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Competence-Competence principle in International Commercial Arbitration

Master thesis

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ABBREVIATIONS

ADR- Alternative Dispute Resolution

UNCITRAL – the United Nations Commission on International Trade Law

NYC- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

ICC- International Chamber of Commerce

IBA-International Bar Association

AT-Arbitral Tribunal

Principle- Competence-Competence principle

SCC – Stockholm Chamber of Commerce

INTRODUCTION

The relevance of the master thesis. The right to a fair trial [1] is guaranteed by both international and local area in today's developed world, where progress is made every minute. Due to the aforementioned sensitivities, states are more compelled to ensure both the theoretical and practical execution of afore-mentioned right. Previously, above rights was only carried out through the traditional way- meaning the court proceedings, but today, due to the repercussions of unavoidable advancements, alternative dispute resolutions are becoming especially crucial and important. In particular, arbitration should be pointed out with outstanding clarity, providing the parties with a more flexible, quick-witted functional, and profitable conditions[2]. However, it is prominent that arbitration and court have identical purpose and goals, in particular-hearing the case and ruling on the parties' conflict. That is why it is critical to maintain a healthy balance in their relationship. The principle of Competence-Competence plays an essential role in aforementioned process. Competence-Competence primarily refers to the arbitrators' capability to rule on their jurisdiction. Hence, they are supposed to be the first to make a decision on their own jurisdiction. The concept is one of the most vital components in performing the arbitration effectively. Nevertheless, its applicability is primarily determined by domestic legislation and internal policies set by the countries. Numerous strategies and ambiguous situations result from a lack of uniformed international regulation.

Scientific research problem. A key problem is the lack of uniformity; However, numerous trials have been concluded, starting with international conventions and finishing with international guidelines; but despite the above trials, currently the Competence-Competence principle is not governed by uniform rules or generally accepted procedures. Consequently, the aforementioned causes numerous ambiguities, difficulties, and disparities both, in local and global contexts.

Scientific novelty and overview of the research on the selected topic. The theoretical existence materials, applicable legislative rules, and practice developed by courts and arbitral tribunals demonstrate that there is no comprehensive and uniform approach to the Competence-Competence principle's both theoretical and practical implementation. The scope is mostly determined by the interpretation of the court and the arbitral tribunal itself. They are acting in accordance with national legislation since, as previously said, there is no binding legal framework and the accepted uniform standards. As a result, researchers have always been interested in the topic because it is important in the process of determining the actual power and existence of the

[1] ''Council of Europe portal'' Council of Europe, accessed 10 May 2023, https://www.equalityhumanrights.com/en/human-rights-act/article-6-right-fair-trial#:~:text=You%20have%20the%20right%20to%3A,remain%20silent

[2] ''SAC ATTORNEYS LLP'', Sac attorneys llp, Accessed 14 April 2023. https://www.sacattorneys.com/the-advantages-and-disadvantages-of-arbitration.html#

arbitration as alternative dispute resolution mechanism itself. Scholars such as Dr Gary Born, E. Gaillard, Dr. Ozlem Susler, [3]Dr. Kabir Duggal, Ms. Saadia Bhatty, and Dr. Sigvard Jarvi[4], have conducted extensive studies on the current topic. The primary emphasis is on the principle's explanation, background legal historical merits, evolved case law, and the specific methodologies used in a very narrow sense. Because the topic is not harmonized in the international arena and the practice of courts and tribunals is evolving on a daily basis, I would like to acknowledge newly employed approaches and interpretations provided by courts and tribunals in a broad sense with this research. Furthermore, based on the comparative analysis, the thesis will assess the core, critical questions in connection with the scope of the balance between the court and the tribunal, which is novel because comprehensive and exhaustive analyses based on theoretical and practical experiences exist neither in the academic field nor in the practical level. In addition, because it is directly related to the determination of jurisdiction, proper orientation will be paid to the recent case law-including Lithuanian, French, Georgian case law.

The indicated topic needs to be studied in greater depth, although there are some excellent works by the aforementioned competent researchers. Furthermore, the theoretical and practical components that will be discussed during the research are current and have innovative elements for the international prospect. With this thesis, I hope to supplement the currently existing approaches and relatively fill the gap between international and national legislative viewpoints, focusing on the allocation of the balance between the court and the arbitral tribunal, alongside defining and reviewing the principle of Competence-Competence itself.

The aim of the research. The principal purpose and goal of the research are the following:

- To review the peculiarities of the Competence-Competence principle;
- To identify and explain the gaps between international and local approaches, as well as to show the potential of keeping the balance between the court and the arbitral tribunal.

The questions of the research

- How regulated the competence-competence principle is regarding the allocation of the balance between the arbitral tribunal and the local courts?
- What approaches are adopted by France, Sweden, Georgia, and Lithuania?

[3]Ozlem Susler, ‘’The English Approach to Competence-Competence,’’ pepperdine dispute resolution law journal, Vol.13:415, 2013.
https://www.researchgate.net/publication/289519192_%27The_English_Approach_to_Competence-Competence%27

[4]Sigvard Jarvin, ‘’The role of international arbitration in the modern world,’’ The International Journal of Arbitration, Mediation and Dispute Management
Volume 75, Issue 1 (2009) pp. 65- 70
https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/75.1/AMDM2009006

- How is the Competence-Competence principle regulated in the international legal framework?
- What are the useful tools to fill the gaps between the international and local levels?
- What are the most current methods adopted by courts and tribunals to the competence-competence principle?
- In case of the need of uniformity, how far international arena can go in terms of the regulating the principle?

The objectives of the research. The following tasks must be completed in order to achieve the stated goals of this master thesis:

- Analyze the term- Competence-Competence principle itself;
- Identify the key problems with the non-comprehensive strategy and laws in the international arena;
- Discuss the approaches adopted by France, Sweden, Georgia, and Lithuania;
- Conducting a comparative examination of existing case law in order to assess a strategy regarding the scope of the Arbitration Tribunal and the court itself;
- With the survey, demonstrate the views of the legal practitioners concerning the principle.
- With the specific interviews conducted with the Georgian and French field professionals, assess the local consequences regarding the competence-competence principle in a deep manner.

The practical significance of the research. The aforesaid research will be beneficial and helpful for legal academics, practitioners, students, who are interested in alternative dispute resolution, particularly International Commercial Arbitration. Furthermore, the current research will be useful to those attempting to create a clear line between arbitration tribunal and the court.

Research methodology. The following research techniques will be employed:

Data collection and data analysis. The main method is associated with data analysis, taking into account important legal framework, both international and national legislation, case law, arbitral tribunal practice, legal opinions generated by the qualified academics. Several statistics generated from the reliable sources will be discussed and assessed in connection with the current thesis.

Comparative analysis. Secondly, in order to determine how comparable and distinct countries' strategies are, relevant practices must be discussed, connected, compared, and conclusions drawn. For the above-mentioned purpose, the following countries' approaches would be discussed: France, Germany, Italy, Georgia, Lithuania, Germany, and Switzerland. Countries are scrutinized by both European and Non-European merits. Examining the examples of countries with varying characteristics and levels of development is an excellent way to see the both parallel and

discrepancies across the countries, as well as the role of the level of development has in the process of international arbitration harmonization.

Logical method. Because the focus of this master's thesis is mostly on comparison and analysis, a logical strategy should be employed to appraise and make the proper findings based on the presented materials and reviewed factual situations.

Case studies. To figure out the courts' attitude to the principle, significant existing case law will be discussed, which will assist us in characterizing their attitude as well as certain special idiosyncrasies used in the process. Therefore, case study, as a method of the research would be implemented. Cases include decisions made by the first instance of state courts, appeal, and supreme courts. Also, Arbitral Tribunals awards will be discussed. Discussed cases are not limited with one jurisdiction, on contrary, the jurisdictional scope is quite wide and encompasses diverse of the countries. Every discussed issue is directly concerned with the research thesis topic- The Competence-Competence principle per se.

Survey. A specific questionnaire survey has been concluded and filled by the field professionals, practicing in international commercial arbitration. The survey includes 13 closed and 1 open question listed in Annex N1. For the survey, Google forms platform is used. Survey has been distributed to the field professionals, through LinkedIn groups, for instance, Group of International Arbitration, International Commercial Arbitration. Respondents overall number is: 74. Due to the fact that respondents are most probably the field professionals, we can treat the afore-mentioned survey as a reliable, solid, and trustworthy source of the information. The results of the survey would be disclosed and analyzed during the research. Mainly, results are represented through diagrams. Moreover, results of the open question are reflected through table and include the citation of the answers generated from the respondents.

Interviews. It was decided to conduct two separate interviews with the specialists working in the field. First, an interview with the Georgian professional and subject matter specialist- Ucha Todua. Moreover, he is the current Judge at state court of Tbilisi with civil matters, alongside the judging, he is an invited lecturer at Ilia State University. Furthermore, he has been leading person in the process of enactment and development of alternative dispute resolution mechanism in the scrutiny of Georgia.

Second, an interview with Hannah Dickson, a French-speaking attorney in private practice. The majority of her work is done in connection with the following company, eCential Robotics, [5] where she serves as a board member and as a legal consultant. In addition to her work as a lawyer, she also holds an invited lecturer position at the University of Savoie Mont Blanc.

[5] ''Essential-Robotirs'', accessed 10 March 2023, https://www.ecential-robotics.com/en

The interviews lasted for a total of forty minutes and were conducted over Microsoft's Teams service. The majority of the questions focused on the negative applicability of the Competence-Competence principle in accordance with French and Georgian legal grounds. In addition, the respondents who have already been cited addressed the particular legal gaps and difficulties, and they further expressed their perspective on potential solutions. Both interviews will be a reliable source of information due to the fact that both of the respondents cover unique problems in relation to the practical applicability of the principle, and moreover, both of them propose recommendations that are crucial and necessary. Annex N2 contains a listing of each and every question that was brought up during the mentioned interviews. The results of the interviews will be discussed in a comprehensive and in-depth manner during the present thesis.

Structure of the research. The current master thesis is divided into several sections:

In the first paragraph, the vast majority of its focus is directed on providing a general explanation of the competence-competence principle. In particular, the general features, historical context, dualistic conception of the principle, which refers to both the negative and the positive effect of the Competence-Competence principle, and the last part focuses its attention to the separability doctrine of arbitration agreement, in particular the connection between them (Separability doctrine and Competence-Competence principle).

The second paragraph focuses mostly on international legislation pertaining to the afore-mentioned principle. In particular, UNCITRAL Model Law on international commercial arbitration [6]; UNCITRAL arbitration rules [7]; Convention on the Recognition and Enforcement of Foreign Arbitral Awards- as it called New York Convention[8]; 2021 Arbitration Rules [9]will be covered and analyzed. International Bar Association (IBA) Guidelines on conflicts of interest in International Arbitration[10]; European Convention on International Commercial Arbitration[11]; The articles regarding the Competence-Competence principle would be addressed, as well as the the importance and the peculiarities of the legislative documents.

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[6] ''UNCITRAL Model Law on International Commercial Arbitration,'' United Nations Commission on International Trade Law. Accessed 10 April 2023, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf

[7] ''UNCITRAL Arbitration Rules,'' United Nations Commission on International Trade Law. Accessed 5 January 2022, https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration

[8] '' Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958),'' United Nations. Accessed 1 February 2023. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf

[9] ''21 Arbitration Rules,'' International Chamber of Commence. Accessed 2 April 2023. https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#:~:text=A%20party%20wishing%20to%20have,the%20date%20of%20such%20receipt.

[10]''IBA guidelines on conflict of interest in International Arbitration,'' International Bar Association. Accessed 2 April 2023, https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918

[11] ''European Convention on International Commercial Arbitration'', United Nations. Accessed 1 February 2023, https://treaties.un.org/doc/treaties/1964/01/19640107%2002-01%20am/ch_xxii_02p.pdf

In the third paragraph, standard of the review of the case used by the state courts will be discussed. In particular, *Prima facie* and *De novo* standards of review. Besides above, approaches from France, Sweden, Georgia, and Lithuania will be reviewed, with a comparative comparison concluding. The review consists of the theoretical legislative rules, practical implementation-case law, legal gaps existing across the jurisdictions. Also, part of Lithuanian jurisdiction will concentrate on its recent case law, including the overall review of the cases and the defining the contribution in understanding the competence-competence principle. Moreover, the results from the conducted interview regarding the Georgian and French approaches will be discussed. The main aim for the above-mentioned is to show how diverse and different the jurisdictions are in connection of daily applicability of the competence-competence principle. It is worthy to mention that the countries are representing both European and non-European scrutiny in order to evaluate whether the differences differ due to the afore-mentioned scope.

The fourth paragraph devotes its majority of attention to parallel proceedings, including positive and negative sides of the above, as well as the solutions do balance parallel proceedings from the practical standpoint. In that regard, the approaches used by Italy, Switzerland, and France will be discussed.

The fifth paragraph concentrates on the result of the survey concluded during the research.

The findings, conclusions, and recommendations, as well as the general outcome of the current master thesis, are presented in the final paragraph.

Defence statements 1-Due to the lack of international uniformity regarding the competence-competence principle, numerous ambiguities and legal uncertainties exist.

2-The country-by-country approach is outlined as the primary source for interpreting the principle. However, the practical applicability of the principle varies significantly between jurisdictions.

3-The existing legal loopholes regarding the competence-competence principle should be assessed and overcome at both binding and soft law levels.

4-International legal societies, comprising preeminent arbitral centers, judges, arbitrators, and legal professionals, should prioritize the principle and devote the majority of their efforts to study and research.

CHAPTER 1. PECULIARITIES OF COMPETENCE-COMPETENCE PRINCIPLE

One of the fundamental rights recognized and enforced by numerous conventions and international society is the right to a fair trial. One of the most important is the European Convention on Human Rights,[12] specifically article 6, which provides requirements on fair trials with the following characteristics: reasonable time, competent tribunal, fair and public hearing, regulated by law, and so on[13]. Another major one is Article 10 of the Universal Declaration of Human Rights, [14]which states that everyone has the right to a fair and public hearing before an independent and impartial tribunal in order to determine his rights and obligations, as well as any criminal charge brought against him. As a result of the foregoing, signatory countries have both positive and negative obligations. In particular, create the relevant and adequate legal framework on the one hand, and the proper environment to use the current right on a daily basis on the other.

What is the key source for countries to enforce the aforementioned right? A traditional strategy would have been employed, and judicial proceedings would have been used, but today's worldwide community is looking for an alternative dispute resolution mechanism. ADR- the abbreviation for alternative dispute resolution stands for the methods that could be utilized instead of going to court to solve the existing dispute. International arbitration is one kind of ADR that is speedier, more private, discreet, practical, targeted to the needs of the parties, and sometimes less expensive than court proceedings. Because of the aforementioned characteristics, arbitration has grown in popularity. In addition, the arbitration system's comprehension, knowledge, skill, and expertise have grown. As a result, an increasing number of business entities and individuals are becoming aware of the advantages and disadvantages that arbitration might provide as an overall outcome.

The most important question is whether or not the arbitration is intended to take the place of the judicial proceedings, or whether or not these two processes may work together and hence coexist. The response to the issue that was just asked is that, according to the customs that are followed during the current conditions, there is room for both courts and arbitral tribunals. A further key concern is the manner in which the authority of the courts and arbitral tribunals is distributed. Where exactly is the boundary between the two of them? The competence-competence principle is the one and only answer that is appropriate for the questions that were just addressed.

What is the history of mentioned above? First and foremost, competence-competence is one of the coping stones, the heart of the arbitration itself. The principle is sometimes referred to as

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[12]‘’European Convention on Human Rights,’’ Council of Europe. Accessed 10 January 2022, https://www.echr.coe.int/documents/convention_eng.pdf-

[13] Susan Schiavetta, "The Relationship Between e-ADR and Article 6 of the European Convention of Human Rights pursuant to the Case Law of the European Court of Human Rights." 2004 (1) The Journal of Information, Law and Technology (JILT). Accessed May 19, 2023. http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/schiavetta.

[14] ‘’Universal Declaration of Human Rights,’’ United Nations. Accessed 12 February 2023, https://www.un.org/en/about-us/universal-declaration-of-human-rights

"Kompetenz-Kompetenz," which refers to its German origins. The aforementioned premise was first applied by Germany's Federal Constitutional Court[15]. The principle's main distinction is that it empowers the arbitral tribunal to rule on their jurisdiction. In other words, that is the guarantee for arbitral tribunals that they have the right to decide and determine whether they have jurisdiction, or on the contrary, they are lacking the jurisdiction, based on the peculiarities presented into the case.[16]

To begin, it is worthwhile to comprehend when the aforementioned principle becomes effective and what measures must be made to meet the appropriate requirements.

Arbitration, as a method of settling a dispute arising from the parties' common agreement, is primarily based on the parties' private liberty and the personal autonomy. Personal autonomy refers to the parties' ability to settle legal disputes using this dispute-resolution mechanism. What steps are required? Arbitration as alternative dispute resolution mechanism should be expressly included in the formal form of the agreement between the contracting parties, according to usual practice. The parties' liberty is neither limited or conditionally tied to specific criteria, therefore, allowing the contracting parties to establish their own conditions and terms. Another concern lays down with the arbitration agreement, in particular the following questions arises: what is a legally binding arbitration agreement? Aside from the aforementioned criteria, certain fundamental legal frameworks address the above subject. For instance, Article 7(1) of the UNCITRAL Model Law states that "an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement" [17]. As a result, a legitimate arbitration agreement is essential for meeting the requirements. After that, the impact of competence-competence takes effect automatically per se.

Below are some positive effects of the competence-competence principle:

Autonomy of the contracting parties: The principle of competence-competence maintains party autonomy, which is one of the fundamental principles of arbitration. It empowers the parties to determine the scope and validity of their arbitration agreement and permits them to autonomously, voluntarily choose and determine arbitration as a method for resolving their disputes. Afore-mentioned guarantees flexibility as well as respect for the intentions of the persons involved.

Quick and effective dispute resolution: By granting the arbitral tribunal the authority to rule on its own jurisdiction, the principle of competence-competence enables the prompt and efficient resolution of disputes. It mitigates the potential risk of delays resulting from multiple proceedings

[15] Katarina Hruskovicova and Alfred Siwy, ‘’Austria:Who decides? ECJ Rules on the ‘’Kompetenz-Kompetenz’’ Of Arbitral Tribunals’’, *schoenherr roadmap*`10, accessed 16 April 2023, https://www.mondaq.com/austria/maritime-transport/93796/who-decides-who-decides-ecj-rules-on-the-kompetenz-kompetenz-of-arbitral-tribunals

[16] Gary,Born ‘*’International Arbitration Law And* Practice’’, The Netherlands: Kluwer Law International, 2016,1-10

[17] ‘’UNCITRAL Model Law on International Commercial Arbitration’’, supra note 6:4

before national courts to determine jurisdictional issues, since the tribunal can handle them directly.

Guaranteed expertise, competent arbitrators- International society is quite sensitive regarding the people who are handling the arbitral cases. Hence, the requirements of the arbitrators to be appointed are quite strict, detailed and regulated. The specific requirements lay down and mainly depends on the rules we are using into the arbitral proceedings. Generally, below are the requirements used while appointing the arbitrators: Expertise, cognitive ability, diligence, availability, nationality, honesty, arbitration experience, linguistic skills, and knowledge of a particular industry or area of law are essential qualifications. Therefore, tribunals typically consist of arbitrators with specialized knowledge and expertise in particular areas of law or industry sectors. As a result of the competence-competence principle, these specialists are able to determine on their own jurisdiction, which helps to ensure that conflicts are resolved by those who have the necessary expertise and experience. Afore-mentioned helps to ensure that the decisions that are made are both accurate and of high quality.[18]

Encourage the settlement: The competence-competence approach can also motivate parties to negotiate a resolution by highlighting their respective areas of expertise. When the parties to a dispute are aware that the arbitral tribunal has the last say on whether or not the dispute falls within its own jurisdiction, they may be more motivated to investigate the possibility of reaching a settlement rather than engaging in protracted battles over who has jurisdiction over the matter. This encourages a cooperative approach to the resolution of disputes.

Worldwide recognition- on a global scale in international arbitration, the competence-competence principle is extensively recognized. Its consistent application across various jurisdictions and arbitration rules contributes to the relative harmonization and predictability of cross-border dispute resolution. This facilitates international trade and investment by providing parties with a consistent and reliable dispute resolution framework.[19]

1.2 Ambivalent effect of the competence-competence principle

Competence-Competence principle is a single phrase, but in practice, we can divide it into two parts: positive and negative effect that are caused by the principle. For the better illustrations, we should define both separately.

1- Positive effect of Competence-Competence- that refers to the arbitrators' ability to rule on their jurisdiction. The aforementioned comprehension is fully recognized and appreciated by the

[18] Born, *op.cit.,* 7-14

[19] Charles Kwitonda Uwimana, "A legal Analysis of the Competence-Competence Doctrine under Arbitration Jurisdiction'' dissertation, Kigali Independent University ULK.10-20

legal community. As a result, usually no problems exist in that regard. In particular, regarding the legal framework, international documents are recognizing the principle. More specifically,

- United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, article 16(1):

Article 16(1): "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement''[20].

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards- New York Convention Article II (3): "The 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."[21]
- International Chamber of Commerce (ICC) Rules of Arbitration:
- Article 6(2): "The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, validity, or scope of the arbitration agreement."[22]
- Convention on the Settlement of Investment Disputes Between States and Nationals of other States (ICSID CONVENTION): Article 41(1): "The Tribunal shall be the judge of its own competence."[23]

2- Negative effect of competence-competence- that goes much deeper into the practical implementation of the process, especially given the court's assertive status in the preceding proceedings: courts are supposed to appreciate and recognize the principle and try to limit their actual and potential concerns with the case, as long as the arbitral tribunal is the organ that is supposed to rule on their jurisdictions first. The line between the courts and arbitral tribunals regarding the allocation of balance lays down with the following sentence: ''unless it finds that the said agreement is null and void, inoperative or incapable of being performed''[24], therefore, it is obvious that only existence of such sentence is not efficient in order to determine the nature and the imminent ground that can be anticipated on a future basis, on contrary, above creates a lot of ''grey'', ambiguous areas. Courts imminent interference, limits, standards of review etc. are quite

[20] ''UNCITRAL Model Law on International Commercial Arbitration'', *supra note* 6:8
[21] '' Convention on the Recognition and Enforcement of Foreign Arbitral Awards'', *supra note* 8:8
[22] ''21 Arbitration Rules'', *supra note* 9:2
[23] ''21 Arbitration Rules'', *supra note* 9:2
[24] ''Convention on the Settlement of Investment Disputes Between States and Nationals of other States(ICSID CONVENTION), International Centre for Settlement of Investment Disputes, 2006, accessed 1 March 2023, https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf

blurred and hard to determine. Hence, the maneuvering powers are in the hands of the countries, as the country-by-country approach remains the only source for the interpretation. Due to afore-mentioned grounds, regarding recognizing the negative effect of the competence-competence principle, the higher degree of consistency and stability are needed, because the border between Arbitration Tribunal and the stare courts is primarily determined only by local legislation. As a result, the afore-mentioned topic is still novel and open for discussion. The number of countries that significantly appreciate the negative effect of the principle is fairly small. Still, the trend is continuing, and we can observe the following countries under appreciation of the scrutiny of the negative effect: Sweden, France, Georgia, Germany, Italy, Lithuania.

Moreover, it should be emphasized when the principle of competence-competence comes to the legal effect and if there exists any kind of the legal requirements. Since the competence-competence principle has the direct link with the jurisdictional matters, having the valid arbitration agreement, concluded between the contracting parties is the prerequisite. Moreover, it should be noted that sometimes the parties specifically include the clause regarding the enforceability of the competence-competence principle, as the major concept for the determination of the jurisdiction. With this action, parties deemed to be more secured from the imminent consequences.

Initially it is essential to point out that scholars also have different opinions on this issue, bearing in mind the perception of the aforementioned positive and negative effects, as well as existing connections between them, if any. Particularly, some scholars [25] consider the negative effect as a direct consequence and the result of the Competence-Competence principle itself; That is, if arbitrators have the authority to determine their jurisdiction, courts should be insulated from the interference per se. On the other hand, some academicians are adamant that the negative effect has no connection to the principle and is, therefore, a completely separate and isolated concept. They tend to believe that in some instances, negative effects are related to the principle of competence-competence, but not a priori. Therefore, the question arises, the way is the negative effect regulated, as well as what material or theoretical resources we have in this case? The answer depends significantly on the particular country and its legislative policies. As a consequence, it can be challenging to comprehend the negative impact as it is not systematically organized, and country-specific approaches differ substantially[26]. Regarding the afore-mentioned legal framework, each of them, and the specific peculiarities of the principle accordingly, will be assessed during the research.

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[25] Gaillard, Emmanuel, and John Savage. Fouchard Gaillard Goldman on International Commercial Arbitration. 2nd ed. Hague: Kluwer Law International, 1999, p. 122.

[26] John James Barcelo, ‘’Kompetenz-Kompetenz and Its Negative Effect—A Comparative View,’’ Cornell Legal Studies Research Paper No. 17-40, p-1-5, accessed 5 January 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035485

Since negative effect strongly is connected with the courts' actions and mitigation of their perspective concerns with the case, it is worthy to mention, why sometimes courts are not friendly towards the arbitration. Below are some of the widespread reasonings:

Safeguarding the judicial authority- Courts are institutions of the state that are responsible for upholding and applying the law. It is important that this authority be preserved. Due to the fact that arbitration entails resolving conflicts outside of the conventional court system, there is a chance that some judges and other legal experts will perceive it as an attempt to undermine their authority. Because of this, there may be an impression of competition or friction between the arbitration process and the judicial system.[27]

Due to a general absence of acquaintance-Arbitration follows its own unique set of rules and procedures, which may be foreign to judges who focus largely on resolving legal disputes through litigation rather than alternative dispute resolution methods. The specialized nature of arbitration can lead to a lack of understanding or discomfort among some judges, which can result in skepticism or a hesitation to fully embrace or implement arbitral rulings. This can be caused by a combination of factors.

Reduced control- When opposed to more typical court processes, the arbitration process is subject to a significantly reduced amount of control and oversight from the judicial system. When there are issues about due process, access to justice, or the enforcement of awards, this might be considered as a possible challenge to their ability to provide procedural fairness. This is especially true when there are concerns about the enforcement of awards.[28]

Judicial backlogs- Arbitration could be seen as an additional hardship in judicial systems that have severe judicial backlogs or overcrowded court dockets. It is possible that they would prefer to keep control over conflicts in order to assure effective case management and to prioritize their own workload, which would result in an attitude that is less supportive of arbitration.[29]

Protection of legal precedents- The establishment and utilization of legal precedents are highly valued by the judicial system because they ensure uniformity and predictability in the application of the law. Arbitral awards, in contrast to court judgements, do not often have any precedential value that can be enforced. Because of this, some courts may be more cautious or less sympathetic to the idea of arbitration because it is possible that arbitration will not directly contribute to the formation of legal principles or provide advice for upcoming cases.[30]

Public Policy- It is the duty of the judicial system to safeguard concerns relating to public policy and to ensure that legal disputes are resolved in a manner that is both fair and just. If there are

[27] Kwitonda Uwimana, *op.cit.,19-30*
[28] Ibid.
[29] Ibid.
[30] Ibid.

concerns regarding fundamental rights, the enforcement of public laws, or charges of fraud or serious misconduct that are not sufficiently addressed within the arbitral process, then the courts may be more inclined to intervene in the arbitration process. In some situations, the courts may be more inclined to intervene in arbitration if there are concerns about these issues.[31]

The cultural and institutional characteristics- that are unique to a certain jurisdiction can also play a role in shaping the perspective that the courts have regarding arbitration. The overall receptiveness of courts towards arbitration can be influenced by factors such as historical backdrop, established legal traditions, and how individuals within that particular legal system view arbitration[32].

1.3 Relation with the principle- the separability of the arbitration agreement

Separability doctrine is one of the most important and significant notion in international commercial arbitration per se. The Competence-Competence principle is closely related to the separability doctrine. As a result, it is worthwhile to indicate the existing link between them. According to the word terminology, the content of the separability is obvious. The arbitration agreement is treated separately from the primary contract. What are the important repercussions of the preceding attitude? For example, if the main contract contains some invalidity aspects or legal discrepancies, or is even treated as illegal, the existence of the arbitration agreement is unaffected because, due to the separability doctrine, the agreement is treated as a completely divided, isolated, and separated concept from the main contract. As a result, even if the main contract is declared unlawful, the arbitration agreement remains in full force and legal capacity, and the same logic applies in reverse. The doctrine firstly appeared in English case law, specifically: Harbour Assurance Co. Ltd. v. Kansa General International Assurance[33]. Alongside with the afore-mentioned, following case law is significant since the court precisely pointed out that the arbitration agreement, accordingly arbitration clause was completely separate from the main contract- Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)[34]. Regardless the afore-mentioned importance, it should be noted when the separability doctrine takes full effect and if there exists any kind of mandatory requirements. The following court case- DHL Project & Chartering Ltd v Gemini Ocean Shipping Co., Ltd [2022] EWCA Civ 1555[35], fully answers the

[31] Ibid.
[32] Ibid.
[33] ‘’Harbour Assurance Co. Ltd. v. Kansa General International Assurance,’’ Queen's Bench Division (Commercial Court), 1991, Accessed 1 February 2023 https://www.trans-lex.org/302700
[34] ‘’Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395,’’ USA, 1967, accessed 10 February 2023, https://supreme.justia.com/cases/federal/us/388/395/
[35] ‘’DHL Project & Chartering Ltd v Gemini Ocean Shipping Co., Ltd [2022] EWCA Civ 1555’’, United Kingdom, accessed 10 February 2023, https://cms-lawnow.com/en/ealerts/2023/01/how-separate-is-separate-court-of-appeal-clarifies-the-scope-of-the-separability-principle-with-respect-to-arbitration-agreements?format=pdf&v=9

above question. In particular, the court strictly pointed out that the existence of the valid arbitration agreement is the key concept for separability doctrine, in order to take full effect.

One of the most recent cases once again pointed out the significance of the separability doctrine, in particular earlier mentioned case: DHL Project & Chartering Ltd v Gemini Ocean Shipping Co., Ltd [2022] EWCA Civ 1555[36] , where the the tribunal made vital definition of the separability doctrine listed below:

‘’The separability principle, holding that an arbitration agreement is, or must be treated as, a contract which is separate from the main contract of which it forms part, is widely accepted internationally. It is an important concept for arbitration lawyers, although it may be questioned how many business people who include an arbitration clause in their contracts are aware that it exists’’[37].

‘’Separability serves the narrow though vital purpose of ensuring that any challenge that the main contract is valid does not, in itself, affect the validity of the arbitration agreement. This is necessary because the challenge to the validity of the arbitration agreement often takes the form of a challenge to the validity of the main contract’’[38].

It should be emphasized that, in terms of relevant law, both main and arbitration agreements may have entirely distinct applicable laws and clauses. The aforementioned premise is governed by UNCITRAL Model Law on International Commercial Arbitration, Article 16, specifically: "An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract," says Article 16(1) of the Model Law[39].

Regardless of the immense significance of the preceding principle, the obvious query is: what is the relationship between the Competence-Competence principle and the doctrine of separability? Both concepts are the fundamental and essential principles of international commercial arbitration. Specifically concerning matters of jurisdiction. The majority of the time, they are viewed and described separately, but they have the same purpose and objective: to safeguard the practical implementation of the arbitral proceedings. Therefore, rather than viewing each as a separate concept, they should be viewed as complementing each other to strengthen arbitration proceedings as an alternative dispute resolution mechanism. The competence-competence doctrine, alongside with the separability doctrine cannot be implemented without a proper, validly concluded arbitration agreement, for other words, afore-mentioned means that arbitral tribunal lacks the jurisdiction, since the consent from the parties, as the mandatory requirement of the contract, is

[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] ‘’UNCITRAL Model Law on International Commercial Arbitration’’, *supra note* 6:8

not visible. As a result, the enforceability factor appears, with the goal of ensuring that the parties' consent is highly valued, recognized and appreciated.

In the context of arbitration, the concept of separability and the competence-competence principle are intertwined and share a number of similarities. There are numerous connections between these two legal concepts, which are summarized below:

Independence: As the independence from the existing main, primary contract remains one of the mutual concepts for both, Competence-Competence principle and Separability doctrine. [40]

Objectives- Both of the afore-mentioned principles have the major goal in common: practical implementation of the parties' consent to conclude their disputes under the alternative dispute resolution mechanisms, in particular arbitration, therefore, courts' judicial participation is restricted into the arbitration process. [41]

Both principles have as their primary objective the restriction of judicial participation in the arbitration process. The theory of separability discourages courts from invalidating an arbitration clause on the basis of challenges or disputes involving the underlying contract. The principle of competence-competence prevents courts from drawing premature conclusions regarding the tribunal's jurisdiction. In contrast, the competence-competence principle prohibits courts from making premature competence determinations.[42]

Safeguarding of the Arbitration Agreement- Both of the principle aims to protect the arbitration agreement, regardless any ongoing issue with the primary contract. In particular, the doctrine of the separability ensures that the arbitration agreement and accordingly, arbitration clause is valid despite the invalidity or any discrepancies that take place with the main contract. On the other note, competence-competence ensures that the arbitral tribunal has the jurisdiction regardless the problems with the main contract. [43]

Common legal grounds- Competence-competence principle and the doctrine of separability are recognized through the international documents. The importance and significance of the aforementioned principles are mentioned simultaneously. It should be noted that not only international arena, but local approaches are safeguarding both of the principles.

Regardless of their distinct legal foundations and functions, the competence-competence principle and the separability doctrine cooperate to ensure that the arbitration process is as efficient, independent, and autonomous as possible.[44] Their relationship highlights how vital it is to protect

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[40] Kayode Filani, ''The Doctrines of Competence-Competence and Separability in International Arbitration'', 2021, accessed 19 February 2023, https://www.kayodefilani.com/the-doctrines-of-competence-competence-and-separability-in-international-arbitration/

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Ibid.

the autonomy of the parties involved and ensure that the arbitration agreement is kept completely separate from the underlying contract.

Consequently, we may conclude that, on the one hand, separability doctrine is the material basis for arbitration to be generally implemented as a procedure, whereas the principle of competence primarily refers to procedural beginnings; specifically, it grants arbitrators the authority to determine their jurisdiction, as mentioned previously.

CHAPTER 2. LEGAL FRAMEWORK ON COMPETENCE-COMPETENCE PRINCIPLE

The fundamental objective of this chapter is to conduct a review and investigation of the pre-existing legal framework on an international level in relation to the Competence-Competence principle. To be more specific, a large amount of focus will be placed on the degree of uniformity that is offered by the international harmonisation as well as the identification of any grey areas that may exist. In order to accomplish the goals that were outlined before, we will be discussing the following legal documents: Convention on the Recognition and Enforcement of Foreign Arbitral Awards; UNCITRAL Model Law on International Commercial Arbitration; International Bar Association Guidelines on Conflicts of Interest in International Arbitration; Rules on Arbitration Adopted by the International Chamber of Commerce (ICC); European Convention on International Commercial Arbitration.

2.1 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The so-called New York Convention - The Convention on the Recognition and Enforcement of Foreign Arbitral Awards - is one of the most influential tools in international arbitration. The 1958, June 10, New York Convention aims to regulate the conditions governing the Enforcement and Recognition of foreign arbitral awards. Total achievement of the aforementioned Convention is represented by the subsequent numbers: currently one of the most widely adopted conventions, with 172 contracting states[45]; There have been over 2400 court decisions, and more than 90% of the cases have been done successfully, meaning that cases have been granted enforcement[46].

It is essential to mention the applicable provisions pertaining to the competence-competence principle. The primary one is mentioned under the 2(3) articles, in particular: ‘’The 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’’[47].

The primary objective is to instruct the contracting states on how to recognize and respect arbitration properly. Again, the court's role is defined as not reviewing the case and, if the material and formal requirements for the use and application of arbitration are met, directing the parties to refer to arbitration as a method of dispute resolution. It should be noted that the term-‘’shall’’ is used, that directly indicates the mandatory nature of the above obligation, hence there is no

[45] List of the contracting states of the New York Convention, accessed 8 May 2023, https://www.newyorkconvention.org/countries -
[46] Statistics of New York Convention, accessed 5 May 2023, https://www.newyorkconvention.org/in+brief
[47] ‘’New York Convention’’- Art. 2(3)

discretion and maneuvering power left for the courts. The query is whether this principle is absolute. Does the law permit the possibility of interference with the right?

The response appears repeatedly throughout the convention's text. More particularly with the following wording: '' unless it finds that the said agreement is null and void, inoperative or incapable of being performed'', New York Convention, 2(3) Article[48].

The only reference to the principle described above is provided. The convention is largely reticent on the topics and offers no additional comments or clarifications on the procedure. Thus, numerous ambiguities arise, including: how can the court define the terms-null, void, inoperative or incapable of being performed? How should each case be handled by the court? In this aspect, what is the relationship between the court and the arbitral tribunal?

Unfortunately, neither the convention nor the convention's guidelines and comments provide additional clarifications regarding one of the critical concerns raised above. What is the scope of the case review, if the there do not exist any kind of binding provisions or agreed practices? Is it merely a *prima facie* review that entails respecting the negative effect of the competence-competence, thereby preserving the arbitral tribunal's authority to determine its jurisdiction first, or does the convention refer to the court's exhaustive, exclusive review, meaning using the De Novo standard of review? Where can we consequently find the guides how to regulate the aforementioned cases? Everything depends on the distinctive approach used each country, since the convention does not prohibit either using the broad, or narrow approach listed above. [49]For instance: on the case named: Italy, Corte di Cassazione (Supreme Court) / Heraeus Kulzer GmbH v. Dellatorre Vera SpA / 35[50], the Italian court singled out the primary authorities regarding the principle that are currently being investigated by state courts. These authorities are as follows: to examine and make a determination about the validity of the arbitration agreement. Afore-mentioned approach is applied under the German law, in particular section 1032 of Code of Civil procedure- meaning the following: ''Until the arbitral tribunal has been formed, a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings''[51]. Not only the theoretical framework supports the courts full intervention into the arbitration proceeding, but also the case law practice- meaning the several decisions pointing out

[48] Ibid.
[49] Born, *op.cit.,* 16-17
[50] ''Heraeus Kulzer GmbH v. Dellatorre Vera SpA / 35'', Supreme court of Italy, 2007, accessed 2 March 2023, https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1409-
[51] ''Code of Civil Procedure'', Germany, accessed 2 March 2023, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3471

that courts inherent power is to discuss every matter concerning the arbitration agreement, for instance: BGH, Urteil 13 Januar 2005, III ZR 265/03. Reported NJW 16/2005 at 1125[52].

To sum up shortly, according to the lack of uniformity, following types of the review/analysis of the case exist worldwide:

- Parallel proceedings;
- „First in time'' Ruling;
- Anti-suit injunctions;
- *Prima Facie*-Standard of review;
- *De Novo*-Standard of review;

Each of the above would be discussed during the present thesis.

2.2 UNCITRAL Model Law on International Commercial Arbitration

As we have previously mentioned, the New York Convention has left the several important queries regarding the Competence-Competence principle. With the aim to provide the relatively uniform and the common practices the Model Law on the International Commercial Arbitration has been drafted and enacted.

Before defining the applicable provisions, I would first like to discuss the essence and specific characteristics of the UNCITRAL Model Law. Initially, model law was enacted in 1985, but several amendments were concluded in 2006. The model law establishes relatively uniform practices and regulates in detail the procedural aspects. Although necessary, the aforementioned lacks a binding nature and thus does not constitute a convention or a set of obligatory regulatory provisions; Therefore, the practical implementation fully depends primarily on the will of the country. Consequently, the Model Law intends to serve as a template for countries' future consideration and review. Above is also stated in the explanatory note prepared by the secretary of the UNCITRAL, meaning '' The Model Law constitutes a sound and promising basis for the desired harmonization and improvement of national laws''[53].

Despite the aforementioned, UNCITRAL model law enjoys the broad international recognition and the greatest degree of popularity. In particular, 86 states [54] have adopted the UNCITRAL Model Law. In addition, to monitor the usage of the UNCITRAL texts and provided guidelines,

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[52] ''BGH, Urteil 13 Januar 2005, III ZR 265/03'', Germany, Accessed 10 February 2023, https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=13.01.2005&Aktenzeichen=III%20ZR%20265/03

[53] ''Explanatory note on Model law on International Commercial Arbitration'', UNCITRAL, accessed 2 March 2023, https://www.mcgill.ca/arbitration/files/arbitration/ExplanatoryNote-UNCITRALSecretariat.pdf

[54] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status- The list of the countries that adopted the Model Law

the Clout [55] database was established. Clout is the name of the database where court and arbitral cases/awards can be searched, monitored, and tracked. Checking the database will reveal a significant number of cases. Moreover, having the systematized and documented database ensures the practical importance and significance of the Model Law, in particular: database reflects how broad and widespread the international recognition is and what kind of interpretations are given by the state courts and Arbitral Tribunals to the existing Model Law provisions.

Concerning the connection with the competence-competence principle, it is essential to note that the UNCITRAL provides the same framework as New York Convention; more specifically, article 8, paragraph 1 states that: ''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''[56].

Therefore, the Model Law mirrors the same approach as that of New York Convention without additional clarifications and explanations. Consequently, the above-mentioned questions posed under the scrutiny of New York Convention remain unchanged and do not provide any new clarity or a green light on the afore-mentioned matters regarding the principle. Even the UNCITRAL itself states that the practical implementation differs from country to country, hence different approaches are used[57].

Alongside with the UNCITRAL Model law on International Commercial Arbitration, UNCITRAL adopted the arbitration rules, which are essentially the procedural guidelines and framework for concluding the arbitration proceedings. The competence-competence principle is defined relatively broadly in this regard. Meaning Article 23- which gives jurisdiction the utmost importance, empowers arbitrators to rule on their jurisdiction regardless of any challenges to the existence or enforceability of the arbitration agreement. The timeframe during which such claims may be made is also rigorously defined. It should be noted that the arbitral tribunal has the authority to proceed despite obstacles[58]. Then, if the principle is regulated, what precisely is the difficulty? The foregoing relates to the nature described above regarding Model law, and it is merely a guideline that countries can modify and amend at their discretion. Consequently, the absence of a binding nature is an obstacle that renders the implementation ineffective[59].

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[55] The Clout database, accessed 10 March 2023, http://www.uncitral.org/clout/search.jspx?match=arbitration-
[56] Ibid.
[57] ''2012 Digest of Case Lawon the Model Law on International Commercial Arbitration'', UNCITRAL , accessed 10 March 2023, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mal-digest-2012-e.pdf
[58] ''21 Arbitration Rules'', Art.23
[59] Born, *op.cit.,* 27

2.3 European Convention on International Commercial Arbitration

European convention on International Commercial Arbitration regulates the competence-competence principle under the article 5 and 6, with the comprehensive and detailed clarifications beginning from the defining the principle, ending to the practical implementation. The Arbitral Tribunal is empowered to rule on their jurisdiction, also regarding the validity and the existence of the arbitration agreement itself, without the interference from the courts and other governmental authorities. Moreover, the claims which parties can assess are strictly limited in times, and if the deadline is missed, it can not be re-granted. Thus, we can say that Arbitral Tribunal is in the beneficial condition, exercised the full power to freely determine and hear the case. However, the problem regarding above should be addressed[60]. If we check the contracting states, we will see the slight number of the countries, in particular: 32 countries[61]. On the other hand, despite the recognition of the principle, the convention remains silent on the various practical topics, most specifically, concerning the limitation of the usage of the principle, meaning the interference from the courts side; On the other hand, since the conventions leaves the open maneuvering spaces regarding the principle, the application of the convention mostly depends on the will of the countries. [62]

2.4 IBA guidelines on the conflict of interest in International Arbitration

In addition to the above-described New York Convention and the UNCITRAL Model Law, which are the foundational theoretical materials for the competence-competence principle, it is pertinent to review the other materials that highlight the significance of the principle. First, I would like to define the International Bar Association's (IBA) conflict of interest in Intetrnational Arbitration guidelines. IBA is an organization composed of attorneys, law firms, and competent individuals in the field of law. Conflict of interest guidelines include provisions pertaining to the potential compromise of the impartiality and independence of arbitrators, as well as disclosure conditions illustrated with the appropriate examples. Why does the above matter to our objectives? Under IBA guidelines on the conflict of interest, the Arbitrators power to determine on their jurisdiction is highly protected.

Moreover, the guideline attempts to prevent local courts from interfering with the tribunal. It states that the granted power exists regardless of any contrary decisions or findings issued by national courts or administrative agencies. In this regard, the problem is that the provisions are more of a

[60] Born, *op.cit.,* 21
[61] Contracting states of European Convention on International Commercial Arbitration – accessed 10 March 2023 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en
[62] Ibid.

suggestions than a binding set of rules. Therefore, the practical application of the competence-competence principle itself does not contribute to its uniformity[63].

2.5 International Chamber of Commerce (ICC) rules on the Arbitration

International Chamber or Commence is one of the most prestigious international organizations promoting the global trade and international investment. Currently, the International Chamber of Commerce represents one of the most leading institutions in the field of business and the international trade. Since Arbitration is the wide-spread dispute resolution mechanism among the multinational business entities, due to privacy and confidentiality, ICC regulates the matters concerned the Arbitration proceedings.[64] The concerning binding rules, the International Chamber of Commerce (ICC) rules on arbitration, particularly Article 6, paragraph 9, which recognizes the Competence-Competence principle and offers the limited scope of the protection. The wide scope of the International Chamber of Commence is reflected into the below listed figures: 27 000th case has been filled to the International Chamber of Commence court, in May[65]. According to the ICC, 946 new cases were filed in 2020, involving 2,507 parties from 145 countries and territories. French law was appointed by the parties in 56 of these cases, and Paris is the main seat for arbitration proceedings. The number of French parties before the court was 112 in 2020. Given that the principle is protected by the ICC, it is important to note the application's specifics. First, the article contains the phrase "unless otherwise agreed," which leaves a large door opportunity for maneuvering. On the other hand, the time in which the rules becoming the binding should be noted. Depends largely on the private autonomy and concept of the parties. When concluding the arbitration agreement, they should expressly designate that the ICC rules will govern the proceedings[66].

2.6 Assessment of the criteria for the validity of the arbitration agreement

The legal framework often mentions that despite the importance of the Competence-Competence principle, it does not represent the absolute right, since in the specific conditions it could be limited, the aforementioned principle sometimes appears in a secondary role. Therefore, to protect other strongly related principles, the use of interference in it and neglecting the existing protection mechanisms becomes legitimate. The main exceptions have the strong link with the validity of the

[63] ‘’IBA guidelines of the conflicts of interest’’-Art.- 3.3
[64] Born, *op.cit.,* 28
[65]‘’ ICC Dispute Resolution Services in 2022: a year in review’’, International Chamber of Commerce, accessed 2 April 2023, https://iccwbo.org/news-publications/news/icc-dispute-resolution-services-in-2022-a-year-in-review/
[66]‘’2021 Arbitration Rules’’, International Chamber of Commence(ICC), accessed 10 January 2023, https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-6

arbitration agreement. Important thing is to determine what are the criteria for assessing the validity, generally according to the scholars unified interpretation validity of the arbitration agreement should meet the following criteria: Formal and Substantive validity. The used coordinating conjunction-‘’end’’ refers to the cumulative nature with the meaning that both part of the criteria should be established simultaneously. Formal criteria mainly encompass- the form of the arbitration and the capacity of the contracting parties to enter into the agreement, while the substantive criteria are relying on the substance, in particular: the consent from the parties to conclude their disputes under the arbitral proceedings and the agreement expressly included between the contracting parties. For the above-mentioned reasons, proper legislation should be reviewed. In thar regard, UNCITRAL Model Law on international commercial arbitration and the New York Convention should be discussed. The UNCITRAL Model law on Commercial Arbitration, in particular, article 7- the following criteria are established:

- Agreement between the contracting parties;
- With the coverage of the disputes-all or certain disputes;
- Defined legal relationship;
- Both, contractual and non-contractual legal relationship;
- The mandatory written form;
- The form of an arbitration clause in a contract or in the form of a separate agreement[67].

Under the New York Convention on enforcement and the recognition of the foreign awards, article 2.1 the following criteria is noticeable:

- Written form;
- Consent from the contracting parties;
- Agreement existing between the contracting parties;
- Defined legal relationship;
- Both, contractual and non-contractual;
- Subject matter should be capable of being settled by the arbitration as a dispute resolution mechanism[68].

Thus, if we compare both of the approaches, they are quite similar except the following aspect: how the written form should be assessed? Does the afore-mentioned include the modern mean of the communication alongside the classic, typical tools? In that regard, the New York Convention offers a very limited scope of the interpretation, in particular,’’ signed by the parties or contained in an exchange of letters or telegrams’’[69]. Thus, the convention stays silent on the immense

[67] ‘’UNCITRAL Model law on International Commercial Arbitration’’, art.7
[68] ‘’New York Convention’’, art.2.1
[69] Ibid.

technical development and the advanced tools for the communication. On the one hand, it is quite understandable, since the legislators could not foresee such development when they were drafting the clauses, but on the other hand, they are always the open doors for the amendments, if there exist the proper will from the governing bodies.

In comparison to the above-mentioned, UNCITRAL Model law is briefly interpreting the topic and moreover, covers almost every kind of spread means of the communication used by the modern society.

For the better clarity, the below information reflecting the legal acts is accurate:

According to the New York Convention, ‘’each contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration’’.

According to UNCITRAL Model law on International Commercial Arbitration:

‘’(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been con- cluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the ref- erence is such as to make that clause part of the contract’’[70].

[70] ‘’UNCITRAL Model law on International Commercial Arbitration’’, art-7

2.7 How to interpret- ‘’Null, void, inoperative or incapable of being performed’’?

The allocation of the balance between the Court and the Arbitral Tribunal mainly depends on the following sentence: ‘’Unless it (Court) finds the Arbitration Agreement null, void, inoperative or incapable of being performed". Both New York Convention and UNCITRAL Model law on International Commercial Arbitration refer to the above precisely but without further indicating how the courts can assess each. Thus, the central maneuvering powers are in the hands of the courts and, therefore, their interpretation. Also, before delving into the peculiarities of the clause mentioned above, from the general standpoint, understanding and appreciation regarding the arbitration agreement vary. What is meant by the above is that the scope and the interpretation of the mentioned clause are strictly and entirely dependent on the counties. For instance, some jurisdictions may adopt a relatively liberal approach regarding the performance of arbitration agreements, in particular, understanding and viewing the arbitration agreement broadly, giving the highest value to the contracting parties’ intentions, thus, safeguarding the maximum amount of the legal effect. On the other hand, there are limited, restricted, and scrutinized countries do exist that impose narrow scope for interpreting the arbitration agreement; hence, the legal effect is significantly diminished and weakened.[71]

2.7.1 Null and Void Arbitration Agreement

First, we must consider and evaluate how above differs from the other mentioned ‘’exceptions’’ [72]from a legal point of view. The essential point is that null and void arbitration agreement is void from the moment the contract is concluded. New York Convention does not provide any conditions in where the term could be enforced, therefore, the list is non-exhaustive and its daily applicability depends on the case law developed by the state courts and arbitral tribunals, as the major creators of the case law. Moreover, defining the null and void, generally the following criteria are briefly assessed: Ratione personae and Ratione materiae. As other words, objective and subjective criteria, accordingly. When we are assessing objective grounds, we are referring the the arbitrability powers. On the other hand, defining subjective criteria, we are evaluating the capacity of the contracting parties to submit the dispute to arbitration. Firstly, When the courts assess the term,

[71] Born, *op.cit.,*91-97
[72] ‘’Inoperative or Incapable of being performed’’

‘’Null and void" generally, they follow Lex Fori Concursus [73]approach. Thus, the law applicable to the courts' proceedings is being used. For instance, if the case is brought in the French Court, French law would apply in that case, and thus, the provisions covering the invalidity of the contract will have a direct and automatic effect. The common grounds for invalidity include the following: The agreement has not been correctly agreed between the contracting parties due to some circumstances (Lack of consent, harassment, duress, misrepresentation). [74]As mentioned earlier, there is no exhaustive, defined groups what referred to each of the above-mentioned concept, thus, everything is evaluated used case-by-case approach. However, according to the developed court practices, the common grounds could be visible. For instance, while assessing the duress, Swiss court in BAKWIN case indicated the following criteria: (i) existence of a 'threat', (ii) Above should be unlawful, (iii) the threat must result in actual and justified fear, and (iv) The mandatory existence of the casual link between the threat and the consent to conclude the agreement[75].

2.7.2 Inoperative Arbitration Agreement

The usual practice regarding the term mentioned above is to evaluate that in the beginning, when concluding the arbitration agreement, the consent from the parties and the words were in line with all the requirements. Thus, both formal and substantive criteria for the validity were met, but due to some circumstances, the arbitration agreement ceased to have an effect. These circumstances are evaluated case by case and are determined mainly by the courts' side. One of the most common grounds for an inoperative" Arbitration Agreement is the parties' right to waive the agreement on arbitration as an alternative dispute resolution. The party's autonomy and the free will granted and guaranteed by the major principles of civil law empower the parties to waive their right. Sometimes the parties agree on some conditions and the specified timeframe deadline; thus, the Arbitration Agreement is deemed inoperative and ineffective if the needs are not met or the time has expired without any consequences. The same approach is used in the following French decision- Société Gefu Küchenboss GmbH & Co. KG and Société Gefu Geschäfts-und Verwaltungs GmbH v. Société Corema[76].

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[73] Lawinsider, Law Insider, accessed 23 January 2023, https://www.lawinsider.com/dictionary/lex-fori-concursus#:~:text=Lex%20fori%20concursus%20means%20the,the%20insolvency%20proceedings%20are%20commenced

[74] Born, *op.cit.,* 81-85

[75] Bakwin Eire ‘’International Trading Co Inc v Sotheby's,’’ Arbitration Law Reports and Review, Volume 2005, Issue 1, 2005, Pages 83–95, accessed 20 February 2023, https://academic.oup.com/alrr/article-abstract/2005/1/83/92395?redirectedFrom=fulltext

[76] Société Gefu Küchenboss GmbH & Co. KG and Société Gefu Geschäfts-und Verwaltungs GmbH v. Société Corema , France, Accessed 10 February 2023, https://newyorkconvention1958.org/index.php?lvl=notice_display&id=507

Moreover, when the issue is with the parallel proceedings, and res judicata is used, the arbitration agreement could be deemed as inoperative.

2.7.3 Incapable of being performed Arbitration Agreement

The concept, as mentioned above, is strictly linked with the capability of arbitration agreement to set into motion practically. The list is indeed not exhaustive; thus, courts' evaluation is the only source for determining if we are facing incapable of being performed arbitration agreement or not. Thus, the interpretations from the judges have the drastic impact. For the better illustration, below is the statement from the Broken Hill City Council case:

'' An arbitration agreement could be incapable of being performed, if, for example, there was contradictory language in the main contract indicating the parties intended to litigate. Moreover, if the parties had chosen a specific arbitrator in the agreement, who was, at the time of the dispute, deceased or unavailable, the arbitration agreement could not be effectuated. In addition, if the place of arbitration was no longer available because of political upheaval, this could render the arbitration agreement incapable of being performed. If the arbitration agreement was itself too vague, confusing or contradictory, it could prevent the arbitration from taking place''[77].

In addition to the above case, Lucky-Goldstar International (HK) Ltd v NG Moo Kee Engineering Ltd [78] remains one of the core decisions regarding the interpretation of the afore-mentioned concept. To mention the key items, the parties according to the mutual consent and trust concluded the arbitration agreement, decided on the applicable rules under the organization that have never existed.

Moreover, as an additional note, as per New York Convention Guide states, the two most common grounds for the term ''Incapable of being performed'' are the following:

"(i) when the arbitration agreement is unclear and does not provide sufficient indication to allow the arbitration to proceed, and (ii) when the arbitration agreement designates an inexistent arbitral institution" -New York Convention Guide[79].

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[77] ''Broken Hill City Council V Unique Urban Built Pty Ltd'', Supreme Court of New South Wales, accessed 23 April, 2023, http://expertdeterminationelectroniclawjournal.com/wp-content/uploads/2018/09/Broken-Hill-City-Council-v-Unique-Urban-Built-Pty-Ltd-2018-NSWSC-825-5-June-2018.pdf - 32

[78] ''LUCKY-GOLDSTAR INTERNATIONAL (HK) LTD v NG MOO KEE ENGI- NEERING LTD'', High Court of Hong Kong, Accessed 2 February 2023, https://www.uncitral.org/clout/clout/data/hkg/clout_case_57_leg-1158.html

[79] ''New York Convention Guide'', United Nations, accessed 9 March 2023 https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=618&opac_view=-1#110

2.7.4 Conclusion regarding defining, Null and void, inoperative, incapable of being performed''

All the discussions mentioned above and given theoretical and practical examples uniformly and indeed reveal that one standard does not apply in the review and evaluation process. Why is the above important for our purposes? To that extent, the above definition directly relates to determining the balance between the arbitrators and the court. That is the extent to which the provision prioritizes the arbitration, meaning the power to determine on its jurisdiction, until we deal with the above factors presumptively. When practical implementation is highly variable and unstable, depending on the jurisdictions and internal order of different countries, it is clear that potential ambiguity, imprecision, and legal instability are inevitable.

2.8 Conclusion regarding the legal framework on Competence-Competence principle

To sum up, based on what has already been discussed above, the international arena is heterogeneous, unorganized, wide-ranging, and severely deficient in practical implementation of the Competence-Competence principle. Thus, it is necessary to use country-by-country approach and define specific peculiarities and the regulative background used by the countries which will be covered during the following chapters.

CHAPTER 3. NATIONAL LEGISLATIONS

Due to the fact that the applicability of the competence-competence principle and its interpretation are mostly based on the approach taken by each individual country, it is worthwhile to analyze the experiences of the local countries and the current regional framework in conjunction with the case law. The major objective is to identify the procedures that were observed and, in addition to the aforementioned, compare and contrast them. The following nations, among others, will be covered in this chapter: France, Sweden, Georgia, and Lithuania

3.1 Standards of the review used by the courts

Why is the preceding question important? As we have gone over in the past, in actuality, the fact that the applicability of the Competence-Competence principle and the breadth of the interference from the courts' side are not controlled, hence above creates an open door for maneuvering since there is grey area for wiggle room. The term "maneuvering" refers to the fact that the court has the ability to apply alternative criteria for review depending on the motions it makes on its own, which are unrestricted and unregulated. The standard of review has a close relationship and a direct link with the powers that are utilized by the courts during the proceedings. As was indicated before, the principle is not regulated, thus it is up to the court to decide whether the parties should place limits on themselves or allow for a wide variety of choices. The following criteria for the review stand out in light of the practices prevalent in the countries:

Table No.1- Standard of the review

Standard of the review	Meaning	Countries that are using
Prima Facie	The phrase in Latin from which the official meaning is derived means "at first sight," which is what the term implies. The court's review is quite narrow in scope, and it does not delve very thoroughly into the merits of the case. Instead, it focuses solely on the general issues,	France, Japan, Spain, United States, India, Mexico, Austria, Netherlands, Venezuela, Plilippines[81].

[81] '' UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards'', UNCITRAL, accessed 2 March 2023, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf

	such as whether or not the arbitration clause in the agreement is addressed, and if it is, whether or not it is legal [80].	
De Novo	The literal translation of the phrase in Latin means "from the beginning," [82]therefore the official meaning can also be translated as "a new." Mention is inextricably linked to the in-depth and all-encompassing investigation of the case that was conducted. Therefore, the interference of the courts is quite broad: taking into consideration the reviewing of all of the issues related to the case, creating the impression that the ongoing case is being heard for the very first time; as a result, the courts go much deeper than simply reviewing the validity and existence of arbitration agreement.[83].	Italy, Germany, Georgia, Sweden.

First, it should be noted that both standards have the right to exist to the extent that the New York Convention does not limit either. Accordingly, it is worthy to shortly mention some peculiarities of the principle and how does each of you affect the proceedings itself, alongside the pros and cons of the principles as well. Most importantly, *Prima facie* review guarantees the purpose of the Competence-Competence principle to the extent that the arbitrators are the first ones who are

[80] Cambridge Dictionary, accessed 10 April 2023, https://dictionary.cambridge.org/us/dictionary/english/prima-facie
[82] Oxford reference, accessed 10 April 2023
https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100345150
[83] Legal information institute, Cornell law school, accessed 24 April, 2023
https://www.law.cornell.edu/wex/de_novo

deciding on their jurisdiction. Secondly, the country's local legislative frameworks often allow for the possibility of challenging the arbitration decision in court, including the validity of the arbitration agreement. For example, according to the law of Georgia, article 16.5 of the law of Georgian on Arbitration states the above[84]. In addition, the court is frequently able to make use of the facts and circumstances that were uncovered throughout the course of the arbitration proceedings. On the other hand, regarding the full review from the courts side, the proponents are largely focused on cost-effectiveness objectives. What exactly does the afore-mentioned entail? A priori their arguments are dramatically based on and addresses the prevention of double waste of costs, time, and resources. More specifically, if the court examines only in general terms and does not touch upon the grounds of validity, there will always be a risk that the enforceability and legality of the arbitral award will be questioned, and the court will have to vacate the above. Hence the potential risk of costs, risks, and wasted energy are presumed[85].

Below are some positive sides of *Prima Facie* standard of review:

Adopting the *prima facie* standard of review increases judicial efficiency by reducing the workload of appellate courts. The *prima facie* standard enables appellate courts to concentrate their resources on cases with a genuine need for review, such as those involving significant legal errors or issues of public importance.

The *prima facie* standard of review encourages judicial restraint and acknowledges the principle of separation of powers. It ensures a proper balance of power between the judiciary and decision-makers at the lower level by limiting the interference of higher courts in the decisions of lower courts and tribunals.

Increasing Consistency: Deference to the decision of a lower court or tribunal increases consistency in the application of the law. It discourages appellate courts from making arbitrary or inconsistent decisions and promotes predictability and stability in the legal system.

The *prima facie* standard of review preserves the finality of decisions rendered by lower courts or tribunals. It emphasizes the significance of parties having certainty and being able to rely on the initial decision-maker's decisions. Restricting the ability to appeal or reverse decisions encourages parties to accept the outcome and move forward, thereby avoiding unnecessary delays and expenses.

The *prima facie* standard of review is consistent with the principle of procedural fairness. It recognizes that parties have the right to a fair hearing and that decisions made by lower courts or

[84] ‘’Law of Georgia on Arbitration’’- Art.16

[85]Frédéric, Bachand. "Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?" *Arbitration International 22*, no. 3 (September 1, 2006): 463-476.

tribunals should be accorded deference and weight unless there are clear and compelling reasons to overturn them.[86]

3.2 Arbitration and the principle of competence-competence under French Law

France is considered one of the most arbitration-friendly countries within the European Union. The reasoning behind the above is inextricably connected with legislative, practical provisions and actions set by both formal-on a governmental, and non-formal level.

On an official level, everything started in the early twentieth century. In particular, with the Napoleonic codes, ''Code de Procédure Civile'' and the ''Code de Commerce'' although they contained the provisions regarding the arbitration, it offered only limited scope of the review. The main success regarding the arbitration began in 1980, 1981 and the decrees that passed are called as, revolutionary'' since they have the drastic and the most essential impact on the process of development the arbitration proceedings and linked legal framework. Below are some takeaways of the listed decrees- 1980 Decree No. 81-500 of May 12 1981:

- Private autonomy and liberty of the contracting parties;
- Negative effect of the competence-competence principle, meaning that the limitation of the courts' power to intervene into the arbitration proceedings.
- Rule on the validity of the arbitration and arbitral tribunal's jurisdiction as well, reflecting the positive effect of the Competence-Competence principle.

Furthermore, it should be noted that France was one of the first countries that acknowledge, respect, and recognize the New York Convention. More specifically, France adopted, and the convention, as mentioned earlier, officially went into legal force on September 24 1959. Additionally, France has ratified the following conventions:

- European Convention on International Commercial Arbitration-21 [87]April 1961;
- Washington Convention on the Settlement of Investment Disputes-18 March 1965.[88]

Although the paramount importance of the UNCITRAL model law, France has not yet adopted the aforementioned.

Back to the history of the arbitration, a watershed moment goes to the reform made in 2011 with the listed decree-Decree No. 2011-48 of January 13 2011. Amendments in the existed law can be shortly represented through below:[89]

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[86] Born, *op.cit.,* 56-58

[89] Nathalie Marie-Pierre, Potin'' Comparative study of the context of arbitration and the powers and duties of arbitrators in the light of English, French, Scottish law and the ICC Rules'', Doctoral Dissertation, The University of Edinburgh, accessed 10 March 2023, https://era.ed.ac.uk/handle/1842/21469?show=full

- Reflecting the courts' supportive approach towards the arbitration and in particular, arbitral tribunal;
- Principle of Estoppel has been established;
- Simplification of the obtainment of the courts' review regarding the award.

Moreover, the importance of the ICC should be emphasized once again. As a leading trade center, having the headquarter in Paris, creates France even more attractive.

Thus, according to the all-abovementioned historical background, we can sum up and indicate that French system has a number of revisions, decrees, and trials to systemize the arbitration framework as it is now. Thus, it is worth mentioning current conditions. To begin, for our purposes, Code de procédure civile- Code of Civil Procedure of France should be discussed in connection with the Competence-Competence principle[90].

The Code of Civil Procedure is the major legal source that dedicate a high intensity of attention to the arbitration and the peculiarities which can be foreseen in the process of the arbitration proceedings itself. The key provisions are set under book four (4), bearing in mind the provisions from Article 1442 until Article 1507. The following topics are covered: Arbitration clause, compromise, standard rules, arbitration proceedings, arbitral award, means of review, international arbitration, recognition, and enforcement of foreign arbitration awards[91]. As we can interpret from above, the French Arbitration legislation strictly differs, and the line between domestic and International Arbitration is precisely pointed out since different provisions set by the law are applicable for each procedure, separately.

Regarding the Competence-Competence principle, initially the French legislators are acknowledging both, positive and negative effect of the principle. Not only acknowledging, but also guarantying the protection as well. In particular, article 1465 of commercial code of procedures refers that the tribunal has expressly mentioned- ''exclusive'' jurisdiction to rule on its jurisdiction[92]. On the other hand, the code recognizes the negative effect of the principle and states the below: "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"[93]. As we can see from the above, the principle is not absolute, meaning that there are several conditions when the court can interfere in the principle and accordingly, rule on the jurisdiction. Above are represented below:

[90] Denis J. Bensaude, ''FRANCE - WORLD ARBITRATION REPORTER'', 2021, accessed 2 March 2023, https://arbitrationlaw.com/library/france-world-arbitration-reporter-war-2nd-edition
[91] ''Code of Civil Procedure'', France, accessed 10 March, 2023, https://allowb.org/acts_pdfs/CPC.pdf
[92] Ibid:169
[93] Ibid.

- Arbitral tribunal is not yet seized; And Vica Versa- meaning that it is accepted that if the arbitration proceedings are started already, court can not rule and directly treat themselves incompetent[94].
- Arbitration agreement is manifestly null or manifestly unenforceable;
- Granting the interim measures.

Alongside CPC, The Civil Code of France [95]should be discussed. In particular 2059, 2060, and 2061 provisions that are regulating the arbitrability powers, generally, but the regulation is not that bold as CPC.

Alongside the legal framework, courts are having the paramount effect and influence on the legal system. Their interpretations, decisions, and each word has the significant impact on the applicability of the provisions per se. Firstly, regarding the frame of the types of courts, the following should be mentioned:

Regional courts, District courts, Local courts, Commercial courts, courts of second instance (cours d'appel), and the most important The Court of Cassation (Cour de cassation), since the latter represents the supreme court of France that, is the main responsible body in the process of interpreting the legal terms, implementing the specific approaches, and reaching the uniformity among the case law's practices[96].

Regarding the Competence-Competence principle, the practice of the court is quite solid and constant. The court does appreciate the significance of the principle and mainly, stands with the position that courts' interference in a best possible scenario-should not be, and as a maximum-should be extremely limited. What I am meaning by ''extremely limited''- it should be *Prima facie* standard of review, that means hearing only basic grounds, without the deeper merits of the case, just the issue of the existence of the Arbitrational clause in the agreement and accordingly, the validity of the clause.[97]

Following case law is the real representation of the above-mention statements. In particular, below listed cases- Carbon Impact [USA] v. Structil [France][98], and aviosa Chimica Mineraria [Italy] v. Afitex [France[99]] where the several drastic grounds regarding the Competence-Competence principle have been addressed, solved, and interpreted. In both cases, the significance of the Arbitrators power to determine on their jurisdiction have been safeguarded.

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[94] Born, *op.cit.,* 57
[95] ''The Civil Code of France'', France, accessed 1 April, 2023, https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf
[96] Courts' system in France, accessed 10 March 2023, https://e-justice.europa.eu/18/EN/national_ordinary_courts?FRANCE&member=1
[97] Born, *op.cit.,* 81-85
[98] Jennifer Kirby and Denis Bensaude, ''View from Paris'', MEALEY'S International Arbitration Report, Vol. 24, 5 May 2009, 2-6
[99] Ibid.

Does the above mean that the courts' practice would remain the same for all of the cases? The answer to the above-mentioned question is apparent and states- no, due to the recent developed case law, that creates a lot of ambiguous questions, doubts both in the legal framework lever, and the field professionals circle as well[100]

The following question is a quite challenging:

3.2.1 Can French courts go beyond the *Prima Facie* review of the Competence-Competence principle?

Under this question, the remarkable decision made by the French cessation court should be discussed. I would like to shortly discuss the main factual grounds and the issue of the present case. The parties got into the binding agreement, in particular the Spanish company was obliged to provide the tax and legal services to the counter-party-French resident. Under the precontractual phases, several modifications of terms and conditions have been drafted. Moreover, since the parties represented the different countries, therefore, agreements were bilateral, meaning that clauses were concluded both, on Spanish and French Languages. Parties agreed that the applicable dispute resolution mechanism would be Arbitration, in particular Spanish Arbitration Centre. When the dispute raised, the party referred to the court proceeding, which was objected by the counter-party, but the court dismissed the claim due to the peculiarities of the case. Thus, the court did not recognize the negative effect of the Competence-Competence principle. This decision afterward was brought to the cessation court under French law. As we have already discussed, generally, French courts conduct only a *Prima Facie* review standard of the case. Thus, only the general, limited scope of the review is more than enough for the courts to be used, but in the present case, the court of cessation used *De Novo* standard of review and moreover, made the variety of remarkable changes. These modern, new approaches questioned the existing, uniform practices and understanding of the competence-competence and its negative effect applicability. In particular, the following two principles contradicted each other in the case:

On the one hand, the principle of Competence-Competence, and on the other hand, Consumer law and the protection of the consumers per se. Court raised the question regarding the interference in the mentioned principle due to the public order. Thus, the court went way further than typically the *Prima Facie* review is understood. Therefore, what is the outcome, and does the present case change anything regarding the local law? It should be noted that the case is recent, bearing in mind the date of the execution, which is 2020 year. Meanwhile, the field professionals are concerned,

[100] CMS, ''International Arbitration Law and Rules in France'' accessed 10 April 2023, https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/france

and they have made a variety of summaries with the imminent influence on the principle of the Competence-Competence itself[101].

3.2.2 What could be the consequences of the recent French case law?

To shortly assess the above question, we should consider the following imminent consequences:

- The weakening and diminishing the impact and the influence of the Competence-Competence principle.
- The case accurately represents that even the solid, constant, established and unchanging case law can be altered if the local legal framework permits some degree of legal maneuverability.
- The imminent ambiguities regarding the scope of the allocation of the balance between the state courts and the arbitral tribunal.

In conclusion, in accordance with French legislation, the future of the principle is uncertain, despite the fact that France was (and still is) regarded as one of the countries that offers the most favorable and attractive conditions in terms of international commercial arbitration. Therefore, the pertinent question that has been posed is as follows: If we are confronted with the previously described crucial grounds under French Law, what may be anticipated from the local viewpoints of the various nations that are less developed in regard to alternative dispute resolution mechanisms- alternative dispute resolution? Is it a stalemate for arbitration and alternative dispute resolution in general?

3.2.3 Interview with field professional regarding French approach towards the Competence-Competence principle

A special interview has been undertaken with the field professional, Hannah Dickson, an in-house lawyer, in order to examine the practical implementation of the competence-competence principle under French jurisdiction. This was done in order to determine whether or not the principle has been practically implemented. The majority of her work is done in connection with the following company, eCential Robotics, where she serves as a board member and as a legal consultant. In addition to her work as a lawyer, she also holds a lecturer position at the University of Savoie Mont Blanc. As a result of the fact that she has been actively engaged in international business and related activities, she has accumulated significant and important experience; hence, the interview

[101] Par Laurent-Fabrice Zengue, ‘*’New impact of competence-competence principle in international commercial arbitration*’’, 2021, accessed 10 April 2023, https://www.village-justice.com/articles/nouvel-impact-principe-competence-competence-sur-arbitrabilite-consumeriste,40946.html

has developed into a credible source for the research issue. The following are the most important things that learned from the interview:

- The idea of competence, as the practitioner points out, is crucial in French arbitration law. Article 1465 of the French Code of Civil Procedure codifies it. According to the idea, the arbitral tribunal has exclusive competence to rule on disputes relating to its own jurisdiction. This principle is vital for ensuring the efficacy of the arbitration procedure since it precludes courts from interfering with an arbitral tribunal's jurisdiction unnecessarily. The autonomy of arbitration is highly supported by the French legal system.
- The practitioner refers to French legislation, specifically Article 1448 of the French Code of Civil Procedure, which states that if a dispute subject to an arbitration agreement is brought before a court, the court must declare itself incompetent, unless the arbitral tribunal has not yet been seized and the arbitration agreement is manifestly null or unenforceable. In other words, unless the arbitration agreement is clearly illegal, French courts normally defer to the arbitral tribunal's jurisdiction.[102]
- In terms of current legal loopholes, French law is primarily designed to limit court intervention in arbitration proceedings. Some locations, however, may still be deemed "grey areas" or possible conflict zones. For example, if a party challenges an arbitral tribunal's jurisdiction and the arbitral tribunal decides that it has authority, the losing party may petition a French court to vacate the award on the grounds that the tribunal lacked jurisdiction. The French court may then decide whether or not to accept the arbitral tribunal's decision on its own jurisdiction. This dual evaluation of arbitral jurisdiction can result in disagreements or contradictions in some situations.
- Regarding the standard of review used by the French courts, the lawyer states that mainly the court is using *Prima Facie* review standard, when deciding whether or not to defer to the arbitral tribunal’s jurisdiction. In other words, the court is only determining if the existing arbitration agreement is manifestly invalid or unenforceable, so evaluating just general grounds. It has the direct effect, meaning that if the court foresee that if arbitration agreement is not *prima facie* evident, due to the significance and high recognition of the competence-competence principle, the court itself will refer and defer to the arbitral tribunal to determine their jurisdiction per se.
- While acknowledging the existing above-mentioned, grey’’ areas, the possible solutions to fill the gaps and overcome the obstacles have been discussed. One of the major one is reflected into the harmonization. As the lawyer states, adoption of common regulations,

[102] French Code of Civil Procedure- art-1448

procedures, and standards pertaining to the principle will aid in harmonizing practices and ensuring predictability in international arbitration. It may help to balance the separation of powers between the courts and the arbitral tribunal by creating clear criteria for when the courts may interfere. However, the respondent believes that the practical execution may be challenging. Arbitration is approached and seen differently in different legal systems around the world. A global agreement may necessitate considerable diplomatic and legal reform efforts. Even if a uniform standard can be established, it may be difficult to enforce. States would have to include such a standard into their national legislation and ensure that it is correctly applied by their courts. This procedure could be time-consuming and costly. Furthermore, a procedure for resolving disagreements or doubts about the standard's interpretation would need to be established, which could lead to litigation. Furthermore, one of arbitration's benefits is its adaptability and flexibility. Rigid regulation may jeopardise this adaptability and flexibility. As a result, harmonization efforts must be carefully weighed against the necessity for arbitral flexibility.

3.3 Arbitration and the principle of Competence-Competence under Swedish Law

Sweden represents one of the solid countries regarding the appreciation and recognition of Arbitration as alternative dispute resolution (ADR) mechanism. Not only theoretical grounds are solid, but also the practical implementation, meaning the developed progress of the cases that have been concluded by Arbitral proceedings. According to the one of the prestigious arbitral Centre called Swedish Chamber of Commerce in 2022, 143 new cases were registered[103]. In order to determine the progress made by the country, we should shortly dig into the historical background and mention the key factors promoted the evolution of the field.

Firstly, the term ‘’Arbitration’’ was barely seen, merely the term ‘’entrusted persons’’ was used. For instance, according to the The Swedish Enforcement Code, article 1734 stated that parties could refer a dispute to entrusted persons[104]. After the trial of the several arbitration act, the most essential one entered into the force on April 1, 1999 called Swedish Arbitration act.

Regarding the international conventions, Sweden ratified the New York Convention in 1972, January 28, and the convention entered into the legal force a bit later, in particular, April 27,

[103] SCC Arbitration Institute, ‘’Statistics about the Arbitration’’, February 2023, https://sccarbitrationinstitute.se/en/about-scc/scc-statistics -
[104]CMS ‘’International Arbitration Law and Rules in Sweden’’, accessed 10 January 2023, https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/sweden

1972[105]. Also, the country is the party of The Convention on the Settlement of Investment Disputes between States and National of Other States 1965 (ICSID Convention).

Concerning the UNCITRAL Model Law on international commercial arbitration, Sweden has not officially implemented, but the provisions and legal approaches used in the Swedish Arbitration Act are extremely similar to the Model law, therefore, the influence is easily readable.

Moreover, it is worth noting that the Stockholm chamber of commence was founded in 1917. The organization represents one of the most core body while assessing the disputes and the matters connected to the international and domestic arbitration. The popularity and the prestige of the SCC is easily represented through the below figures: approximately 200 disputes between the parties from 50 different nationalities. The overall value of the disputes in 2021 reached two billion euros[106].

What is important for our aim is the attitude regarding Competence-Competence Principle. Firstly, Section 2 of the Swedish Arbitration Act precisely mentions the principle. In particular, acknowledges the positive effect of the principle, meaning that ''the tribunal may rule on their own jurisdiction to decide the dispute''[107]. As we are already aware, the positive effect of the principle is more less uniformly accepted, the main issue goes with the negative acceptability. Regarding the negative effect of the principle, the Swedish Arbitration Act on the same section states that: ''The arbitrators may rule on their own jurisdiction to decide the dispute. If the arbitrators have rendered a decision finding that they have jurisdiction to adjudicate the dispute, any party that disagrees with the decision may request the Court of Appeal to review the decision. Such a request shall be brought within thirty days from when the party was notified of the decision. The arbitrators may continue the arbitration pending the court's determination''[108]. Moreover, clause 4 of arbitration act tries to safeguard the competence-competence principle and forbids the state court to interfere in the proceedings after its commencement. Above is not absolute, hence the certain exceptions exist, for instance: dispute between consumer and a business entity[109]. Thus, regarding the principle Sweden is using *De Novo* approach. Thus, the courts possibility to interference into the Arbitral proceedings are quite high. Firstly, the moments when, on what stage, the court can interfere should be assessed. According to the provisions set under the Swedish Arbitration Act, courts power is not limited with the stages, meaning that the court can rule on the jurisdiction either when the arbitration proceeding is commenced, or even without any arbitral

[105] Information about Sweden and New York Convention relations, accessed 10 January 2023, https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1750
[106] SCC, *Supra note* 103
[107] ''Swedish Arbitration Act'', Sweden, accessed 10 April 2023, https://sccarbitrationinstitute.se/sites/default/files/2022-11/the-swedish-arbitration-act_1march2019_eng-2.pdf
[108] Ibid.
[109] Ibid, sec-4

proceeding's commencement[110]. The listed judgement indicates the afore-mentioned: Supreme Court in cases NJA 2010 s. 508[111].

3.4 The Competence-Competence principle under Georgian Law

Georgia is a developing country that is getting acquainted to the European Union and the principles and approaches used within the EU and international arena. Alternative dispute resolution mechanisms (ADR) are novel and quite fresh for the country. In particular, the first binding legal act entered into legal force in 1997. The first trial to regulate the arbitration proceedings had drastic impacts; in particular, the above needed to be defined in detail. The legal act granted only the right to commence arbitration proceedings without further clarification. Therefore, people were mainly using the ADR for the only purpose of validating illegal actions. Georgia's desire to shift the focus to creating an attractive and favorable environment for the investment and the trade itself led to essential changes, including the refinement of Arbitration, since the last was supposed to be one of the primary criteria for the inventors to choose the country and therefore, jurisdictions to invest inside due to the high degree of safety, security, and guarantees. For afore-mentioned purpose, the legislators enacted the new law on Arbitration in 2009. The provisions set by the law directly represent UNCITRAL Model law on international commercial arbitration proceedings. Thus, the country decided to follow the practice and the values laid down under the Model law. Moreover, Georgia is the signatory country of the New York Convention, and the recognition and enforcement of foreign awards are specifically regulated under the scrutiny of the Supreme Court of Georgia, the most prestigious and essential instance, primarily aiming to maintain the consistent legal practice and make the paramount interpretations of the legal norms and the practices itself[112].

Regarding the competence-competence principle, both- positive and negative effect of the Competence-Competence is reflected under the Georgian legal framework. The provisions laid down under the Model law is directly represented, in particular, according to the chapter 9, article 1 of the law on Arbitration of Georgia:

'' A court before which an action is brought in a matter that is the subject of an arbitration agreement, based on a request of a party that is made before the expiration of the time for submitting a statement of defense, is obliged to terminate the proceedings and refer the parties to

[110] Jurgita Petkutė-Guriene, ''The Competence-Competence Principle in Commercial Arbitration: a Comparative Analysis'', Social Transformations in Contemporary Society, 2017 (5) ISSN 2345-0126.

[111] ''Case No. Ö 2301-09/NJA 2010 s. 508'', Supreme Court of Sweden, 2010, accessed 2 April 2023, https://www.arbitration.sccinstitute.com/Swedish-Arbitration-Portal/Supreme-Court/The-Supreme-Court2/The-Supreme-Court/d_952269-judgment-of-the-supreme-court-of-sweden-12-november-2010-case-no.-o-2301-09nja-2010-s.-508

[112] Information about Georgia, accessed 10 April 2023 https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=576&opac_view=-1

arbitration, unless it finds that the agreement is void, invalid or incapable of being performed''[113]. Hence, overall, the following requirements should be met in order to safeguard the principle of Competence-Competence and from the courts' side to refer the arbitral tribunal to determine its jurisdiction:

- Statement of the defense made by the counter-party;
- The deadline to file the objection- that is set under the Civil Procedure code of Georgia and differs from 14 to 21 days[114];
- The dispute by its nature could be settled under the arbitration. It should be noted that there is no unified exhaustive list regarding the topics that could not be revolved by the mean of the arbitration, as dispute resolution mechanism, however, the different kind of legal acts are mentioning the specific nature disputes can be solved by only the court proceedings. For instance, Tax Code of Georgia specifically mentions that tax related disputes can be solved by only the Court proceedings. Even though the article does not mention anything about the Arbitration, the limitation itself indicates the above.
- The written form of the arbitration should be met;
- The consent from the parties to use arbitration as their dispute resolve mechanism;
- The arbitration agreement should not be invalid, inoperative or incapable of being performed;[115]

Concerning the principle of Competence-Competence, Georgia strictly follows the *De novo* standard of review, meaning that the court is reviewing the dispute on the merits, not only the reassuring that the valid arbitration agreement exists and the form requirements are met, but also the consequences, conditions, terms, pre-contractual relationships, etc. The following cases are the direct representation of the above-mentioned statements: Appeal court of Georgia, Case No- 2B/3055-11, Appeal court of Georgia, Case No- 2/4781-15[116], where not only the written form of the arbitration agreement has been discussed, but also the conditions, the pre-contractual relationships, etc. Moreover, the court emphasized the importance of the Competence-Competence principle. It was stated that interference with the arbitration agreement does not preclude and negate the significance of the above and on the contrary, it has the leitmotiv to protect and safeguard the arbitration agreement and accordingly, the parties will.

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[113] ''Law of Georgia on Arbitration'', Georgia, accessed 4 April 2023, https://matsne.gov.ge/ru/document/download/89284/5/en/pdf
[114] ''The code on Civil procedure'', Georgia, 2008, accessed 2 April 2023, https://matsne.gov.ge/en/document/download/29962/92/en/pdf
[115] Ibid.
[116] Atbitration Initiaitive Group, *''Guide in Arbitration''*, UNDP GEORGIA: 2017, accessed 10 April 2023, https://www.undp.org/sites/g/files/zskgke326/files/migration/ge/UNDP_GE_DG_Arbitration_Guide_for_Judges_geo.pdf

3.4.1 Interview with the field professional regarding the Georgian legal framework on competence-competence principle

An extensive interview with a local expert named Ucha Todua, who is also the main leading person regarding the international platform, was carried out in order to determine the specifics and peculiarities of the principle. Ucha Todua is the current Judge at state court of Tbilisi with civil matters, alongside the judging, he is an invited lecturer at Ilia State University. Moreover, he has been leading person in the process of enactment and development of alternative dispute resolution mechanism in the scrutiny of Georgia. In terms of the characteristics of the interview, the one that was stated above lasted for a total of thirty minutes, and during that time, a field expert responded to a series of specific questions (which are listed in Annex 2). In light of the findings of the interview, the following assertions can be summed up as follows:

- The environment that Georgia has created in reference to the competence-competence principle is rather new and fresh.
- Arbitration is viewed in Georgia as a potent instrument that may bring about various significant and necessary changes in the internal environment of the country. In particular, as a result of the exceptionally large number of cases, the deadlines set for the proceedings are frequently disregarded. In fact, according to the statistics that were compiled by IDFI, in the city court of Tbilisi between the years 2015 and 2018, the deadlines for 4,660 civil cases and 5,601 administrative cases were breached[117]. Since the country seeks and tries to make state courts more efficient, and since the new alternative dispute resolution mechanism is being established, which means that a large number of civil cases is being the subject to the examination of Arbitration, the state intends to make state courts more efficient. Second, Georgia wants to establish an environment that is welcoming to businesses and transform itself into an industrial hub; hence, having arbitration as a mechanism for conflict resolution is a particularly profitable and effective tool that can be used in afore-mentioned process.
- The number of cases decided by arbitration is relatively low for a number of reasons, including the following: society is unaware of the benefits of arbitration; there is a lack of competent arbitrators; the power and existing prestige of state courts; the imminent possibility for state courts to interfere in the arbitral proceedings; the complexity of enforcing arbitral awards and the power granted to state courts; theoretical legislation has been modified and is in line with current practises; Georgia is a signatory to a number of

[117] Institute for Development of Freedom of Information, '*'The practice of the courts 2015-2018 years''*, accessed 10 April, 2023, https://idfi.ge/public/upload/Deadline%20Compliance%20in%20Tbilisi%20City%20Court.pdf

international conventions, including the New York Convention and the International Centre for Settlement of Investment Disputes Convention.

- The legislation, specifically the Georgian arbitration act, governs how the workload is divided up between state courts and arbitral tribunals. This helps maintain a healthy balance. This provision is precisely identical to the one that is provided by the UNCITRAL Model Law on International Commercial Arbitration.
- There is a shortage of scientific information pertaining to the Arbitration, in addition to the aforementioned characteristics. In actual practise, both of these alternatives are encountered frequently: Either there is no information available at all, or the information that is available is glaringly inaccurate.
- In the real of arbitration, the important powers, particularly in regard to the competence-competence concept, are held by state courts. As a result of the fact that the courts only apply the *De Novo* standard, the court is conducting an in-depth analysis of the case.
- It should also be pointed out that, in general, the degree of public trust is the most significant aspect in the stage of maintaining the sustainability of any process. Given the preceding, it is critical to have an understanding of the degree to which society places its faith in the institution of arbitration. How widely does the general public agree that arbitration is effective, how independent is it, and how unbiased is it? It is sufficient to read the "Review of Legal and Practical Aspects of Arbitration in Georgia" that was released by the UNDP in order to understand the genuine responses to the questions that were posed earlier. In this document, the researchers provide a detailed explanation of each of the situations that were discussed earlier. Very few individuals and business entities are familiar with the concept of arbitration in general. Even fewer of them are aware of the procedural concerns that characterise the alternate dispute resolution process that is now in place, in particular competence-competence should be emphasized. The aforementioned factors contribute to a lack of information. As a result, it is required to put some pertinent steps into effect in order to address the existing problem. These actions will primarily concentrate on the general public and will, to some extent, assist to boosting the general population's level of awareness of the institution of arbitration.
- The respondent is of the opinion that the methods that are currently in use need to be revised. The modification of scientific information ought to be the initial step in the reform process. The intervention of state courts need to be restricted to the greatest extent practicable. Arbitrators ought to be at liberty to choose the scope of their own jurisdiction. For the purpose of making day-to-day progress towards the implementation of the

Competence-Competence Principle, the court ought to make use of the *Prima Facie* standard of review.

3.5 The competence-competence principle under Lithuanian law

Within the context of this study, I would like to take into consideration not only the nations who have already established themselves as the primary centers of commerce, but also the nations that are in the process of experiencing the aforementioned transition. For instance, Lithuania is a prime example of a nation that makes it a point to advance on a daily basis in order to ensure that the environment in which investors, corporations, and businesses in general do business is one that is appealing, effective, and inviting.

As a consequence of this, it is of the utmost importance to determine the level of both the country's legal and practical experience with arbitration, as well as the country's overall understanding of the Competence-Competence principle.

Concerning the legal framework, the following acts are the most essential ones:

- 1992- Convention on the settlement of Investment Disputes between States and Nationals of other states;
- 1995- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- 1996- Law on Commercial Arbitration. [118]Moreover, the present act was amended in 2012, changes were made in order to strengthen the influence of UNCITRAL Model Law on International Commercial Arbitration, bearing in mind that the all of the provisions should be seen under the scrutiny of UNCITRAL Model Law. Even though the significance of the UNCITRAL, Lithuanian legislators dare to offer some additional, different, novel ruling than the provisions mentioned under the Model Law. One of the examples would be discussed below.

The fundamental act from the Legislative perspective is the Law on Commercial Arbitration, in particular Article 19 that rules on the Competence on Jurisdiction. The present article grants Arbitral Tribunal not only the right regarding the positive effect of the doctrine, but also, the right to rule on their jurisdiction in extreme circumstances- such as conditions facing the doubts regarding the existence or validity of arbitration agreement. Mentioned is a novel and innovative approach, since the countries are mainly referring the following sentence, ‘’unless it finds arbitration agreement null, void, inoperative or incapable of being performed’’. Therefore, since

[118] ‘’Law On Commercial Arbitration’’, Lithuania, 2012, accessed 10 April 2023, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/35954312dcb311e6be918a531b2126ab?jfwid=

that sort of right is expressly indicated in the main act, it is worth investigating the courts' approaches and legal practices concerning the Competence-Competence principle and the level of the recognition of the powers of arbitral tribunal. [119]

The general approach used from the courts' side is the following principle: Favorem Contractus, which is the representation that the courts are attempting to safeguard and protect the intentions that existed at the exact moment of concluding the contract, thereby, keeping and preserving the bond of the contractual relationship[120]. As a result, the aforementioned is respected and acknowledged by the courts if the parties agree to settle their issues through the use of alternative dispute. The following cases significantly represent the above statements: civil case No. 3K-3-431/2013 dated 2 October 2013[121]; civil case No. 3K-3-545/2009 dated 1 December 2009[122]; civil case No. e3K-3-173-469/2020[123], dated 27 May 2020. However, the courts' current practices are creating doubts about the consistency of the courts' approaches. To evaluate the above, the following case law should be briefly discussed:

Civil case No. e3K-3-343-916-2019, dated 14 November 2019[124]- is one of the most controversial due to the following grounds:

The Supreme Court of Lithuania held the case. According to the Judicial system framework of Lithuania, the Supreme Court of Lithuania is the only cassation body. Moreover, the court's primary purpose is to guarantee uniform and standardized legal practices alongside vital interpretations. Therefore, the courts' influence on legal grounds is significantly drastic.

The issue of the case: Shipment of the goods. Parties: Austrian and Lithuanian companies. The thing that is important for our aims is the following: The defendant argued that standard clauses of the main contract existed between the contracting parties, including the provisions regarding the Arbitration- the settlement of the disputes, thus the arbitral tribunal should have been the one deciding on their jurisdiction, not the courts itself. In the first two instances, bearing in mind the Court of First Instance and the Court of Appeal agreed that there was no agreement between the parties regarding the Arbitration, and accordingly, courts had the power to hear the case.

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[119] Ibid, art-19

[120] Bertlam, Keller ‘*’Favor Contractus’’*, accessed 12 April, 2023 https://iicl.law.pace.edu/sites/default/files/bibliography/keller1.pdf -

[121] ‘’Flight Test Aerospace INC v. UAB AK Aviabaltika ‘’, Supreme Court of Lithuania, 2013, accessed 1 April 2023, https://newyorkconvention1958.org/index.php?lvl=notice_display&id=3666&opac_view=2

[122] ‘’Fez developments limited v. UAB Vici Logistika’’, Supreme Court of Lithuania, 2009, accessed 10 January 2023, https://eteismai.lt/byla/42648525213793/3K-3-545/2009

[123] Tadas Varapnickas, and Patricija Rukstelyte, ‘*’Lithuania's Aspirations to Become a preferred Seat of Arbitration: Is it Ready Yet?,* 2020, accessed 1 April 2023, https://arbitrationblog.kluwerarbitration.com/2020/09/23/lithuanias-aspirations-to-become-a-preferred-seat-of-arbitration-is-it-ready-yet-2/

[124] Ibid.

The defendant relied on an aforementioned legal principle as "competence-competence" and asserted that the Supreme Court of Lithuania lacked the authority to judge whether or not the Arbitral Tribunal possessed the necessary qualifications to execute its job. Article 19.1 of the Lithuanian Law on Commercial Arbitration was the most important provision that the defendant relied on in its defense. The condition that was just described gives the arbitral tribunal the authority to rule on their own jurisdiction, even in situations in which questions are raised about the legality or existence of the arbitration agreement. Regarding the position taken by the Supreme Court of Lithuania, it should be noted that the court conducted an extensive review, which means that:[125]

Even though the provision indeed contains that sort of wording, the power of the Courts to rule on the validity of the arbitration agreement is not diminished or precluded in the following two conditions:

1. First, when the issue of the validity of arbitration agreement is under the scrutiny of the courts, meaning- it has been challenged in court;
2. Secondly- Arbitration proceedings have not yet to commenced.

The conjunction "and" placed in the middle indicates that the conditions are stacked one on top of the other, referring and pointing out its cumulative nature. Therefore, in order for above to be effective, it is necessary for both of these things to be presented (The challenge is pending in court, and the arbitration proceedings have not yet begun).

The mentioned ruling and understanding of the principle itself, is quite ambiguous since it contradicts with the supportive approach with the recognition of the competence-competence under the scrutiny of the Arbitral Tribunal powers used by the courts over a decade. Therefore, the future of the principle is not evident. The practitioners content and argue that used approach would not be applied, hence repeated in future cases, however, mentioned lacks the legal certainty and solid argumentation, per se.

3.6 Comparison of French, Swedish, Georgian, and Lithuanian legal and practical approach regarding competence-competence principle

According to the all aforementioned brief review of the theoretical legal framework and the practice developed by the court, the Competence-Competence principle is regulated in all above-mentioned countries, in particular: France, Sweden, Georgia, and Lithuania. As a principle that reflects the effect of a chameleon, bearing in mind the positive and negative impact of the principle, both should be assessed and discussed regarding the comparative analysis. All discussed jurisdictions uniformly and similarly recognize and respect the positive effect of the principle. The

[125] Ibid, art-19.1

laws grant the arbitrator's right to determine their authority. The main difference derives from the applicability of the negative effect. France itself is using the *Prima Facie* review, meaning the limited scope of the court's interference that encompasses only the existence of the valid arbitration agreement, while Swedish and Georgian courts are using the *De novo* standard of review, meaning that the court goes beyond the *Prima facie* review and going through all of the facts and the peculiarities of the case, from the beginning, like the case is being heard for the first time; Lithuania even from the legal framework offers to the arbitral tribunal an exclusive right to rule on their jurisdiction even on the cases where the doubts regarding the validity or existence of arbitration agreement have been raised. Alongside those as mentioned above, the texts under the binding legal provisions are significantly different. Swedish arbitration acts grant various powers, as discussed above in the court, while the French one remains quite strict and offers a limited scope of interference. Georgian legal framework is quite new, thus does not reflect all of the peculiarities of the principle itself.

Sweden and France have similar backgrounds regarding adopting international conventions, meaning the New York Convention, the ICSID Convention, and the European Regulation of Arbitration. Both above-mentioned countries have strong organizations incorporated in their territory, particularly ICC in France and SCC in Sweden. Interest regarding arbitration is relatively high; both countries are trying to become the leading trade center for investment, business, and trade. Thus, the government's concern is deep in that regards. Regarding Georgia, from the perspective of the developing country that is trying to get acquainted with the international standards, country has adopted New York Convention, and ICSID Convention. Regarding the UNCITRAL Model Law on International Commercial Arbitration,officially only Lithuania has adopted, but for French, Swedish and Georgian legislative framework – they all have the direct and evident influence deriving from the UNCITRAL Model Law guidelines. Concerning the Lithuania, country that evolved dramatically and even now, strives to maintain and continue the progress, ICSID Convention[126], New York Convention have been ratified, moreover, the specific law on Arbitration based on the UNCITRAL Model Law has been enacted. Furthermore, the Lithuanian legislative bodies do not hesitate to include novel provisions, different approaches than the ones offered and laid down by the UNCITRAL Model Law on international commercial arbitration. Alongside the Legal frameworks, regarding the practical applicability, we have seen the French and Lithuanian case law deemed to be stable and constant, but due to current case law practice, they are changing the legal standpoint unexpectedly. Recent case law in both jurisdictions indicate that the practices are changing. The challenging question is- what to expect in the future?

Although the practitioners are trying to address the topic, we do not have any relevant sources or proofs. Thus, the future is quite ambiguous and blurred.

3.7 Conclusion regarding the comparative analysis

To summarize, despite the fact that countries share some things in common with regard to the adoption of international legal documents, the day-to-day applicability of the principle is manifestly different between each country, along with the interference of courts and the generally granted powers into the arbitral proceedings.

CHAPTER 4. PARALLEL PROCEEDINGS

When we are addressing the concept of the Competence-Competence, in practice mainly we are dealing with the Parallel proceedings. First, it is worth noting that parallel proceedings are a susceptible topic, especially for international commercial arbitration. We need to define what parallel processes are in general. Afore-mentioned applies to the situation when a dispute is being discussed in more than one body with the involvement of the same parties on one issue. Thus, in practice the following types of parallel proceedings are seen:

• An arbitral tribunal and a state court;

• Two arbitral tribunals;

• An arbitral tribunal and a supra-national court or tribunal[127].

Before directly moving forward to the core factors of the parallel proceedings, we should examine its pros and cons. We should discuss the connection between the AT and the state courts for the present research's aims. One of the core benefits of the bifurcated proceedings is strongly connected with legal certainty since the matter is discussed deeply and by more than one body. However, despite the benefit mentioned above, the bifurcated proceedings are subject to high criticism due to the following grounds:

There is always an increased likelihood that the final outcomes will be in direct opposition to one another whenever the subject matter is considered in two separate bodies (State courts, arbitral tribunal). As a result, there is a significant possibility of inconsistency. Naturally, when the matter is heard by more than one body, the cost, effort, and resources needed are going to be much higher; in fact, they are going to at least double as a result of the duplication. Parallel processes have the high likelihood and imminent potential to cause significant delays, and in addition, they can create hurdles for the arbitration process itself.

One of the most effective measures in order to deal with the parallel proceedings is the Anti-suit injunctions What is meant by above? According to the definition offered by Mrs. Vysudilova ZuZana, ''anti-suit injuctions are interlocutory or provisional measures issued by arbitral tribunals to prevent the parties from initiating or pursuing recourse before State courts or other international tribunals pending resolution of a dispute before a particular arbitration forum''[128]. Hence, above really represents the core tool for balancing the parallel proceedings. However, it is worth noting

[127] Gabrielle Kaufmann-Kohler, ''How to Handle Parallel Proceedings: A Practical Approach to Issues such as Competence-Competence and Anti-Suit Injunctions'', accessed 4 April 2023, https://lk-k.com/wp-content/uploads/How-to-handle-parallel-proceedings-A-practical-approach-to-issues-such-as-Competence-competence-and-anti-suit-injunctions.pdf

[128] Zuzaba, Vysudilova, ''Anti-suit injuctions'', accessed 13 March 2023, https://jusmundi.com/en/document/publication/en-anti-suit-injunctions#:~:text=In%20investment%20arbitration%2C%20anti%2Dsuit,dispute%20before%20a%20particular%20arbitration

that the tool called, anti-suit injuctions'' is spread and strongly linked with the common law countries. Therefore, we can not find them under the civil law countries' legislative scrutiny. The tool used by the civil law countries is called 'Lis pendens''. The term's general essence is associated with the first-time ruling concept. Despite the importance and significance of the above, the principle is not regulated internationally, meaning EU scrutiny. Thus, its practical implementation entirely depends on the county-by-county approach. In that regard, countries mainly refer to the Competence-Competence principle when deciding on the Jurisdiction.

France:

As mentioned previously, France is safeguarding both, positive and negative effect of the Competence-Competence. The following provision is crucial for our aims:
"Where in a dispute regarding which the arbitration tribunal is seised by virtue of an arbitration agreement is brought before a court of law of the State, the latter shall have to decline jurisdiction. Where the arbitration tribunal is not yet seised, the court shall equally have to decline jurisdiction save where the arbitration agreement is manifestly null. In both cases, the court may not raise *ex proprio motu* its lack of jurisdiction ''- Article 1458 , Code of Civil Procedure[129].

Switzerland:

As mentioned previously, with the ''Fomento case,'' even though parallel proceedings have been commenced, the ICC tribunal in Geneva consequently decided and ruled on their jurisdiction, thus finding that they had the proper jurisdiction to hear the case. Therefore, there were no grounds to stay the Arbitral Proceedings. Moreover, one the core reasonings lies down with the Competence-Competence principle.[130] For the better illustrating, below is the relevant provisions:
''1. When an action having the same subject matter is already pending between the same parties in a foreign country, the Swiss court shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognized in Switzerland.
...
3. The Swiss court shall terminate its proceedings as soon as it is presented with a foreign decision capable of being recognized in Switzerland"[131].

[129]Code of Civil Procedure-Article 1458
[130] Adam Samuel, ''FOMENTO - A TALE OF "LITISPENDANCE", ARBITRATION AND PRIVATE INTERNATIONAL LAW'', accessed 3 April 2023, http://www.adamsamuel.com/pdfs/fomento.pdf
[131]''Federal Act on Private International Law'', The Federal Assembly of the Swiss Confederation, 1987, accessed 2 March 2023, https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en

Italy:

For Italy the principle of Lis pendens is not applicable for the arbitration proceedings.

Conclusion

As a summary of the facts, it should be noted that international regulations that provide a comprehensive analysis of the subject matter that has been described do not exist for now. In addition, the dependency and reliance on the county-by-country method as the only source for interpretation continues to be a concern due to the fact that the applicability on a daily basis is subject to significant shifts. Therefore, from a legal viewpoint and position, inconsistency, confusion, and imminent obstructions could be anticipated, particularly with the connection between the state courts and arbitral tribunals. Aforementioned is particularly applicable and accurate in regard to the allocation of the balance between the state courts and the arbitral tribunals.

Due to the factors mentioned above, as a summarized note, international regulations that fully reviews the afore-mentioned topic do not exist. Moreover, dependency and reliance on the county-by-country approach, as the only source for interpretation, remains problematic since applicability in a daily manner is strongly fluctuating. Hence, from the legal perspective and standpoint, inconsistency, uncertainty, and imminent impediments could be foreseen, especially concerning the allocation of the balance between the state courts and the arbitral tribunals.

CHAPTER 5. THE RESULTS AND THE ANALYSIS OF THE SURVEY

The primary purpose of the survey is to elicit responses from legal practitioners regarding their intentions and perspectives regarding international commercial arbitration. In order to achieve this objective, a dedicated survey has been written and sent out to the respondents. The survey has a total of fourteen (14) questions, of which twelve (12) are closed and two (2) are open. The findings are displayed visually through the use of the tables and figures.

5.1 Sample size

It is necessary to conduct an analysis of the survey in conjunction with the sample size in order to establish both the accuracy and the relevance of the results. The term "sample size" is heard rather frequently in the field of statistics. The information presented above mostly reflects the total number of respondents who participated in the surveys that were carried out. The most important objective and the significance of the methodology that was just described can be seen in the following: Both of these statistical features are affected by the size of the sample: 1) the accuracy of our calculations, and 2) the ability of the research to provide meaningful inferences.

According to the sample size and in relation to the survey conducted, we can sum up and reflect the below formula:[132]

Accordingly, the needed formula in order to calculate the sample size is reflected through below:

$$\text{Sample size} = \frac{\frac{z^2 \times p\,(1-p)}{e^2}}{1 + \left(\frac{z^2 \times p\,(1-p)}{e^2 N}\right)}$$

Above mentioned letters should be analyzed according below instructions:

z = 1.96 for a confidence level (α) of 95%,

p = proportion

N = Desired population size

e = The imminent margin of error

z = 1.96,

p = 0.5,

N = 87,

e = 0.05

[132] ‘’Sample Size in Statistics’’, accessed 10 March 2023, https://www.statisticshowto.com/probability-and-statistics/find-sample-size/

$$n=\frac{\frac{1.96^2*0.5(1-0.5)}{0.05^2}}{1+\frac{(1.96^2*0.5(1-0.5)}{0.05^2*87}}$$

$$n=\frac{384.16}{5.4156}=70.935$$

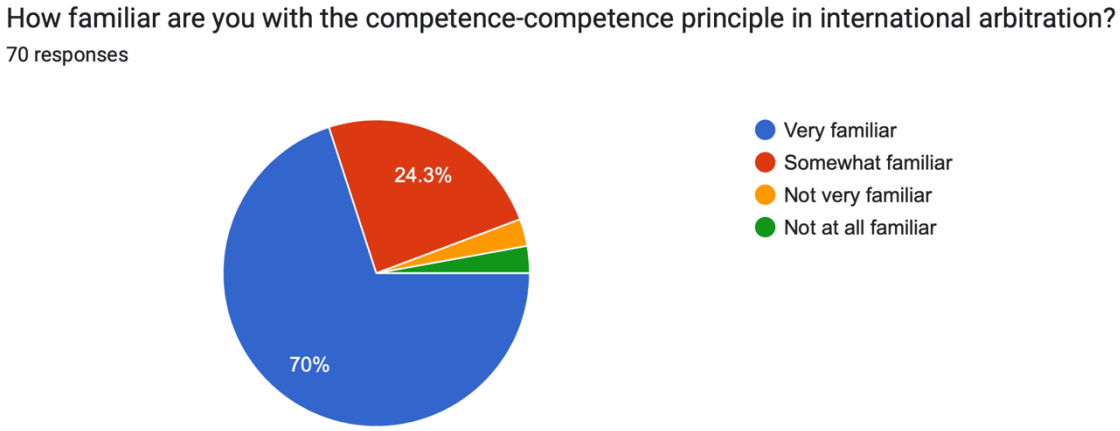
$$n\approx 71$$

In light of the information presented above, and given that we have already provided the relevant figures inside the previously described formula, the following is the answer that we have arrived at as a consequence:
Random selection led to the participation of Seventy-one (71), out of Eighty-seven (87), persons in the study.

5.2 Analysis of the survey

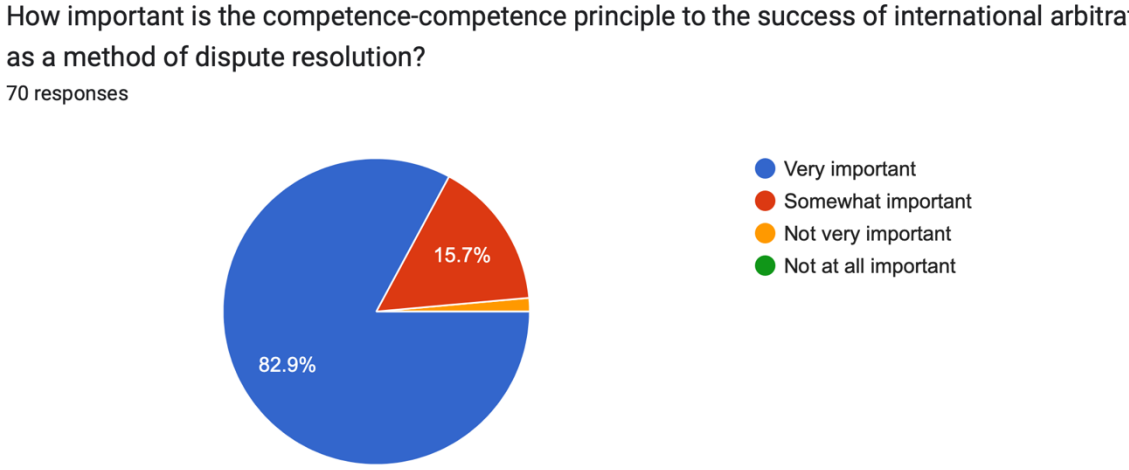
For the objectives of the master's thesis, a specific survey has been carried out over the internet, with particular emphasis placed on the use of the Google forms platform. This was done in order to identify the attitudes held by field experts towards the competence-competence principle, as well as the looming legal and practical gaps. 71 people signed up to take part in the event. The following diagrams reflect the findings of the survey, which may be found below:

Figure No. 1:



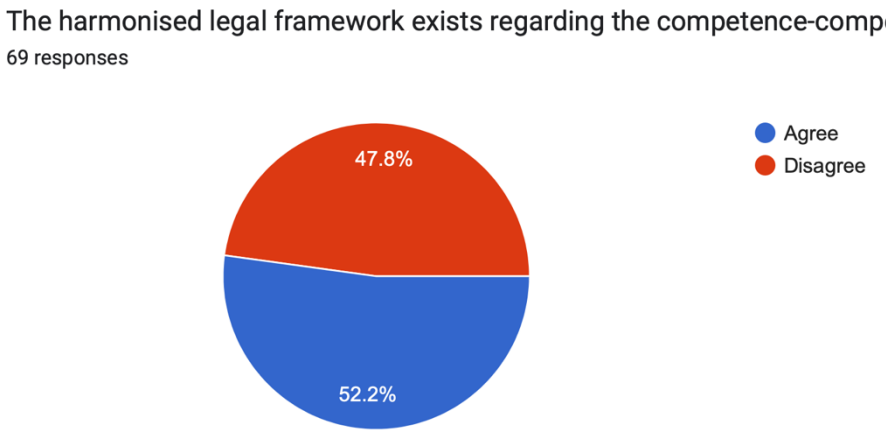
Seventy percent of respondents are either highly familiar with the principle, or moderately familiar with it, which accounts for the other 24.3 percent. Because of this, their experience and competence can be assumed; hence, their involvement in the study and the answers they supply have the potential to be a credible and trustworthy source for the goals of the current research.

Figure No. 2:



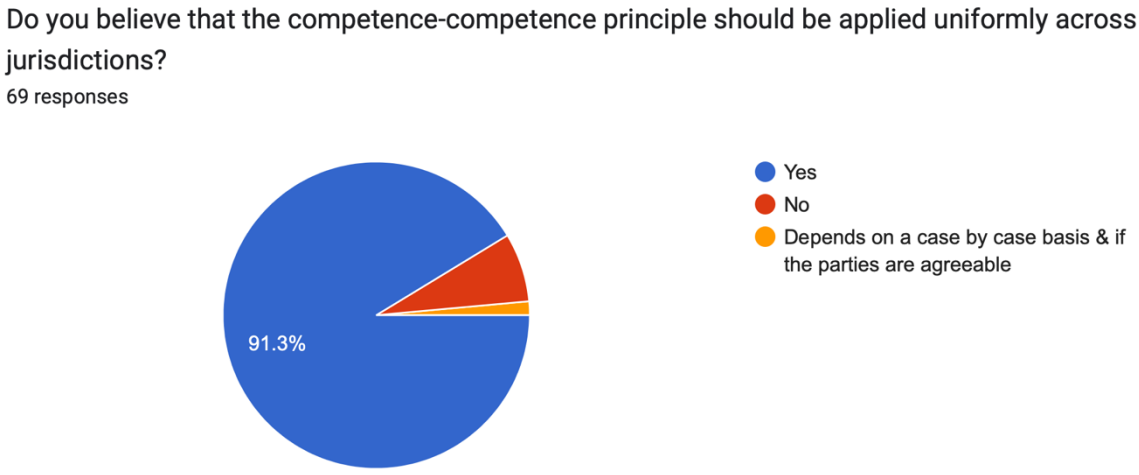
According to the numbers presented above, vast majority of the respondents treat the Competence-Competence principle as one of the most major of the Arbitration amounting in 82.9%.

Figure No. 3:



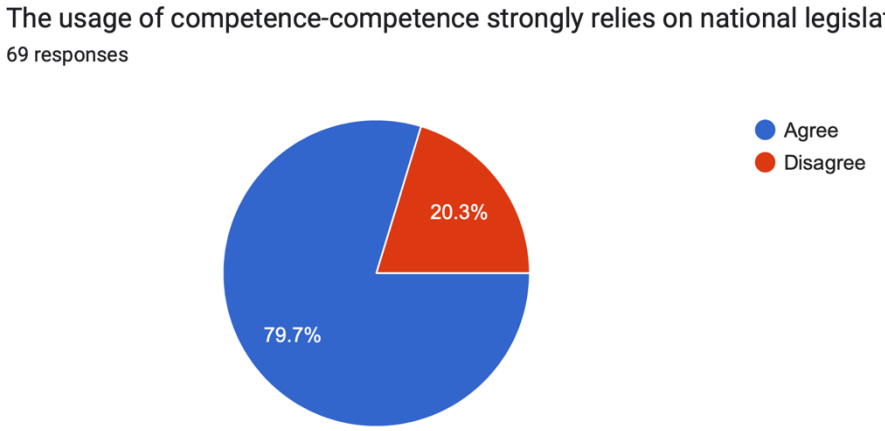
Based on the data presented above, we can deduce that the respondents have some worries regarding the availability of a standardised and harmonised legal framework pertaining to the principle. 52.2% of people hold the opinion that there is no such thing as uniform legislation in an international setting.

Figure No. 4:



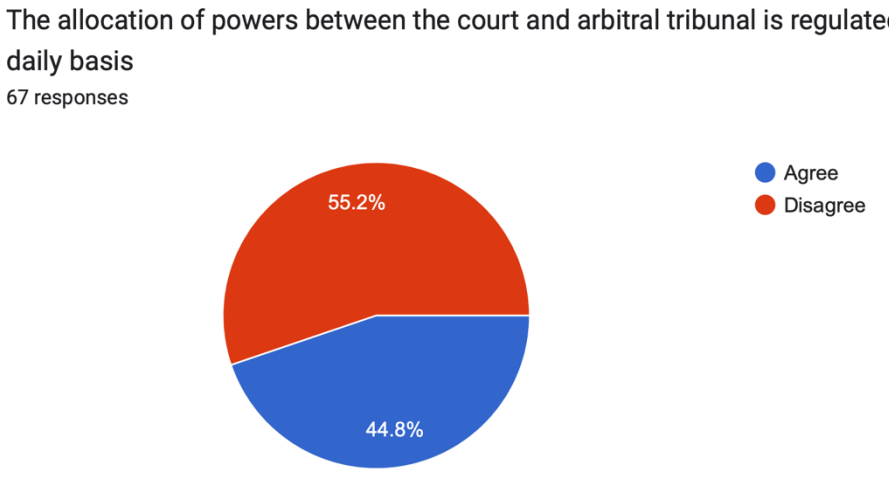
As a result, the following questions will lead to the opportunity to develop standard legislation addressing the applicability of the principle. The overwhelming majority of respondents, 91.3%, are of the opinion that the principle ought to be applied in the same manner in all jurisdictions.

Figure No. 5:



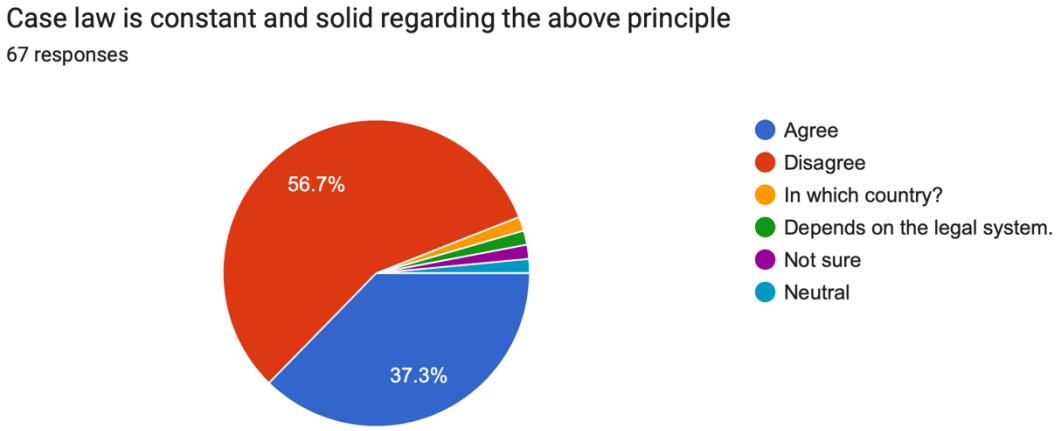
The majority of respondents (79.7%) are of the opinion that the application of the Competence-Competence principle is highly dependent on the national jurisdictions; as a result, the legislative bodies of the countries are the primary actors in the process of regulating and configuring the principle.

Figure No. 6:



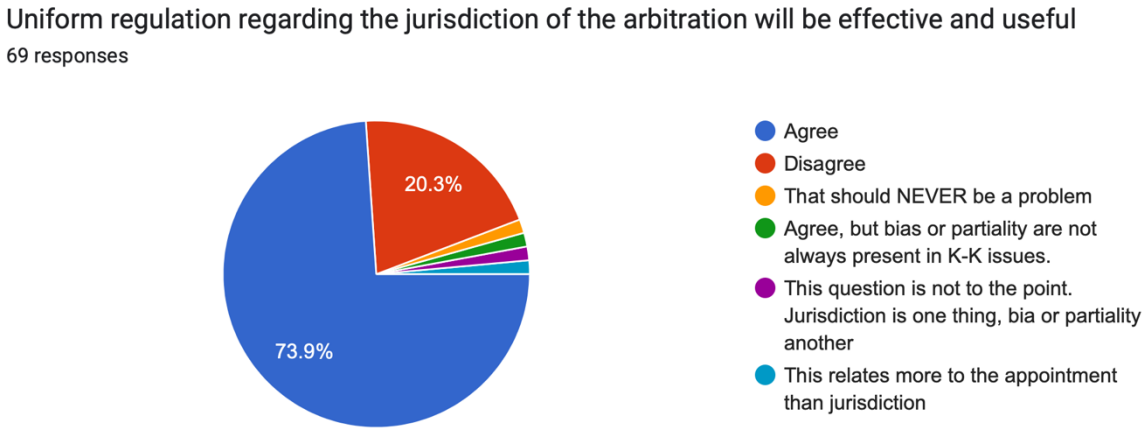
The notion that the distribution of the balance between the arbitral tribunal and state courts is regulated and carried out on a daily basis is rejected by 55.2% of the population.

Figure No. 7:



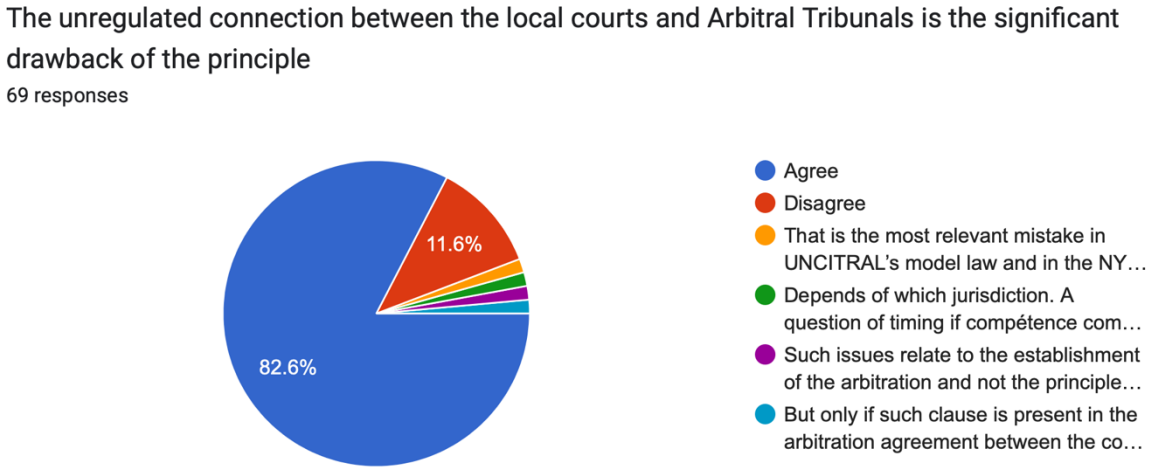
Regarding the case law, 56.7% of respondents believe that there is no consistency or solidity in the case law with respect to the application of the concept.

Figure No. 8:



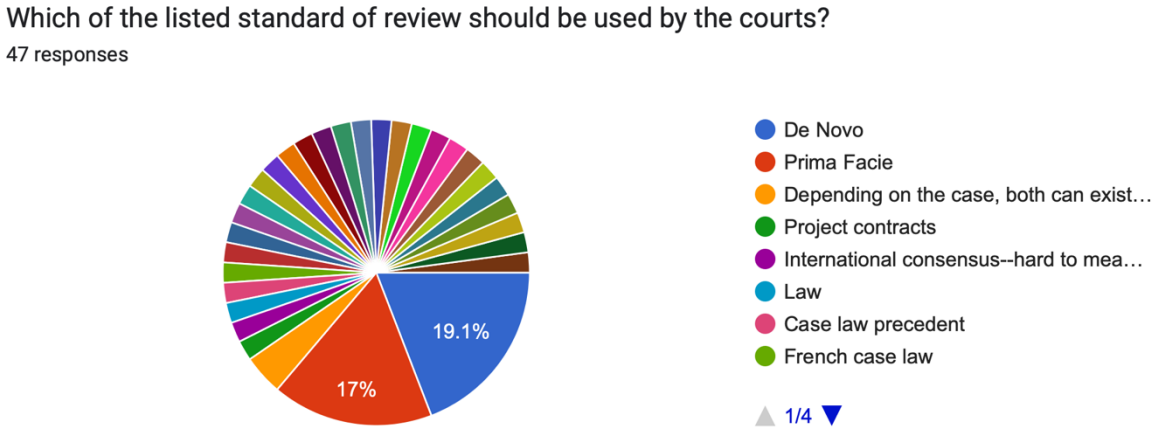
73.9 percent of respondents agree that it is necessary to implement uniform regulations and practices with regard to the competence-competence principle.

Figure No. 9:



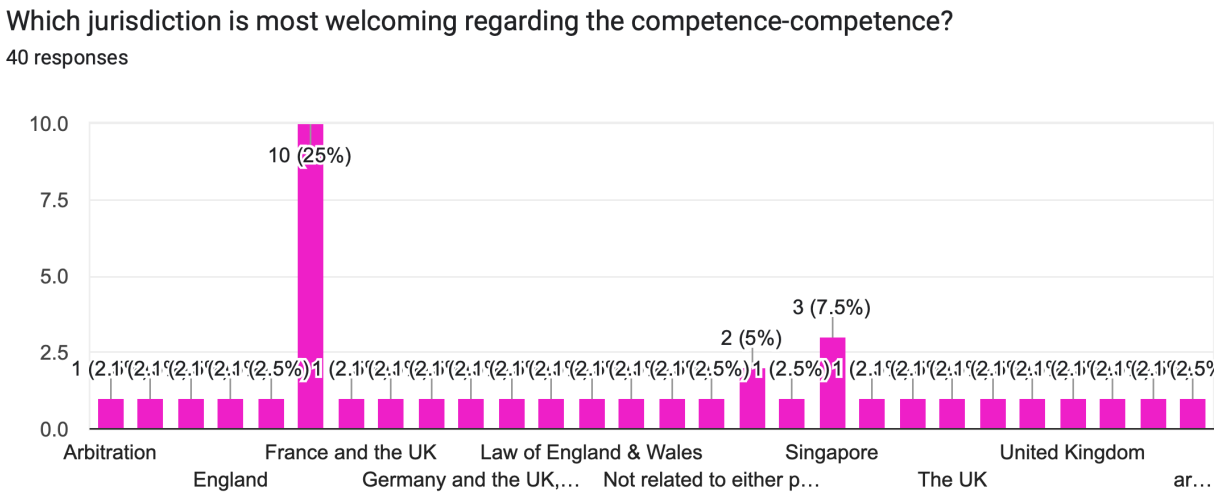
An overwhelming majority of individuals (82.6%) agree that the unfettered and unbalanced connection between the courts and arbitral tribunals continues to be one of the most fundamental flaws and problems with the system as a whole.

Figure No.10:



Those respondents who have either no information or an agreed upon attitude towards the standard of review are represented by the picture and the findings in the previous paragraph. In light of this, the disparity is extremely negligible, with 19.1% of respondents favoring the *De Novo* level of review and 17% supporting the *Prima Facie* review.

Figure No. 11:



Regarding the jurisdictions that favor the competence-competence principle, France is the dominant. Alongside the France, below listed countries are mentioned: Singapore, England, and Germany.

Alongside the closed questions, one opened question has been included in the survey, stating below: ‘’Do you believe that the competence-competence principle should be applied differently in different jurisdictions? Why or why not?’’. I would like to provide some of the answers which have been received:

Table No.2: Answers from the respondents

‘’No, it should be applied uniformly in order to harmonise the legal framework and promote efficiency’’.
‘’No, the goal for competence-competence principle is in its independence from national Jurisdictions, hence unifying different jurisdictions’’.
‘’No, the power of Arbitral tribunal to rule in its own jurisdiction should be ensured equally in every jurisdiction. So, the competence-competence principle should be maintained everywhere’’.

‘’It should not be differently applied. Consistency and predictability in international arbitration would suffer if different principles become applicable’’.
‘’No so as to ensure uniformity across the commercial arbitration dispute settlement arena and ensure that this involves a harmonised set of rules that apply regardless of where arbitration is seated. This can promote legal certainty and coherency and promote the arbitration dispute settlement option as a good alternative to litigation’’.
‘’No. Because the competence competence is an international arbitration principle and not just a local domestic principle. Hence, it must be uniform in all jurisdictions’’.
‘’No, to ensure consistency and predictability’’.
‘’No. This allows for uniformity in the interpretation of the principle’’.
‘’No. A question of consensus and universality and efficiency ‘’.
‘’The cross fertilisation from Alabam to the current form of international adjudication (including ad hoc) shows that there is no room for different types ‘’.
‘’No. I believe that the principle has reached a point in its evolution where it is largely acknowledged across jurisdictions with respect to the way it operates, both in national legislation and investment treaties. Therefore, parties involved in arbitration proceedings have a reasonable expectation that the principle will operate in its traditional way, which adds up to more legal certainty and predictability, elements for which the parties usually agree to arbitration in the first place’’.
‘’No. Ideally there should be a uniform approach’’.

‘’No. Applying competence-competence differently in different jurisdictions, will give a lack of uniformity in the application of this measure. The principle should be applied in such a manner that the countries using the principle don't really benefit from any additional clauses present in their domestic legislation and having an impact on the consent of the parties’’.
‘’No, so the parties know what to expect even when the proceeding is held in another jurisdiction ‘’.
‘’No, Arbitrations tems derive from the parties’ agreement. Arbitrators should have the power to rule on their own jurisdiction under a provisional basis. Courts may rule on this matter either in the annulment proceedings or when asked to submit the parties to arbitration (i.e. Art. II.3, NYConvention). This simple structure should be applied worldwide’’.

5.3 Conclusion of the survey

According to the findings of this study, the great majority of respondents, the vast majority of whom are field experts, do believe that the uniform method is a good thought for the growth of the principle of Competence-Competence, as well as arbitration in and of itself. The majority of respondents are also professionals in the field. In addition, one of the most major drawbacks and negative aspects is the distribution of the workload between the state courts and the arbitral tribunals. This creates an imbalance in the legal system. Respondents do believe that the uniform standardised method may lead to the dramatic changes, since according to the results, neither the consistency of case law nor the attitude towards the case review standard is reflected. Consequently, respondents do believe that the uniform standardised approach may cause the drastic changes. In addition, those who took part in the survey are of the opinion that the universal standardised strategy could result in significant advancements. In conclusion, the findings of the survey reveal that there is a pressing necessity for, and significance in adhering to, a standardised approach to the principle of competence-competence around the globe. This is indicated by the fact that there is a pressing requirement for, and significance in adhering to, the principle of competence-competence. When discussing the legal systems that are supportive of arbitration as

a mechanism for conflict resolution, some of the countries that are listed are France, England, Germany, and Singapore. Other countries that are mentioned include Singapore.

CONCLUSIONS

Due to the theoretical and practical standpoint discussed during the research, we can sum up and make the conclusions listed below:

The competence-competence principle is recognized in the international arena. In particular, one of the most influential one is- The New York Convention on the Recognition and Enforcement of Foreign Awards. Alongside with the New York Convention, the following acts are reviewing the principle: UNCITRAL Model Law on International Commercial Arbitration the European Convention on International Commercial Arbitration, the International Chamber of Commerce Rules on Arbitration, the IBA Guidelines on Conflict of Interest in international arbitration. Hence, both hard law and soft law are visible.

The documents described above primarily state and reflect the positive and negative effects of the Competence-Competence principle. The positive effect of Competence-Competence-which relates to the arbitrators' competence to rule on their jurisdiction. The legal community fully recognizes and appreciates the aforementioned comprehension. As a result, there are usually no problems and legal gaps in that regard; on the other hand, there is a negative effect of Competence-Competence- that goes much deeper into the practical implementation of the process, especially given the court's assertive status in the preceding proceedings, meaning the less interference, control and determination, as long as the arbitral tribunal is the organ that is supposed to rule on their jurisdiction concerns. In terms of recognizing the negative effect, greater consistency is required because the border between the Arbitration Tribunal and the court is not specified by current international legislation; hence, the only source of the above lays with the local legislative bodies and powers. As a result, the subject remains new and open for debate. The number of countries that safeguards and protects the negative effects of the preceding concept is rather few. Still, the tendency is continuing, and the following countries are being scrutinized for their detrimental impact: Sweden, France, Georgia, Germany, Italy, Lithuania.

The allocation of balance between arbitral tribunals and the state courts is not deeply regulated under the international legislative framework, hence courts' interference into proceedings is highly expected. In this regard, two standards of reviewing cases are observed: *Prima Facie* and *De novo*. *Prima Facie* review focuses on the existence and validity of the arbitration agreement, while *De novo* reviews the facts and all related issues in the case. Countries' attitudes towards these standards vary, with France, Japan, Spain, United States, India, Mexico, Austria using *Prima Facie* and Italy, Germany, Georgia using *De novo*. Both standards have the right to exist to the extent that the New York Convention does not limit either.

Since the peculiarities and practical applicability of afore-mentioned principle is not regulated internationally, its interpretation lays down with the country-by-country approach. Thus, the approaches of local countries remain one of the most trustworthy and reliable sources. The Range of differences arising while reviewing and comparing France, Sweden, Georgia, and Lithuania include methods of interpretation, wording of the provisions and international legal sources that jurisdictions are subscribed to. Sweden and France have similar backgrounds in adopting international conventions, such as the New York Convention, ICSID Convention, and European Regulation of Arbitration. Georgia has adopted the New York Convention and ICSID Convention, while Lithuania has ratified the ICSID Convention and New York Convention, and enacted a specific law on Arbitration based on the UNCITRAL Model Law. Even though French, Swedish, and Georgian local legislation has the effect and peculiarities of the UNCITRAL Model Law in International Commercial Arbitration, officially only Lithuania has adopted, as a matter of fact. Moreover, Lithuanian legislative bodies do not hesitate to include novel provisions, different approaches than the ones offered and laid down by the UNCITRAL Model Law. Regarding the courts' interference, France is using the *Prima Facie* standard of review, while Sweden and Georgia are using *De Novo* standard of review. Moreover, It should be noted that French and Lithuanian case law has been deemed to be stable and constant regarding the scope of the competence-competence principle, but recent case law indicates that the practices are changing unexpectedly. Despite the fact that countries share some things in common with regard to the adoption of international legal documents, the day-to-day applicability of the principle is manifestly different between each country, along with the interference of courts and the generally granted powers into the arbitral proceedings.

One of the major problems remains the parallel proceedings. The one of the most functional remedies in order to balance the powers between the arbitral tribunal and the state courts is anti-suit injuctions, however, the concept is mainly recognized in Common law countries, thus, civil law countries are not capable of using it, since mentioned does not exist in the afore-mentioned legal framework. Although, the civil law countries mainly are using lis pendens, the term's general essence is associated with the first-time ruling concept. Despite the importance and significance of the above, the principle is not regulated internationally, in particular, European Union scrutiny. Thus, its practical implementation entirely depends on the county-by-county approach. In that regard, countries mainly refer to the Competence-Competence principle when deciding on the Jurisdiction. Thus, its applicability truly differs, for instance: For Italy, according to the interpretation made by the Supreme court, the principle of Lis pandens is not applicable for the arbitration proceedings, Switzerland is highly protecting above, while France has limited protection. Thus, as a conclusion, dependency and reliance on the country-by-country approach,

as the only source for interpretation, remains problematic since applicability in a daily manner is strongly fluctuating. Hence, from the legal perspective and standpoint, inconsistency, uncertainty, and imminent impediments could be foreseen, especially concerning the allocation of the balance between the state courts and the arbitral tribunals.

Interviews with the field professionals in Georgian and French legal arena represented that the uniform approach is lacking both in Georgia, and France. The legal gaps mainly indicate the need of the uniformity.

Regarding the survey, majority of the respondents do believe that the uniform approach concerning the Competence-Competence principle would be efficient way to regulate and overcome the existing obstacles in the international and local area. Moreover, field practitioners do believe that the major drawback of the afore-mentioned principle lays down with the allocation of the balance between the arbitral tribunal and state courts, per se. The uniform, standardized, scrutinized approach would be the solution to deal with the existing legal gaps, according to the majority of the votes. To sum up, the survey reflects that there is the drastic need and significance of the uniform approach regarding Competence-Competence principle worldwide. Regarding the jurisdictions that favor Arbitration as a dispute resolution mechanism- France**,** England, Germany, and Singapore are mentioned.

RECOMMENDATIONS

- First, the most crucial line is understanding the problem, studying it, and raising awareness. Only If the above exists, using effective prevention measures will be manageable, productive, and effective. Therefore, as a result, the scientific community should prioritize the aforementioned problem at first. How can above be accomplished? scientific community should set the mentioned topic as a priority. A numerous scientific conference, moot courts, Arbitration proceedings, essay and paper competitions among the students and practicing lawyers in the field of Arbitration should be scheduled. The main focus should be not only the Arbitration, but merely precisely-regarding the Competence-competence principle, allocation of the balance between the Arbitral Tribunal and state courts.

- It is necessary to share practices and solid organizational structures with coordinated and agreed-upon steps and actions that may organize discussions and panels, where deliberations will take place according to rounds. The participants included officials of the organization's administration, arbitrators, judges, and practicing lawyers. By reflecting and presenting the overall picture, as the problem will be better identified, we will get a more effective result in finding a solution.

- Obviously, the use of soft law is an important mechanism, especially when there is a UNCITRAL Model Law on International Commercial Arbitration, with the high intensity of the international trust and recognition. In light of the above-mentioned legal obstacles and voids pertaining to the competence-competence principle, I do not believe the use of a soft law will be fruitful due to the following reasons: 1-Countries will be less interested in the extent that the act lacks the accessory right of the legal chain. 2- Countries will not give up their means of maneuvering until they become legally bound. 3- To be used only as a guideline; As a result, despite the potential benefits, we cannot consider it an effective instrument in eradicating the problem for these reasons. Thus, having the binding natured act is crucial. Obviously, by far, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is the most important. The convention is a living organism; it is active, which means it has a mechanism of change and rearrangement according to the innovations introduced by development and ongoing inevitable practice. Hence, the possibility of amendments is mentioned under the

convention. Although mentioned is a complex and difficult process, I believe the trial will be an efficient solution.

- In addition to establishing that changes should be made to the existing convention, it is most important to emphasize what type of changes we are discussing and what level of principle harmonization we should touch upon. Universal harmonization of the competence-competence principle, or a certain degree of harmonization with the specific conditions? According to the practical standpoint, achieving universal harmonization at this stage will be very complicated; therefore, from the point of view of practical implementation, using limited universality is the most optimal side. Suppose the Convention regulates the limits, for example. In that case, the court applies only the *prima facie* standard of review when it intervenes, evaluates only in general, and uses all the powers to enforce the competence-competence principle in a daily basis. The amendments should have the direct effect, thus self-executing nature is the mandatory, bearing in mind that no other actions should be needed from signatories' sides, it will have an automatic, direct effect to all signatory countries.

- Although the changes with an immediate effect are a powerful and vigorous instrument, the primary maneuvering powers are still subject to and under the scrutiny of the local implementation in the signatory countries. According to the information presented above, a specialized committee that will oversee the process of implementation needs to be established. Additionally, it would be useful if countries shared an annual report regarding the changes, progress, challenges, and obstacles, etc.

- Having a soft law as a template and guidance would be an effective tool. Hence, UNCITRAL as the one of the most powerful and prestigious centers can adopt the guidelines covering the allocation of the balance between the state courts and the arbitral tribunal with all of the above-mentioned peculiarities and with the aim to safeguard the arbitration, accordingly competence-competence principle.

- Last but not least, cooperation-communication is the critical and pertinent principle regarding allocating the balance between the Arbitral Tribunal and State courts. Mentioned encompasses not only courts and tribunals but every organization structure, body, and individual who are the actors and the players in the international arbitration field.

ANNEXES

No. 1-Online questionnaire

Survey questions:

1-How familiar are you with the competence-competence principle in international arbitration?

- Very familiar
- Somewhat familiar
- Not very familiar
- Not at all familiar

2- How important is the competence-competence principle to the success of international arbitration as a method of dispute resolution?

- Very important
- Somewhat important
- Not very important
- Not at all important

3- In your opinion, what is the purpose of the competence-competence principle in international arbitration?

- To give the Arbitral tribunal the power to rule on its own jurisdiction
- To ensure that the parties have agreed to the terms of the arbitration agreement before proceeding with arbitration
- To promote efficiency and reduce the costs of international arbitration
- Other:

4- The harmonised legal framework exists regarding the competence-competence principle

- Agree
- Disagree

5- Do you believe that the competence-competence principle should be applied uniformly across all jurisdictions?

- Yes
- No
- Other:

6- The usage of competence-competence strongly relies on national legislation

- Agree
- Disagree

7- The allocation of powers between the court and arbitral tribunal is regulated and implemented on a daily basis

- Agree
- Disagree

8- Do you believe that the competence-competence principle should be applied differently in different jurisdictions? Why or why not?

9- Case law is constant and solid regarding the above principle

- Agree
- Disagree
- Other:

10- Uniform regulation regarding the jurisdiction of the arbitration will be effective and useful

- Agree
- Disagree
- Other:

11-The unregulated connection between the local courts and Arbitral Tribunals is the significant drawback of the principle

- Agree
- Disagree
- Other:

12-The EU has the power to regulate the competence-competence principle

- Agree
- Disagree
- Other:

13-Which of the listed standard of review should be used by the courts?

- *De Novo*
- *Prima Facie*
- Depending on the case, both can exist and the court should decide which one to apply?

14-Which jurisdiction is most welcoming regarding the competence-competence?

No. 2: Interviews-Georgian and French experts

Questions for interview-Interview N1-French expert; Interview N2-Georgian expert

- How do you evaluate the importance of the Competence-Competence principle under French law?

- Regarding the Competence-Competence, Is the allocation of the power between the courts and the arbitral tribunal regulated under French law? If yes, how?

- Do you see any legal gaps regarding the courts' interference in the Arbitral proceedings?

- Which of the following standards of review is used by French courts- *Prima Facie* (Considering only the validity of the arbitration agreement) *De novo* (Comprehensive review);

- Do you believe that adoption of the uniform regulation, approach, standards regarding the principle will be an efficient remedy in order to balance the power allocation between the courts and the Arbitral tribunal? If yes, how realistic is the practical implementation?

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ABSTRACT

The research represents the comprehensive study of the competence-competence principle in international commercial arbitration. The following are the primary and key objectives of the present research: 1-reviewing the peculiarities of the Competence-Competence principle; 2-Identify and explaining the gaps between international and local approaches; and show the potential of keeping the balance between the court and the arbitral tribunal. During the research, the concept is analyzed deeply. Fundamental problems regarding the theoretical and practical legislative standpoint are analyzed. The approaches used by France, Sweden, Georgia, and Lithuania are discussed. Specific interviews have been undertaken with Georgian and French field professionals. The research provides the analysis and the results of the particular survey conducted for the current study. The research contains the specific recommendations based on both, theoretical and practical information addressed in the present study. The major leitmotiv of the viewpoint is that uniform practices do not exist, and the applicability of the competence-competence principle is substantially dependent on the county-by-county approach. The existence of the uniform practices, both reflecting in binding and soft in nature, is the major solution, coupled with cooperation-communication between the actors and players in the international commercial arbitration vicinity.

Key words: Commercial Arbitration, Competence-competence principle; Balance between the state courts and arbitral tribunals

SUMMARY

The present research represents the comprehensive and extensive studies of the competence-competence principle in international commercial Arbitration.

Arbitration, as one of the significant tools in dispute settlement mechanisms, enjoys the widespread and prevalent international acceptance and recognition. However, it is abundantly evident that Arbitration and court have identical purposes and goals- in particular-hearing, the case and ruling on the parties' conflict. That is why it is critical to maintain a healthy balance in their relationship. The principle of Competence-Competence plays a fundamental role in this process. Competence-Competence primarily refers to the arbitrators' capability to rule on their jurisdiction. Hence, they are the first to decide on their jurisdiction. The concept is one of the most vital components in performing Arbitration effectively.

Nevertheless, its applicability is primarily determined by domestic legislation and internal policies set by the countries. A lack of unified international regulation results in variety of ambiguities and present and imminent uncertainties. Therefore, the fundamental discrepancy and disparity narrows in the absence of homogeneity.

The following represent the fundamental goals of the research:

- To review the peculiarities of the Competence-Competence principle;
- To identify and explain the gaps between international and local approaches and to show the potential of keeping the balance between the court and the arbitral tribunal.

Throughout the research following objectives have been accomplished. The peculiarities of the competence-competence are analyzed. The research emphasizes the particular problems regarding the non-comprehensive approaches and legal framework in the international arena; The study reviews the existing primary legal documents in the international arena, such as the New York Convention, UNCITRAL Model Law on International Commercial Arbitration, IBA Guidelines on conflict of interest in international Arbitration, the European Convention on International Commercial Arbitration, International Chamber of Commence rules on Arbitration. The research contains a brief review and a comparison of the following countries' approaches to Arbitration and, in particular, the competence-competence principles: France, Sweden, Georgia, and Lithuania. Research has the comparative examination of the existing case law. With the specific survey conducted for the research objectives, the study demonstrates and reflects the viewpoints of the legal practitioners regarding the competence-competence principle. The research provides the results of interviews with Georgian and French field professionals. Due to the all reviewed factual matter, the study provides the findings, conclusions, recommendations, and general outcome of the current master thesis.

The major leitmotiv of the viewpoint is that uniform practices do not exist, and the applicability of the competence-competence principle is substantially dependent on the county-by-county approach. Consistent rules, both reflecting in binding and soft in nature, are the foremost solution, coupled with cooperation-communication between the actors and players in the international commercial arbitration vicinity.