JURISDICTION OF ARBITRATION TRIBUNALS IN FRANCE

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1. INTRODUCTION

This article relates to international commercial arbitration as it examines the jurisdiction of arbitral tribunals to rule on their own jurisdiction. It reviews arbitral jurisdiction in France by considering the principle of arbitral jurisdiction as applied by its national courts. Although this principle is recognised in the national arbitration laws of many jurisdictions, there are some important differences. For instance, there is divergence in relation to the stage at which judicial intervention occurs and the degree of intervention by courts of different countries. Divergence is also observed in the type of judicial review undertaken by the courts.

This article focuses on an examination of the French legislation, case law and practice. It provides an overview of arbitral jurisdiction and proceeds to review the French approach to arbitral jurisdiction including the new legislation. The extent and the stage at which court intervention occurs in this jurisdiction is examined.

It is argued the best practice is the French approach to giving priority to the jurisdiction of arbitral tribunals. This renders jurisdictions which support such an approach a more attractive venue for international arbitration.

2. DETERMINING THE JURISDICTION OF ARBITRATION TRIBUNALS

2.1 The principle of competence-compétence

The principle of competence-compétence concerns the arbitrator’s power to rule on a dispute which is conferred by agreement between the parties. This is the essence of
the *compétence-compétence* principle.\(^1\) Such power is also referred to as ‘arbitral jurisdiction’.\(^2\) The term *compétence-compétence* – also referred to as *compétence sur la competence* or *kompetenz-kompetenz* – confers a right on arbitrators to decide their own jurisdictional authority to hear a dispute and is essential to the practice of international commercial arbitration.\(^3\)

There is widespread recognition that the principle of *compétence-compétence* is a necessity.\(^4\) Recognition of this can be seen in international treaties, institutional rules

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2 The term ‘arbitral jurisdiction’ is used more commonly in the United States. This will be discussed in more detail in Part Three of this Article.

3 The principle of *compétence-compétence* is defined as the arbitrators’ power to determine their own jurisdiction, to hear and determine the dispute before them. Carbonneau, T.E., *Cases and Materials on the Law and Practice of Arbitration* 2003, Juris, 3\(^{rd}\) revised ed, at p. 21. The German principle of *Kompetenz-Kompetenz* will not be used in this article because this term was traditionally employed to denote the *Kompetenz-Kompetenz* clause which is a particular agreement to empower the arbitral tribunal to rule on its own jurisdiction. Such a ruling is final and cannot be examined by national courts at the phase of challenge or enforcement of the award. Under the current German law, such a clause is not enforceable and is not discussed in this article. See *Zivilprozessordnung* (ZPO) Code of Civil Procedure (Germany) arts 1025-1048.

and national laws which provide for *compétence-compétence* to differing extents.\(^5\) For example, Art. 21 of the UNCITRAL Rules of Arbitration confers power to the arbitral tribunal to determine the validity of objections to its jurisdiction, including challenges regarding the existence or validity of the arbitration agreement.\(^6\) Moreover, major institutions for arbitration such as the London Court of International Arbitration also uphold the principle of *compétence-compétence* in their procedural rules.\(^7\) Although *compétence-compétence* is recognised in the national arbitration laws of France, and many other countries, there are some important differences.\(^8\) These differences are delineated in this article. Particular emphasis is placed on the grounds for challenging arbitral jurisdiction. Such challenges frequently relate to the existence or validity of the arbitration agreement.\(^9\) Although challenges on other grounds exist, challenges on jurisdictional grounds are the focus of this article.

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\(^5\) Gaillard, E., *Prima Facie Review* at p. 3.


\(^7\) London Court of International Arbitration LCIA Rules, art 23. Effective 1 January 1998.


2.2 Jurisdictional Challenges

The principle of *compétence-compétence* typically arises where a challenge has been brought on jurisdictional grounds. In this category, disputes relating to the formation, validity and interpretation of arbitration agreements are a common occurrence. Jurisdictional challenges during the early stage of an arbitral hearing often result in national court proceedings. Frequently, the arbitral tribunal itself may be asked by the parties to resolve the issue of jurisdiction.\(^\text{10}\) The notion of jurisdiction in the context of arbitration refers to the scope of the arbitral tribunal’s power to examine and determine the facts, interpret and apply the law and issue a written judgment. The jurisdiction of the tribunal is usually stipulated in the contract between the parties, along with any laws that govern the arbitration procedure and the substantive laws that govern the contract.\(^\text{11}\)

Most institutional arbitration rules provide expressly that the arbitral tribunal has the authority to rule on its own jurisdiction.\(^\text{12}\) For example, the tribunal has the option to

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\(^{11}\) ‘2010 International Arbitration Survey: Choices in International Arbitration’ (Survey, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London and White & Case, 2010) 1, 2. (‘*White & Case Survey*’).

rule on the issue of jurisdiction as a preliminary question by issuing an interim award. Alternatively, the tribunal may determine the jurisdictional question with the merits in its final award. Whether the question of jurisdiction is determined in an interim or final award is subject to a number of factors. These include the will of the parties, the complexity of the case and the degree to which jurisdictional issues are enmeshed with the merits. If jurisdiction is challenged by one of the parties, the most efficient response is to undertake a preliminary proceeding to address the issue.\(^\text{14}\)

If the tribunal undertakes a preliminary jurisdictional proceeding, it will normally issue an interim award upholding their jurisdiction, or a final award declining jurisdiction. Generally, such an award may then be subject to court action to dismiss it, normally only in the country where the award was made. Alternatively, if it becomes apparent that the issues are interrelated with the merits, a determination on jurisdiction may be reserved until a final award is issued by the arbitral tribunal.\(^\text{15}\)

\(^{13}\) LCIA Arbitration Rules, Art 23(3).
losing party may oppose enforcement of the award in the national courts where the winning party seeks to have it enforced.\textsuperscript{16}

There are tactical reasons why parties may choose to wait until the enforcement stage to challenge jurisdiction. One may be that the party challenging the existence or validity of the agreement does not wish to be bound by the possibility that the court at the \textit{seat} may find the tribunal has jurisdiction.\textsuperscript{17} They would rather reserve the challenge for the enforcement proceedings.\textsuperscript{18} Such challenges may be partial or total challenges to jurisdiction of the tribunal.

\section{3. \textsc{The French approach to \textsc{compétence-}
\textsc{compétence}}}

\subsection{3.1 Introduction}

This chapter provides a detailed analysis of the French approach to \textsc{compétence-compétence}. The objective is twofold: (1) to examine the circumstances in which a

\textsuperscript{16} See \textit{Dallah Real Estate and Tourism Holding Co v Pakistan} [2010] UKSC 46. (‘\textit{Dallah}’).

\textsuperscript{17} The term \textit{seat} refers to the national arbitration laws which govern the procedural aspects of the arbitration. Conversely, the court where enforcement may be sought is usually in a different jurisdiction to that of the \textit{seat}.

\textsuperscript{18} In fact, this is what occurred in \textit{Dallah} where the seat of the arbitration was in France and enforcement proceedings were held in the United Kingdom. The national courts of the two countries ruled differently as to the validity of the arbitral award.
French court will intervene in the jurisdiction of an arbitral tribunal and (2) to identify the degree of intervention taken by the courts. To this end, the article discusses a line of judicial cases. Particular emphasis is placed upon void and manifest inapplicable arbitration agreements. Civil law systems such as France have been more reliant upon legal codes than case law to establish a legal framework for the regulation of arbitration. The provisions for arbitration in the codes are specific. Judicial rulings seek to reinforce rather than adapt the statutory provisions. Consequently, law-making by the French courts is consistent, disciplined and predictable.\(^1\)

The French legal tradition is premised on a strict separation between private law and public law. These comprise two distinct systems each with their own courts, their own legal notions and authors. French law adopts a deductive process of reasoning, inferring its rules from broad axioms and developing solutions from those rules. This method is applied to private law on the basis of the Codes which emanated from the Napoleonic codification.\(^2\) In order to understand the popularity of France as a ‘seat’ and the ICC in particular as an institution for conducting international

\(^1\) Carbonneau, T.E., *Cases and Materials* at p. 1065.

\(^2\) The Napoleonic Codes consisted of legal codes which reformed laws in France. The first code was introduced in 1801. de Cruz, P., *Comparative Law in a Changing World* 2006, Cavendish Publishing, 3\(^{rd}\) ed, at p. 27.
3.2 The historical development of arbitration in France

During the 1950s and 1960s, private justice was in a precarious position in France. Arbitration lingered on the margins of the legal profession. Neither the Court of Appeal nor the Tribunal of Commerce of Paris had any substantial involvement in resolving commercial disputes. These circumstances created an opportunity to introduce alternative dispute resolution regarding business disputes. The obstacles for entry into arbitration were low and protectionist attitudes from the Paris bar were virtually non-existent, owing to the general antipathy for disputes intimately connected with business.²¹

Accordingly, commercial disputes were free from any monopolization. The legal practitioners who specialized in commercial law were not powerful enough to object to the rise of arbitration or attempts to usurp their area of practice. With the exception of academics, a few judges and a small number of practitioners, there was a lack of interest in this new method of dispute resolution. These circumstances

combined with the liberal attitude found in Paris, culminated in the flourishing of the International Chamber of Commerce as a premier institution for the resolution of international commercial disputes.\textsuperscript{22} The arbitrators of the ICC were perceived as an elite group as some of them were prominent in international law and the Hague Court of International Justice. The eminence of these early arbitrators placed the ICC on the map internationally.\textsuperscript{23} During the 1970s, arbitrations conducted by the ICC proliferated, firmly establishing it as a credible alternative to commercial litigation.

In France, courts have developed a set of principles which seek to protect the effectiveness of arbitration. Substantive laws have been formulated including a rule stipulating the priority of the tribunal to rule on jurisdiction. In the case of \textit{American Bureau of Shipping v Copropriété Maritime Jules Verne}, the highest court in France, the \textit{Cour de Cassation} held that:

\begin{quote}
The principle of validity of the international convention to arbitrate and the principle that the arbitrator may rule on his jurisdiction are substantive rules of French international arbitration law which establish on the one hand the lawfulness of the convention to arbitrate
\end{quote}

\textsuperscript{22} \textit{Ibid.}

\textsuperscript{23} \textit{Ibid.}, at p. 304.
independently from any reference to a national law and, on the other hand, the efficiency of arbitration by allowing the arbitrator, when his jurisdiction is disputed, to rule first.\textsuperscript{24}

\textit{Jules Verne} provided arbitrators with first priority to rule on jurisdiction, and the principle was codified under Art. 1448 in the \textit{New Decree No 2011-48 of 13 January 2011}.\textsuperscript{25} France confers the tribunal with exclusive power to determine challenges to its jurisdiction, subject to minimal or no curial review. Moreover, curial review is possible on limited grounds. Notably, review does not include review on the merits of the award.

\section*{3.3 Sources of International Arbitration Law in France}

The sources of arbitration law in France are: the \textit{New Decree}, the \textit{Code of Civil Procedure}, international conventions, French case law and to a limited degree,


arbitration awards.\textsuperscript{26} The \textit{New Decree} amends the arbitration provisions of the \textit{Code of Civil Procedure}.\textsuperscript{27} Although it maintains the distinction between domestic and international arbitration, it sets out the basic principles and procedural framework for international arbitration with its \textit{seat} in France. It codifies many developments in case law since 1981, making French arbitration law even more user-friendly.\textsuperscript{28} It widens the autonomy granted to parties to tailor their arbitration to meet their own requirements. Although France follows the civil law tradition, the judgments of the French courts are a valuable source for arbitration law.\textsuperscript{29}

The highest court ruling on arbitral disputes is the French Supreme Court – \textit{Cour de Cassation} - the apex of the judicial hierarchy. Below it, the Paris Court of Appeal – \textit{Cour d’ Appel de Paris} - with its specialised chamber for hearing arbitral disputes, is

\begin{quote}
\textsuperscript{26} \textit{New Decree}. This Decree has comprehensively reformed the law of arbitration in France which is the \textit{CPC}. The \textit{CPC} is the French Civil Code which is a collection of statutes established by Napoléon I in 1804. The \textit{New Decree} came into force on 1 May 2011 and codifies the case law. Not all arbitration awards are made public but some types of arbitrations such as investment arbitrations usually are.

\textsuperscript{27} \textit{CPC}.


\end{quote}
a court where arbitration disputes are more commonly heard. The Court of First Instance of Paris – *Tribunal de Grande Instance* – is lower in the hierarchy. The president of the Court of First Instance plays a key role and is authorised to grant orders for judicial assistance to the arbitration. Further, if the matter is an international arbitration, the jurisdiction of the Court of First Instance is exclusive. 30

Key French curial judgments are usually reported in the *Revue de l’Arbitrage*. Awards are seldom made public and if they are, they do not form binding precedents although they may have persuasive value. 31 If they are published, the identity of the parties and other key information is concealed. Although France is an arbitration-friendly jurisdiction, it has not officially adopted the *Model Law*. There are also a number of international conventions to which France is a signatory, namely the *New York Convention*, the *European Convention* and the *Washington Convention*. 32 The *New York Convention* is discussed in the following section. 33

31 Kovacs, R.B., *Challenges to International Awards* at p. 421.
4. The Right of Arbitration

A fundamental precept of French law is that parties may have disputes resolved either through the national courts or alternative dispute resolution mechanisms. For parties to arbitrate there must be a freely concluded arbitration agreement and an arbitrator must be appointed to resolve a dispute by an award.\textsuperscript{34} Arbitrators are not judges of national courts and do not render judicial decisions. However, in France, arbitral decisions have the same binding power as judicial determinations. An award is binding on the parties as soon as it is issued.\textsuperscript{35} Where the seat of an arbitration is in France, a party must obtain an enforcement order from the \textit{Tribunal de Grand Instance} – the Court of First Instance, to enforce an award.\textsuperscript{36}

\begin{itemize}
\item [\textsuperscript{33}] New York Convention.
\item [\textsuperscript{34}] In some circumstances, arbitration may be mandatory, and a specific arbitration agreement is not required. However, the circumstances in which mandatory arbitration applies, is not within the scope of this thesis.
\item [\textsuperscript{35}] New Decree, art 1484.
\item [\textsuperscript{36}] This is in accordance with New Decree, Art. 1487. An enforcement order will not be granted if it is contrary to public policy as per Art. 1488.
\end{itemize}
5. **RIGHT OF APPEAL TO COURTS**

One of the most significant changes in the *New Decree* is Art. 1506, which states that unless the parties agree otherwise, certain provisions applicable to domestic arbitrations are equally applicable to international ones.³⁷ Appeals against awards are heard before the Court of Appeal, pursuant to Art. 1525. Unless the parties have waived the right to appeal, the Court of Appeal may also set aside the award if the *seat* of the arbitration is France.³⁸

Provided the validity of an arbitration agreement has not been questioned, the issue of whether it applies to a dispute or solely to specific parts is not for the courts to determine. Equally, a French court would not refuse jurisdiction on its own volition; it would do so only if a party challenges the existence of the arbitration agreement.³⁹ French arbitration law recognizes that parties must have a safety net in case there is an unfair arbitral hearing or a miscarriage of justice. A losing party may make an

³⁷ Article 1506 covers many provisions including but not limited to: 1446, 1447, 1448(1) and (2), 1449, 1452-1458, 1460, 1481 and 1482.

³⁸ *New Decree*, Art. 1523. Under this provision, there is also a one month time limit from the date of service of the enforcement order in which a party must apply to court to seek to have the enforcement order set aside.

application to the Court of Appeal in a narrow set of circumstances. The purpose of such an appeal could only be to either have an award set aside or appeal an enforcement order. The grounds for appeal are found under Art. 1520 of the *New Decree*.\(^4^0\) Pursuant to this provision, an award may be set aside only if:

(a) The arbitral tribunal wrongly upheld or declined jurisdiction; or

(b) The arbitral tribunal was not properly constituted; or

(c) The arbitral tribunal ruled without complying with the mandate conferred on it; or

(d) Due process was violated; or

(e) Recognition or enforcement of the award is in violation of international public policy.\(^4^1\)

Art. V(1)(e) of the *New York Convention* stipulates that an award may be refused recognition and enforcement if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.\(^4^2\) French courts have held that since Art. V(1)(e) does not fall under any of the grounds within Art. 1520 of the *New

\(^{40}\) *New Decree*, Art. 1520.

\(^{41}\) *New Decree*, Art. 1520.

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Decree, French law prevails over the New York Convention owing to Art. VII. Art. VII confers a right on the parties which is clearly subject to the laws of the country where the award is appealed.

This means that an award which has been set aside in the jurisdiction where it was made can still be enforced in France. In international commercial arbitrations, French courts are not obliged to take into consideration proceedings that have been commenced to challenge an award in the courts of the country where it was made or where the award has been suspended or annulled by another foreign court. Courts in France are not bound by the judicial opinions which are deemed to be the concern of the foreign court. There is no judicial comity applicable to this aspect of French law. This position is now codified in the New Decree under Art. 1526.

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43 New York Convention, Art. VII.
45 New Decree, Art. 1526 applies to awards made in France and elsewhere. It provides that: ‘Neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award. However the first president ruling in expedited proceedings or, once the matter is referred to him or her, the judge assigned to the matter, may stay or set conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties.’

[Type text]
The Cour de Cassation has qualified the French position by stating that the arbitral tribunal is international. Therefore, its rulings cannot be considered attached to the national legal order of the country where it was made. The position of the French judiciary is also evidenced in the courts’ refusal to examine the annulment of awards in the country where they were rendered. This was clearly enunciated in the *Hilmarton v Omnium de Traitement et de Valorisation* case which concerned *res judicata* of a previous enforcement of an award. The case of *Société PT Putrabali Adyamulia v Société Rena Holding* further reinforced the court’s position. Here, the court made it clear that the annulment of an award by the courts of the country where it is rendered does not prevent the award from being recognised and enforced by the courts in France. The *Cour de Cassation* held that:

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An international arbitral award which is not anchored in any national legal order is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought. Under Art. VII of the [1958 New York Convention], Rena Holding was allowed to seek enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules. It could also base its request on the French rules on international arbitration, which do not provide that the annulment of an arbitral award by the courts of the country where it was rendered is a ground for refusing its recognition and enforcement.\footnote{Pinsolle, P., “Recent Significant French Judicial Decisions Involving International Arbitration” in Arthur W. Rovine (ed), Contemporary Issues in International Arbitration and Mediation-The Fordham Papers 2008 2009, Martinus Nijhoff, at pp.109,117.}

The significance of the judgment in Putrabali is two-fold. Firstly, the Cour de Cassation verified that an international arbitral award is not indexed to any national system of law. Secondly, the court deemed the award to be an international judicial decision. It reasoned that the award is independent from the laws of the place of arbitration, but also independent of all national legal systems. Accordingly, there is an arbitral legal order which operates autonomously from national legal systems.
Acceptance of the award as a judicial decision brings with it the recognition of an international arbitral order.\textsuperscript{50}

6. THE DALLAH SAGA

The lack of significance attributed to judgments of the courts at the seat concerning the validity of a foreign award is not shared by the laws of many other countries, especially those from a common law tradition.\textsuperscript{51} A recent decision which is relevant on this point is \textit{Dallah Real Estate and Tourism Holding Company v Pakistan.}\textsuperscript{52} The English and French courts issued contradictory judgments pertaining to the enforceability of an International Chamber of Commerce award made against the Government of Pakistan. Essentially the English court held that the ICC tribunal had erred in declaring jurisdiction over the Government because the Government was not a signatory to the arbitration agreement.\textsuperscript{53} The \textit{Cour d'Appel de Paris} – Court of Appeal of Paris – upheld the ruling by the tribunal that it had jurisdiction.

The facts of the case were as follows: The Government of Pakistan had established a pilgrimage trust for the purpose of serving its citizens who performed pilgrimage in Mecca.\textsuperscript{54} Dallah executed a contract in July 1996 with the Government for the

\textsuperscript{50} \textit{Ibid.}, at pp. 117-118.


\textsuperscript{52} \textit{Dallah Real Estate and Tourism Holding Co v Pakistan} [2010] UKSC 46.

\textsuperscript{53} The Government of Pakistan (‘Government’).

\textsuperscript{54} Pilgrimage Trust (‘Trust’).
construction of accommodation for Pakistani pilgrims who travelled to Mecca.\footnote{55} The Contract was executed by the Trust. It provided for arbitration by the ICC in Paris. However, the \textit{seat} of the arbitration was unspecified. Subsequent to the dissolution of the Government in 1996, the Trust also was dissolved.

In early 1997, the Secretary of the Ministry of Religious Affairs of the Government wrote to Dallah alleging that it had failed to submit specifications for review and approval by the Trust. Curial proceedings were therefore brought against Dallah in the national court in Pakistan in the name of the Government.\footnote{56} Dallah consequently sought arbitration by the ICC. Although the Government did not submit itself to the jurisdiction of the tribunal, the tribunal relying on \textit{competence-compétence}, ruled that the Government was a party to the arbitration agreement. Accordingly, the tribunal ruled that it had jurisdiction to determine the claim made by Dallah.\footnote{57}

\footnote{55} This contract executed by the Trust. (’\textit{Contract}’).

\footnote{56} \textit{Ibid} \[9\] (Lord Mance).

The arbitral tribunal determined the dispute in favour of Dallah finding that the Government was a party to the agreement. The Government resisted enforcement in the courts of the United Kingdom on the grounds that the arbitration agreement was invalid under the laws of France. The Government argued that it was not a party to the arbitration agreement and therefore not bound by it.  

Given that there was no seat provided for by the parties, the law of France was applied to the agreement since the award was made in France. In particular, the question of whether the Government was a party to the arbitration agreement had to be determined in accordance with French law.

Dallah sought to enforce the award issued by the ICC. On appeal from the Court of Appeal, the Supreme Court of the United Kingdom refused to enforce the award on the basis that the arbitral tribunal had erred in finding that the Government was bound by the agreement to arbitrate. The Government had successfully resisted enforcement in the United Kingdom on the basis that the arbitration agreement was invalid pursuant to the laws of France. Article V(1) of the New York Convention states that recognition may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought proof that:

the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Although both the United Kingdom and the French courts had to apply the same French test of ‘common intention of the parties’ to determine if the Government was a party to the arbitration agreement, the different legal approaches produced divergent results. The French expert for Dallah stated in his report that the ‘arbitrators must look for the common will of the parties, express or implied, since it is a substantive rule of French law that the courts will apply when controlling the jurisdiction of the arbitrators.’

Dallah sought to have the award enforced by the Tribunal de Grande Instance de Paris – the Court of First Instance of Paris, which granted it the enforcement order. In response, the Government appealed to the Paris Court of Appeal seeking an annulment of the award on the basis that the tribunal had incorrectly ruled that it had jurisdiction over the Government. On 25 January 2009, the Supreme Court of the United Kingdom refused Dallah’s application to stay the proceedings pending a decision by the Paris Court of Appeal. Shortly following the judgment of the United Kingdom Supreme Court, the Paris Court of Appeal ruled that the establishment of

60 Ibid [17] (Lord Mance). The French expert was Yves Derains who provided an expert report to the Supreme Court of the United Kingdom.
the Trust was simply a formality and the Government was a party to the Contract. Accordingly, the Court of Appeal rejected the application by the Government for the annulment of the award.\footnote{Grierson, J. and Taok, M., “Dallah: Conflicting Judgments from the UK Supreme Court and the Paris Cour d’ Appel” (2011) 28(4) \textit{Journal of International Arbitration} 408.}

The Paris Court of Appeal applied the \textit{Dalico} doctrine whereby:

(1) An international arbitration is not governed by any national law but by French material rules of international arbitration\footnote{These ‘material rules’ are applied by French courts without a conflict of laws analysis.} and;

(2) The question of whether a party is bound by an arbitration agreement must be resolved by a factual inquiry, that is, the court must determine if the parties intended to go to arbitration.\footnote{Bouchardie, N. et al, “Insight: In Dallah, the Paris Court of Appeal and UK Supreme Court Reach Contrary Decisions Applying the Same Law to the Facts” White & Case Newsletter (February 2011). Available at: \url{http://www.whitecase.com/insight-03022011}.}

The court then proceeded to closely review the successive stages of the project including the negotiations between the parties. It concluded that the Government was the sole negotiating counterpart to the Contract.\footnote{\textit{Ibid.}} This has been a contentious case and highlights the different approaches taken by the courts of France and the United Kingdom to the same questions.\footnote{\textit{Dallah Real Estate & Tourism Holding Co v Pakistan} [2010] UKSC 46.}
7. Manifestly Null or Manifestly Inapplicable Arbitration Agreements

According to the French notion of arbitration, there are two prongs to the principle of *compétence-compétence*. The first one is typically called the *effet positif*. This is referred to as the ‘*positive effect*’ in English. It enables arbitrators to determine their own jurisdiction if it is challenged, usually on the grounds of a void arbitration agreement or the issues being beyond the scope of the arbitration agreement. The second prong is the *effet négatif*, the ‘*negative effect*’ which bars French courts from examination of the validity or applicability of the arbitration agreement once the arbitrators’ have accepted their mandate. The *negative effect* is applicable, on the proviso that the agreement to arbitrate is not manifestly void or manifestly inapplicable.

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66 *New Decree*, Art. 1456 defines the meaning of the tribunal being seized of the dispute as being when the arbitrators’ accept their mandate to act. As of that date, the tribunal is said to be seized of the dispute. After this point, the parties cannot bring the dispute to court until an award is issued.

67 *New Decree*, Art. 1448 provides that: ‘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.’ This is a clear restriction for the court which is an application of the negative effect. See Derains, B., *Recent Developments in French Arbitration Case Law* (2010) Executive View <http://www.executiveview.com/digital_guides.php?id=52>. See *CPC* (France) Art. 1458(2).
French courts have given a narrow interpretation to the manifestly void and inapplicable arbitration agreements.\textsuperscript{68} In \textit{Distribution Chardonnet v Fiat Auto France}, the Paris Court of Appeal found that the ‘manifestly null’ exception would be inapplicable even though both a choice of court and an arbitration clause had been incorporated into the one contract.\textsuperscript{69} Subsequently, in the \textit{La Chartreuse v Cavagna} decision, where a real estate lease contract included a choice of court and an arbitration clause, it was held that it was for a tribunal to decide which clause would prevail.\textsuperscript{70}

In a more recent \textit{Cour de Cassation} judgment, a party contested the validity of an arbitration agreement on the grounds that the dispute was not capable of being


\textsuperscript{69} Distribution Chardonnet v Fiat Auto France, Cour de Appel Paris [Court of Appeal] 29 November 1991 reported in (1993) Rev Arb 617. (‘Distribution Chardonnet’). At the time of this decision the relevant provision was Art. 1458 of the \textit{Civil Code of Procedure} 1981 (France) which used the phrase ‘manifestly null and void’.

\textsuperscript{70} La Chartreuse v Cavagna, Cour de Cassation [Court of Cassation] 18 December 2003 reported in (2004) ASA Bull 796. (‘La Chartreuse’).
resolved by arbitration.⁷¹ The Court found that this did not amount to a ‘manifestly null’ arbitration agreement, therefore the ruling pertaining to validity would be exclusively for an arbitral tribunal to determine. This was held irrespective of the narrow wording of the arbitration agreement which left the question of validity beyond the scope of the arbitration agreement.⁷²

The cases which came before French courts where manifest inapplicability of the arbitration agreement was found, primarily concerned the scope of the arbitration clauses. In *SA PT Andhika Lines v Axa Corporate Solutions Assurances*, the *Cour de Cassation* held that there was manifest inapplicability of an arbitration clause concerning a maritime freight shipment case.⁷³ The facts related to booking notes which incorporated an arbitration clause and stated that the clauses would be annulled and replaced by the terms of bills of lading to be subsequently executed by the parties. The bills of lading included a clause which conferred exclusive jurisdiction on the national courts of the country in which the freight forward was located. The Court found that:

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⁷¹ *Cour de Cassation [French Court of Cassation], 12 December 2007. (unpublished).*


⁷³ *SA PT Andhika Lines v Axa Corporate Solutions Assurances*, *Cour de Cassation [French Court of Cassation], 03-19.838, 11 July 2006.*
the arbitration clause, contained in the preliminary contracts which were the booking notes, had been replaced, through a new expression of the intent of the parties, by the terms of the bills of lading, in a way which meant that it had become manifestly inapplicable.\textsuperscript{74}

These cases suggest that only in a few narrow circumstances will an arbitration agreement be considered as manifestly null.\textsuperscript{75} What is deemed as ‘manifestly null or void’ has been qualified by the\textit{ Court de Cassation} through these decisions. Article 1448 of the\textit{ New Decree} has enabled French courts to continue to apply a radical approach to the \textit{negative effect}, as it provides virtually unqualified priority to tribunals over courts in relation to the review of the validity of arbitration clauses.\textsuperscript{76}

In contemplating the possibility for national courts in France to determine the arbitrators’ jurisdiction, it appears that Art. 1448 and the case law of the French Court of Cassation delineates between:

1. Whether the parties agreed to arbitrate at all; and,

\textsuperscript{74} Ibid.

\textsuperscript{75} Brekoulakis, S., “The Negative Effect of Compétence-Compétence: The Verdict has to be Negative” Queen Mary University of London, School of Law, Legal Studies Research Paper No. 22/2009.

\textsuperscript{76} As did the\textit{ CPC}, Art. 1458 which similarly gave priority to tribunals to rule on jurisdiction.
2. The determination of the scope of the arbitration clause agreed to between the parties.\textsuperscript{77}

Even if the dispute relates to non-contractual claims relating to a contract incorporating an arbitration agreement, this is insufficient for a French court to deny the tribunal the power to initially rule on its jurisdiction pursuant to Art. 1448.\textsuperscript{78} In the absence of a ruling that the arbitration agreement is manifestly null or manifestly inapplicable, the court is obliged to decline jurisdiction and refer the parties to arbitration. It is then for the tribunal to determine as an initial matter whether the scope of the arbitration agreement is sufficiently broad to encompass the arbitration agreement.\textsuperscript{79}

9. Judicial Assistance for Compétence-Compétence

The first time the principle of \textit{compétence-compétence} was applied by a French court was in 1949.\textsuperscript{80} Currently an abundance of case law exists pertaining to this principle from the specialised chamber of the Paris Court of Appeal and the \textit{Cour de cassation}. There has been a steady development of French case law which has

\begin{footnotesize}
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\item \textsuperscript{77} Colaiuta, V., \textit{The Similarity of Aims in the American and French Legal Systems} at pp. 154-155.
\item \textsuperscript{78} \textit{New Decree}, Art. 1448.
\item \textsuperscript{79} Colaiuta, V., \textit{The Similarity of Aims in the American and French Legal Systems} at p. 155.
\item \textsuperscript{80} See \textit{Caulliez-Tibergien v Caulliez-Hannart}, Cour de Cassation [French Court of Cassation], 4899, 22 February 1949, reported in (1949) JCP 2 Ed. G, Pt. II, No. 4899.
\end{itemize}
\end{footnotesize}
provided unequivocal support for *compétence-compétence*. In a 2007 case, the *Cour de Cassation* held that the existence of two arbitration agreements referring to two separate arbitral institutions found within one agreement, was insufficient to prove the inapplicability of the parties’ agreement to arbitrate. The reasoning of the *Cour de Cassation* stated that the lack of intention to arbitrate was not found and the parties had not applied to the *juge d’appui* - the judge acting in support of the arbitration, who has the exclusive jurisdiction for resolving problems in the formation of the arbitral tribunal.  

The *juge d’appui* is a support judge, who works in conjunction with the arbitration procedure, providing assistance where required by issuing such court orders as may be needed to assist the arbitration or to enforce specific measures when other enforcement mechanisms are unavailable.  

*Compétence-compétence* is strongly supported by the courts as an essential requirement of the practical norms of

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82 *New Decree*, Art. 1460.
international arbitration. The degree to which the French judiciary supports arbitral jurisdiction, sets it apart from other countries.

The intervention of a court in the jurisdiction of an arbitral tribunal introduces the issue of jurisdiction of the court at the seat of arbitration. The seat of arbitration influences the speed and efficiency of arbitration. The common practice is that jurisdiction lies with the courts at the seat to review the arbitration agreement. If there is no evidence as to the seat of the arbitration, French laws stipulate for one or more secondary measures to determine jurisdiction of the courts. Pursuant to Art. 1505 of the New Decree, the courts of France have jurisdiction over an arbitration when it is conducted in France as well as when the arbitration has been submitted to French procedural law. The law of the seat and national courts in France are reluctant to interfere with the arbitral process unless there is an exception as per Art. 1448.

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84 *New Decree*, Art. 1505. The other two situations where French courts may review the arbitration agreement are where the parties have expressly granted jurisdiction to French courts or one of the parties is exposed to a risk of denial of justice.

85 *New Decree*, Art. 1448.
10. INAPPLICABILITY OF THE ARBITRATION AGREEMENT

Article 1448 of the New Decree enshrines the negative effect by providing inter alia, that courts must delay any action if the arbitrators have accepted their mandate. This provision extends further by stipulating that not only must the arbitrators have not yet accepted their mandate but, also the arbitration agreement must be manifestly void or manifestly inapplicable. In fact, in Impex v Malteria Adriatica it was held that in the same way that the judge has the authority to determine his own jurisdiction, where the judge is an arbitrator whose authority is conferred by the parties’ agreement, the same power exists. Following the decision in Impex, it has become the norm to recognise that the arbitral tribunal for an international arbitration has the authority to determine its own jurisdiction.

Although the French Cour de Cassation is willing to acknowledge the potential inapplicability of an arbitration agreement, there are few cases where this has actually occurred. One such case is DMN MachinefabriekBV v Tripette and Renaud, where the Cour de Cassation annulled a ruling whereby, prior to the commencement of an arbitration procedure, a lower court had refused the arbitrators jurisdiction.

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86 New Decree, Art. 1448.
87 Impex v Malteria Adriatica, Cour de Cassation [French Court of Cassation], (1969) reported in (1969) Rev Arb 95. (‘Impex’).
concerning a tort claim on the premise that such a claim was beyond the scope of the arbitration agreement.  

In *Machinefabriek*, the *Cour de Cassation* annulled the determination of the lower court. The primary reason was that the only grounds which permit French courts to determine arbitrators’ jurisdiction prior to the constitution of the tribunal are manifest nullity or inapplicability of the arbitration clause. The interpretation provided by the lower court failed to demonstrate that the alleged nullity or inapplicability was manifest. In fact, the requirement to interpret the arbitration clause in itself, suggests that the nullity or inapplicability was not manifest. If a prima facie inspection of the arbitration agreement by the court does not indicate any nullity or inapplicability, by default it should be referred to the tribunal to determine. The *Cour de Cassation* accordingly upheld the arbitrator’s jurisdiction over the tortious claim.  

This approach received further reinforcement in the *M Zanzi v M de Coninck* decision where the Court upheld the power of the arbitral tribunal to determine its own jurisdiction, defining *competence-compétence* as one of the guiding principles

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of French international arbitration law.\textsuperscript{90} The granting of chronological priority does not undermine the rights of parties as the tribunal may find it lacks jurisdiction. Alternatively, during the enforcement or annulment stage, the court will conduct a full review of jurisdictional issues.\textsuperscript{91} This non-interventionist approach to competence-compétence was reaffirmed in the judgment of Jules Verne\textsuperscript{92} where the Cour de Cassation enunciated how the ‘manifest’ aspect of the nullity or inapplicability of the arbitration agreement is to be perceived by opining that:

> Whereas the combination of the principles of validity and compétence-compétence prevents, as a result of their rationale, the French national judge from making a substantive and thorough analysis of the arbitration agreement regardless of where the arbitral tribunal is located or has its seat, the only grounds in view of which the judge may analyse the arbitration clause before he is asked to verify the existence or the validity of the clause

\textsuperscript{90} M Zanzi v M de Coninck et autres, Cour de cassation [French Court of Cassation], 5 January 1999 (1999) reported in Rev Arb 260.

\textsuperscript{91} Ibid. See also Chang, E., “Note-Cour de cassation (2e.Ch.Civ.), 18 December 2003; The Superiority of the Arbitration Clause over a Forum Selection Clause under French Law” (2004) 22(4) ASA Bulletin, at pp. 800-802.

in connection with a challenge of the arbitral award, are those of the manifest nullity or inapplicability of the clause.\textsuperscript{93}

In reviewing the arbitration agreements in the above-mentioned cases, French national courts indicate preference for a deferential approach to *competence-compétence*. Moreover, when the courts review the tribunal’s jurisdiction it is typically a *prima facie* method of review. This is addressed in the next section.

11. The Prima Facie Approach

The arbitrators’ jurisdiction is subject to their respective appointment predicated on the agreement of the parties. Given that the majority of laws on arbitration recognise such independence, this denotes that the jurisdiction of the court at the *seat* of the arbitration is secondary. This secondary characteristic in France means that where the parties have assented to arbitration, the jurisdiction of the court at the *seat* of the arbitration is precluded until an application is made to court to set aside the award or seek recognition and enforcement of it.\textsuperscript{94} This practice renders the French approach as non-interventionist.


\textsuperscript{94} Poudret, J.F. and Besson, S., *Comparative Law* at para. [424].
A court which is requested to appoint an arbitrator where there is a contest of the arbitrator’s jurisdiction, must at a minimum review the arbitration agreement to ascertain its validity. If such review is conducted in a *prima facie* manner and without prejudgment as to the ruling of the arbitral tribunal once formed, it should not undermine the power of the arbitral tribunal to determine its own jurisdiction. Moreover, the prima facie ruling by the court cannot have a *res judicata* effect in these circumstances. It may be subject to further review if necessary, once the award is issued.

There is no requirement in French law that the question of jurisdiction be determined by a preliminary decision. There is however, a time limit in which a party may apply to have the award set aside if the award has its *seat* in France. Pursuant to Art. 1519 of the *New Decree*, the parties have one month following the notification of the award to make an application to the Court of Appeal. The French legal position clearly takes a non-interventionist, *prima facie* review approach to the jurisdiction of the tribunal. Article 1448 of the *New Decree* enshrines both the *positive* and *negative effect* by providing inter alia that courts must delay any action if the arbitrators have already accepted their mandate. The priority conferred by

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95 *New Decree*, Arts. 1452, 1453, 1454.
96 Poudret, J.F. and Besson, S., *Comparative Law* at para. [469].
97 *New Decree*, Art. 1448.
this provision on the tribunal is unequivocal. Article 1448 unambiguously asserts that the arbitrators must be the first judges of their own jurisdiction, thereby enforcing the priority of the tribunal.\textsuperscript{98}

Uniform application of \textit{prima facie review}, however, may present a potential risk. If there is no valid arbitration agreement and the tribunal is granted exclusive jurisdiction to rule on the question of existence or validity of the arbitration agreement, this could result in parties being denied their legitimate right to timely judicial review. Consequently this will mean increased costs and delay for the parties in dispute. In particular disputes, such as where there has been an assignment of an arbitration agreement, it is not always clear who the parties to the arbitration agreement are. In such circumstances, the prima facie approach to examination of the arbitration agreement would be inadequate to determine the question. Rather, a complete review may be necessary to ascertain the identity of the parties to the arbitration agreement.\textsuperscript{99}

\textsuperscript{98} Although Art. 1458 (which is the predecessor of the \textit{New Decree}, Art. 1448) was part of the section governing domestic arbitration in the \textit{CPC}, the court tacitly applied it to international arbitrations. Following the decision in \textit{Eurodif Corporation v Islamic Republic of Iran Cour de Cassation}, [French Court of Cassation] 14 March 1984 reported in (1989) Rev Arb 653, the court expressly recognised that Art. 1458 of the \textit{CPC} is applicable to international arbitrations.

\textsuperscript{99} Brekoulakis, S., “The Negative Effect”.

[Type text]
12 **THE NEGATIVE EFFECT**

The negative effect encapsulated in Art. 1448 provides that French courts only possess the power to review jurisdictional issues after the issue of the award, which may then be set aside or enforced by the court.\(^{100}\) Therefore once a tribunal has been appointed, jurisdictional interference is limited to cases where a *prima facie review* verifies that the arbitration agreement is clearly inapplicable or void. This does not bar the parties from challenging the award of the tribunal, on the grounds of jurisdictional matters once the award has been issued.\(^{101}\) The language of Art. 1448 effectively provides a chronological priority to tribunals on the issue of jurisdiction, unless the exception of being ‘manifestly null and void’ applies to the arbitration agreement. The underlying policy reason for such a provision may be that once a tribunal delivers its award, the parties are less inclined to challenge the jurisdiction of a tribunal in bad faith.\(^{102}\)

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\(^{100}\) New Decree, Arts 1419, 1514 for setting aside and enforcement respectively.

\(^{101}\) CPC, Art 1444(3) also provides that the judge called on to appoint the arbitrator(s) may determine that the arbitration clause is manifestly void and may declare that no appointment should be made.

In *Copradag v Dame Bohin*, the *Cour de Cassation* applied a rigorous interpretation of the *negative effect*, granting the tribunal full confidence to determine the issue of validity of the arbitration agreement.\(^{103}\) The court of first instance in *Copradag* ruled that an arbitration agreement was void and the arbitral tribunal should not be constituted, notwithstanding that one party had filed arbitral proceedings. The Court of Appeals upheld this decision however the *Cour de Cassation* reversed it holding that:

> The President of the Tribunal of First Instance cannot declare that the arbitrators should not be appointed on the basis that the arbitration agreement is clearly void unless there is a problem involving the constitution of the arbitral tribunal; the arbitral tribunal alone has jurisdiction to rule on the validity or limits of its appointment, on the proviso that the issue has been brought before it.\(^{104}\)

This was an unambiguous victory for the *negative effect*, which has been consistently upheld in the French jurisdiction. Article 1448 provides credence to the priority of the tribunal which does not negate the right of review the court reserves,

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\(^{104}\) Ibid.
if the arbitration award is appealed on valid grounds. Subsequently, in the case of 
_Renault v V2000_ this approach was supported by the _Cour de Cassation_ which held 
that the arbitrators must implement the arbitration clause subject to future judicial 
review.\textsuperscript{105}

### 13. **Construction of Arbitral Jurisdiction by the Courts**

Court interference in the arbitral process is limited through the consistent application 
of the principle of _compétence-compétence_. Deference to the principle has meant 
that there is a significant degree of predictability and certitude with respect to the 
enforceability of arbitral awards. Recent case law illustrates that courts are aware of 
the need to construe exceptions to _compétence-compétence_ narrowly.

For example, in _Prodim v Lafarge_, the French _Cour de Cassation_ took a stringent 
approach to finding exceptions.\textsuperscript{106} In this case, Mr and Mrs De Abreu executed a 
franchise agreement with Prodim. The contract included an arbitration clause that 
provided for any dispute resulting from the interpretation and the performance of the 
agreement to be submitted to arbitration. Subsequently, the business of De Abreu

Arb, 537.

\textsuperscript{106} _Prodim v Lafarge_ Court de Cassation [French Court of Cassation], G 07-13.927, 12 December 
went into liquidation and the liquidator took steps to have the agreement declared
null and void.\footnote{107}

The liquidator brought its claim against Prodim before the Commercial Court.
Prodim challenged the court’s jurisdiction by relying on the arbitration clause in the
contract and asked the court to enforce it by referring the parties to arbitration. Both
the Commercial Court and the Court of Appeal, found that it had jurisdiction to rule
on the dispute. The Court of Appeal reasoned that the scope of the arbitration clause
was confined to disputes concerning the interpretation and performance of the
contract and therefore was not applicable to the liquidator’s claim pertaining to
validity of the contract.\footnote{108}

The \textit{Cour de Cassation} effectively overturned the decision of the Court of Appeal. It
ruled that an arbitration agreement stipulating for disputes arising as to the
interpretation or enforcement of the contract also extended to disputes concerning

\footnote{107}{Kleiman, E., “Supreme Court Confirms Strict Criteria for Kompetenz-Kompetenz Exceptions” 6

\footnote{108}{Ibid.}
the validity of the contract. The Court also opined that the basis upon which the Court of Appeal decision was made failed to adequately show that the arbitration clause was either manifestly null and void or manifestly inapplicable.

What Prodim indicates for the French approach to compétence-compétence is that where an arbitration clause refers solely to disputes emanating from the interpretation and performance of the contract, a challenge to the validity of the contract is not deemed to be prima facie beyond the scope of arbitral jurisdiction. Given that nullity and performance claims are contractual issues which are closely interlinked, when a party challenges the contract for being null and void, it will often result in preventing the performance of the contract. The benefit of this narrow construction is that it permits the court to defer priority to the arbitral tribunal to decide its own jurisdiction. The narrow construction to the exceptions found in Arts. 1458 and 1460 of the CPC circumvent any dilatory tactics the parties may resort to in order to stall or prevent arbitration.

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110 Kleiman, E., “Supreme Court Confirms Strict Criteria”.

111 At the time of the Prodim decision, the governing law was that of the CPC. In particular Arts 1458, 1460.
An express reference to *compétence-compétence* was also made recently by the *Cour de Cassation* in the case of *Jules Verne*, where an appeal against a judgment by the Paris Court of Appeal was permitted on the grounds that it had failed to consider the *negative effect of compétence-compétence*. In *Jules Verne*, a syndicate of French investors entered into a contract with Tencara – an Italian shipyard – for the construction of a boat. The contract stipulated for the vessel to be constructed according to the standards of the American Bureau of Shipping (‘ABS’). Subsequently, Tencara submitted a Request for a Classification Survey and Agreement with ABS. Part of ABS’ general conditions incorporated an arbitration agreement stipulating that disputes must be heard in New York. ABS issued a Final Certificate of Classification for Hull on 29 April 1993. On 27 March 1993, the vessel suffered damage to the hull whilst sailing in international waters off the Italian coast.

Legal action was instigated in France, Italy and the United States. In 1999, the United States Court of Appeals for the Second Circuit affirmed a decision of the U.S. District Court in favour of ABS. This decision compelled the owners, their

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113 ABS is a private organisation responsible for the inspection of vessels and compliance with safety standards.
insurers and Tencara to arbitrate in New York. The matter proceeded through a
number of courts in France. The Paris Commercial Court held that it had jurisdiction
to hear the matter which was affirmed by the Paris Court of Appeal. The Cour de
Cassation, however, reversed the decision, holding that it was necessary to consider
the validity of the arbitration clause. The Cour de Cassation found the manifest
nullity of the arbitration agreement to be:

the only barrier to the [compétence-compétence principle] that establishes
priority of arbitral competence to rule on the existence, the validity and the
scope of the arbitration agreement.\textsuperscript{115}

The Cour de Cassation emphasised that the tribunal should decide the issue of
jurisdiction, unless the court finds a manifest nullity in the arbitration agreement.
Accordingly, the Cour de Cassation referred the matter back to the Court of Appeal
which ultimately reversed the decision of the Commercial Court.\textsuperscript{116} The Court of

\textsuperscript{114} Jules Verne, Court de Cassation [French Court of Cassation], T03 – 12.034, 7 June 2006 reported

\textsuperscript{115} Ibid. See also Gaillard, E. and Banifatemi, Y., “Negative Effect of Kompetenz-Kompetenz: The
Rule of Priority in Favour of the Arbitrators” in Emmanuel Gaillard and Domenico di Pietro (eds),
Enforcement of Arbitration Agreements and International Arbitral Awards: The New York

\textsuperscript{116} Jules Verne, Court de Cassation [French Court of Cassation], T03 – 12.034, 7 June 2006 reported
Appeal found that it had no jurisdiction over the matter and referred the parties to arbitration in New York. In doing so, the court highlighted that according to substantive rules of French international arbitration laws, it is for the arbitrator to rule on his/her jurisdiction. The court concluded:

French state courts [are prohibited] from conducting a substantive and in-depth analysis of the arbitration agreement, regardless of the arbitral tribunal’s seat; the only case in which the judge can examine the arbitration clause, before it is requested to review its existence or validity in the context of an action to set aside or refuse enforcement of an award, is where the arbitration clause is manifestly null or inapplicable, so as to avoid, in order to save time and costs, conducting a procedure doomed to failure.  

In Groupama Transport v MS Regine Hans und Klaus Heinrich KG, Deher Freres entered into a contract with MS Regine Hans and Klaus Heinrich KG for the carriage of a yacht to the Antilles. The booking note used for the transport of the

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yacht incorporated special conditions providing for arbitration of any disputes in Hamburg, Germany. The yacht was damaged whilst being loaded onto the transport vessel, leading to a dispute between Freres and Heinrich. Groupama Transport took legal action on behalf of Freres against Heinrich in a French court. The court held that it lacked jurisdiction owing to the arbitration clause provided for in the booking note. This decision was affirmed by the Court of Appeal and reaffirmed by the Cour de Cassation.

The Cour de Cassation followed the New York Convention which provides for the application of a national law that is more favourable to the recognition of the validity of arbitration agreements. Accordingly, the court applied national law. As stated, French law prevents state courts from determining the existence, validity and scope of an arbitration clause before an arbitral tribunal has decided on the issue. In its holding the court found that Freres was aware of the contents of the booking note which incorporated the arbitration clause and hence was bound by it.\(^{119}\)

A similar recognition of the general principle of *compétence-compétence* was enunciated in the case of *Gefu Kuchenboss Gmbh und Co. Kg v Corema*.\(^{120}\) The

\(^{119}\) *Ibid.*

Cour de Cassation established that the voidness or manifest inapplicability of the arbitration clause are the only bases upon which courts may interfere with the arbitral tribunal’s power to rule on its jurisdiction. In this case, the agency agreement between the German company, Gedunker Funke (Gefu Kuchenboss) and the French company, Corema, incorporated an arbitration clause. This clause stipulated that the parties must jointly appoint an arbitrator within twelve weeks following the notification of a dispute, otherwise, jurisdiction would be granted to the Commercial Court of Toulouse. On 24 May 2005, Corema notified Gefu that it had appointed an arbitrator and asked Gefu to make its own appointment. Following Gefu’s non-compliance with this request, Corema applied to the Commercial Court of Toulouse. Gefu unsuccessfully objected to the tribunal’s jurisdiction on the basis that Corema had failed to adhere to the procedure stipulated in the arbitration clause. Corema had in fact properly notified Gefu.

The approach adopted by the French courts and arbitrators to competence-competence is one of deference, coupled with a policy of avoiding strict application of national laws to international arbitrations. This is supported by the French legal expert’s report in Dallah Real Estate & Tourism Holding Co v Pakistan where it was submitted that ‘it is open to an arbitral tribunal [with its seat] in Paris in an international arbitration to find that the arbitration agreement is governed by
transnational law.\textsuperscript{121} Most arbitration legislation and rules of international arbitral institutions require the arbitrators to provide a preliminary award concerning jurisdiction. In the majority of instances a preliminary award will be expeditiously issued. This permits a party to the dispute to subsequently apply for judicial review of the matter. In France, an annulment review will be conducted \textit{de novo} in accordance with Art. 1052 of the \textit{French Code}, which provides the court with opportunity for a full verification of the award.\textsuperscript{122}

Article 1448 is capable of serving as a model in other jurisdictions, where the \textit{negative effect} is construed more widely.\textsuperscript{123} The French position provides higher priority to ensuring the arbitral process proceeds without intervention.\textsuperscript{124} Further, in the majority of cases, it is in the interests of efficiency for a tribunal to have a chronological priority over a court to rule on questions concerning the validity and existence of a contract. The priority of the tribunal to rule on its jurisdiction should,

\begin{quote}
\textsuperscript{121} \textit{Dallah Real Estate \\& Tourism Holding Co v Pakistan} [2010] UKSC 46. The French expert was Yves Derains appearing for Dallah, who provided an expert report on French law to the Supreme Court of the United Kingdom, 14.


\textsuperscript{123} \textit{New Decree}, Art. 1448.

\textsuperscript{124} Jones, D., “Kompetenz-Kompetenz” at p. 61.
\end{quote}
at a minimum, be granted until an award on jurisdiction has been issued. Cases such as *Prodim* and *Jules Verne* cement the narrow approach adopted by French courts in relation to ‘manifest nullity or inapplicability’.

14. **CRITIQUES OF THE FRENCH APPROACH**

As stated earlier, the key features of the French approach are the tribunal possessing exclusive power, at least initially, to determine challenges to its jurisdiction, subject to minimal or no curial review. If the tribunal has not yet been seized of the dispute, then courts have limited power to review jurisdiction.\(^ {126} \) If the arbitrators have accepted their mandate, courts are restricted from ruling on a challenge to an arbitration agreement, until an award is issued. When reviewing an arbitration


\(^ {126} \) The meaning of being ‘seized of the dispute’ is defined in the *New Decree*, art 1456. In this provision a tribunal is considered as completely constituted when the arbitrators’ accept their mandate. ‘As of that date, the tribunal is seized of the dispute.’ Pursuant to art 1448 of the *New Decree*, the court may only intervene if the tribunal has not been constituted and the agreement is manifestly void or inapplicable.
agreement, the court generally adopts a *prima facie review* to ensure the autonomy of the arbitral tribunal. This restriction is enshrined in Art. 1448 of the *New Decree* which applies to both domestic and international arbitrations.\(^{127}\)

French case law concerning international commercial arbitration is distinguished by its consistency. This is because arbitration disputes are centralised in the Paris Court of Appeal with a specialised chamber.\(^{128}\) Consequently, the court’s judgments are authoritative in France. The importance of French judgments is also attributed to the ICC, which is the most selected institution for arbitration. The cases from both the Court of Appeal and the French Supreme Court - *Cour de Cassation* - demonstrate the support for arbitration by the French judiciary.\(^{129}\)

One potential risk presented by the approach of French courts is that it may compel parties to submit to arbitration against their will. However, this must be balanced against the dilatory tactics used by parties to stall proceedings. Essentially, the French position is most likely to hold parties to their bargains and facilitate arbitration. Another criticism is that in more complex circumstances such as when

\(^{127}\) *New Decree*, Art. 1448.

\(^{128}\) See *New Decree*, Arts. 1523, 1525.

there is a dispute relating to a group of companies and the name of a non-signatory party is not included in the main contract or the agreement to arbitrate, conducting a prima facie review may not be sufficient to determine the question of jurisdiction. Nor may it assist to identify the parties to the arbitration agreement. This is a practical limitation of the prima facie approach. Therefore, a ‘one-size-fits-all’ approach to review can result in unfair outcomes.

Samuel argues that the French approach of prima facie review of arbitration agreements has a flaw, as it may result in three different proceedings. He contends that a prima facie review lends itself to substantial debate without necessarily resolving the matter. Deference to the arbitrator’s compétence-compétence may result in three separate proceedings: (1) the initial proceeding which could be in a court of the seat during the stage of formation of the arbitral tribunal; (2) a proceeding before the arbitral tribunal and (3) a proceeding at the appellate court of the seat. Notwithstanding, such an outcome is usually not more time-consuming than legal proceedings in a court where an appeal is available. Both speed and costs are dependent upon the assiduousness of the arbitrators and the capacity of the courts to hear the matter promptly.

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130 Brekoulakis, S., “The Negative Effect”.
131 Poudret, J.F. and Besson, S., Comparative Law at para. [470].

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14.1 Conclusion

French courts have provided parties with an assurance that the arbitral award will be enforced. The courts have supported arbitration through their judgments, and the New Decree which ensures that France remains the most progressive in its approach. Further, the establishment of a specialised chamber in the Court of Appeal leads to consistency. These factors have made France a popular seat for arbitrations. The positive effect enables arbitrators to determine their own jurisdiction, unless the agreement is manifestly void or inapplicable. The negative effect takes this one step further. It restricts the courts from determining the existence or applicability of an arbitration agreement prior to the issue of an award by the tribunal determining its jurisdiction. Both the positive effect and the negative effect provide benefits; however, there appears to be more criticism of the negative effect.

It should be noted, however, that the prima facie approach has its limitations. For example, it is not satisfactory in complex disputes where it is not manifestly evident that the parties agreed to arbitration or who the parties are. In such cases a more comprehensive review may be warranted. Thus, the overuse of the prima facie approach may result in subsequent proceedings, thereby escalating costs and delay.

Accordingly, the legislation should confer discretion on the courts to enable judges to decide which approach is the most suitable in the particular circumstances. A
‘one-size-fits-all’ approach may result in some parties losing their legitimate right to judicial review. Although France is considered the most progressive jurisdiction with respect to *compétence-compétence*, in the interests of justice, there must be some discretion given to the national courts.

Unless the arbitration agreement is manifestly void, tribunals have exclusive jurisdiction once they have been constituted.\(^{132}\) The courts are expressly forbidden from reviewing an arbitration agreement until the tribunal has ruled on the question of jurisdiction.\(^ {133}\) The disadvantage of granting tribunals exclusive jurisdiction is that it may squander legal resources, since the parties may have to wait until an arbitral tribunal issues its final award. Only then may a party mount a challenge before national courts. From this perspective, the *prima facie* examination provides scope for misapplication, as it allows national courts to refer the question to a tribunal following a brief inquiry into the validity of the agreement. This holds true especially in disputes concerning a complex matrix of facts, such as non-signatory parties. In spite of the shortcomings, the approach adopted by the French courts to

\(^{132}\) *New Decree*, Art. 1465.

\(^{133}\) *New Decree*, Art. 1448. provides that: ‘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 inapplicable’.

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compétence-compétence remains the most arbitration-friendly and conducive to holding parties to their agreements.