ruling out the application of *kompetenz-kompetenz*: that is, if the arbitration agreement is "manifestly void" and "manifestly inapplicable". The term "manifestly" denotes that both circumstances only permit a *prima facie* review. By *prima facie* it is meant that the courts cannot conduct a thorough or substantial examination of the elements that could potentially impact the existence and validity of the arbitration agreement. Thus, if a French court finds *prima facie* existence and validity of an arbitration agreement, it will refer the parties to arbitration. In a sense, the essence of the French exceptions to *kompetenz-kompetenz* lies in such a *prima facie* test.

The circumstance "manifestly void" has long been accepted as an exception to *kompetenz-kompetenz* in France. The French Arbitration Law (2011) simply inherited this approach from the French Arbitration Law (1980s) which provided that "unless the arbitration agreement is manifestly void".[103] In a case in 1999, the French Supreme Court reiterated that "the manifest nullity of the arbitration agreement is the only circumstance capable of preventing the application of the principle of *kompetenz-kompetenz*".[104]

In contrast, the circumstance "manifestly inapplicable" did not appear in the former French Arbitration Law (1980s) but was later adopted by the current French Arbitration Law (2011). In fact, such a circumstance

[102] French Code of Civil Procedure art 1448 currently in effect.
[103] French Code of Civil Procedure before 2011 art 1458.
[104] Cour de Cassation, Chambre civile 1, du 1 décembre 1999, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000007043343?isSuggest=true (visited 15 September 2021).

was added by the French Supreme Court in 2001 in *Quarto Children* in which the Court said:

> "According to this doctrine (*kompetenz-kompetenz*), the court of the State seized of a dispute intended for arbitration must declare itself incompetent, except in the case of manifest nullity or manifest inapplicability of the arbitration agreement."[105]

The function of this exception is to respond to cases where the arbitration agreement is not void itself, but simply unenforceable against the person to whom it is claimed to apply.[106]

An important condition to the establishment of the above two circumstances is that an arbitral tribunal has not yet been seized of the dispute. In other words, if the arbitral tribunal has been seized of the dispute, even if the arbitration agreement is "manifestly void" or "manifestly inapplicable", the courts are precluded from intervening and denying arbitral jurisdiction. It is the arbitral tribunal that will make a decision on it. A curious question comes along. What if the arbitral tribunal ignores those manifest flaws of the arbitration agreement and proceeds to uphold its jurisdiction? Assuming that no arbitral tribunals wish their arbitral award to be eventually annulled by the court, such a theoretical scenario is an unnecessary worry.

The real question, however, is when an arbitral tribunal is deemed to have been seized of the dispute? Recognising the concept of *contrat d'arbitre* (arbitrator's contract), the French case law takes into account the arbitral tribunal's acceptance of the mission to arbitrate, thus equating arbitral tribunal's being seized of the dispute to its definitive constitution. The French Supreme Court, in *CSF*, in 2006, held:

> "The arbitration proceeding is only in progress from the moment when the arbitral tribunal is definitively constituted and can therefore be seized of the dispute, that is to say from the acceptance by all the arbitrators of their mission and the only notification by a party of its arbitrator cannot constitute referral to the arbitral tribunal."[107]

The case law definition of the moment in which the arbitral tribunal is deemed to have been seized of the dispute was later confirmed by the French Arbitration Law (2011), which provides that the constitution of the arbitral tribunal shall be complete upon the arbitrators' acceptance of their mandate and as of that date, the tribunal is seized of the dispute.[108]

[105] Cour de Cassation, Chambre civile 1, du 16 octobre 2001, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000007045739/ (visited 15 September 2021).
[106] See Clay (n 87 above) pp 473, 474.
[107] Cour de Cassation, Chambre civile 1, du 25 avril 2006, available at https://www.legifrance.gouv.fr/juri/id/JURITEXT000007050373/ (visited 15 September 2021).
[108] See French Code of Civil Procedure before 2011 art 1456.

The French exceptions to *kompetenz-kompetenz* should serve as a safety valve to abuse of arbitration by the parties. However, it seems that the exceptions have a more symbolic role than a real one. According to a study by Thomas Clay in 2017, the French Supreme Court recognised that an arbitration agreement was manifestly null or manifestly inapplicable only nine times. He points out that "this ridiculously low figure compared to the number of times the opposite has been alleged is enough to cool the inclinations of those who, against all evidence, invoke such a sanction".[109]

(b) China's "Rejection" of Kompetenz-Kompetenz

The Chinese rules on *kompetenz-kompetenz*, as analysed in previous sections, are very different from the widely recognised *kompetenz-kompetenz* represented by the UNCITRAL Model Law, not to speak of the French *kompetenz-kompetenz*, which can be viewed as rather progressive.[110] Some of the essential aspects of *kompetenz-kompetenz* are lacking under Chinese law. In fact, there is a heated debate among Chinese scholars as to whether Chinese law has adopted *kompetenz-kompetenz* at all.[111] It is the author's view that the 1994 PRC Arbitration Law undoubtedly rejects *kompetenz-kompetenz*, be its positive or negative aspect.

As far as the positive aspect is concerned, *kompetenz-kompetenz* is rejected simply because arbitration institutions rather than arbitral tribunals have the power to rule on arbitral jurisdiction. Since it is generally accepted that an arbitral tribunal has the power to decide its own jurisdiction and this power is inherent in the appointment of an arbitral tribunal and is essential for the latter to carry out its task properly,[112] denying the arbitral tribunal such an important power simply distorts the normal structural relationship between the arbitral tribunal and the arbitration institution. An arbitration institution is a service provider by nature. It provides case administration services, including procedural assistance, hearing facilities and even scrutiny of arbitral awards as to their form as

[109] Thomas Clay, "Arbitrage et des modes alternatifs de règlement des litiges (panorama)" (2017) 44 *Recueil Dalloz* 2559.

[110] From a comparative law perspective, the French model of *kompetenz-kompetenz* which "delays court consideration of jurisdictional matters until the award review stage" is even characterised as an extreme by a leading international arbitrator. See William Park, "The Arbitrator's Jurisdiction to Determine Jurisdiction", available at http://www.bu.edu/law/faculty-scholarship/working-paper-series/ (visited 15 September 2021).

[111] See Min and Lianbin (n 75 above) pp 96–101; Wang Yong, "Revisiting *Kompetenz-Kompetenz* in Chinese International Commercial Arbitration—A Discussion with Ning Ming and Song Lianbin" (Woguo Guoji Shangshi Zhongcai Zhong De Guanxiaquan Dallol Yuanze Zhi Zaishuping) (2002) 2 *Contemporary Law Review* (*Dangdai Faxue*) 118.

[112] See Redfern and Hunter (n 2 above) p 5.104.

the case may be.[113] But a line must be drawn between services and adjudication. In other words, the adjudicating power, including that to decide its own jurisdiction, is exclusively exercised by the arbitral tribunal.

In responding to an article criticising China's rejection of *kompetenz-kompetenz*,[114] a Chinese scholar argued that it is not uncommon for leading international arbitration institutions, such as the ICC, to intervene on jurisdictional matter at the outset of the arbitral process.[115] It is true that the ICC rules provide for the possibility of a provisional check on the *prima facie* existence of the arbitration agreement by the ICC Court.[116] Specifically, if a party against whom a claim has been made contests arbitral jurisdiction or the possibility of determining all claims together, the Secretary General is likely to refer the matter to the ICC Court for *prima facie* determination. However, such *prima facie* determination by the ICC Court of arbitral jurisdiction should not be read as trumping arbitral tribunal's power to decide it. As William Park notes:

> "The ICC Court's preliminary determination that the arbitration agreement may exist has no binding effect on the jurisdictional decision of the arbitral tribunal. If an objection passes the institutional gate-keeping function, the arbitrators themselves, not the ICC, make the final jurisdictional decision."[117]

Section 3 of this article has analysed the likely considerations for this much criticised arrangement and the consequences. It is worth emphasising that, by depriving an arbitral tribunal of the power to decide its own jurisdiction, the 1994 PRC Arbitration Law makes the arbitral tribunal dependent on the arbitration commission under the auspices of which the arbitration is conducted. In practice, it is not uncommon for young secretaries in Chinese arbitration commissions to undertake the task of determining arbitral jurisdiction.[118] Moreover, as the arbitration commission's

[113] Scrutiny is a distinctive feature of ICC arbitration. ICC Arbitration Rules (2021) art 34 states:

> "Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form."

[114] For a criticism of China's rejection of *kompetenz-kompetenz*, see Min and Lianbin (n 75 above) pp 96–101.

[115] See Yong (n 111 above) p 118.

[116] See ICC Arbitration Rules (2017) art 6. Such provisions can also be found in other arbitration institutions with a strong case management tradition such as the SCC. See SCC Arbitration Rules (2017) arts 9, 10.

[117] William Park, "Challenging Arbitral Jurisdiction: The Role of Institutional Rules" No. 15–40 Boston University School of Law, Public Law Research Paper (2015), available at https://scholarship.law.bu.edu/faculty_scholarship/11 (visited 15 September 2021).

[118] See Min and Lianbin (n 75 above) p 101.

decision on arbitral jurisdiction has no final effect, some Chinese scholars even argued that the arrangement for arbitration commissions to rule on arbitral jurisdiction is even worse than the model under which all disputes concerning arbitral jurisdiction are to be exclusively decided by the courts.[119] It is no doubt that such an arrangement constitutes an obvious barrier to the modernisation of China's legal regime of arbitration.[120] The good news is that the recently published draft revised PRC Arbitration Law has recognised positive *kompetenz-kompetenz*. If adopted by the Chinese legislature, it will undoubtedly be regarded as an important development in Chinese arbitration law.

As far as the negative aspect is concerned, as demonstrated by the foregoing section, the priority rule of *kompetenz-kompetenz* in its normal form is upended and has become a priority rule in favour of the court.

Admittedly, even for countries such as France that honour the arbitral tribunal's priority to decide its own jurisdiction, the court is not completely precluded from intervening at the outset of the arbitral process. As analysed in the above subsection, two circumstances exceptionally justify French courts' intervention in arbitral jurisdiction at this stage. However, such an early intervention by the court is rigidly restricted by two important conditions. The first condition restricts the possibility of intervention. Once an arbitral tribunal is constituted, the court is prohibited from intervening. The second condition restricts the depth of intervention. The court is prohibited from conducting a full review of arbitral jurisdiction. In other words, French courts' review of arbitral jurisdiction is subject to a *prima facie* test which is emblematic of the French approach to negative *kompetenz-kompetenz*.

However, in China, not only do the courts have priority to review arbitral jurisdiction at the beginning of the arbitral process, but also the Chinese courts' review of arbitral jurisdiction is far from a *prima facie* one.

Nowhere in Chinese law can a concept bordering on the meaning of *prima facie* be found concerning judicial review of arbitral jurisdiction.

[119] *Ibid*.

[120] At a recent conference on revision of the PRC Arbitration Law, Dr. Li Hu, vice-secretary of CIETAC points out that China's arrangement for arbitration institutions rather than arbitral tribunals to decide arbitral jurisdiction runs counter to international common practice, suggesting that the current legal regime for arbitral jurisdiction should be revamped and brought in line with at least the UNCITRAL Model Law. See "The revision of China's arbitration law being considered by Chinese legislative body, experts suggest adding Chinese elements into international arbitration", available at http://www.legaldaily.com.cn/Arbitration/content/2018-10/08/content_7661264.htm?node=79488 (visited 15 September 2021).

Modelled on art II (3) of the New York Convention,[121] with a view to enforcing a valid arbitration agreement, art 26 of the 1994 PRC Arbitration Law states as follows:

> "If the parties have concluded an arbitration agreement and one party has instituted an action before a people's court without declaring the existence of the arbitration agreement and if the other party presents to the people's court the arbitration agreement prior to the first hearing, the people's court shall dismiss the case unless the arbitration agreement is null and void."

The question whether the arbitration agreement is null and void is a jurisdictional issue. It is uncertain to what extent judicial review should be exercised by the court to make a decision on such a question with jurisdictional consequences.

Unfortunately, art 40 of the draft revised PRC Arbitration Law simply copies the above provision of art 26 of the 1994 PRC Arbitration Law, which would mean that the full judicial consideration of interlocutory jurisdictional challenges remains possible.

In judicial practice, the extent to which Chinese courts review arbitral jurisdiction varies. For example, in a case before the Kunming Intermediate People's Court in 2017,[122] the party applying to confirm the invalidity of the arbitration agreement claimed that the main contract containing an arbitration clause was not signed by him and applied to verify the handwriting. The court granted leave to this application. By contrast, in a 2018 case presenting similar facts in Guangzhou Intermediate People's Court,[123] the court rejected the party's application to verify the handwriting, holding that review of the validity of an arbitration agreement should not touch on the merits of the main contract and an application to verify the handwriting should be filed before the arbitral tribunal.

Although the Guangzhou Intermediate People's Court's approach towards the extent of judicial review is supportive of the arbitral tribunal's power to determine its own jurisdiction and seems popular with courts in large Chinese cities with more arbitration activities,[124] it is not a consensus among courts all over China. Furthermore, whatever the extent

[121] New York Convention art II (3) states:

> "[T]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

[122] See Kunming Intermediate People's Court (2017) Civil Verdict No. 147 (Kunming Zhongyuan (2017) Yun 01 Min Te 147 Hao).

[123] See Guangzhou Intermediate People's Court (2018) Civil Verdict No. 719 (Gungzhou Zhongyuan (2018)Yue 01 Min Te 719 Hao).

[124] For instance, in a case in 2018, the Beijing Fourth Intermediate People's Court considers that the substantive part of the case falls outside of the scope of judicial review of arbitration

of judicial review might be for different Chinese courts, the discourse on *prima facie* review prevalent in France[125] is hard to find in China.[126]

6. Conclusion

It goes without saying that *kompetenz-kompetenz* is one of the most important principles in modern arbitration. Yet concrete rules on *kompetenz-kompetenz* have not been harmonised at the international level to date. This Sino-French comparative study demonstrates how far countries can differ in their approaches towards *kompetenz-kompetenz*, especially as far as its negative dimension is concerned.

Under the French model of *kompetenz-kompetenz*, the arbitral tribunal has priority to rule on its own jurisdiction and courts may not intervene in the arbitral process unless the arbitral tribunal has not been constituted and the arbitration agreement is "manifestly void" or "manifestly inapplicable".

For historical and other reasons, China has a peculiar system in which the practical functioning of *kompetenz-kompetenz* is not only distorted by the arrangement for arbitration institutions to decide arbitral jurisdiction, but it is also substantially compromised by courts' priority to do the same at the outset of the arbitral process. While the limitations of both positive and negative *kompetenz-kompetenz* under the 1994 PRC Arbitration Law are in some way redressed by Chinese institutional arbitration rules and SPC's judicial opinions, the increasing internationalisation of China's arbitration practice calls for a reform of the law itself.

As Emmanuel Gaillard remarked, "[T]he real sign of the maturity of a law in relation to arbitration today lies, in our opinion, in the recognition of *kompetenz-kompetenz* and especially of its negative effect".[127]

agreements. See Beijing Fourth Intermediate People's Court (2018) Civil Verdict No. 299 (Beijing Sizhongyuan (2018) Jing 04 Min Te 299 Hao).

125 See Olivier Cachard, "Le contrôle de la nullité ou de l'inapplicabilité manifeste de la clause compromissoire" (2006) 4 *Revue de l'arbitrage* 893; Yves Strickler, "La jurisprudence de la Cour de cassation en matière d'effet négatif de la compétence-compétence" (2011) 1 *Revue de l'arbitrage* 191; Eric Loquin, "Le contrôle de l'inapplicabilité manifeste de la convention d'arbitrage" (2006) *Revue trimestrielle de droit commercial et de droit économique* 764.

126 The author noted that in their publications on *kompetenz-kompetenz* Chinese scholars tend to focus on the argument that an arbitration tribunal should be empowered and given priority to rule on its own jurisdiction, but rarely do they discuss whether *prima facie* review is desirable when it comes to the extent to which judicial intervention should be allowed. See, eg, Sun Nanshen and Hu Di, " An Analysis of the Doctrine of *kompetenz-kompetenz* and Judicial Review in International Commercial Arbitration" (Guoji Shangshi Zhongcai De Zicai Guanxia Yu Sifa Shencha Zhi Falv Fenxi) (2017) 3 *Wuhan University International Law Review (Wuda Guojifa Pinglun)* 10; Yuqing (n 57 above) p 117; Jiang Rujiao, "An Analysis of the Doctrine of *Kompetenz-Kompetenz* in International Commercial Arbitration" (Guoji Shangshi Zhongcai De Zicai Guanxiaquan Yuanze Tanxi) (2012) 4 *Journal of Chongqing Normal University Edition of Social Sciences (Chongqing Shifan Daxue Xuebao Zhexue Shehui Kexue Ban)* 80.

127 See Gaillard (n 9 above) p 709.

The French contribution to the development of *kompetenz-kompetenz* is unparalleled and continuing.[128] Even if controversy surrounding negative *kompetenz-kompetenz* exists among different countries, the general trend is that the French approach is increasingly accepted.[129] It is the author's hope that the revision of the current 1994 PRC Arbitration Law, which has already been put on China's legislative agenda since 2018,[130] will align China with the good practice represented by France and embrace *kompetenz-kompetenz* in its entirety.

[128] See Gaillard (n 13 above) pp 535, 536.

[129] Negative *kompetenz-kompetenz* has been accepted by Hong Kong, India and the Philippines and, more recently, by Singapore and Venezuela. See Gaillard (n 13 above) pp 535, 536.

[130] See the "Legislative Program of the Thirteenth Standing Committee of the National People's Congress" (Shisanjie Quanguo Renda Changweihui Lifa Guihua), available at http://www.npc.gov.cn/npc/c30834/201809/f9bff485a57f498e8d5e22e0b56740f6.shtml (visited 15 September 2021).