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Abstract

This research essay will focus on distinguishing the jurisdiction of the arbitral tribunal, particularly its jurisdiction to determine its own jurisdiction, and the procedural powers that the parties may confer on arbitrators to assist them in the proceedings. For this purpose, an analysis of the principle of competence-competence and the doctrine of separability of the arbitration agreement will be performed. Additionally, a thorough approach will be made on the sources and limitations of the arbitral tribunal’s jurisdiction and powers, where the importance of the parties’ consent to arbitration, usually articulated by means of an express agreement, will be determined as a common factor of both issues.
Introduction

It has been suggested that a distinction should be drawn between the jurisdiction of the arbitral tribunal, especially its jurisdiction to rule on its own jurisdiction, and the powers that allow it to achieve its purpose, which is to decide the disputes of the parties. In Section 1 of this research essay, we will be approaching the concepts of competence-competence and separability of the arbitration agreement, which are the basis for establishing the jurisdiction of the arbitral tribunal, but particularly operate to protect the arbitration proceedings. The powers of the arbitral tribunal are defined in Section 2, where we can determine that they serve a more procedural nature.

There is a general criterion that the arbitral tribunal shares the same source of jurisdiction and powers, which is the arbitration agreement. In Section 3 of this research essay we will demonstrate that while the parties’ consent is required to establish the arbitral tribunal’s jurisdiction, as well as confer upon it the powers necessary to fulfil its tasks, there are other requirements that need to be satisfied to define the arbitrator’s jurisdiction, as well as further sources through which the arbitral tribunal may obtain its powers.

The limitations of the arbitral tribunal’s jurisdiction and powers are also dependant on the agreement of the parties and the relevant national laws. In Section 4 we discuss the matter of the arbitrability of the parties’ disputes as another limitation on the arbitral tribunal’s jurisdiction, and the private nature of the arbitral process as a limitation on the exercise of the arbitrator’s coercive powers, which are necessary to resolve certain issues brought before the tribunal by the parties.

1. Jurisdiction of the arbitral tribunal

The jurisdiction of the arbitral tribunal is ordinarily considered as the power to legally resolve a dispute, where a determination on the merits is made and damages or other remedies are granted, usually by means of an award. But before the arbitral tribunal can adjudicate the substantive claims under dispute, it must be established that it has jurisdiction. As a result of the voluntary nature of arbitration, an arbitral tribunal may only decide the disputes that the parties have agreed to submit to arbitration. This power to decide the parties’ disputes arises from a combination of complex contractual and jurisdictional elements, namely, the will of
the parties as conveyed in the arbitration agreement, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place where recognition or enforcement of the arbitral award is sought. Due to its importance in the arbitration process, the tribunal’s jurisdiction is often a matter of controversy amongst the parties, and may in fact be the only issue brought for resolution.

Consequently, in order to reinforce the jurisdiction of the arbitral tribunal and reduce challenges that may delay or obstruct the proceedings, most arbitration laws and institutional arbitration rules have adopted the competence-competence principle and the doctrine of separability of the arbitration agreement. According with the former principle, the arbitral tribunal has the power to decide on any issue regarding its jurisdiction, that is, as to the effectiveness of the arbitration agreement; and, under the latter, the arbitration clause is a separate and independent agreement, hence, the arbitral tribunal has jurisdiction to decide any dispute on the existence and validity of the main contract. Both doctrines will be discussed in detail below. Additionally, some national laws also allow tribunals to commence or resume arbitral proceedings, even if their jurisdiction is being challenged before the courts.

1.1. The competence-competence principle

According to Fouchard, Gaillard and Goldman, ‘the fact that arbitral tribunals have jurisdiction to determine their own jurisdiction–known as the “competence-competence” principle–is among the most important, and contentious, rules of international arbitration’. This principle has certainly ‘given rise to much controversy and misunderstanding’ and there are still commentators who oppose it by frequently raising the question on exactly how can an arbitral tribunal hear a claim and decide on the validity of an arbitration agreement merely on the basis of such an agreement. The answer offered by the abovementioned authors is that the basis for the competence-competence principle does not entirely rest in the arbitration agreement, but in the arbitration laws of the country where the proceedings are held and,
especially, in the laws of the countries responsible of recognizing an award issued by an arbitral tribunal on the matter of its own jurisdiction.\textsuperscript{7}

The power of arbitrators to rule on their own jurisdiction has generally been accepted to be an essential characteristic of their appointment, and indispensable for the adequate performance of the tasks entrusted to them by the parties. The arbitral tribunal must be in the capacity of analysing the arbitration agreement, the conditions of its appointment, and any other evidence that would assist the panel in determining whether the dispute falls within its jurisdiction.\textsuperscript{8} The power of the arbitral tribunal to decide on its own jurisdiction, or competence to decide upon its own competence has been contemplated as an inherent power, although it is expressly recognized by the main international conventions on arbitration, institutional arbitration rules and the majority of modern arbitration statutes.\textsuperscript{9}

For instance, Article 5, paragraph 3, of the European Convention on International Commercial Arbitration manifestly provides that ‘the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or of the contract of which the agreement forms part.’ Similarly, Article 23(1) of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (the ‘UNCITRAL Arbitration Rules’) states that ‘[T]he arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement’; whereas, Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration (the ‘UNCITRAL Model Law’), which a number of States have adopted by incorporating it into their domestic law, provides that ‘[T]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement’. In investment arbitration, Article 41 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ‘ICSID Convention’) contains a similar provision, which precludes the parties from challenging the jurisdiction of the tribunal in other forums, such as domestic courts.

\textsuperscript{7} ibid para 658
\textsuperscript{8} Blackaby [n. 2] para 5.98
\textsuperscript{9} ibid para 5.90
The competence-competence principle serves two distinct purposes, and like the arbitration agreement, may have both positive and negative effects.10 The positive effect enables the arbitral tribunal to decide on its own jurisdiction, determine the validity of the arbitration agreement, and render an award stating that it lacks jurisdiction without contradicting itself. As stated in the preceding paragraph, this rule has been generally recognized by international conventions and by modern statutes on international arbitration. But even if such provisions would cease to exist, arbitral tribunals have usually exercised their right to decide on their own jurisdiction, based on the presumed will of the parties to refer all aspects of their disputes to the arbitral tribunal, including matters of jurisdiction.11

Nonetheless, it has been argued that the competence-competence principle may only be fully effective if the arbitral tribunal is able to arrive at a decision concerning its jurisdiction before the courts, which would have to limit their role to the review of the award and refrain from hearing any substantive argument as to the jurisdiction of the tribunal, until the latter has decided on the issue. This rule known as the negative effect of the competence-competence principle requires that the arbitrators initially hear any challenge to their jurisdiction, subject to a subsequent judicial review upon application to the court by either party.12 Considering that the law of the place of arbitration determines the scope of this rule, numerous jurisdictions have chosen not to accept its whole extent.

The case law in England has remained decisive on the topic, providing that a party may (i) challenge the substantive jurisdiction of the arbitrators before the arbitral tribunal itself under Section 30 of the English Arbitration Act 1996, while reserving its right to challenge any award on jurisdiction before the court under Section 67 of the Act; (ii) request the court the determination of a preliminary point as to the substantive jurisdiction of the tribunal, without previously referring the issue to the arbitrators under Section 32 of the Act; and, (iii) question the status of the arbitration by bringing proceedings in court for a declaration or injunction or other appropriate relief under Section 72 of the Act.13 The United States Supreme Court in First Options of Chicago, Inc. v Kaplan and MK Investments, Inc.,14 held that the power to

10 Steingruber [n. 1] para 5.84
11 ibid para 5.85
12 Gaillard [n. 5] para 660
13 Azov Shipping Co v Baltic Shipping Co [1999] 1 Lloyd’s Rep. 68
decide arbitrability [arbitral jurisdiction] is determined by whether the parties agreed to submit such a matter to the arbitral tribunal. If so, then the court will apply the same standard that it applies when it reviews any other issue that the parties have agreed to arbitrate. On the other hand, if the parties did not agree to submit the question of arbitrability to arbitration, then the court shall decide on the subject independently.

In contrast, the French Code of Civil Procedure provides that where a dispute referred to an arbitral tribunal pursuant to an arbitration agreement, is brought before a court, the latter must decline jurisdiction, even if the case has not been heard by the arbitral tribunal, unless the arbitration agreement is manifestly null. This rule also applies to international arbitrations subject to French law.¹⁵ Lastly, the UNCITRAL Model Law has taken an intermediate approach. Article 8 of the Model Law states that a court before which a claim is brought in a matter which is the subject of an arbitration agreement shall, upon request of a party and before pleading to the merits, refer the parties to arbitration, unless the agreement is null and void, inoperative or incapable of being performed. Notwithstanding the above, arbitral proceedings may be initiated or continued and an award may be rendered while the court is deciding the issue.

On occasion, the competence-competence principle has been thought to derive from the doctrine of separability of the arbitration agreement. Actually, most arbitration rules, institutional or ad hoc, and national laws contain provisions that associate the two rules. Article 23(1) of the UNCITRAL Arbitration Rules, following the text cited above, establishes that ‘[F]or that purpose [the arbitral tribunal having the power to rule on its own jurisdiction], an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.’ Article 16(1) of the UNCITRAL Model Law also provides that for such a purpose ‘an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.’ From these texts, it may be implied that the arbitral tribunal’s power to decide on its own jurisdiction is based on the separability of the arbitration agreement from the main contract.¹⁶

¹⁵ French Code of Civil Procedure, Articles 1458, 1495
As stated by Born, however, ‘it is conceptually wrong to explain the competence-competence doctrine by reference to the separability presumption’.\(^{17}\) Primarily, the competence-competence principle allows the tribunal to proceed with the arbitration, even if the existence or validity of the arbitration agreement has been challenged for reasons directly related with the arbitration agreement, and not merely based on a claim that the main contract is void. Conversely, the doctrine of separability of the arbitration agreement is sufficient to resist allegations that the arbitration agreement is ineffective if the contract containing it is invalid, but it does not enable the tribunal to continue with the proceedings if the alleged invalidity directly affects the arbitration agreement.\(^{18}\) Therefore, it seems obvious that albeit the two principles intersect, theoretically they serve different purposes.

In any case, to comprehend the scope of an arbitral tribunal’s jurisdiction in a specific legal system, it is necessary to determine if both doctrines are present in the pertinent arbitration law. In England, the separability of the arbitration agreement and the competence-competence principles are established separately in Sections 7 and 30 of the Arbitration Act 1996, respectively.\(^{19}\) Their relationship, then again, is discussed in *Vee Networks Ltd v Econet Wireless International Ltd*,\(^{20}\) where it was held that the essence of the separability doctrine, pursuant to Section 7, is to insulate the arbitration agreement from the main contract, whereas competence-competence, as provided in Section 30 of the Act, contemplates the principle of separability, but ‘leaves intact the requirement that the arbitration agreement should be valid and binding’.\(^{21}\)

1.2. **The doctrine of separability of the arbitration agreement**

As briefly mentioned in the previous Section, the doctrine of separability recognises the arbitration agreement in an underlying contract as a separate, independent and distinct instrument. The nature of this principle is that the validity of an arbitration clause is not bound to that of the underlying contract and vice versa, thus, the illegality of the latter does not have any effect on the jurisdiction of the arbitral tribunal, which has its origin in a different agreement than that of the main contract. The obligation to resolve all disputes

\(^{17}\) ibid
\(^{18}\) Gaillard [n. 5] para 658
\(^{19}\) Blackaby [n. 2] para 5.105
\(^{20}\) [2004] EWHC 2909 (QBD)
\(^{21}\) ibid para 20
referred to arbitration continues even if the main contract has been terminated or is vitiated, providing a legal basis for the appointment of the arbitrators.\textsuperscript{22} According to Lew, Mistelis and Kröll ‘[W]hile the doctrine of competence-competence empowers the tribunal to decide on its own jurisdiction, the doctrine of separability ensures that it can decide on the merits’,\textsuperscript{23} but the principle of separability also allows the arbitral tribunal to assume such jurisdiction, so if the tribunal were to decide that the agreement to arbitrate is not valid, it would be reputed that it lacked that authority \textit{ab initio}.\textsuperscript{24}

The separability of the arbitration agreement has been perceived as an ambiguous expression, which has led some authors to distinguish between material separability, that is, from the main contract, and legal separability, namely, from the law of the main contract, but even from all legal systems.\textsuperscript{25} The first of the two distinctions can be illustrated as noted by Judge Schwebel that ‘when the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin survives any birth defect or acquired disability of the principal agreement’.\textsuperscript{26} This material separability proposition entails the possible validity of an arbitration clause, irrespective of the inexistence, invalidity, illegality, or termination of the main contract, but also the possible validity of the main contract, regardless of the invalidity, illegality, or termination of an accessory arbitration clause.\textsuperscript{27}

Due to its practical advantages, the doctrine of separability of the arbitration agreement is also widely recognised in most arbitration laws and institutional arbitration rules, as well as in the decisions of arbitral tribunals and national courts.\textsuperscript{28} By way of illustration, reference can be made to two landmark cases. Initially, the United States Supreme Court held that an arbitration clause in a contract is separable from the rest of the contract, and that allegations directed to the validity of the contract in general, as opposed to the arbitration clause in particular, shall be decided by the arbitral tribunal, not the court. The Supreme Court importantly added that unless otherwise intended by the parties, arbitration clauses are

\textsuperscript{23} ibid para 6-10
\textsuperscript{24} Blackaby [n. 2] para 5.96
\textsuperscript{25} Steingruber [n. 1] para 5.88
\textsuperscript{26} Stephen M Schwebel, \textit{The Severability of the Arbitration Agreement, International Arbitration: Three salient problems} (Grotius 1987) p. 5
\textsuperscript{27} Born [n. 16] p. 351
\textsuperscript{28} Steingruber [n. 1] para 5.90
separable from the contracts in which they are included, thus, where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be sufficient to allow a claim that the contract itself was induced by fraud to be heard in arbitration.\textsuperscript{29} Subsequently, the House of Lords in \textit{Fiona Trust & Holding Corporation and others v Privalov and others},\textsuperscript{30} sustained a similar criterion having decided that an arbitration agreement could only be void or voidable on grounds that relate directly to the arbitration agreement, and not as a consequence of the invalidity of the main agreement. \textit{Lord Hoffman} also emphasised that naturally there may be cases in which the ground upon which the main agreement is invalid is the same as the ground upon which the arbitration agreement is invalid.

Another consequence of the principle of separability is that the arbitration agreement may be governed by a different law from that of the main contract or by principles of international law.\textsuperscript{31} This effect has its explanation on the presumption that the parties have concluded two separate agreements, which have different characteristics and may be ruled by two distinct legal systems. The separability presumption does not necessarily imply that the law applicable to the arbitration agreement is different from that applicable to the main contract, since in most circumstances the same law governs both instruments, but that distinct national laws may apply to the arbitration agreement and the main contract. However, the salient feature in situations where the arbitration clause is separate from the underlying contract is that a conflict of laws analysis must be performed to each agreement independently.\textsuperscript{32}

The result in various cases where the law applicable to the arbitration clause is different from that of the main contract is that arbitral tribunals and national courts have ruled in favour of international arbitral agreements, where challenges to their existence and validity was based on local law.\textsuperscript{33} For example, an International Chamber of Commerce (ICC) tribunal decided that ‘an arbitration clause in an international contract may perfectly well be governed by a law different from that applicable to the underlying contract’.\textsuperscript{34} The French \textit{Cour de cassation} went a step further almost achieving a complete delocalisation of the arbitration agreement.

\begin{thebibliography}{99}
\bibitem{29} \textit{Prima Paint Corp. v. Flood & Conklin Mfg. Co.}, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)
\bibitem{30} [2007] UKHL 40
\bibitem{31} Steingruber \textsuperscript{[n. 1]} para 5.97
\bibitem{32} Born \textsuperscript{[n. 16]} p. 464
\bibitem{33} ibid
\bibitem{34} ibid p. 486
\end{thebibliography}
agreement\textsuperscript{35} in Municipalité de Khoms El Mergeb v. Société Dalico,\textsuperscript{36} where it held that under a substantive rule of international law, an arbitration clause is independent from the main contract in which it is contained directly or by reference, and its existence and validity shall be subject to the mandatory rules of French law and international public policy, according to the common intention of the parties, without it being necessary to refer to a national law.

Ultimately, the principle of separability has contributed to protect the efficiency of international arbitration agreements and has assisted in assuring that the will of the parties to submit their disputes to arbitration is not undermined. In this way, the presumption that an arbitration clause is a separate agreement from the main contract in which it is comprised, also serves to protect the jurisdiction of the arbitral tribunal.\textsuperscript{37}

2. Powers of the arbitral tribunal

The nature of arbitration is that the powers of the arbitral tribunal are ‘those conferred upon it by the parties themselves within the limits allowed by the applicable law [i.e. the proper law of the arbitration agreement and the law of the place of arbitration], together with any additional powers that may be conferred by operation of law’.\textsuperscript{38} Originally the power to establish the conduct of the proceedings, such as the governing law, the place of the arbitration, the designation of arbitrators, and the rules that shall be applied to the arbitration, lies solely on the parties, whose consent to the former may be expressed in an arbitration clause or a submission agreement. Nevertheless, once the arbitrators become acquainted with the issues in dispute, the powers conferred upon the tribunal will reduce any remaining powers that the parties had to control the arbitral proceedings.\textsuperscript{39} These powers are necessary for the arbitrators to achieve their function, which is to resolve the disputes brought before them, and perform what is required so that their tasks are accomplished within the period established for the conclusion of the arbitration.\textsuperscript{40}

\textsuperscript{35} Lew, Mistelis and Kröll [n. 22] para 6-66
\textsuperscript{36} Municipalité de Khoms El Mergeb v. Société Dalico [1994] 1 Rev Arb 116, Cour de cassation
\textsuperscript{37} Lew, Mistelis and Kröll [n. 22] para 6-10
\textsuperscript{38} Blackaby [n. 2] para 5.06
\textsuperscript{40} Jean-Louis Delvolvé et al, French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration (2\textsuperscript{nd} edn, Kluwer Law International 2009) para 216
2.1. Powers that derive primarily from the parties

As identified earlier, the powers of arbitrators are derived primarily from the parties, and may be conferred either directly or indirectly, but subject to the limitations of the applicable law.\(^{41}\) The conferment of powers occurs directly when the parties specify in the arbitration agreement, in the terms of appointment, or any other written agreement, the powers that they wish the arbitrators to exercise (e.g. order the production of documents, appoint experts, hold hearings, require the presence of witnesses, and examine the subject matter of the dispute). An indirect conferment of powers occurs when the parties agree that the arbitration shall be conducted pursuant to rules of arbitration, either ad hoc or institutional.\(^ {42}\) The agreement of the parties to adopt and submit to such rules enables the tribunal to apply them, but within the restrictions of the relevant law, notwithstanding that the conferral of powers is rendered by the parties indirectly.\(^ {43}\)

These rules of arbitration confer on the arbitral tribunal express powers, which can be both general and specific. For instance, Article 17(1) of the UNCITRAL Arbitration Rules, provides that ‘the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate’, bestowing upon the tribunal a general power through the use of broad terms with sufficient amplitude, allowing it to adopt the appropriate procedure, while conducting the proceedings with propriety and expedition. In addition, the specific powers of arbitral tribunals are those concerned with matters related to the commencement, continuation, or conduct of the arbitration, where failure of the parties to reach an agreement may frustrate or delay the proceedings, and the involvement of the arbitral tribunal is required.\(^ {44}\) In this regard, Article 18(1) of the UNCITRAL Arbitration Rules establishes that ‘[I]f the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal’, whereas Article 35(1) provides that absent an agreement of the parties, ‘the arbitral tribunal shall apply the law which it determines to be appropriate’.

\(^{42}\) Blackaby [n. 2] para 5.09
\(^{44}\) ibid
2.2. Powers conferred by the applicable law

The law governing the arbitration agreement and the law of the place of the arbitration, referred to above as the applicable law, also determine the extent of the arbitral tribunal’s powers. They may act as to supplement the powers conferred by the parties upon the arbitral tribunal by directly granting it additional powers, or authorising national courts to exercise powers on behalf of the tribunal or the parties. For example, the English Arbitration Act 1996 confers on the arbitral tribunal both general and specific procedural powers. Section 34(1) of the Act provides that “[I]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter”. An international arbitral tribunal with seat in England may also appoint experts or other advisers, order a claimant to provide security for costs, give directions in relation to any property which is the subject of the arbitration, administer oaths to witnesses, and give directions to a party for the preservation of any evidence in his custody or control.

2.3. Powers typically conferred to arbitral tribunals

It has been mentioned that arbitral tribunals usually have extensive powers to determine the appropriate procedure of the arbitration, which may include deciding the applicable law and the place of the arbitration, when the parties have failed to reach an agreement. However, there are additional powers that arbitral tribunals enjoy that are either conferred by the parties directly, indirectly (subject to institutional or ad hoc rules of arbitration), or are vested upon the tribunal under the applicable arbitration law, which although were briefly stated above, require further consideration.

Commonly the arbitral tribunal may decide the language of the arbitration when it is not established in the arbitration agreement and the relevant arbitration rules do not provide a solution to the matter. Furthermore, arbitrators may order the production of documents where one of the parties refuses to disclose specific documents and the tribunal has considered it appropriate, as well as examine the subject matter of the contract under dispute. Certain

45 Jenkins [n. 41] p. 156
46 Blackaby [n. 2] para 5.10
47 Jenkins [n. 41] p. 156
49 Blackaby [n. 2] para 5.10
arbitration rules and statutes, as identified in the preceding paragraph, allow the arbitral tribunal to require the presence of witnesses that are accessible to the parties, administer oaths to verify the veracity of oral evidence, appoint its own experts, and order the claimant the delivery of security for the cost to the respondent of defending the claim.\textsuperscript{50}

Perhaps one of the most controversial topics in arbitration is the power of arbitral tribunals to order interim or provisional measures. According to the decision of the European Court of Justice (ECJ) in \textit{Reichert and Kockler v. Dresdner Bank},\textsuperscript{51} provisional measures are those ‘intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter’. In the opinion of \textit{Poudret} and \textit{Besson}, the jurisdiction of arbitral tribunals to order interim or provisional measures must be differentiated from their power to decide the procedural issues of the arbitration. These authors maintain that such jurisdiction originates from the law of the place of the arbitration or, in the event that there is no provision on this subject, from the arbitration agreement, and that the rules of arbitration chosen by the parties may also confer on the arbitral tribunal jurisdiction to order interim measures, provided there is no provision to the contrary in the law of the seat of the arbitration.\textsuperscript{52} This mistakenly suggests that the capacity to order interim and provisional measures should be regarded as a matter of jurisdiction, and not as a procedural power of the arbitral tribunal. What the referred authors failed to consider is that while the arbitral tribunal may have jurisdiction to decide the parties’ dispute, it may or may not have the power to order interim or provisional measures.

Most arbitration rules also confer upon the arbitral tribunal the power to decide if oral hearings should take place, while allowing the parties to be heard orally if required, unless they have agreed otherwise. The arbitral tribunal may convene the parties to an oral hearing on its own initiative, or at the their request, and shall decide the time and date for such hearing. In case one of the parties fails to appear at the hearing, the tribunal may continue with the proceedings and render its award.\textsuperscript{53} In the end, while employing their numerous powers during each procedural stage, arbitrators must respect the parties’ rights to due process, the principle of equal treatment, and the right of the parties to be heard. The arbitral

\textsuperscript{50} ibid paras 5.16, 5.17, 5.19, 5.20, 5.21, 5.22, 5.31
\textsuperscript{52} Jean-François Poudret and Sébastien Besson, \textit{Comparative Law of International Arbitration} (Sweet & Maxwell 2007) para 606
\textsuperscript{53} Jenkins [n. 41] p. 169, 170
tribunal must also be fair and act efficiently to avoid causing unnecessary delay and expense.  

3. Sources of the arbitral tribunal’s jurisdiction and powers

3.1. Consent as the basis of arbitral jurisdiction

The sources of jurisdiction of the arbitral tribunal are the instruments through which the parties express their consent either directly, indirectly, implicitly or imputably. These sources usually consist of the treaty or agreement instituting the arbitration, which provide the tribunal the authority to decide all of the disputes that the parties have submitted to it and are covered by the latter. The decision of the arbitrators shall be binding on the parties and may be enforced before the courts, but the tribunal must ensure that it stays within the terms of its mandate, that is, not to exceed its jurisdiction. According to Amerasinghe, ‘[T]here is no formal or standard requirement for a source and sources may be sought in any place where they may be located’.

Nevertheless, most international conventions on arbitration, particularly the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’) as well as the ICSID Convention, and the UNCITRAL Model Law, require that consent to arbitration or the agreement to arbitrate shall be in writing. The explanation for this requirement argued by commentators is that it provides proof of the parties’ initial consent, along with the terms of the agreement to arbitrate. In view of the fact that a valid agreement would refer the parties to arbitration while excluding the jurisdiction of national courts, it is thus appropriate that the parties produce evidence of such an agreement in writing, although modern arbitration laws are currently more flexible on this formality.

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54 ibid p. 171
55 Chithararangjan F Amerasinghe, International Arbitral Jurisdiction (Martinus Nijhoff Publishers 2011) p. 79
56 Gaillard [n. 5] para 648
57 Blackaby [n. 2] para 5.85
58 Amerasinghe [n. 56] p. 79
59 Blackaby [n. 2] para 2.13
61 Blackaby [n. 2] para 2.13
Moreover, there may be various sources from which an arbitral tribunal may obtain jurisdiction, which not only may be multiple, but presented successively in the proceedings. The Permanent Court of International Justice (PCIJ), predecessor of the International Court of Justice (ICJ), approached the issue of multiple sources and their application having decided that the multiplicity of agreements concluded between the parties accepting the jurisdiction of the court is only evidence that they intended to provide new means of access to the court, rather than to prevent prior means, or to allow them to cancel each other out, preventing the court from taking jurisdiction. Accordingly, there may be several sources of arbitral jurisdiction, which shall have a cumulative and not an exclusive effect, unless the parties have intended otherwise.

3.2. Sources of jurisdiction in investment arbitration

In contrast to commercial arbitration, where the jurisdiction of the arbitrators is based solely on the consent of the parties expressed in a valid arbitration agreement, in investment arbitration the parties’ consent is not a sufficient source of jurisdiction. The host State and the foreign investor must provide their consent to refer their investment related disputes to arbitration in an express agreement, under a national investment law, or an investment treaty. But the host State’s ratification of investment treaties and, where applicable, of the ICSID Convention, does not automatically constitute consent to arbitration. Certain objective jurisdictional requirements provided in the latter or in the investment law of the host State must be satisfied to establish the jurisdiction of the arbitral tribunal.

The first jurisdictional requirement established by an investment treaty is determined in terms of time (ratione temporis), and provides that a dispute shall be covered by the investment treaty only if it arises after a certain date, ordinarily the date on which the treaty entered into force. A time period is usually granted during which claims may be brought after the termination of the treaty. The second jurisdictional requirement is determined in terms of person (ratione personae), and provides that a dispute shall be covered only if it has arisen between the host State and a national of the other State, as defined in the treaty, while excluding any dispute between the host State and nationals of a third State. The third

62 Amerasinghe [n. 56] p. 79
63 Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 77 (Apr. 4)
64 Amerasinghe [n. 56] p. 80
65 Steingruber [n. 1] paras 13.01, 13.03, 13.05
jurisdictional requirement is determined in terms of the subject matter (ratione materiae), and provides that a dispute shall be covered by the investment treaty only if it is related to investments, as defined in the treaty. In addition, the jurisdictional requirements of the International Centre for Settlement of Investment Disputes (the ‘Centre’ or ‘ICSID’) is that there be a legal dispute and an investment, in accordance with the provisions of Article 25 of the ICSID Convention.

3.3. The arbitration agreement is not the only source of powers

As indicated above, the arbitration agreement is the tribunal’s main source when establishing its powers to conduct the proceedings. It may specify to a greater or lesser extent the powers that the arbitral tribunal enjoys, and define its level of discretion in the absence of an agreement. The parties are in the liberty of deciding the procedure to be adopted in the arbitration, but within certain limitations and subject to the minimum standard of procedural fairness. Many national arbitration laws and rules of arbitration recognize the autonomy of the parties to determine the rules of procedure, such as the UNCITRAL Model Law, the English Arbitration Act 1996, the Rules of Arbitration of the ICC, and the London Court of International Arbitration (LCIA) Arbitration Rules, which all establish that the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, and only failing such an agreement, may the arbitral tribunal determine the appropriate procedure to be adopted.

It has been made abundantly clear, however, that to establish the source of the arbitral tribunal’s powers, it is not sufficient to refer solely to the arbitration agreement, or to the rules of arbitration that that parties have decided to include to their agreement, but also to the law governing the arbitration agreement and the law of the place of the arbitration, which generally extend the powers conferred by the parties. Therefore, in order to determine the

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68 Jenkins [n. 41] p. 157
69 Article 19
70 Section 34(1)
71 Article 19(1)
72 Articles 14.1, 14.2
73 Blackaby [n. 2] para 5.12
nature and scope of the arbitral tribunal’s powers, it is necessary to examine (i) the arbitration agreement, which establishes the powers that the parties have agreed to confer on the arbitral tribunal, whether directly or indirectly; (ii) the law governing the arbitration agreement, which determines its validity and may supplement or restrict such powers conferred upon the arbitral tribunal; and (iii) the law of the place of the arbitration, which may extend the powers conferred on the arbitral tribunal, but may also restrict them, since the law governing the arbitration would supersede the provisions of the arbitration agreement.74

4. Limitations on the arbitral tribunal’s jurisdiction and powers

4.1. Scope of the agreement and arbitrability as limitations on jurisdiction

The jurisdiction of the arbitral tribunal is in every circumstance dependant upon the agreement of the parties and the laws of the applicable jurisdictions. These relevant national laws directly or indirectly influence the effectiveness of the arbitration agreement. Where the nature of the dispute submitted to the tribunal is not covered by the agreement to arbitrate, or the subject matter is prohibited from being referred to arbitration, then the agreement will be unenforceable. If a party to the dispute should challenge the arbitral tribunal’s jurisdiction, the latter may determine that it is legally incapable of continuing with the proceedings due to lack of jurisdiction, otherwise any award on the merits rendered by the arbitral tribunal may be declared ineffective.75

The limitations of the arbitral tribunal’s jurisdiction coincides exactly with the scope of the arbitration agreement, and if necessary will depend on its interpretation. The matter of which parties have agreed to arbitration or what issues are covered by the agreement of the parties to arbitrate, regularly involve the limits and extent of the arbitral tribunal’s jurisdiction.76 For this reason, if the parties fail to expressly confer, whether directly or implicitly, on the arbitral tribunal the authority to decide their specific disputes, and which arise out of a particular contractual relationship, there can be no arbitration proceedings.77

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74 ibid para 5.13
76 Gaillard [n. 5] para 648
77 Lew [n. 76] p. 74
The arbitrability of the parties’ disputes is another limitation on the arbitral tribunal’s jurisdiction, since it determines which disputes can be referred to arbitration, and is a condition of the validity of the arbitration agreement. Arbitrability is not only subjected to the customary standards contained in the applicable arbitration laws, that is, monetary claims or rights that can be disposed of by the parties, but may exclude recourse to arbitration by conferring jurisdiction to the courts or administrative authorities. The New York Convention refers to the matter of arbitrability in Article 2(1), by providing that each Contracting State shall recognize an arbitration agreement ‘concerning a subject matter capable of settlement by arbitration’. On this subject, an important legal precedent was set in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., where the United States Supreme Court decided that antitrust claims arising from an international transaction could be resolved by arbitration, although it had previously been held that issues under antitrust laws were nonarbitrable.

4.2. The private nature of arbitration as a limitation on the tribunal’s powers

The principal limitation on the arbitral tribunal’s powers is that they originate and rely on the agreement of the parties, who usually have the right to agree upon, and to require the arbitral tribunal to implement the rules of procedure of their choice, but subject to the limits provided for in the law governing the arbitration agreement. The parties may not, however, impose restrictions on the arbitrator’s powers as to prevent them from performing their main function, which is to resolve the dispute. The arbitral tribunal must be capable of conducting the arbitration by deciding certain procedural matters that allow the proceedings to move forward expeditiously towards its conclusion, while remaining within the constraints of the due process principles (i.e. independence and impartiality of the arbitrators, equal treatment and the parties right to be heard), public policy or mandatory rules of the lex fori, institutional rules of arbitration, and the principle that the arbitration cannot affect third parties.

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78 Poudret and Besson [n. 53] para 326
80 See American Safety Equipment Corp. v. JP Maguire & Co., 391 F.2d 821 (2d Cir. 1968)
81 Delvolvé [n. 40] paras 216, 218
82 Jenkins [n. 41] p. 159
But the private nature of the arbitral process probably imposes the most significant limitation on the powers of arbitrators. The arbitral tribunal, which is not an organ of a State, does not enjoy the coercive powers of a national court, and cannot by force of law or authority, compel the parties to the dispute, and certainly third parties, to comply with the orders it makes or assist in the functioning of the proceedings. The parties cannot confer upon the arbitral tribunal the coercive powers vested by the State on its national courts, and any power granted beyond what is allowed by the applicable law shall be invalid. This has been regarded as one of the disadvantages of arbitration, considering that the arbitral tribunal does not have sufficient coercive authority to settle matters that may arise between the parties and that require immediate attention.

As a matter of example, if one of the parties requests the disclosure of evidence and the arbitral tribunal were to order the production of documents, should the requested party not comply with the tribunal’s order, the latter has no imperium to force such production, nor could this power be exercised against third parties to the arbitration. The same applies when the arbitral tribunal requires the presence of witnesses, given that it lacks the power to recur to the forces of public order if a witness fails to appear. In either circumstance, the arbitral tribunal is usually limited to draw adverse inferences from such failure. The only alternative in the event that a party fails to comply with one of the arbitral tribunal’s orders is to request the support of the relevant national court for the enforcement of such order.

Conclusion

The jurisdiction of the arbitral tribunal is the power to resolve the parties’ disputes, but also involves determining if the arbitrators can exercise such jurisdiction at the outset. Once it has been established that the arbitral tribunal has jurisdiction, we can look to the powers conferred upon it by the parties. Some authors and commentators interchangeably use the two concepts, but it is self-evident that although an arbitral tribunal may have jurisdiction to decide a certain dispute, it may or may not have a particular procedural power to assist it during the adjudication. That is to say, one is dependant on the other, so in order for the

83 Delvolvé [n. 40] para 216
84 Blackaby [n. 2] paras 5.8, 5.10
85 Delvolvé [n. 40] para 216
86 Blackaby [n. 2] paras 5.17, 5.19
arbitral tribunal to use one of its powers (e.g. order interim measures), it must have already taken jurisdiction.

The source of the arbitral tribunal’s jurisdiction is usually the arbitration agreement, but there may be several sources through which the parties may express their consent to arbitration, provided they comply with the formal requirements imposed by national arbitration laws and international conventions on arbitration. Nevertheless, in investment arbitration, consent alone is not a sufficient source of jurisdiction. The parties (generally the investor) must also comply with jurisdictional requirements in terms of time, person, and subject matter of the dispute. The arbitration agreement is also the source of the arbitral tribunal’s powers. It may confer such powers upon the tribunal either directly or indirectly by referring to international arbitration rules (ad hoc or institutional). In this case, and unlike the arbitral tribunal’s jurisdiction, the law governing the arbitration agreement and the lex arbitri may extend the arbitral tribunal’s powers.

The extent of the arbitration agreement will also define the limitations on the arbitral tribunal’s jurisdiction to decide the parties’ disputes. Any absence of the parties’ express consent to refer a specific issue to arbitration will entail the ineffectiveness of the agreement to arbitrate, and result in that any award issued by the arbitral tribunal may be declared null and void. In addition, for a dispute to be settled by arbitration it must be arbitrable, which implies that the matter is not prohibited from being decided by an arbitral tribunal, and that the national courts or administrative authorities do not have exclusive jurisdiction. The parties may also limit the powers of the arbitrators by agreeing on the rules of procedure that the tribunal must apply, but without depriving it from its authority to decide the dispute. These powers are also limited by the fact that the arbitral tribunal it is not an organ of a State, for which reason it will inevitably require the assistance of the competent courts.
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