

**Research Article**

# The Concept of Competence-Competence: An Indonesian Approach

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**Abstract.**

In international arbitration, the concept of competence-competence, which allows an arbitral tribunal to make decisions in cases within its own jurisdiction, is regarded as a fundamental principle. However, state adoption of the notion into their national law has shown that each nation applies this principle in different ways. In order to understand how the principle of competence-competence is used in the jurisdiction of Indonesian courts, it is important first to understand the country's legal system. Our findings demonstrated that the Indonesian legal system needs to clearly apply the competence-competence concept, making it challenging to use the legal basis for arbitration in deciding cases within its own jurisdiction. This affects the Indonesian courts' recognition of the principle, which has yet to be applied in accordance with the original provision. The authors suggest that Indonesia acknowledge and incorporate the competence-competence concept into its national law so that the principle can guide the court's practice. Adopting this principle into federal legislation can improve the efficiency of arbitration and contribute to Indonesia becoming a nation with a supportive arbitration environment.

**Keywords:** Arbitration, Competence-Competence, Arbitral Competence

## 1. Introduction

Competence-competence is one of the fundamental principles in arbitration. This principle provides an opportunity for the arbitral tribunal to adjudicate its own authority in the event that such authority is in question.[1] As commonly understood, the arbitral authority is granted by the arbitration agreement made by the disputing parties[2] [3]. The arbitration agreement became the basis for the birth of the absolute competence of the arbitration tribunal as well as the declaration of the authority of the courts that were set aside [4]. In this regard, the principle of competence-competence allows arbitrators to examine the existence of an arbitration agreement, along with its scope and validity without having to go through a national court [5] [6] This will minimize the court's intervention in the arbitration settlement in the first place [7]. The principle of

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competence-competence provides additional strength to the arbitration agreement and the overall effectiveness of the arbitration by means of empowering the power of the arbitral tribunal to self-determine [8].

Essentially, the principle of competence-competence can deliver a positive effect in the increase of the effectiveness of arbitration, but there is another assessment that shows the negative side of this principle which is also inevitable [9]. In a positive perspective, this principle provides an opportunity for arbitrators to examine their own jurisdiction [10] without having to go through a court system. The principle of competence-competence can prevent the tactics of delaying the proceedings of the parties so that the effectiveness of the arbitration can be maximized. But these opportunities are also at the same time a negative side of competence-competence principle. This principle wishes to give priority to the arbitral tribunal before the case is decided by the court [9]. The principle of competence-competence limits the function of the court in examining jurisdiction, arbitration agreements of the parties and other contractual issues [9].

The principle of competence-competence has been accepted in various international instruments on arbitration. In Article 16 (3) of the UNCITRAL Model Law states that the arbitration tribunal may rule on a plea that the arbitration tribunal does not have jurisdiction either as a preliminary question or in an award on the merits, and that in the event of an action to set aside a partial award concerning jurisdiction, the arbitration tribunal may continue the arbitral proceedings and make an award. Some countries have also accepted this principle in their respective national laws, such as America [11], France [12], Turkey [1], Switzerland [1], the UK and India [13]. However, the practice of this principle varies among countries [14], [15]. Variations in adoption in different degrees of both the positive and negative aspects of the competence-competence principle led to substantial differences in national arbitration legislation and jurisprudences that develop in each country [14]. This will relate to each country's option to respect and adopt that principle in its national law [5]. Therefore to assess the extent of the arbitrator's power in examining his own jurisdiction should examine the arrangements reflected in the national laws of each country [16].

This paper aims to elaborate on the legal framework of the competence-competence principle and its application in Indonesian courts. This is motivated by the emergence of arbitration cases in Indonesia that are resolved inconsistently based on the varying application of the principle of competence-competence. This relates to the objectives

of the Indonesian state in transforming itself into an arbitration-friendly country. This objective will be achieved if the practice of arbitration can be done in line with the fundamental principles of arbitration, including the principle of competence-competence.

## 2. Methods

This paper uses doctrinal research methods with an emphasis on the study of laws, regulations, and court decisions related to the principle of competence-competence. Data assessment is also supported by several approach methods such as the legislation approach, the case approach, and the comparative approach. The data generated from the research were studied qualitatively to answer the formulation of problems about the legal framework of the competence-competence principle in Indonesia and the application of these principles in the jurisdiction of this country. Data analysis was carried out by descriptive-analytical methods in accordance with the objectives of this study.

## 3. Results and Discussion

### 3.1. Legal Framework of Competence-Competence Principles in Indonesia

The principle of competence-competence is available in various frameworks of international arbitration law [17]. In the UNCITRAL Model Law for instance, it can be seen in article 16 below.

*(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

*(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is*

*raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.*

*(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*

In addition, the UNCITRAL Arbitration Rules also provide that *the arbitration tribunal shall have the power to rule on objections that the tribunal has no jurisdiction, including any objections with respect to the existence of validity of the arbitration clause or of the separate arbitration agreement.* Furthermore, Article 6 (4) of the ICC Rules also states the same that *any decision as to the jurisdiction of the arbitration tribunal, except in relation to parties or claims for which the court decides that the arbitration cannot proceed, shall then be taken by the arbitration tribunal itself.*

Some countries of the world have also recognized the existence of this principle in their national laws. France, for example, provides for regulation of the principle of competence-competence in Articles 1458 and 1466 of the French Code of Civil Procedure [12].

The article 1458 of French Code of Civil Procedure states as below.

*Where a dispute, referred to an arbitration tribunal pursuant to an arbitration agreement, is brought before a court of law of the State, the latter must decline jurisdiction. Where the case has not been brought before an arbitration tribunal, the court must also decline jurisdiction save where the arbitration agreement is manifestly null. In both cases, the court may not raise sua sponte its lack of jurisdiction.*

The article 1466 of French Code of Civil Procedure states as below.

*If, before an arbitrator, one of the parties has challenged the principle or scope of power of the arbitrator, the latter must rule upon the validity and limits of his nomination.*

In addition, Switzerland also gives recognition of this principle in Article 359 in the Swiss Federal Law on Civil Procedure following [1]

*“(1) If the validity of the arbitration agreement, its content, its scope or the proper constitution of the arbitral tribunal is challenged before the arbitral tribunal, the tribunal*

*shall decide on its own jurisdiction by way of an interim decision or in the final award on the merits.*

*(2) An objection to the arbitral tribunal on the grounds of lack of jurisdiction must be raised prior to any defence on the merits. ”*

Within the framework of Indonesian national law, the principle of competence-competence has not been clearly regulated [18]. Although the Indonesian national arbitration law, namely Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution, has regulated the independence of the arbitration authority, but these arrangements are not qualified enough to support the authority of arbitration in examining its own jurisdiction. The arrangements on the independence of the arbitral authority and separation from the authority of the courts can be seen in the following articles.

Article 3 of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution reads, "The District Court is not authorized to adjudicate disputes of the parties who have been bound by the arbitration agreement."

Article 11 of Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution reads, "(1) The existence of a written arbitration agreement negates the right of the parties to submit a dispute or dissent resolution contained in the agreement to the District Court. (2) The District Court shall refuse and shall not intervene in a dispute resolution which has been established by arbitration, except in certain matters set forth in this Act." Both provisions provide only for the absolute competence of the arbitration born of the arbitration agreement entered into by the parties. With this agreement, the parties are not entitled to submit the case to the court [19] and the court is also obliged to reject cases that have been bound by the arbitration agreement [20]. Nevertheless there is no further arrangement of the jurisdiction to which the case is entitled in the event that the absolute competence of the arbitration is in question of the parties. Therefore disputes regarding arbitral jurisdiction are likely to end in Indonesian courts [21].

### **3.2. Application Competence-Competence Principle in Indonesia**

The principle of competence-competence whose original meaning is the authority of arbitration to adjudicate its own jurisdiction [11], adapts differently in its application

depending on the acceptance of each country [5]. Iliana Todorovic portrays four differences in the state acceptance model against the principle of competence-competence [5]. First, a rebuttal from either party regarding the arbitration agreement does not necessarily preclude the tribunal's authority to proceed with the arbitration proceedings [22]. Therefore, the existence of a request for a review of the competence of the arbitration in the arbitration agreement does not close the authority of the tribunal to hear the case. Second, there is a common power between the arbitral tribunal and the court [22]. In this case, although the arbitrator or arbitral tribunal is authorized to decide the dispute regarding the arbitration agreement, any such decision is subject to judicial review. Third, in certain cases, arbitrators are given exclusive authority to be the preliminary decision makers on objections relating to the arbitration clause, but such decisions can still be reviewed by the court [22]. Fourth, the arbitral tribunal has exclusive power in deciding jurisdiction-related rebuttals in the arbitration agreement [5].

In the Indonesian context, the acceptance of the principle of competence-competence can be seen in cases that roll between courts and arbitrations. The first case involved PT. Golden Spike Energy Indonesia and PT. Pertamina Hulu Energi Raja Tempirai. The two subjects of law have actually been bound by an arbitration agreement contained in Article 11.1.2 of the Production Sharing Contract Agreement which reads: "Disputes, if any, arising between Pertamina and Contractor relating to this Contract or the interpretation and performance of any of the clauses of this contract, shall be submitted to the decision of the International Chamber of Commerce." Under such arbitration clause, should any dispute arising out of the agreement be submitted to the selected arbitration. However, the case eventually rolled out in court with an award declaring the arbitration clause non-binding because there was a transfer of the revenue sharing contract [23]. With the award, the arbitral jurisdiction is annulled and transferred to the court.

Furthermore, the case between PT. Roche fought PT. The tempo that arises from the implementation of the drug distribution agreement. At first PT. Roche terminated the agreement unilaterally so that PT. Tempo filed a lawsuit against the law in court. Between the two parties, they are actually bound by the arbitration clause in Article 19 paragraph (2) of the Distribution Agreement which specifies Indonesia National Arbitration Bodies (BANI) as the elected arbitral body. But PT. Tempo argues that Indonesia National Arbitration Bodies (BANI) does not have the authority because the case filed is not a

default, so PT. Tempo filed to South Jakarta District Court. This case was then decided by winning the South Jakarta PN as an institution competent to decide this case (24). The judge's consideration is based on the reason that this case is a case of tort and not a case of tort so it does not fall into the jurisdiction of arbitration [24]. Another case is between PT. Sapta Sarana against PT. Conoco which was also decided by the Central Jakarta district court [25]. The parties in this regard have also been bound by an arbitration clause in Article 24 of the TE 10707/RD Contract on Rig Management Service which bases the settlement on the ICC Rules. However, because the court considered that there was a unilateral change in the contract, the arbitration clause was declared invalid and therefore transferred the authority to adjudicate at Central Jakarta District Court.

Based on these cases, the application of the competence-competence principle in Indonesia has not worked in accordance with the original spirit of the principle. If we return to Iliana Todorovic's opinion about state acceptance of the principle of competence-competence, Indonesia is not even among them. Based on that opinion, if a dispute on the jurisdiction of the arbitration cannot be resolved by the tribunal itself, then at least it will involve two institutions namely the said arbitration tribunal and the court. However, looking at the cases that occurred in Indonesia, disputes regarding arbitration jurisdiction were entirely resolved by the courts. The absence of rules regarding the principle of competence-competence can be a logical reason for the occurrence of such legal facts.

## 4. Conclusions

The principle of competence-competence that has been known internationally and practiced in several countries, especially those that adopt the UNCITRAL Model Law, is accepted differently in Indonesian jurisdiction. By law, Indonesia does not yet have an explicit legal framework regarding arbitration opportunities in adjudicating its own jurisdiction. This has an effect on the implementation of this principle in the court environment. Indonesian courts conducted admissions differently in the original spirit of the principle. In order to make Indonesia a pro-arbitration country, the fundamental principles of arbitration need to be implemented properly. The first step to implementing fundamental principles such as the competence-competence principle is to accept and adopt it in Indonesian national law. The adoption of this principle within a clear legal

framework is expected to direct the practice in courts in accordance with the original purpose of this principle.

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## References

- [1] S. Ö. A. The Principle of Separability and Competence-Competence in Turkish Civil Procedure Code No. 6100. *Ann la Fac Droit d'Istanbul* [Internet]. 2015;45(62):263–76.
- [2] Azar Osmanov F. Arbitraj sazişin anlayışı və müstəqillik doktrinası. *Sci. Res.* 2022 May;09(5):72–7.
- [3] Abbas A, Khan MM, Lohani A. The Optimization of Judicial Involvement in Commercial Arbitration in Pakistan. 2022;42(1):129–35.
- [4] Nwaobi EA. The existence of a valid arbitration agreement as a prerequisite for arbitration. *Int. J. Law.* 2022;8(2):144–149. Available: [https://www.researchgate.net/profile/Ezinwanne-Nwaobi/publication/360529341\\_The\\_existence\\_of\\_a\\_valid\\_arbitration\\_agreement\\_as\\_a\\_prerequisite\\_for\\_arbitration/links/627c2ae437329433d9a975eb/The-existence-of-a-valid-arbitration-agreement-as-a-prerequisite-fo](https://www.researchgate.net/profile/Ezinwanne-Nwaobi/publication/360529341_The_existence_of_a_valid_arbitration_agreement_as_a_prerequisite_for_arbitration/links/627c2ae437329433d9a975eb/The-existence-of-a-valid-arbitration-agreement-as-a-prerequisite-fo)
- [5] Todorović I. A CLOSER LOOK AT THE DOCTRINE OF SEPARABILITY IN ARBITRATION. *IUS Law J.* 2022;1(1):6-29. Available: <http://iuslawjournal.ius.edu.ba/index.php/iuslawjournal/article/view/6>
- [6] Chillakuru V. The Rule of Competence – Competence: A Comparative Analysis of Indian and English Law. *Contemporary Asia Arbitr. J.* 2013;6(1):133–51.
- [7] NYSBA. *New York Dispute Resolution Lawyer.* 2020;13(2).
- [8] M. EL-BANA. The Application of the Doctrines of Severability and Competence-Competence in the UAE *International Journal of Law and Arbitration* by MOHIEELDIN EL-BANA. The British University; 2014.



- [9] Susler O. The English Approach to Competence-Competence. *Pepperdine Dispute Resolut Law J.* 2013;13:427–52.
- [10] B. GA., The ‘Gateway’ Problem in International Commercial Arbitration. *Yale J Int Law.* 2012;37(1):0-50.
- [11] Wang W. Research on the Objection to the Jurisdiction of International Commercial Arbitration. *Proceedings of the 2022 7th International Conference on Social Sciences and Economic Development (ICSSSED 2022)*, 2022;652:203–208
- [12] S. MC. The existence of the doctrine of severability and competence-competence under the constellation of Indonesian arbitration law. *Glob Jurist.* 2019;19(2):1–13.
- [13] Banerjee A. The Interpretation Of The Rule Of Competence – Competence In International Commercial Arbitration From An Indian Perspective Bengaluru, 2020. <https://doi.org/10.2139/ssrn.3809158>.
- [14] M. N. The Rule Of Competence-Competence: A Historical &Comparative Analysis Between English-Indian Law. *Willamette J Int Law Disput Resolut.* 2019;26(1–2):75–98.
- [15] Abugu U, Oduwole A. “An overview of the principle of competence-competence in international commercial arbitration,” *CHUKWUEMEKA ODUMEGWU OJUKWU Univ. J. Priv. PUBLIC LAW, COOUJPPL.* 2019;2(1):1–7.
- [16] Feehily R. Separability in international commercial arbitration; Confluence, conflict and the appropriate limitations in the development and application of the doctrine. *Arbitr Int.* 2018;34:3355–83. <https://doi.org/10.1093/arbint/aiy026>.
- [17] O. Y. (Editors) Harkrisnowo H. Juwana H, *Law and Justice in a Globalized World.* London: Taylor and Francis Group; 2018.
- [18] Bell GF. Conflicts of Laws and Jurisdictions in Indonesia-related Arbitrations Seated in Singapore – Perspectives From The Tribunal. *Indones. Law Rev.* 2022;12(1):33–55.
- [19] Kurasha PER. South Africa’s jurisdictional challenge with the under-development of cross-border commercial litigation: Litigation v Arbitration. *Jure Law J.* 2022;55(1):1-27. <https://doi.org/10.17159/2225-7160/2022/v55a1>.
- [20] Patel BS. ANALYZING THE ARBITRABILITY OF SUBJECT-MATTER. *Commonw. Law Rev. J.* 2022;8:201–13.
- [21] Gary F. Bell, *The UNCITRAL Model Law and Asian Arbitration Laws.* New York: Cambridge University Press; 2018.
- [22] Paliwal S. The More Favorable Regime Within The ‘Overlapping Coverage’ Of Faa Chapters One And Two. *Am. Rev. Int. Arbitr.* 2012;23(2):267–311.

- [23] Central Jakarta District Court. Decision No. 153/PDT.G/2013/PN.JktPSt; 2013.
- [24] South Jakarta District Court. Decision No. 454/Pdt.G/1999/PN. JktSel; 1999.
- [25] Central Jakarta District Court. Decision No. 238/Pdt.G/2005/PN.JKt.Pst; 2005.