THE ROLE PLAYED BY THE PRINCIPLE OF KOMPETENZ-KOMPETENZ IN INDIAN ARBITRATION LAW

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INTRODUCTION

The 7-judge bench of the Supreme Court, delivering the judgment in *SBP v. Patel Engineering*[1] did not only overrule its earlier judgment in *Konkan Railway v Rani Constructions*[2] but set the stage for an overhaul in the court's role in commercial arbitrations in India. The court in this case ruled that appointment of arbitrators by the court is not an administrative but a *judicial* action, affecting as it does, the material interests of the parties.[3] This means that the court may now appoint arbitrators after having examined the contract to determine the validity of the arbitration clause as well as jurisdiction of the arbitrators. The *ratio* of this judgment has therefore hit hard two precepts fundamental to the powers of the arbitration tribunal in a commercial arbitration: severability[4] and Kompetenz-Kompetenz. It is the latter that shall form the subject of discussion in the ensuing paper.

The right of an arbitration tribunal to rule on its own jurisdiction is generally accepted throughout the world.[5] This doctrine has developed into more than a mere principle of lawin most countries, phrased as "kompetenz-kompetenz" in Germany, "Kompetenz de la Kompetenz" in France, and "Kompetenz of Kompetenz" in England.[6] However, what has most enhanced the stature of this principle has been the inclusion of this power of the arbitration tribunal in Article 16 of the UNCITRAL Model Law on International Commercial Arbitration; this has, also, been incorporated in all material particulars in Section 16 of the Indian Arbitration and Conciliation Act of 1996.

Though almost universally recognized, the legal implications of kompetenz-kompetenz are by no means uniform in all jurisdictions. Still, most commonly

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[1]2005 (9) SCALE 1.

[2]AIR 2002 SC 778

[3]Supra note 1.

[4]Separability, or the autonomy of the arbitration clause, provides that the agreement to arbitrate is separable from and independent of the main contract. *See Infra* Note 6.

[5]*See* Mahir Jalili, 'Kompetenz-Kompetenz: Recent U.S. and U.K. Developments', (1996) 13 J. Int'l Arb. 169

[6]*See* Natasha Wyss, 'First Options Of Chicago, Inc. V. Kaplan: A Perilous Approach To Kompetenz-Kompetenz' (1997)., 72 Tul. L. Rev. 351

applied international conventions, rules of arbitration, and foreign jurisdictions support the power of the arbitrator to rule on his own jurisdiction, though the substance and implications of this right may vary.[7] The position in India was thus defined by *Konkan Railways* and later by *Patel Engineering*. It is this shift in focus that the authors would mark as the starting point in the ensuing report. The authors would attempt to map the concept by first looking at the import and merits of the principle and then adopt a comparative approach to examine the Indian position in this regard.

The authors shall, in discussing the topic at hand, divide the ensuing paper into three distinct but interrelated sections. In the first section, the authors shall deal with the concept of Kompetenz-Kompetenz dealing therefore with the merits and demerits of court intervention and the import of the concept. In the second section, the authors would trace the Indian response to the concept of Kompetenz-Kompetenz and understand the criticisms that entail from this position. In the third and final section, the authors would look at how other leading jurisdictions have handled this principle and therefore attempt to understand the best way forward.[8]

UNDERSTANDING KOMPETENZ-KOMPETENZ: THE ROOT OF THE MATTER

In the course of this section, the authors would deal with the concept of Kompetenz-Kompetenz as it emerges from the international laws on arbitration. For this purpose the authors will trace the legislative history of Article 16 of the UNCITRAL Model Code. The authors will also look at the justifications for Kompetenz-Kompetenz and its pros and cons.

THE DOCTRINE OF KOMPETENZ-KOMPETENZ

The Core Principle

The doctrine of Kompetenz-Kompetenz holds that arbitrators have the jurisdiction to decide challenges to their own jurisdiction or to decide challenges to the arbitration agreements on which their own authority to resolve the parties' disputes is based. [9]The proposition that the arbitration tribunal can decide it does have jurisdiction to proceed to judge the dispute on the merits, notwithstanding a pending challenge against their jurisdiction before a court, is perhaps the core principle of Kompetenz-

[7]Ibid.

[8]Please Note that the term used by the author through the course of this project to refer to the doctrine shall be 'Kompetenz-Kompetenz'

[9]Robert SMIT, 'Separability And Kompetenz-Kompetenz In International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come From Nothing?' (2002),13 Am. Rev. Int'l Arb. 19 at 25

Kompetenz.[10] Keeping this core principle in perspective, the doctrine of Kompetenz-Kompetenz has taken wings in different directions in different jurisdictions,[11] most notably in that at which stage and whether at all a court may intervene into the authority of the arbitration tribunal.

This doctrine principally has two aspects to it, firstly, it confirms to the arbitrator that they may decide on their jurisdiction without the need for support from the court and secondly that it prevents the court from determining the issue before the arbitration tribunal has decided it.[12] Some authors argue that there is also a third aspect, which relates not to the power of the tribunal, but that of the court, whereby the judicial authority, when dealing with the issue of the jurisdiction of the arbitration tribunal should confine itself to find that an arbitration agreement *prima facie* exists and to refer the parties to arbitration.[13]

Extent of 'Jurisdiction'

As to the extent of the power of the Arbitration Tribunal to rule on its own jurisdiction there is notable support among scholars for the contention that there is a wide consensus among countries about the arbitration tribunal has the power to decide on its jurisdiction, subject to court control.[14] Similarly, numerous court decisions from various jurisdictions demonstrate that the arbitration tribunal has the power to determine a range of jurisdictional issues including, for example:[15]

- Whether an arbitration agreement exists between the parties;
- Whether the matter in dispute comes within the scope of the arbitration agreement;
- What is the proper interpretation of the arbitration agreement; and
- Whether the arbitration agreement is valid or was terminated

[10]John ZADKOVICH, 'Divergence and Comity Among the Doctrines of Separability and Kompetenz-Kompetenz', (2008)12 VJ 1 at 9

[11]PHILIPP, S. 'Is The Supreme Court Bucking The Trend? First Options V. Kaplan In Light Of European Reform Initiatives In Arbitration Law', (1996)14 B.U. Int'l L.J. 119 at 130

[12]MALHOTRA, O.P., *The Law and Practice of Arbitration and Conciliation* (New Delhi, Eastern Book Company,2006,) at 630.

[13]Gaillard, *Negative Effect of Kompetenz-Kompetenz: The Rule of Priority in Favor of the Arbitrators* in Enforcement of Arbitration Agreements and International Arbitration Awards: The New York Convention in Practice, (Cameron May, 257 (2008))

[14]UZELAC, A., 'Jurisdiction of the Arbitration Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law' (2005) 8 International Arbitration Law Review 5, Cited in Zadkovich, Supra Note 10.

[15]ZADKOVICH, Supra Note 10 at 9.

Positive and Negative Kompetenz-Kompetenz

Some scholars state that the doctrine of Kompetenz-Kompetenz has both positive and negative implications.[16]Kompetenz-Kompetenz doctrine takes into account the principle that arbitrators are empowered to rule on their own jurisdiction and they are not required to stay the proceeding to seek judicial guidance in the meantime.[17] This is an uncontroversial aspect of Kompetenz-Kompetenz and is known as Positive Kompetenz- Kompetenz.

The doctrine has another, much more debated aspect, known as the negative effect of Kompetenz-Kompetenz. It originated in French law, which is well known for its pro-arbitration character.[18]The negative effect which this doctrine hold is that it allows arbitrators to rule on their own jurisdiction at as an initial matter, court jurisdiction should be constrained as in it cannot go into questions of the arbitrators' jurisdiction and must refrain from doing so. Thus challenge underlying the doctrine is to find the right amount of and context for court restraint. The discussion of this aspect is especially important since it is on this question that national jurisdictions seem to diverge most, the issue of stage and extent of court intervention being the most contentious of questions.

JUSTIFICATION FOR KOMPETENZ-KOMPETENZ

Although as pointed out above, the Kompetenz-Kompetenz doctrine is more controversial in that there is lack of international consensus on its actual scope. As a matter of strict logic, some find hard to see how an arbitrator has the jurisdiction to determine his or her own Kompetenz since to do so assumes that he or she already possesses Kompetenz under the very agreement which is doubted.[19]

However, the doctrine has been justified on several grounds. Firstly, that there is a rebuttable presumption that such jurisdictional power has been conferred by the will of the parties when they entered into the arbitration agreement.[20] This is particularly true with respect to parties in international transactions, where parties of different nationalities generally expect and intend that any and all disputes about their contractual relationship, including disputes about their agreement to arbitrate, will be resolved in a neutral, non-national arbitration forum. [21] If it is presumed that

[16]BARCELO, J., 'Who Decides the Arbitrators' Jurisdiction? Separability and Kompetenz-Kompetenz in Transnational Perspective' (2003) 36(4) Vanderbilt J. of Transn'l Law 1116 at 1124

[17]Id at 1124-1126

[18]Id.

[19]LEE, Jack Tsen-Ta,'Separability, Kompetenz-Kompetenz and the Arbitrator's Jurisdiction in Singapore.' (1996)Singapore Academy of Law Journal, Vol. 7, 421, at 423

[20]Id. See also WYSS,N.;First Options Of Chicago, Inc. V. Kaplan: A Perilous Approach To Kompetenz-Kompetenz',(1997)72 Tul. L. Rev. 351 at 374

[21]See WYSS, Id.

the parties have conferred the arbitrator with the jurisdiction to decide his or her own jurisdiction in the same way that he or she deals with the other legal matters arising in the arbitration, the court should respect the contract of the parties so long as the arbitrator acts in good faith. [22]It has also been argued that Kompetenz-Kompetenz is inherent in all judicial bodies and is essential to their ability to function.[23]

Therefore, Kompetenz-Kompetenz is best seen as a rule of convenience designed to reduce unmeritorious challenges to an arbitrator's jurisdiction. Kompetenz-Kompetenz therefore becomes a practical necessity because, without it, a party to an arbitration agreement would be able to frustrate or delay the arbitration merely by challenging the parties' arbitration agreement and insisting upon judicial determination of that challenge.[24] It also promotes the arbitration process by giving arbitrators the Kompetenz to decide their own Kompetenz so that parties are not compelled to seek relief in the courts.[25]

CRITICISMS OF KOMPETENZ-KOMPETENZ

The criticisms of Kompetenz-Kompetenz progress on both a theoretical and practical levels. Theoretically, there is arguably no foundation for an arbitrator's authority to decide his or her own jurisdiction because an arbitrator's authority derives exclusively from the parties' arbitration agreement.[26] This argument has found favour especially in the United States where the courts have held that: "*Courts have jurisdiction to determine their jurisdiction not only out of necessity but also because their authority depends on statutes rather than the parties' permission.*"[27]Arbitrators, on the other hand, lack a comparable authority to determine their own authority because there is a non-circular alternative (the judiciary) and because the parties do control the existence and limits of an arbitrator's power.[28]Kompetenz-Kompetenz raises practical objections because since some argue that it is unrealistic to expect arbitrators to rule with complete objectivity on challenges to their own jurisdiction where they have a financial interest in sustaining their jurisdiction in order to continue earning their arbitrator fees.[29]

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[22]See SMIT, Supra note 9 at 27.

[23]Id.

[24]See LEE, Supra Note 19

[25]*See*SMIT, Supra Note 22 at 28.

[26]*See*SMITId.. Arbitrators therefore lack authority to decide anything unless and until their authority under the parties' arbitration agreement is established. See also PHILIPP, Supra Note 11 for US Position.

[27]*See Sphere Drake Ins. Ltd. v. All American Ins. Co.[2001]*256 F.3d 587, 591 (7th Cir. 2001)

[28]Id.

[29]*See Ottley v. Sheepshead Nursing Home[1982]* 688 F.2d 883, 898 (2d Cir. 1982)(Lumbard, J., dissenting). See also *Trafalgar Shipping Co. v. Int'l Milling Co.,[1968]* 401 F.2d 568, 573 (2d Cir. 1968) ("Moreover, it is not likely that arbitrators can be altogether objective in deciding whether or not they ought to hear the merits. Once they have bitten into the enticing fruit of controversy, they are not apt to stay the satisfying of their appetite after one bite."). Cited in SMIT, Supra Note 25

Be that as it may, there is no doubt about the fact that because of overwhelming operating efficiency, Kompetenz-Kompetenz has emerged in most nations as an effective tool in commercial arbitrations. In this context it may be interesting to look at the international legislative framework for the same in terms of the UNCITRAL Model Code.

ARTICLE 16 OF THE UNCITRAL MODEL CODE

Relevant Features

The Model Law codifies a minimal form of the Kompetenz-Kompetenz doctrine. As a matter of fact, some scholars believe that it is only a time limiting device that is thinly veiled in the cloak of Kompetenz-Kompetenz.[30] UNCITRAL considered several drafts of Article 16 which granted varying degrees of power to the arbitration tribunal to determine its own Kompetenz. The final version of Article 16 is aimed at achieving a balance between the competing interests of efficiency and finality of arbitration proceedings, and judicial control of arbitration. Further, Article 16 allows national legislatures to interpret or modify its provisions in order to promote one goal over another.

The first working draft recognized the arbitration tribunal's power to determine its own jurisdiction by delaying court review of the arbitration ruling "*until the arbitration award is made, unless* [the court] *has good and substantial reasons*" to exercise its review earlier[31] echoing the French arbitration law. Comments to the second working draft indicated a concern that the first draft did not sufficiently emphasize the concurrent power of national courts. In the third draft, the writers rejected a proposal allowing a party to appeal directly to a court, without prior challenge to the arbitration tribunal regarding its jurisdiction. These variations indicate a struggle between insufficient and excessive judicial control of the arbitration process, in an effort to confer upon the arbitrators substantial authority without damaging the integrity of the dispute resolution system or the judiciary especially in case of domestic arbitrations.[32]

The final draft of Article 16 grants to arbitration tribunals the initial authority to determine the scope of their jurisdiction (over parties and subject matter), subject to court review. The power to make the initial determination remains a mandatory aspect, essential to the doctrine of Kompetenz-Kompetenz, which the parties may not contract around.[33] This initial ruling by the tribunal, however, is immediately reviewable by a court at the complaining party's request. The code does this by

[30]See PHILLIP, Supra Note 26 at 132.
[31]*Id* at 126
[32]*Id* at 126-132
[33]*Id.* at 133

placing time limitation on jurisdictional challenges to interim rulings.[34] The relevant part of Article 16(3) reads, "*If the arbitration tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days ..., the court ... to decide the matter.*"[35] The Model Law attempts to vitiate the use of jurisdictional challenges as an instrument of delay. Thus, this language promotes immediate resolution, so as to avoid a wasted arbitration proceeding, while attempting to minimize the use of objections for dilatory purposes. For these very reasons, many laws have allowed parties to contract for their own limitation periods for appeal.[36] This is intended to ensure that all outstanding jurisdictional issues shall be disposed of as early as possible in order to insulate the proceedings from any further disruption and to help the parties save time and money if the clause turns out to be invalid.[37]

Criticisms

The model law provisions on Kompetenz-Kompetenz are also criticized on a number of grounds, not the least of which is the fact that in order to achieve international consensus on the provisions the concept has been much diluted. Firstly, while Article 16 refrains from conferring absolute decision-making power on the arbitration tribunal. UNCITRAL's solution to the conflicting views on the proper balance between arbitration freedom and judicial control of the arbitration process has been designed to encourage preliminary jurisdictional rulings but allow the tribunal to postpone decision of frivolous or dilatory objections, or ones that are difficult to separate from the merits of the case. This causes problems in the fact that Article 16(3) permits an arbitration tribunal to issue its jurisdictional decision as part of its final award, without stating that this may be done only in cases where the tribunal believes the objections to jurisdiction are frivolous or solely for dilatory purposes.[38] If an arbitration tribunal can freely delay its decision, the goal of early finality on the jurisdictional question is not realized.

Secondly, Article 16 does not directly tackle the problem of competing litigation. Model Law Article 5 requires a court to refrain from entertaining litigation pending properly commenced arbitration proceedings. While under the strict understanding of Kompetenz-Kompetenz rule a court may not even look at a dispute covered by an arbitration clause, Article 5 implicitly leaves room for a court to examine the contract to determine whether arbitration governs the matter, thereby determining whether the arbitration tribunal is indeed competent to hear the case.[39] UNCITRAL rejected the hard line position of law, adopting instead a version of Kompetenz-Kompetenz vulnerable to the very problem of competing litigation which the doctrine seeks in

[34]See WYESS Supra Note 20 at 375
[35]See UNCITRAL Model Law on Int'l Commercial Arbitration art. 16(3).
[36]Id.
[37]*See*PHILLIP, Supra Note 30 at 130.
[38]See SMIT, Supranote 25 at 30
[39]See LEE, Supra note 22 at 433.

part to avoid.[40]

Thirdly, there exists a conflict between the principle of Kompetenz-Kompetenz as embodied in Model Law Article 16 and the traditional grounds for the setting aside of an award pursuant to Model Law Article 34. The question as to if application for the set aside of an award on the grounds of an arbitration tribunal's excess of authority redundant after Article 16 is not addressed in the model law.[41] If several redundant or conflicting provisions coexist under the Model Law, a party may challenge the validity or existence of an arbitration agreement at several stages, thus causing delays in the substantive decision-making process.

Finally, Article 16 does not address Kompetenz-Kompetenz, where parties have explicitly agreed to arbitrate the question of arbitration. Truly the "most contentious" version of Kompetenz-Kompetenz allows the parties to independently and explicitly agree to entirely forego judicial review of the substantive jurisdictional question;[42] it is this lack of clarity has spawned the whole question of contract in the United States.

THE INDIAN JUDICIARY AND THE MUTILATION OF KOMPETENZ-KOMPETENZ

As emphasized in the above section, the principle of Kompetenz-Kompetenz has developed differently in different countries, especially given the leeway that is granted by the Model Code. In this part of the paper, the authors shall look at how the doctrine has evolved in the Indian context. For this purpose, the authors would first look at the historical position in India, moving on to looking at the legislation in force and compare it to the model code. The authors shall then move on to discussing the relevant case laws and how they have shaped the Indian law.

EVOLUTION OF INDIAN STATUTORY LAW RELATING TO KOMPETENZ-KOMPETENZ

The Arbitration Act 1940

The 1940 Arbitration Act had no provision dealing directly with Kompetenz-Kompetenz. However, the position to be followed in this regard was enunciated by the Supreme Court[43] where the court was of the view that whether a given dispute inclusive of any question as to the arbitrator's jurisdiction comes within an arbitration clause or not depends on the terms of the contract itself. This depends on

[40]See PHILLIP, Supra note 37 at 132
[41]Id.
[42]See LEE Supra note 39.
[43]*See Renusagar Power Co. v. General Electric Co.* [1984] 4 SCC 679

what the parties intended to provide and what language they employed.[44] The court further went on to rule that though ordinarily the arbitrator will not be invested with the power to rule on his own jurisdiction, the parties may grant him that power through a collateral contract.[45]

Section 16 of the Arbitration and Conciliation Act, 1996 and its comparison with Article 16 of the UNCITRAL Model Law

Section 16 of the ARBITRATION and Conciliation Act is the operative provision of law dealing with Kompetenz-Kompetenz in India and is derived from and closely resembled Article 16 of the Model Code. The provision *prima facie* invests the arbitration tribunal to rule on its own jurisdiction excluding the jurisdiction of the court till such time as the final award is challenged.[46] The primary deviation however is found in Section 16(6) which is different from Art 16(3) in that whereas the Model Law provided the aggrieved party a 30 day period in which to make an application, this right however is not granted by the statute which provides that any application against the ruling on jurisdiction can only be made in accordance with section 34 of the Act which deals with final awards.[47]

JUDICIAL DECISIONS AND THE SHAPING OF KOMPETENZ-KOMPETENZ

Konkan Railway and Shin-Etsu - One Step Forward

Curiously enough the Indian courts when defining the scope of Kompetenz-Kompetenz have never been dealing directly with the power of arbitrators or their jurisdiction. This course has been charted through judicial decisions as to whether in the appointment of arbitrators the Chief Justice carries on a judicial or an administrative function. Whereby, a judicial procedure would entail going into the merits of the arbitration agreement to determine its validity as well as the arbitration capacity of the dispute itself, whereas, if it is an administrative function it would mean just a *prima facie* determination of a valid arbitration agreement after which the final call will lay with the tribunal.[48] A Constitution bench of the Supreme Court in deciding the question in ***Konkan Railway v. Rani Constructions***[49]unanimously held that the function of appointment was *administrative* and not judicial.

[44]MALHOTRA, 2006, at 622

[45]Id.

[46]This position, as shall be discussed in later part of this section has been debated by the courts in a slew of cases and the final position is far removed that that appears on the face of the statute book.

[47]MALHOTRA Supra Note 45 at 627-629

[48]S.KACHHAWA, 'Indian Arbitration Law: Towards a New Jurisprudence', [2007]Int. A.L.R. 13 at 15

[49](2002)2 SCC 388.

The follow-up to this came in the case of ***Shin-etsu Chemical Co. v. AkshOptifbre Ltd.*** [50]where the court held that while adjudicating on an arbitration agreement it is sufficient that the court is satisfied that there exists a *prima facie* valid arbitration agreement the court would not go further into the merits and refer the matter to the tribunal, which shall take the final call as to jurisdictional issues which the courts will not intervene in the first instance.[51] This further strengthened the role of the tribunal and moved towards a stricter understanding of Kompetenz-Kompetenz. This position was however as short-lived as three months before the Supreme Court delivered the ***Patel Engineering*** Judgment.

SBP v. Patel Engineering - The Tide Turns

The Supreme Court of India, in the landmark 7-judge Constitution Bench decision of ***SBP v. Patel Engineering Ltd.***[52] relating to the appointment of arbitrators by the Chief Justice of India or Chief Justice of a High Court, held that such an appointment constitutes a judicial power, and not an administrative power.[53] The implication of this is that the court, when asked to appoint an arbitrator, must go into the question of the validity of the arbitration agreement, the maintainability of the claim and other jurisdictional matters. The court shall therefore appoint an arbitrator only if it satisfied that all the conditions precedent to the initiation of arbitration proceedings exists.

The Majority Judgment

By a majority of 6 to 1, the Supreme Court held that the appointment of arbitrators by the Chief Justice under s. 11(6) is a judicial function. Justice Balasubramanyan writing the judgment for the majority reasoned that appointment of an arbitrator under s. 11 is a judicial function because it materially affects the rights of parties.[54]

The majority judgment reasoned that contentions regarding the validity of the arbitration agreement, can be raised at this stage, and must be ruled upon by the Court before appointing an arbitrator.[55] The judgment counters the objection that there is no requirement for the Court to examine these conditions since the power of Kompetenz-Kompetenz is already enshrined in S.16. by curtailing the operation of

[50](2005)7 SCC 234.The *Shin etsu* judgment was infact lauded by Gaillard. See GAILLARD Supra Note 13 at 268

[51]*Id.*

[52]2005 (9) SCALE 1.

[53]*Id.* See also A.RAY and D. SABHARWAL,' Kompetenz-Kompetenz: An Indian Trilogy',(2007) <http://www.whitecase.com/pu blications_04012007_3/>, accessed April 20 2012.

[54]Id. See also SEN, A., 'The Role of the Court in the Appointment of Arbitrators - an Analysis with Reference to the Supreme Court of India's Decision in S.B.P. v. Patel Engineering', (2006)10 Vindobana J. of Int'l Comm. L. and Arb. 45

[55]Id.

the arbitration tribunal's power under S. 16 to rule on its own jurisdiction.[56]

The court in this case stated that once the Supreme Court or the High Court has determined preliminary questions regarding the existence of the arbitration agreement of the dispute, and has gone ahead and appointed an arbitrator under S. 11, it shall not be lawful for the arbitration tribunal thus constituted to enter into these questions again. Therefore the rule of Kompetenz-Kompetenz will operate only in respect of those arbitrations, where an arbitrator has not been appointed by the Court.[57] The majority further thus felt that a party aggrieved by an order of appointment of an arbitrator under s. 11 would have an appellate remedy under Art. 136 of the Constitution of India. Hitherto such an order was not appealable.[58]

Dissenting Opinion by Justice Thakker

Justice Thakker, delivered the dissenting judgment in the case, which the authors submits provides a better interpretation of the position of law. He reasoned that S. 11 is not a provision that contemplates a response from the opposite party. Hence, in his understanding, an order under s. 11 cannot possibly be a judicial order, but is merely from an administrative order. He substantiates this by the fact that S. 11 allows for any 'person or institution' designated by the Chief Justice to appoint an arbitrator. It flows that if the function was to be of a judicial nature, the legislature would not have allowed for delegation of the function. The legislature surely cannot be said to be unaware of the principle that a judicial function is incapable of being delegated. This was however not sustainable in view of the majority opinion that the words person or institution. However, even according to a minority judgment, the order of an appointment of an arbitrator could be the subject of an appeal under Art. 136 of the Constitution of India.[59]

THE CONTRADICTIONS

The authors submit that the majority judgment is highly problematic in a number of material particulars, in so far as that the ***Shin Etsu***judgment was not even referred to in the majority opinion. This creates a very interesting dichotomy whereby placing ***Shin Etsu*** on one hand ***Patel Engineering*** on the other there exists a contradiction in terms between the two judgments. As pointed out by RAY and SABHARWAL[60]in an instance, where a party challenged the existence of a valid arbitration agreement, a court would be bound by ***Shin-etsu*** to conduct a prima facie review and, upon being satisfied about the existence of such agreement, refer the

[56]See SEN, Supra Note 54.
[57]Id at 47.
[58]Id.
[59]See Supra Note 52.
[60]*See* Ray and Sabharwal , Supra Note 53

parties to arbitration. The party challenging the tribunal's jurisdiction may then refuse to participate in the appointment of the arbitration tribunal, thereby requiring the Chief Justice to appoint an arbitrator under Section 11 of the 1996 Act and, as mandated by *Patel Engineering*, conduct a full and final review of the existence of the arbitration agreement at that stage.

In effect, a party challenging the jurisdiction of the arbitration tribunal would get two bites at the cherry—first, a prima facie review by the court at the outset, and second, a substantive review by the Chief Justice at the time of appointment of an arbitrator. This is in addition to the statutory right to challenge the award under Section 34(2) of the 1996 Act for lack of jurisdiction.[61] Not only would this re-litigation of the same issue be unsupported by the plain language of the 1996 Act, it would inevitably result in uncertainty and delay over the conduct of arbitration proceedings and defeat the whole point of having an arbitration agreement.

THE DISADVANTAGES OF THE INDIAN POSITION AND THE LAW IN OTHER JURISDICTIONS

In the course of this final section the authors would look at the drawbacks of the current Indian position in both legal and economic terms to show that the Patel Engineering position is not sustainable in the long term. The authors will also look at other leading jurisdictions to examine the position in these areas and see if it can be reconciled with the Indian position.

LEGAL FALLACIES IN PATEL ENGINEERING

Even apart from the contradiction pointed out in the above section, there are a number of fallacies of understanding that dog the present Indian position. Firstly, the Supreme Court has suggested that an arbitration agreement is a precondition to the exercise of its jurisdiction under s. 11 is a flawed assumption since there is no requirement under the Act that a valid arbitration agreement must exist at the stage of appointment of arbitrators; if it were so, s. 16 would not clothe the arbitration tribunal with the power to determine the existence of the arbitration agreement.[62] Secondly, s. 16 unequivocally states that the arbitration tribunal shall have jurisdiction to determine the existence of the arbitration agreement. The legislature has not imposed any restrictions on this power. However, in *Patel Engineering*, the arbitration tribunal shall have no jurisdiction to examine the validity of the arbitration agreement after the court has considered the matter. This amounts to hijacking the jurisdiction of the arbitration tribunal.[63]SEN argues that the very fact that the arbitration tribunal's jurisdiction to determine its own jurisdiction

[61]Id.
[62]See SEN, Supra Note 54 at 49
[63]Id at 50

has not in any way been impaired by s. 16 shows that legislative intent was clearly *not* to restrict the power of Kompetenz-Kompetenz. The restriction of the power of Kompetenz-Kompetenz has two negative effects - first, it abrogates a power that is the cornerstone of arbitration law and second, it brings about an effect that the legislature never intended.[64]

Thirdly, s. 11 merely provides procedures for appointment of arbitrators. Surely this should not affect the jurisdiction of the arbitration tribunal to determine the validity of the arbitration agreement. The fact that the arbitration tribunal has been instituted by a particular procedure should not alter its power to examine the arbitration agreement and its own jurisdiction. *Patel Engineering* leads one to an absurd conclusion.

Something that is also especially worrying, submit the authors, is the fact that ***Patel Engineering*** not only departs from the spirit, and perhaps even the letter of law[65] and perhaps more importantly that it displays a manifest lack of trust in the process of the arbitration and the Kompetenz (in terms of understanding) of a tribunal to take a call for itself.

ECONOMIC AND OTHER FACTORS

The failure of the Indian courts to resist the temptation to intervene in arbitrations, it is argued,[66] is harmful in two ways. First, in a legal system plagued by delays, a pro-arbitration stance would reduce the pressure on the courts. There are over 30 million cases currently pending resolutions in India. Arbitration is therefore not just an attractive option for resolving disputes, it is essential to maintaining the integrity of the Indian legal system. It is thus necessary that the courts do not take more burden upon themselves than they already handle.

Second, for a country seeking to attract foreign investment, it is imperative that its legal system provides efficient and predictable remedies to foreign investors. When commercial parties enter into transactions, they factor in the potential legal costs of enforcing their rights. In the present scenario, with the potential re-litigation costs mentioned above, it becomes highly unsustainable for potential foreign investors. If a legal system does not hold the promise of speed or certainty, a risk premium is added to the cost of the transaction which, if excessive, may make the transaction commercially unviable. Foreign investors typically prefer arbitration and have shied away from Indian courts due to prolonged delays in litigation caused by a backlog

[64] *See* Kachhawa, Supra Note 48 at 16

[65] Id *at* 17.

[66] <http://economictimes.indiatimes.com/articleshow/msid-1933720,prtpage-1.cms>accessed April 20 2012.

of cases.[67]

A BRIEF DISCUSSION OF THE POSITION IN OTHER COUNTRIES

England: The English and Indian law lies in that in England, the court and the arbitration tribunal have concurrent jurisdiction to rule on the validity of the arbitration agreement, while in India, this concurrent jurisdiction has been specifically ousted.[68] The English courts thus are mandated by statute to verify the existence of an arbitration agreement when appointing an arbitrator (under s. 18.).[69] In England, the power of the court even while appointing an arbitration tribunal is judicial, and this is so because the nature of the power has been so prescribed by the *Arbitration Act, 1996.*[70]

Hong Kong : In questions similar to that raised in *Patel Engineering* the approach in Hong Kong has been to appoint an arbitrator according to Art. 11 unless it is evident that the arbitration agreement is void and unenforceable.[71] The exact point of contention in *Patel Engineering* was raised in ***Pacific International Lines (Pte) Ltd v. Tsinliens Metals and Minerals Co (HK) Ltd***[72]. The dispute related to an arbitration clause in a charter party agreement. The Court observed if there was 'a plainly arguable case' that an arbitration agreement, within the meaning of Art. 7 of the Model Law, existed, it should appoint an arbitrator

United States of America: The prevalent judicial view seems to be analogous to the position in Hong Kong, A court order appointing an arbitrator is not a final order and is therefore non-appealable. The rationale behind this decision, according to Justice Noonan was to keep judicial intervention in the arbitration process to a minimum.[73] However, the United States follows a policy of contractualism pursuant to ***Kaplan***[74] whereby the Kompetenz-Kompetenz is substantially curtailed as the arbitrators shall only have Kompetenz to take a call on its jurisdiction when the parties expressly stipulate so in an agreement,[75]

Germany: Germany seems to be only notable jurisdiction which takes a divergent

[67]Id.

[68]In England, s. 9 of the Arbitration Act, 1996 empowers the court to grant an anti-suit injunction unless the arbitration agreement is 'null and void, inoperative, or incapable of being performed.'

[69]*Welex A.G. v. Rosa Maritime Ltd. (The Epsilon Rosa) (No. 2)*, [2002] 2 Lloyd's Rep. 701;

[70]SEN, Supra Note 62 at 51

[71]*Private Company 'Triple V' Inc. Ltd. v. Star (Universal) Co. Ltd. and Sky Jade Enterprises Group Ltd.*, Case No. 101, CLOUT (High Court of Hong Kong, 27th January 1995); Cited in SEN Id.

[72][1993] 2 H.K.L.R. 249

[73]*O.P.C. Farms Inc. v. Conopco Inc.*[1998] 154 F.3d 1047 (9th Cir. Sept. 8, 1998).

[74]15 S. Ct. at 1925.

[75]See WYSS, Supranote 12

view. It has been held that it is necessary for the court to determine the existence of the arbitration agreement before appointing an arbitrator.[76] The stance has been justified with the argument that it is unnecessary to spend time and money pursuing an arbitration when no arbitration agreement exists in the first place, so the court must conduct a complete review to ascertain that such an agreement exists.

SUMMARY & CONCLUSION

In the course of the above paper, the authors have attempted to present a comprehensive picture of the Doctrine of Kompetenz-Kompetenz. To do this the authors have first underlined the theoretical underpinnings of the principle tracing its importance in the scheme of arbitrations as well as its import under the UNCITRAL Model Code. In the next part of the paper, the authors have looked at the evolution of the law in this regard in the Indian context and highlighted the fallacies that are involved. The authors have finally objectively looked at the position of law in other leading jurisdictions and tried to enumerate the fact that the views on this are divergent from jurisdiction to jurisdiction, where the UNCITRAL Model Law only provides for the minimum consensus idea of the doctrine.

The authors submit that the clear lack of faith that the judiciary has towards the adjudicative faculties of the tribunal in particular and the arbitration process in particular is hardly sustainable in this day and age. If the Indian legal system wants to flaunt itself as a matured system of dispute resolution, it has to throw away the interventionist cloak and has to be more magnanimous in its approach. The judicial attitude towards this one doctrine signifies only the shifting sands and the authors feel that if the Indian legal system is to go forward on its promises it would have to check its step before it is too late.

[76]See SENSupranote 70 at 52.

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