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Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz

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Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz

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I. INTRODUCTION

An arbitral tribunal’s power to decide its own jurisdiction is its kompetenz-kompetenz and is a “conceptual cornerstone[] of international arbitration as an autonomous and effective form of international dispute resolution.”¹ The inherent requirement that parties to a valid arbitration agreement (AAG) must honor that agreement by arbitrating their disputes precludes national courts from tampering with the result of a valid arbitral

1. Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT’L ARB. 19, 19 (2002).

award.² National courts must respect and uphold valid AAGs as enshrined in Article II(3) of the New York Convention:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative[,] or incapable of being performed.³

However, because the Convention does not provide a firm definition as to what defects qualify as “null and void, inoperative[,] or incapable of being performed,”⁴ States are free to exercise significant discretion.⁵ State discretion under the Convention extends to when and under what circumstances national courts will hand over jurisdictional decisions to tribunals.⁶ The result has been unreliable practices of kompetenz-kompetenz in different nations across the globe, calling into question whether kompetenz-kompetenz is truly the “inherent power”⁷ of arbitral tribunals.

This paper analyzes differing views and approaches to kompetenz-kompetenz and proposes a workable framework of kompetenz-kompetenz for the future. Part II provides an overview of the general principle of kompetenz-kompetenz, discussing the views of some of the leading international commercial arbitration scholars on kompetenz-kompetenz.⁸ Part III analyzes the approaches taken by the United States and the United Kingdom and uses them as helpful illustrations of kompetenz-kompetenz in practice.⁹ Part IV notes the shortcomings of the aforementioned approaches and proposes a limited form of negative kompetenz-kompetenz as the

2. Emmanuel Gaillard & Yas Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257, 257 (Emmanuel Gaillard & Domenico di Petro eds., 2008).

3. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention].

4. *Id.*

5. See Gaillard & Banifatemi, *supra* note 2, at 258.

6. *Id.*

7. NIGEL BLACKABY & CONSTANTINE PARTASIDES WITH ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION: STUDENT EDITION 347 (5th ed. 2009).

8. See *infra* Part II.

9. See *infra* Part III.

solution.¹⁰ Part V concludes.¹¹

II. BACKGROUND

A. *The Basic Notion of Kompetenz-Kompetenz*

In general, kompetenz-kompetenz “recognizes the authority of arbitral tribunals to determine their own jurisdiction.”¹² It provides arbitrators with the authority to determine their own jurisdiction to increase efficiency of the arbitral system without judicial interference.¹³ The level of kompetenz-kompetenz granted to tribunals varies from country to country¹⁴ as States seek to balance two competing interests: preservation of legitimate claims against arbitral jurisdiction and reduction of judicial interference and delaying tactics.¹⁵

Two essential theories allow kompetenz-kompetenz to properly function: (1) an arbitral tribunal is given the power to decide its own jurisdiction (kompetenz-kompetenz); and (2) the arbitration clause is treated as separate and independent from the remainder of the contract (separability).¹⁶ While an in-depth discussion of separability is beyond the scope of this paper, a brief discussion on its importance in connection with kompetenz-kompetenz is vital. Separability and kompetenz-kompetenz work together with the common goal of preventing early judicial interference with arbitration.¹⁷ Separability, by treating the AAG as separate and distinct from the remainder of the contract, protects a tribunal’s ruling on jurisdiction from subsequent failures of the contract.¹⁸ However,

10. *See infra* Part IV.

11. *See infra* Part V.

12. George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 *YALE J. INT’L L.* 1, 14–15 (2012) [hereinafter Bermann, *The “Gateway” Problem*].

13. *See id.* at 14.

14. *Compare infra* Part III.A (analyzing the U.S. approach to kompetenz-kompetenz), with *infra* Part III.B (analyzing the U.K. approach to kompetenz-kompetenz).

15. John J. Barceló III, *Who Decides the Arbitrators’ Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 *VAND. J. TRANSNAT’L L.* 1115, 1119 (2003) (recognizing that not all parties that resist arbitrations are obstructionists).

16. BLACKABY & PARTASIDES WITH REDFERN & HUNTER, *supra* note 7, at 348–49.

17. Barceló III, *supra* note 15, at 1116.

18. BLACKABY & PARTASIDES WITH REDFERN & HUNTER, *supra* note 7, at 348–51. For example, separability permits the tribunal to hold at the merits stage of a dispute that no valid

“whereas separability is universally accepted, [k]ompeten[z]-[k]ompeten[z] is controversial and has spawned a range of different national responses.”¹⁹

All jurisdictional decisions made by a tribunal under its kompetenz-kompetenz are subject to judicial review, and courts have the final word on jurisdiction.²⁰ A tribunal’s kompetenz-kompetenz power varies from country to country and sometimes differs within jurisdictions of the same country.²¹ These transnational inconsistencies have significant repercussions. Without having the power to determine its own jurisdiction, an arbitral tribunal would have to halt proceedings each time a party challenged its jurisdiction and refer the issue to national courts, greatly diminishing the efficiency of arbitration.²² Inconsistent views of kompetenz-kompetenz also undermine the enforcement of arbitral awards as the courts of the country of enforcement may perform their own jurisdictional review—applying the appropriate law of the AAG—and separately conclude that kompetenz-kompetenz was not properly conducted, refusing enforcement of the award.²³

B. Positive v. Negative Kompetenz-Kompetenz

Kompetenz-kompetenz has a positive dimension (granting arbitrators the power to determine their own jurisdiction) and a negative dimension (prohibiting courts from interfering with arbitrators’ kompetenz-kompetenz power at the outset of the arbitral process).²⁴ Challenges to arbitral jurisdiction can occur at one of three stages in the arbitration process: (1) at the initiation of the arbitral process; (2) during the arbitral process; or (3)

contract exists without destroying its initial ruling that the AAG portion of the contract granted proper jurisdiction. *Id.*

19. Barceló III, *supra* note 15, at 1123.

20. BLACKABY & PARTASIDES WITH REDFERN & HUNTER, *supra* note 7, at 351. It is not possible for kompetenz-kompetenz to “completely divest national courts of all authority to consider challenges to arbitral jurisdiction because it is the courts (and the state’s enforcement resources), ultimately, which must enforce any arbitration agreements and awards. . . .” Smit, *supra* note 1, at 25.

21. BLACKABY & PARTASIDES WITH REDFERN & HUNTER, *supra* note 7, at 351.

22. Bermann, *The “Gateway” Problem*, *supra* note 12, at 14. This has led some authors to argue that kompetenz-kompetenz should extend beyond granting tribunals the power to decide their own jurisdiction to actually prohibit courts from hearing jurisdictional challenges until after the issuance of a final award. *See infra* notes 31–37 and accompanying text.

23. *See, e.g.*, Part III.B.1 (discussing this very scenario that occurred in *Dallah*).

24. Bermann, *The “Gateway” Problem*, *supra* note 12, at 16.

after the final award.²⁵ While the timing of jurisdictional challenges is largely within the discretion of the parties, the kompetenz-kompetenz rules of the law applicable to the AAG inform the timing of challenges.²⁶ The relevant law's stance on positive and negative kompetenz-kompetenz is informative of the jurisdictional challenge options open to parties.

The primary issue in determining the appropriate extent of kompetenz-kompetenz is the timing of judicial interference and the extent of review of a tribunal's jurisdiction ruling.²⁷ Positive kompetenz-kompetenz refers to arbitrators' power to determine their own jurisdiction and is recognized in a majority of countries.²⁸ In contrast, courts do not universally acknowledge negative kompetenz-kompetenz because it requires courts to forfeit their judicial authority to hear a dispute regarding arbitral jurisdiction until after the issuance of a final award.²⁹ Similarly, commentators have asserted varied approaches as to the proper approach to kompetenz-kompetenz and the role of negative kompetenz-kompetenz in international arbitration.³⁰

Under negative kompetenz-kompetenz, courts restrict their review of jurisdiction at the initial stages of the arbitral process to a prima facie review of the AGG to determine if the agreement is "null and void, inoperative[,] or incapable of being performed."³¹ Beyond that, national courts cannot interfere with a tribunal's ruling on jurisdiction until after a final award has been issued.³² This makes arbitrators the first—although not sole—judges of jurisdiction³³ and respects the autonomous nature of international commercial arbitration.³⁴

25. BLACKABY & PARTASIDES WITH REDFERN & HUNTER, *supra* note 7, at 351.

26. *Id.* at 351–53.

27. See Gaillard & Banifatemi, *supra* note 2, at 258; see also Alan S. Rau, *Everything You Really Need to Know about "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 93–94 (2003) (categorizing kompetenz-kompetenz as a timing issue).

28. See Gaillard & Banifatemi, *supra* note 2, at 259 (Positive kompetenz-kompetenz "empowers an arbitral tribunal to rule on its own jurisdiction without any illogicality arising from the fact that it is not a permanent body. . .").

29. See *id.* at 259–60.

30. See *infra* notes 35–40 and accompanying text.

31. See Gaillard & Banifatemi, *supra* note 2, at 259; see New York Convention, *supra* note 3 and accompanying text.

32. See Gaillard & Banifatemi, *supra* note 2, at 259.

33. *Id.* at 259–60. "Adopting a prima facie standard of review, on the other hand, is nothing more than accepting a temporary deference to the arbitrators, as opposed to a prima facie suspicion [of] the arbitrators. . . ." *Id.* at 268.

34. See Gaillard & Banifatemi, *supra* note 2, at 269.

Proponents of negative kompetenz-kompetenz assert two primary arguments in its favor: (1) recourse to courts during arbitral proceedings permits judicial interference into what should be an autonomous process; and (2) recourse to courts before the issuance of a final award encourages delaying tactics.³⁵ Gaillard and Banifatemi contend that positive kompetenz-kompetenz fundamentally requires the recognition of negative kompetenz-kompetenz to ensure that courts “refrain from engaging into the examination of the arbitrators’ jurisdiction before the arbitrators themselves have had an opportunity to do so.”³⁶ According to this theory, negative kompetenz-kompetenz has the added benefit of promoting judicial efficiency by condensing courts’ role in reviewing arbitrations to a single proceeding of challenges to the final award as well as jurisdiction.³⁷

In contrast, Bermann concludes that postponing review of jurisdiction until after the issuance of a final award poses significant efficiency issues, and he rejects Gaillard and Banifatemi’s promotion of a strict construction of negative kompetenz-kompetenz.³⁸ Rather, Bermann treats kompetenz-kompetenz as a gateway issue, asserting that kompetenz-kompetenz “need not preclude a court from entertaining a challenge to arbitral jurisdiction prior to constitution of the arbitral tribunal.”³⁹ Bermann’s approach limits negative kompetenz-kompetenz by not stripping courts of their power to hear jurisdictional challenges until the constitution of a tribunal: he would

35. BLACKABY & PARTASIDES WITH REDFERN & HUNTER, *supra* note 7, at 352. Gaillard and Banifatemi argue that protecting arbitration from intentional delaying tactics goes to the very heart of international commercial arbitration by protecting arbitration’s efficiency. See Gaillard & Banifatemi, *supra* note 2, at 260. Additionally, Gaillard and Banifatemi contend that negative kompetenz-kompetenz ensures that parties’ time and resources will not be wasted through unnecessary concurrent jurisdiction with courts. *Id.*

36. *Id.* at 258. Restricting concurrent jurisdiction ensures that parties’ time and resources are not unnecessarily wasted. *Id.* at 260. However, Bermann asserts that negative kompetenz-kompetenz creates its own type of inefficiency: permitting the entire arbitral process to proceed, with the associated costs and time, only to have a court hold there was no jurisdictional after the issuance of the final award. Bermann, *The “Gateway” Problem*, *supra* note 12, at 19; see, e.g., Part III.B.

37. See Gaillard & Banifatemi, *supra* note 2, at 260–61. However, while negative kompetenz-kompetenz may increase judicial efficiency, it may decrease overall efficiency. See discussion *supra* note 36.

38. See Bermann, *The “Gateway” Problem*, *supra* note 12, at 19; see also George A. Bermann, *The U.K. Supreme Court Speaks to International Arbitration: Learning from the Dallah Case*, 22 AM. REV. INT’L ARB. 1, 18–19 (2011) [hereinafter Bermann, *The U.K. Supreme Court Speaks*].

39. Bermann, *The “Gateway” Problem*, *supra* note 12, at 15. Bermann contends that the pertinent issue in determining the correct approach to kompetenz-kompetenz is whether an arbitral tribunal has already been established to begin exercising its kompetenz-kompetenz. *Id.*

permit judicial recourse before the constitution of a tribunal but restrict it afterwards.⁴⁰

III. VARYING APPROACHES: THE CURRENT STATE OF LAW IN THE U.S. AND U.K.

A. *The U.S. Approach*

1. *First Options of Chi., Inc. v. Kaplan: A Presumption Against Kompetenz-Kompetenz*

First Options, a brokerage firm that clears trades on the Philadelphia Stock Exchange, cleared the trading account of MK Investments (MKI), a wholly-owned investment company of Manuel and Carol Kaplan.⁴¹ The Kaplans and First Options signed a “workout” agreement consisting of four documents that governed the resolution of the debts that MKI and the Kaplans owed First Options as a result of the stock market crash of October 1987.⁴² After MKI incurred significant additional losses, First Options liquidated its assets and demanded that the Kaplans personally pay any of MKI’s deficiency.⁴³ First Options sought arbitration after MKI and the Kaplans failed to pay the debt.⁴⁴

Only one of the four documents contained in the workout agreement contained an arbitration clause.⁴⁵ MKI, having signed that document, submitted to arbitration.⁴⁶ The Kaplans, however, had not personally signed the document containing the AAG and insisted that the arbitration panel did

40. *Id.* at 14–21. Bermann favors the German approach to kompetenz-kompetenz, which permits courts to hear jurisdictional challenges to arbitration prior to a tribunal’s constitution. *Id.* at 19–21. However, after the constitution of a tribunal, German courts will take concurrent jurisdiction over jurisdictional challenges but do not permit the stay of arbitration. *Id.* at 21. This removes the potential for parties to use judicial recourse as a delaying tactic for arbitration. *Id.* Although, it does not resolve resource drain of concurrent jurisdiction that Gaillard and Banifatemi were concerned with. See discussion *supra* note 36.

41. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 940 (1995).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 941.

46. *Id.*

not have jurisdiction over their claims.⁴⁷ The panel, exercising its kompetenz-kompetenz, ruled that it had jurisdiction over the Kaplans and issued a final award in favor of First Options.⁴⁸ The Kaplans appealed to the Federal District Court requesting that the award be vacated for lack of jurisdiction.⁴⁹ The district court confirmed the award, the Third Circuit reversed, and the U.S. Supreme Court affirmed, finding no arbitral jurisdiction.⁵⁰

The Supreme Court granted certiorari to define the bounds of kompetenz-kompetenz in American jurisprudence.⁵¹ The Court took a heavily contractual view of kompetenz-kompetenz and instructed that tribunals do not have the power to decide arbitral jurisdiction unless the parties have provided for kompetenz-kompetenz by “‘clea[r] and unmistakabl[e]’” language.⁵² Just as the arbitrability of the merits of a dispute turns on whether the parties contractually agreed to arbitrate that dispute, the issue of who determines the jurisdiction of an arbitral tribunal turns on what the parties contractually agreed on that matter.⁵³ The Court further opined that such a high showing of intent was proper because parties were relinquishing the “practical value” of their right to judicial recourse, displaying the preference of U.S. courts for resolution through courts rather than arbitration.⁵⁴

Under the “clear and unmistakable” standard, American courts begin their jurisdictional analysis with the presumption that tribunals do not have kompetenz-kompetenz to determine jurisdiction.⁵⁵ This presumption takes

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 941, 949.

51. *Id.* at 942.

52. *Id.* at 944 (alterations in original) (citing *AT&T Techs., Inc. v. Commuc’ns Workers of Am.*, 475 U.S. 643, 649 (1986)). The Court’s analysis turned largely on its view that “arbitration is simply a matter of contract.” *First Options*, 514 U.S. at 943.

53. *Id.*

54. *Id.* at 942. The Court further displayed its preference for adjudication over arbitration when it stated that a lower threshold requirement than clear and unmistakable evidence “might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” *Id.* at 945.

55. *Id.* at 944. The Court employs a higher threshold requirement for parties to provide a tribunal with kompetenz-kompetenz: whereas the arbitrability of a merits issue is given the presumption of assent by the Court when the agreement is silent as to the particular issue, the Court reverses the presumption on the jurisdictional issue. *Id.* at 944–45. The Court’s rationale was that it

root in the Court's contractual view of kompetenz-kompetenz.⁵⁶ The Court held that when contracts are silent as to the arbitrability of jurisdiction, the parties' most likely intent was not to submit the issue to arbitration.⁵⁷ Furthermore, any review of jurisdictional rulings made by tribunals to which kompetenz-kompetenz was not clearly and unmistakably given must be analyzed by courts without deference to the tribunal's findings.⁵⁸ In this way, the Court's precedent calls into question fundamental concepts of positive kompetenz-kompetenz without even contemplating negative kompetenz-kompetenz.⁵⁹

2. Repercussions of the U.S. Approach

The repercussions of the U.S. approach to kompetenz-kompetenz are rooted largely in the U.S.'s lack of statutory authority guiding kompetenz-kompetenz⁶⁰ and the U.S.'s failure to distinguish between domestic and international arbitration. Although the FAA is a pro-arbitration instrument, the Court's pro-adjudication approach to kompetenz-kompetenz reflects American courts' suspicion of international arbitration.⁶¹ Years after the

is less likely that a party will realize that it is forfeiting its jurisdictional right when it signs an arbitration agreement. *Id.* at 945.

56. *See id.* at 943–47; *see also* discussion *infra* notes 57–59 and accompanying text.

57. *Id.* at 945. However, the Court's contractually-based rationale does not hold true for international arbitration. *See infra* notes 64–68 and accompanying text.

58. *Id.* at 946–47.

59. *Compare id.* at 943–44 (declining to give tribunals power to determine their own jurisdiction unless parties provide for such power in clear and unmistakable terms), *with supra* Part II.B.

60. The FAA does not include a provision defining the U.S. approach to kompetenz-kompetenz. *See Smit, supra* 1, at 27; Adriana Dulic, Note, *First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle*, 2 PEPP. DISP. RESOL. L.J. 77, 91–92 (2002). Rather, kompetenz-kompetenz is purely defined by the courts. In contrast, most other States have more fully developed arbitration statutes that specifically address kompetenz-kompetenz. *See, e.g.*, Arbitration Act 1996, c.23, § 30 (Eng., Wales, N. Ir.).

61. The Second Circuit stated:

Our deference to arbitrators has gone beyond the bounds of common sense. I cannot understand the process of reasoning by which any court can leave to the unfettered discretion of an arbitrator the determination of whether there is any duty to arbitrate. I am even more mystified that a court could permit such unrestrained power to be exercised by the very person who will profit by deciding that an obligation to arbitrate survives, thus ensuring his own business. It is too much to expect even the most fair-minded arbitrator to be impartial when it comes to determining the extent of his own profit. We do not let judges make decisions which fix the extent of their fees. . . . How, then, can we shut our eyes to the obvious self-interest of an arbitrator?

First Options decision, the Seventh Circuit interpreted the Supreme Court's kompetenz-kompetenz principle, describing arbitral power as circular.⁶² The Seventh Circuit held firm to the "[n]o contract, no power" view taken by the Supreme Court in *First Options* and wondered "how else would jurisdictional disputes be resolved?" then by the judiciary.⁶³

The U.S.'s failure to distinguish between domestic and international arbitration begins with the legislature's failure to embody the distinction in statutes and continues with the judiciary's failure to separate the two when setting precedent.⁶⁴ The negative effects of merging the two forms of arbitration is seen clearly through the kompetenz-kompetenz standard created in *First Options*: while the harsh contractual presumption that parties have not contemplated arbitral jurisdiction may properly gauge party intent domestically,⁶⁵ the same presumption is not as readily applicable to the international arbitration context.⁶⁶ Arbitration is the primary, not secondary, form of resolving international commercial disputes.⁶⁷ So, when parties—who are often times sophisticated businesses—assent to an arbitration agreement, their typical intent is to avoid the mess of international litigation. Unfortunately, the Court failed to contemplate the repercussions of its decision on international arbitration and created a broad-based presumption against positive kompetenz-kompetenz for domestic as well as international arbitrations.⁶⁸

Ottley v. Sheepshead Nursing Home, 688 F.2d 883, 898 (2d Cir. 1982) (Lumbard, J., dissenting) (internal citations omitted).

62. Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 591 (7th Cir. 2001).

63. *Id.*

64. See, e.g., *First Options*, *supra* Part III.A (domestic case that will now apply to international arbitrations under U.S. law).

65. *First Options* dealt with a domestic arbitration. See *supra* notes 41–44 and accompanying text.

66. Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 29–30 ("[E]ven if the *First Options* presumption that parties intend to litigate rather than arbitrate issues of arbitrability were appropriate in the domestic context, it would be inappropriate to import that presumption into the international arena.").

67. *Id.* at 30.

68. See *First Options*, *supra* note 41.

*B. The U.K. Approach**1. Dallah Real Estate & Tourism Holding Co. v. Pakistan*

The dispute in *Dallah* concerned a 1996 contract between Dallah Real Estate and Tourism Holding Company and the Awami Hajj Trust—a trust created by the Government of Pakistan.⁶⁹ The contract between Dallah and the Trust provided Dallah’s construction of housing for pilgrims visiting holy sites in Saudi Arabia.⁷⁰ In 1995, the Government of Pakistan agreed to Dallah’s terms in a Memorandum of Understanding.⁷¹ The terms of the contract were finalized in 1996, and Dallah and the Trust—not the Pakistani Government—signed the contract, which included a valid AAG directing any dispute to International Chamber of Commerce (“ICC”) arbitration.⁷² Subsequently, the regime in Pakistan fell from power and was replaced.⁷³ The new governmental authorities pursued no further actions in regards to the contract with Dallah, and the Trust ceased to exist as a legal entity as of December 11, 1996.⁷⁴

Dallah initiated ICC arbitration against the Government on May 19, 1998 in France.⁷⁵ The Government at all points during the arbitration and subsequent litigation denied being party to any AAG.⁷⁶ The ICC arbitral tribunal, exercising its kompetenz-kompetenz, ruled that it had proper jurisdiction over the claims brought against the Government in a partial award dated June 26, 2001.⁷⁷ The tribunal subsequently found the Government liable for Dallah’s damages, and after over eight years of arbitration, it issued a final award against the Government for \$20,588,040 USD.⁷⁸ Dallah sought enforcement of the award in England.⁷⁹ The High Court refused to recognize the award because the tribunal lacked jurisdiction

69. *Dallah Real Estate & Tourism Holding Co. v. Pakistan*, [2010] UKSC 46, [2] (appeal taken from Eng.), available at http://www.supremecourt.gov.uk/docs/UKSC_2009_0165_Judgmentv2.pdf.

70. *Id.* at [3].

71. *Id.*

72. *Id.* at [7].

73. *Id.* at [8].

74. *Id.*

75. *Id.* at [9].

76. *Id.*

77. *Id.*

78. *Id.* at [1], [9].

79. *Id.* at [10].

over the Government, and the Court of Appeals dismissed Dallah's appeal.⁸⁰

The U.K. Supreme Court—applying French law as the law of situs⁸¹—determined that the Government was not a signatory of the arbitration agreement.⁸² It then denied enforcement of the arbitration award for lack of jurisdiction because the Government was not a party to the AAG and did not qualify as an unnamed third party.⁸³ The U.K. Supreme Court interpreted the French case law as applying an arbitration agreement to an unnamed third party only:

[P]rovided that it is established that their contractual situation, their activities and the normal commercial relations existing between the parties allow it to be presumed that they have accepted the arbitration clause of which they knew the existence and scope, even though they were not signatories of the contract containing it.⁸⁴

The Court rejected Dallah's argument that a reviewing court other than a court of the seat of arbitration should review a tribunal's jurisdictional findings under kompetenz-kompetenz facially and flexibly, granting

80. *Id.*

81. *Id.* at [17].

82. *Id.* at [34]–[35].

83. *Id.* at [69]. While the U.K. Supreme Court identified the correct legal standard to apply under French law, *see infra* note 84 and accompanying text, the U.K. Supreme Court did not properly apply that per the subsequent ruling of the French Court d'Appel. Cour de'appel [CA] [regional court of appeal] Paris, Feb. 17, 2001, No. 09/28533, *Gouvernement du Pakistan Ministere des Affaires Religieuses v. Societe Dallah Real Estate & Tourism Holding Co.* After successfully fending off enforcement of the award in England, the Government of Pakistan challenged the award itself in French courts. *Id.* The French Court of Appeal applied the same French law standard as the U.K. Supreme Court but concluded that the Government of Pakistan had intended to be bound by the arbitration agreement. *Id.* Therefore, while the Government successfully avoided enforcement in England, Dallah's award is still valid to seek enforcement in any other New York Convention signatory. *See* Jacopo Crivellaro, *Conflicting Contrasts in Dallah v. Government of Pakistan*, 17 COLUM. J. EUR. L. 51 (2011), http://www.cjel.net/online/17_2-crivellaro/.

84. *See Dallah, supra* note 69 at [18] (quoting in translation Cour de'appel [CA] [regional court of appeal] 1e civ., 1992, Bull. Civ. I, No. 95 (Fr.) *Orri v. Societe des Lubrifiants Elf Aquitaine, Revue de l'Arbitrage* 95 (Fr.)). The applicable French law required the application of customary practices of international law to determine if the tribunal properly exercised jurisdiction. *Dallah, supra* note 69 at [18]. The U.K. Supreme Court noted that it was “difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations” but still found that the Government did not qualify as a third party to the arbitration agreement. *Id.*; *supra* note 83 and accompanying text.

evidentiary deference to the tribunal's choice.⁸⁵ Instead, the Court performed its own, independent review of jurisdiction with no deference to the tribunal's conclusion on jurisdiction.⁸⁶

Taking a contractual view of arbitration, the Court's analysis of kompetenz-kompetenz relied heavily on what the relevant parties assented to in the contract.⁸⁷ The Court recognized the need for arbitrators to determine the extent of their authority over a dispute but declined to give the kompetenz-kompetenz to do so without having the power conferred upon them by each party.⁸⁸ In reaching this conclusion, the Court relied on the U.S. Supreme Court's holding in *First Options* that "clear and unmistakable evidence" must be given to show specific agreement.⁸⁹ Based on this significant limitation of arbitral jurisdiction, the U.K. Supreme Court concluded that no deference is given to a tribunal's kompetenz-kompetenz when an issue arises as to the validity of the exercise of that power.⁹⁰

2. The Effect of *Dallah*

Dallah set firm precedent that English courts will give no deference to

85. *Id.* *Dallah* contended that a reviewing court outside the country of the seat of arbitration should refuse to become involved in the jurisdictional matter when the tribunal's conclusions were facially plausible or "reasonably supportable." *Id.* In rejecting this point of view, the Court concluded that *Dallah's* position that the courts of the seat of arbitration held a special power to review jurisdiction undermines fundamental concepts of international commercial arbitration. *Id.* at 15 (referring to *Dallah's* argument as "iron[ic]"). The benefit of international arbitration—transnational enforcement under the NY Convention—requires a transnational view of review and enforcement that cannot be tied to a singular country. *See id.*

86. *See id.* at [21]–[29]. Specifically, the Court expressed concern that kompetenz-kompetenz was too often viewed as permitting arbitrators to be the *sole* judges of jurisdiction when "the real purpose of the [kompetenz-kompetenz] rule is in no way to leave the question of the arbitrators' jurisdiction in the hands of the arbitrators alone." *Id.* at [22] (internal citations and quotations omitted). The Court rejected this view as neither logical nor acceptable and determined that jurisdiction must be fully reviewed by the court in which enforcement is sought. *Id.* at [23]. In performing this analysis, the Court found that the Government had proven that there was no common intention for it to be bound by the arbitration agreement. *Id.* at [39].

87. *See id.* at [24]–[26].

88. *Id.* at [24] ("Arbitrators (like many other decision-making bodies) may from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred upon them.")

89. *Id.* at 13; *see also* *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943–44 (1995).

90. *Dallah Real Estate & Tourism Holding Co. v. Pakistan*, [2010] UKSC 46, [30].

arbitral jurisdictional rulings, and it represents the inefficiency of the negative kompetenz-kompetenz model.⁹¹ The U.K. Supreme Court's holding that jurisdictional rulings are not to be given any deference in reviewing their validity has already begun to affect lower courts' application of kompetenz-kompetenz.⁹² In the aftermath of *Dallah*, English courts will not presume that the defendant of a jurisdictional challenge is in a favorable position because an arbitral tribunal ruled in its favor.⁹³ This lack of deference to the decisions of arbitrators as to jurisdiction undermines the basic premise of kompetenz-kompetenz by giving arbitral findings under that authority no subsequent legal effect. The result is a lack of security in the exercise of kompetenz-kompetenz, which threatens to impact the U.K.'s reputation as a pro-enforcement jurisdiction.⁹⁴

Dallah also illustrates the inefficiency of negative kompetenz-kompetenz, which is the model used by French courts (the law of the AAG in *Dallah*).⁹⁵ In *Dallah*, the entire arbitral process had been completed from a partial award on jurisdiction, to a partial award on liability, to a final award with damages before the jurisdictional issue was ever heard by a court of law.⁹⁶ Indeed, it was not until the enforcement stage that judicial recourse concerning jurisdiction—which the Government had challenged from the beginning—was ever heard⁹⁷ because French law's negative kompetenz-kompetenz prohibited judicial recourse anytime before a final award.⁹⁸ The result is a lesson in the inefficiency of such an approach: a long and expensive arbitration may be completed but never enforced due to the

91. See Bermann, *The U.K. Supreme Court Speaks*, *supra* note 38, at 19–20.

92. See, e.g., *A v. B* [2010] EWHC 3302 (Eng., Wales). In *A v. B*, the English commercial court applied the Court's ruling in *Dallah* to a domestic arbitration. *Id.* at [25] A lost an award in an arbitration proceeding and brought a jurisdictional challenge—a section 67 challenge—to the court. *Id.* at [1]. B responded with an application to the court to secure his arbitral award—a section 70(7) application—but his request for security of the award was dismissed. *Id.* at [2]. The commercial court, interpreting *Dallah*, held that challenges to arbitral jurisdiction now require a “complete rehearing and not a review.” *Id.* at [23].

93. Gary Born, *The Impact of Dallah*, KLUWER ARB. BLOG (Feb 10, 2011), <http://kluwerarbitrationblog.com/blog/2011/02/10/the-impact-of-dallah/>.

94. *Id.*

95. See Bermann, *The U.K. Supreme Court Speaks*, *supra* note 38, at 19–20.

96. *Dallah Real Estate & Tourism Holding Co. v. Pakistan*, [2010] UKSC 46, [9].

97. *Id.*

98. Bermann, *The “Gateway” Problem*, *supra* note 12, at 15–19 (describing the French negative kompetenz-kompetenz approach).

threshold issue of jurisdiction.⁹⁹

IV. THE SOLUTION: A REVISED APPROACH TO NEGATIVE KOMPETENZ-KOMPETENZ

The U.S. and U.K. approaches display the pitfalls of taking an overly conservative or overly liberal construction of kompetenz-kompetenz.¹⁰⁰ In *First Options*, the U.S. Supreme Court limited positive kompetenz-kompetenz by creating a presumption that arbitrators do not have the power to determine their own jurisdiction unless clear and unmistakable language in the AAG bestows it upon them.¹⁰¹ Yet, positive kompetenz-kompetenz is vital to the efficiency of international commercial arbitration where judicial recourse is often an inefficient and complicated method of dispute resolution.¹⁰² Furthermore, parties to an international commercial AAG typically intend to bestow positive kompetenz-kompetenz on a future tribunal when they sign an AAG.¹⁰³ As a result, the U.S.'s overly restrictive approach threatens the core efficiency of international commercial arbitration by setting a baseline presumption that parties intend to resolve their disputes in courts.¹⁰⁴

In contrast, *Dallah* displays the inefficiencies that can result from extending kompetenz-kompetenz beyond its positive dimension to actually restrict the power of courts (negative kompetenz-kompetenz). While *Dallah* was ultimately left with a valid award,¹⁰⁵ Bermann's concerns that negative kompetenz-kompetenz creates the possibility that an entire arbitral process will occur only to be overturned on a gateway issue were almost realized by *Dallah*.¹⁰⁶ Had the French court not upheld the award,¹⁰⁷ *Dallah* would have

99. Bermann, *The U.K. Supreme Court Speaks*, *supra* note 38, at 19. Although in the present case, the resources were not completely wasted because the French court upheld the award and enforcement could be sought in an alternative jurisdiction. See discussion *supra* note 83.

100. See *infra* notes 101–08 and accompanying text.

101. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

102. See *supra* notes 24, 28 and accompanying text.

103. See *supra* notes 64–68 and accompanying text.

104. *Id.* However, this presumption could always be overcome with the inclusion of clear and unmistakable language giving the jurisdictional issue to the tribunal. See *supra* note 55 and accompanying text.

105. See discussion *supra* note 83.

106. See *supra* notes 38–40 and accompanying text.

107. See discussion *supra* note 83.

proceeded through over eight years of arbitration—with the compiling costs—only to find out that the tribunal’s jurisdiction was never valid. Essentially, negative kompetenz-kompetenz prevents courts from resolving such massive *threshold* issues until a final award is issued, which may be a decade or more later.¹⁰⁸

A workable solution to kompetenz-kompetenz must balance the U.S.’s respect for valid challenges to jurisdiction—by providing judicial recourse—with negative kompetenz-kompetenz’s reverence for the autonomy of international commercial arbitration.¹⁰⁹ The U.S. approach is too restrictive of a tribunal’s power to determine jurisdiction,¹¹⁰ and the U.K. approach is alternatively too expansive.¹¹¹ First, kompetenz-kompetenz in international commercial arbitration must provide tribunals with the presumption of positive kompetenz-kompetenz.¹¹² Second, tribunal autonomy and efficiency must be protected from delaying tactics through a limited form of negative kompetenz-kompetenz that provides for full review—not simply a *prima facie* determination—of a tribunal’s jurisdiction before a final award is issued.¹¹³

Kompetenz-kompetenz in international commercial arbitration must include a presumption that positive kompetenz-kompetenz exists.¹¹⁴ The rationale behind the U.S.’s opposite presumption does not hold up in the international context where parties are specifically seeking to avoid judicial recourse by opting into the primary method of international commercial dispute resolution: international commercial arbitration.¹¹⁵ Positive kompetenz-kompetenz not only reflects the likely intent of international commercial actors, but it protects the arbitration process from unnecessary interference, increasing efficiency.¹¹⁶ Furthermore, positive kompetenz-kompetenz puts the jurisdictional question in the hands of more qualified

108. *See supra* Part III.B.2. Although a court under Gaillard and Banifatemi’s view must wait until the “end of the arbitral process”, a *prima facie* review of jurisdiction can be made at the outset. Gaillard & Banifatemi, *supra* note 2, at 259–60. However, a *prima facie* review does not preclude the possibility of a subsequent full review discovering that no jurisdiction exists. *See id.*

109. *See infra* notes 117–23 and accompanying text.

110. *See supra* notes 101–04 and accompanying text.

111. *See supra* notes 105–08 and accompanying text.

112. *See infra* notes 114–17 and accompanying text.

113. *See infra* notes 118–21 and accompanying text.

114. *See infra* notes 115–17 and accompanying text.

115. *See supra* notes 64–68 and accompanying text.

116. *See supra* Part II.B.

decision makers—arbitrators—that are familiar with the procedures of international commercial arbitration, conflicts of law, and application of laws from varying countries.¹¹⁷

In order to prevent improper delaying tactics at the outset of arbitration, kompetenz-kompetenz must also have a negative dimension; however, negative kompetenz-kompetenz should be less expansive than Galliard and Banifatemi's assertion that challenges must wait until a final award has been issued.¹¹⁸ A more balanced approach would prohibit recourse to courts only during the jurisdictional phase of arbitration.¹¹⁹ Once a partial award as to jurisdiction is rendered, a party seeking to challenge jurisdiction should have full recourse to courts. Admittedly, judicial recourse can be a long process that can drive up costs through concurrent jurisdiction and can act as a delaying tactic to halt arbitration through a stay.¹²⁰ To remedy these defects, the court hearing the jurisdictional challenge should determine as an initial matter whether a stay of the arbitral proceedings during the litigation of the jurisdictional issue is proper, or whether the litigation and arbitrations should proceed concurrently.¹²¹ A motion for stay of arbitration would trigger a prima facie review of the AAG by the court at the outset of the litigation to allow courts to discern the initial validity of the challenge. If it appears as if the challenge holds little merit and may be a delaying tactic, then the sitting court on its prima facie review should permit arbitration to proceed with concurrent jurisdiction (similar to the German approach¹²²). However, if the court's prima facie review concludes that a valid jurisdictional issue is present, the court should stay the arbitration until the court rules fully on the tribunal's jurisdiction. In this way, the court can balance the two conflicting interests of judicial challenges for jurisdiction by hearing valid challenges to jurisdiction but not permitting meritless delaying tactics to slow the arbitral process.

A presumption of positive kompetenz-kompetenz balanced with a

117. See, e.g. discussion *supra* note 83 (describing how the U.K. Supreme Court incorrectly applied French law, whereas the arbitrators' decision that the jurisdiction was proper under French law was upheld by the French Cour d'Appel).

118. See *supra* notes 31–40 and accompanying text.

119. See *infra* notes 120–23 and accompanying text.

120. See discussion *supra* note 35.

121. In this way, my view differs from the German model that creates concurrent jurisdiction between courts and an ongoing tribunal. See discussion *supra* note 40.

122. See discussion *supra* note 40.

restricted form of negative kompetenz-kompetenz allows arbitrations to be the initial jurisdiction decision makers without precluding valid challenges to jurisdiction until the issuance of a final award.¹²³ While a singular solution to two competing dispute resolution systems will always have its shortcomings, this revised version of kompetenz-kompetenz respects the role of both systems and permits recourse for parties with genuine challenges to a tribunal's jurisdiction.

V. CONCLUSION

States, given the discretion to define the bounds of kompetenz-kompetenz, have created varying forms of kompetenz-kompetenz.¹²⁴ The United States presumes this "inherent power" of arbitrators does not exist.¹²⁵ In contrast, France not only presumes tribunals have the jurisdiction to decide jurisdiction, but courts are prevented from engaging in jurisdictional challenges until a final award is issued.¹²⁶ An unfortunate result of this was almost displayed in the U.K.'s refusal to enforce the *Dallah* award after finding there was never arbitral jurisdiction over the completed eight-year arbitration.¹²⁷ In responding to the shortcomings of the above approaches, this paper proposes that courts take a middle ground: presume positive kompetenz-kompetenz and institute a limited form of negative kompetenz-kompetenz. By merging the two approaches, kompetenz-kompetenz can work to promote the greatest amount of arbitral efficiency and autonomy.

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123. See *supra* notes 114–22 and accompanying text.

124. Compare *supra* Part III.A, with *supra* Part III.B.

125. See *supra* note 55 and accompanying text.

126. See *supra* note 98 and accompanying text.

127. See *supra* Part III.B.

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