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By

LEONEL PEREZNIETO CASTRO
AND
JAMES A. GRAHAM

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Mexican Supreme Court Rejects the Principle of *Kompetenz-Kompetenz*

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If for many years Mexican tribunals were suspicious of arbitration, in recent times they have seemed to support it, especially the Mexican Supreme Court,[1] which might have led one to think that finally Mexico could be considered as a "modern" country in regard to arbitration. However, a recent decision has destroyed this favourable approach, denying the arbitral tribunal the authority to decide the validity of an arbitration agreement.

Mexican arbitration law[2], based almost entirely on the UNCITRAL Model Law, foresees in Commercial Code, art.1432, that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. Even if the legislative text does not expressly say so, it has always been commonly understood that that article incorporates the principle of *kompetenz-kompetenz*, that arbitrators first decide the validity of the arbitration agreement, though their decision can be set aside by state courts. But art.1424 establishes that, if a party brings an action before a court in a matter which is the subject of an arbitration agreement, the court need not refer the parties to arbitration if it finds that the agreement is null and void, inoperative or incapable of being performed.[3] In our view, one has to distinguish between art.1424 that gives state courts a prima facie control and art.1432 that gives the arbitrators full jurisdiction to decide over the validity of the arbitration agreement. In other words, if a party requests the court to remit the dispute to arbitration, it must do so unless the agreement is prima facie void.[4] Such an interpretation does not allow a claimant to seek the avoidance of the arbitration agreement under art.1424, but requires it to make this objection to the arbitrators.

However, our views have not been shared by the state courts. The first, nearly unnoticed, attack on *kompetenz-kompetenz* was in the *SEA* case,[5] where the First Circuit ruled that the tribunal is competent to decide on its own competence "when the arbitral agreement foresees the power of the arbitrators to decide over the avoidance of the arbitral agreement", adopting thus the US approach set out in *First Options*.[6]

The final and definitive attack has been made in the *ADT* case, where the claimant did not bring before the state courts the substantial dispute but argued only that the arbitration agreement was void. In other words, whereas art.1424 foresees a party ignoring the arbitration

[1] Pereznieto Castro and Graham, "Chronique de Jurisprudence Mexicaine" (2005) 3 *Revue de l'Arbitrage* 775; Pereznieto Castro and Graham, "Mexico" (2003–2004) *International Arbitration Review* 24; *ABA's Mexico Update* 2005, 2.

[2] Graham and others, *Guía Práctica para el Arbitraje Internacional* (Lazcano, Monterrey, 2005); Pereznieto Castro, *Arbitraje Comercial Internacional* (DJC, Mexico, 2000); Von Wobeser, "Mexico", *Arbitration World* (European Lawyer Reference, London, 2004) 231; Siqueiros and Hoagland, "Mexico", in Paulsson, *International Handbook on Commercial Arbitration* (Kluwer, The Hague, 2003); Von Wobeser, "Mexico" in Blackaby and Lindsey, *International Arbitration in Latin America* (Kluwer, The Hague, 2003).

[3] Commercial Code, art.1424.

[4] Pereznieto, "La Remisión de las Partes al Arbitraje" (2006) 50 *Pauta ICC Mexico* 61.

[5] Tercer Tribunal Colegiado en Materia Civil del Primer Circuito. Amparo en revisión 14/2005. *Servicios Administrativos de Emergencia, S.A. de C.V.* 5/19/05.

[6] *First Options of Chicago, Inc v Kaplan* (94–560), 514 U.S. 938 (1995) ruling that it is for state courts to decide on the validity of an arbitration agreement, unless the parties have expressly agreed otherwise.

clause and seeking from the judge a substantial solution, in the present case the court was asked to decide whether the agreement to arbitrate was valid. The district judge considered that he was empowered to decide on its validity, even though he was not asked to deal with the dispute. The district court could not refer the parties to arbitration until the validity of the arbitration agreement was resolved.[7]

For technical reasons proper to the Mexican legal system, two different appeals were filed before the Circuit Court, and two opposite solutions given. The first ruling was that an exclusive competence had been given to the arbitral tribunal,[8] whereas the second case decided that there was concurrent jurisdiction, state courts having jurisdiction to decide whether the arbitration agreement was void, without depriving the arbitral tribunal of its competence to continue to hear the dispute.[9]

However, in a mandatory precedent, which we consider more than unfortunate, the Supreme Court has decided that it is for state courts to establish the validity of the arbitration clause[10]: first, there has to be judicial control over arbitration because it is a private proceeding; secondly, arbitration is only possible if it is the will of the parties. If validity is challenged on the ground that there has never been any consent to arbitration, it would be illogical to allow an arbitral tribunal to decide such an issue. It is only when it is established that the arbitration agreement is valid that state courts can refer the parties to the arbitration.

Whereas France,[11] among other European countries, again and again proclaims the principle of *kompetenz-kompetenz*, Mexican tribunals are now the second state jurisdiction in the American continent, after the United States,[12] to deny that principle,[13] not understanding that it is not to be interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. As Fouchard and Gaillard state:

> "that would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the courts if an action is brought to set aside or to enforce the award. Nevertheless, the competence-competence rule ties in with the idea that there are no grounds for the *prima facie* suspicion that the arbitrators themselves will not be able to reach decisions which are fair and protect the interests of society as well as those of the parties to the dispute.[14]
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> However, it is important to recognize that the competence-competence rule has a dual function. Like the arbitration agreement, it has or may have both positive and negative effects, even if the latter have not yet been fully accepted in a number of jurisdictions. The positive effect of the competence-competence principle is to enable the arbitrators to rule on their own jurisdiction, as is widely recognized by international conventions and by recent statutes on international arbitration. However, the negative effect is equally important. It is to allow the arbitrators to be not the sole judges, but the first judges of their jurisdiction. In other words, it is to allow them to come to a decision on their jurisdiction prior to any

[7] Juez Segundo de Distrito en Materia Civil en el DF. Amparo 556/2004-I, /8/11/04.

[8] Recurso en revisión, RC 3836/2004, 11/11/04.

[9] Amparo en revisión 31/2005. *Servicio Electrónico Digital*. 3/1/05.

[10] Tesis Jurisprudencial 25/2006. Contradicción de tesis 51/2005-PS. Entre las sustentadas por los Tribunales Colegiados Sexto y Décimo, ambos en Materia Civil del Primer Circuito, January 11, 2006. NB by a majority of 3:2.

[11] For one of the latest decisions: Civ[1], *AXA Corporate Solutions*, November 22, 2005; (2006) 2 *Revue de l'Arbitrage* 437.

[12] *First Options*, above.

[13] Panama also denied the principle of *kompetenz-kompetenz*, Supreme Court, December 13, 2001; (2002) 2 *Revista Latinoamericana de Mediación y Arbitraje* 40 but Legislative Act No.1 of July 27, 2004 re-establishes the principle.

[14] E. Gaillard and J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) #659.

> court or other judicial authority, and thereby to limit the role of the courts to the review of the award. The principle of competence-competence thus obliges any court hearing a claim concerning the jurisdiction of an arbitral tribunal—regarding, for example, the constitution of the tribunal or the validity of the arbitration agreement—to refrain from hearing substantive argument as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had the opportunity to do so. In that sense, the competence-competence principle is a rule of chronological priority. Taking both of its facets into account, the competence-competence principle can be defined as the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts."[15]

The Supreme Court has not ignored art.432 and proclaims as a general rule the power of the arbitrators to decide the validity of an agreement to arbitrate. However, it found that there is an exception when the claim to set aside is presented before a court. In that case, state courts have the obligation to decide the validity of the arbitration clause. Nevertheless, there is no doubt that this constitutes a direct violation of art.1424, which does not foresee the possibility for a claimant to obtain a decision to set aside. On the contrary it establishes that, if the substantial dispute is submitted to the judge, the judge must refer the parties to arbitration, unless the agreement to arbitrate is void. In this "new" system, if a party presents its claim to the arbitrators, the respondent can bring the case before state courts to challenge the validity of the arbitration agreement and thus leave the arbitral tribunal without any jurisdiction to decide the question. Paradoxically, the arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.[16]

Unfortunately, it is very unlikely that there will be soon a change of case law. There would have to be various contradictory rulings of inferior courts or the same court would have to apply, interpret or rule upon a point of law in the same way in a series of cases, without interruption by any contrary ruling on that point of law.[17] In other words, all the efforts the very same Supreme Court has recently made to promote arbitration have been destroyed by the present decision. No doubt clever lawyers will use this decision to obstruct arbitrations. It will be sufficient to invent any kind of cause to avoid the arbitration agreement before a court. That will delay the arbitration for two or three years.[18] That is why it is hoped that concerned professional bodies (lawyers, scholars, arbitration centres, etc.) will soon propose legislative reform to promote Mexico as a modern Latin American arbitration forum.

[15] at para.660.
[16] Commercial Code, art.1424(2).
[17] For a detailed overview: Zamora, Cossío, Pereznieto and others, *Mexican Law* (Oxford, New York, 2004) 83.
[18] As first instance's decisions are submitted to appeals.