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The Doctrine of "Competence of Competence" and its Practical Application in the Legislation of the Republic of Uzbekistan and in the Practice of International Arbitration

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ABSTRACT

This article examines the phenomenon of "competence of competencies", which takes place in international commercial arbitrations both from the point of view of international normative legal acts and from the point of view of doctrine, considering the opinion of leading scientists in this branch of law. The nature of this principle and its advantages and disadvantages are also discussed. A practical example of the application of this authority is given.

After the arbitration court accepts an application for dispute resolution on the basis of an arbitration agreement concluded between the parties, the court must determine its competence regarding the dispute that has arisen, as a result of which the principle of "competence of competencies" will be applied in practice.

The competence of international commercial arbitrations is the totality of their powers to resolve a dispute on the merits, as well as the powers to conduct proceedings that guarantee compliance with the requirements of a fair procedure when resolving a case [1, p. 166]. The concept of "competence of competencies" is widely recognized both at the national level of many countries and in the regulations of permanent arbitration institutions, and this principle is reflected in many multilateral international agreements to which most countries of the world have acceded. The main essence of the "competence of competencies" is that each arbitration court (arbitration) he himself decides whether he has or does not have competence to resolve a particular dispute. The well-known international document, the UNCITRAL Model Law, also enshrined this principle in paragraph 1 of article 16: "The arbitral tribunal may itself rule on its jurisdiction, including on any objections regarding the existence or validity of the arbitration agreement. For this purpose, the arbitration clause, which is part of the contract, is interpreted as an agreement independent of other terms of the contract. The decision of the arbitration court on the invalidity of the contract does not entail ipso jure the invalidity of the arbitration clause" [2]. Also, the right of arbitrators

to determine their own competence is enshrined in paragraph 3 of Article 5 of the European Convention, Article 41 of the Washington Convention, paragraph 4 of Article 6 of the ICC Rules.

The content of the principle of "competence of competence" is that the arbitration court must make sure:

- in the presence of an arbitration agreement concluded between the parties to the dispute; (since in its absence the parties no longer have the opportunity to apply to the arbitration court to resolve the dispute that has arisen between them)
- in the legal validity of the arbitration agreement; (if the arbitration court finds the arbitration agreement invalid, then it becomes impossible to consider it in arbitration)
- that the arbitration agreement applies to this dispute [3, p. 9] (there are cases when the parties in the arbitration agreement strictly prescribe a list of disputes that they would like to resolve by arbitration).

M.G.Rosenberg correctly emphasizes that issues of competence are considered in detail by arbitration only in cases where this is required due to special circumstances, for example, if there is an inaccuracy in the wording of the arbitration agreement, or in cases when the defendant disputes the validity of the arbitration agreement [4, p. 13].

The doctrinal approaches are very similar to each other and emphasize the same concept of understanding the essence of the principle of "competence of competencies". For example, according to O.Y. Skvortsov, the importance of the "competence – competence" principle for arbitration proceedings is due to the fact that it provides the possibility of executing an arbitration agreement on the transfer of a dispute to an arbitration court [5, p. 140]. E.T.Usenko considers competence to be competence, this is "the question of whether the arbitration court has the right to decide on its competence to consider a particular case when this competence is challenged by one of the parties to the dispute" [6, p. 295]. According to F.According to Klein, this is a principle that allows "arbitrators to continue the proceedings initiated before them, regardless of any charges on the part of the defendant" [7, p. 57]. Here, it should be noted the importance of another principle of international arbitration – this is the autonomy of the arbitration agreement, since, if the arbitration invalidates the main contract, this principle allows the arbitration to make a decision on the merits of the case, which is an important factor for resolving the dispute. For A. Fustukos, "competence-competence" concerns the possibility for arbitrators "to make a decision on whether the subject matter of the dispute falls within the scope of this arbitration: this is a matter of their jurisdiction in the broadest sense of the word" [8, p. 309].

What are the sources determining the competence of the arbitration court?

Upon receipt of any case, the arbitration court must decide on its competence regarding this dispute. Firstly, its competence is fixed at the national level of each country, in the legislative acts on the activities of arbitration courts. Thus, the State, by fixing such norms in its legislation, transfers part of its judicial powers to the arbitration court, and the parties, in turn, by concluding an arbitration agreement, become executors of the norms prescribed in the legislation and endow the arbitrators with competence to resolve the dispute that has arisen. Consequently, the second source was the arbitration agreement itself, since the competence to resolve the issue between the parties to the arbitration court can arise only on the basis of a valid contract concluded between the parties themselves. And the third source is the regulations of institutional international arbitration courts, which serve as a solid foundation for conducting arbitration activities of permanent arbitration institutions.

The next aspect to consider will be the question of the advantages and disadvantages of the

"competence of competencies" principle. The main advantage is that, by applying this principle, arbitration retains its independence from state courts, independently ascertaining the presence or absence of competence to consider any particular dispute, as well as deciding on the validity of the arbitration agreement itself. Turning to the negative sides of this principle, it can be noted that this principle prevents the dispute from being considered in a state court, since, upon receipt of a claim that is the subject of an arbitration agreement, having checked its validity, it is obliged, if any of the parties requests this no later than the filing of its first statement on the merits of the dispute, terminate the proceedings in the case and must refer the parties to arbitration, thereby acknowledging their incompetence.

As already mentioned above, this principle is currently widely applied and recognized, for example, in the Law of the Republic of Uzbekistan "On International Commercial Arbitration" in Article 21. It is stipulated that: "The arbitration court may itself rule on its jurisdiction, including on any objections regarding the existence or validity of the arbitration agreement. For this purpose, the arbitration clause, which is part of the contract, is interpreted as an agreement independent of other terms of the contract. The decision of the arbitration court on the invalidity of the contract does not entail, by virtue of law, the invalidity of the arbitration clause."

Summing up the interim results of the above, we note that arbitration, based on an arbitration agreement, can consider only those disputes that the parties have expressed their will to transfer to its jurisdiction in the event of a dispute between them. That is, it is this action that gives arbitrators the right to consider a particular dispute, therefore, they should not go beyond their powers, which are reflected in the arbitration agreement.

The question remains, but how is this principle applied in practice?

The UNCITRAL Model Law, namely, the explanatory note by the UNCITRAL Secretariat to the 1985 Model Law on International Commercial Arbitration, as amended in 2006, established the right of the arbitral tribunal to rule on its jurisdiction in a preliminary decision, while retaining the possibility of appeal to the court within 30 days, or there is such an option as making decisions in the decision of the case on the merits. If the arbitrators declare that they do not have the competence to resolve this dispute, then it does not seem appropriate to continue considering the case, therefore, the final act in this case will be a decision on the lack of competence. And if the arbitration recognizes its competence, the question arises: whether to issue a ruling in the form of a preliminary decision or to include this act in the arbitration decision on the merits. This issue is decided at the discretion of the parties or the arbitration itself.

We have considered how this is applied in the practice of dispute resolution in ad hoc arbitration, for a full understanding it is advisable to consider the practice of institutional arbitration. For this purpose, consider the Arbitration Institute of the Stockholm Chamber of Commerce. Under the terms of Article 4 of the Rules of the TPS, arbitration proceedings are initiated on the day when the TPS Secretariat receives a request for arbitration. After the registration fee has been paid, and the respondent's explanations to the request for arbitration have been received within the allotted time, the Secretariat submits the case materials to the Board of the Arbitration Institute of the TPS for making a decision on a number of issues, including the possibility of arbitration proceedings under the Rules of the TPS and the transfer of the case materials to the panel of arbitrators. The main condition for the transfer of the case to the arbitral tribunal is a preliminary prima facie assessment of the competence (jurisdiction) of the Arbitration Institute of the TPS. The Board of the TPS Arbitration Institute examines the text of the arbitration clause, the parties' statements of competence and makes an appropriate decision. The powers of the Management Board are regulated by Article 9 of the Rules of Procedure of the TPN: "The Management Board has the right, if necessary: (i) to determine whether the absence of jurisdiction of the TPN in relation to the dispute is obvious in accordance with paragraph (i) of Article 10." The key issue resolved by the Board is the determination of the evidence of the lack of competence of the TPS.

Hence the wording of the decisions that the Board makes – "the lack of competence of the TPS is not obvious" or "the lack of competence of the TPS is obvious". That is, when investigating the issue of prima facie competence, the Board imposes minimum requirements on the content and form of the arbitration clause: "The jurisdictional threshold of the TPN should be characterized as relatively low." The Board is limited only to a preliminary assessment, without investigating the scope of such competence. According to art. 10 of the Rules of Procedure of the TPS, if "the lack of competence of the TPS is obvious", then the Board terminates the proceedings and notifies the parties about it. Proceedings may be terminated in respect of both the entire dispute and its individual parts. For example, in a published case between companies from Germany and the United States, the Board partially terminated proceedings under one of the two contracts on which the plaintiff's claims were based, stating the following: "The lack of jurisdiction of the TPS is obvious in disputes that arise on the basis of the Second Contract. Any claims related to it (the Second Contract) must be rejected. The absence of TPS jurisdiction is not obvious in disputes arising on the basis of the First Contract" [9, p. 3].

In England, for example, the courts, without waiting for the decision of the arbitrators, take into consideration statements that there was no arbitration agreement between the parties at all or that it was initially invalid. Under French law, the court has the right to check the competence of arbitration only after the arbitrators have made a decision on the merits of the dispute. If the arbitral tribunal has already begun to consider the dispute, the court may refuse to accept the application for consideration. If the arbitral tribunal has not yet been formed, the judicial process will go ahead only when the arbitration agreement is clearly invalid. In other countries, the determination of whether the initial decision on the issue of competence will be made by arbitration or by a court depends on the wording (broad or narrow) of the arbitration agreement. In this regard, the opinion has been repeatedly expressed that, since the court may subsequently re-examine the issue of competence, challenging the competence of arbitrators in court at the very beginning of the arbitration process, in the presence of an arbitration agreement, contradicts both the intentions of the parties to "withdraw" their dispute from the jurisdiction of the court, and the legislation and practice supporting arbitration [10, p. 204].

Based on all of the above, we can state that the principle of "competence of competence" is considered widespread in the field of arbitration and gives such courts special powers to independently resolve the issue of both jurisdiction and jurisdiction of a case adopted on the basis of an arbitration agreement, and also provides an opportunity for arbitration courts to be independent and not depend on state courts, this has a very positive effect on the effectiveness, impartiality and competence of the decision.

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