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Determining the doctrine of Kompetenz-Kompetenz: An instrument of fraud or justice

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Abstract
The doctrine of *kompetenz-kompetenz* is governed under Section 16(1) of Arbitration and Conciliation Act, 1996. As a theoretical principle, it is extensively accepted to have a binary effect. While its positive effect confers upon an arbitral bench the power to rule on its governance, the negative effect establishes a presumption of chronological precedence for the bench with respect to resolving questions on governance. Stemming from what appears to be an essential mistrust in the mechanism of arbitration, the Courts in India have been reticent in admitting this negative effect while assessing the myriad questions put before it. It will consequently result in the adoption of an unequal pro-arbitration approach that is agonized with interventions of judiciary at each stage. Before the enactment of the Arbitration and Conciliation Act, 1996, no arbitral tribunals had the power to determine the cogency of the arbitration agreement or the arbitral tribunal's jurisdiction and ultimately the courts had the upper hands. Thus, the arbitral tribunal's power to decide its own jurisdiction is called *"Kompetenz-Kompetenz".* The present research project examines the evolution of the *kompetenz-kompetenz* principle, applicability of the principle, negative and positive effects of the doctrine, other principles like autonomy, separability are also discussed. These principles are the "true pillars of alternative dispute resolution" which is popularly referred to as "Dispute Settlement Mechanisms". It is contended in this project that the principles together form the bedrock of the arbitrator's jurisdiction. After a careful scrutinization and examination of the landmark precedents and recent important case laws on the doctrine of *Kompetenz-Kompetenz,* the conclusion of this paper is that the principle of *Kompetenz-Kompetenz* is an essential tool and instrument of administration of justice.

Keywords: International commercial arbitration, *Kompetenz-kompetenz*, arbitration, principle of severability, arbitration act, conventions, arbitral tribunals, arbitral conventions, judicial intervention

Introduction

Do not encourage litigation. Ask your fellow people to accommodate whenever it is possible. Iterate them how the formal winner is frequently a real no-hoper —in charges, expenses and devotion of time uselessly" [2]. The doctrine of *Kompetenz-Kompetenz* along with its allied principle of separability of the arbitration agreement is amongst the most significant doctrines in modern-day arbitration. The concept implies, to put it simply, the arbitral tribunal's power to comprehensively rule on its own jurisdiction. One may ask why, in the first place, it is important to confer such power specifically on the arbitrator. After all, every adjudicatory authority, before embarking on the exercise of adjudication, is expected to first inquire about its own jurisdiction and rule on it. Then, is it not natural and a matter of elementary principle that the arbitral tribunal should have such power? The answer lies in the arbitrator's unique position and distinction, as an adjudicator, from other adjudicating authorities, all of which derive their power to adjudicate from the state's sovereign power to administer justice or statutes designating them as adjudicators for deciding questions arising themselves. The arbitrator, on the other hand, is a privately chosen forum, owing its power and authority to an agreement entered by the parties, which is usually a part of an underlying contract, to decide disputes under which the parties seek to resort to such forum. What if the contract containing the arbitration agreement is itself invalid or ceases to exist? What happens then to the arbitration agreement? Is it not rendered invalid or non-existent? How can a forum, which owes its very existence to such an agreement is supposed to operate? Throughout the history of arbitration law, the courts have tried to grapple with these conceptually tricky issues, till the arrival of the present-day doctrines of *kompetenz-kompetenz* and separability. The purpose of this research paper is to trace the development of these doctrines and find their exact place in Indian law to ascertain their reach and content under Indian arbitration law, the problem areas that continue to dog us even today, and finally, the road ahead.

Alternative Dispute Resolution: Conceptual Framework

Alternative Dispute Resolution (ADR) as the name itself signifies is an alternative to the traditional judicial system. It seeks to involve people in the process of resolving their dispute, which is not possible in a formal and adversarial system. It offers a wide range of choices in method, procedure, cost, representation and location and speeder than judicial proceedings and reduces the burden of the courts. ADR Mechanism includes all the procedures except the "Traditional Litigation". India is one of the countries vexed by arrears of court cases. The United States of America and, following its inspiration, several countries, including Australia, Canada, Germany, Holland, Hongkong, New Zealand, South Africa, Switzerland and the United Kingdom have been using, over the last twenty years or so, what is popularly known as 'Alternative Dispute Resolution' (ADR), which encouraged the disputants arrive at a negotiated understanding with a minimum of outside help. The ADR procedures consists of negotiation, conciliation, meditation, arbitration and an array of hybrid procedures, including mediation and last offer arbitration, mini-trial, med-arbitration and neutral evaluation.

Nevertheless, ADR mechanism is not to supervene upon totally the conventional modes of resolving disputes by means of litigation.

Adr and Uncitral [3]**:** With the intent to meet the felt necessities of the day and knowing that the General Assembly of the United Nations has recommended that all the countries give due consideration to the UNCITRAL Model Law in view of the desirability of uniformity in the law of arbitral procedures and the specific needs of international commercial arbitration and the UNCITRAL Conciliation Rules, adopted by United Nations Commission on International Trade Laws (UNCITRAL) in 1980, makes significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations, and taking into account the UNCITRAL Model Law and Rules, the Arbitration and Conciliation Bill, 1995 was introduced in the Parliament to consolidate and amend the law relating to (i) Domestic Arbitration (ii) International Commercial Arbitration and(iii) Enforcement of Foreign Arbitral Awards (iv) Defining of law relating to the law of conciliation.

Methods of Adr in India: There are various modes of alternative dispute resolution mechanism used in India. Some of them are: (i) Arbitration (ii) Conciliation (iii) Mediation (iv) Lok Adalat (v) Tribunals (vi) Commissions (vii) Regulatory Authority Commissions (viii) Nyaya Panchayat (ix) Negotiation (x) Ombudsman (xi) Neutral Evaluation (xii) Moderated Settlement Conferences (xiii) Summary Jury Trial (xiv) Mini Trial (xv) Neutral Expert Fact-Finding (xvi) Private Judging (xvii) Private Mediation (xviii) Judicial Settlement (xix) Case Management (xx) Plea Bargaining

Arbitration and conciliation act, 1996: an exhaustive law on the subject of arbitration and conciliation [4]

The Arbitration and Conciliation Act, 1996 on its ultimate enactment received the assent of the President of India on 16th August 1996 and has come into force with effect from 22nd August 1996.Based on the UNCITRAL Model Law and Rules, the Act lays considerable stress on party autonomy. Except for some mandatory provisions, almost all the provisions of the Act are subject to the agreement of the parties. The parties may determine the number of arbitrators, the procedure for appointing the arbitrators, the rules of procedure, the rules governing the substance of the dispute, the place of arbitration and the language of arbitral proceedings. In the absence of agreement between the parties, the arbitral tribunal is given considerable autonomy. Though the major advantage contemplated in the new Act is to facilitate quick resolution of commercial disputes and to speed up arbitration procedure by minimizing intervention by court and the grounds for recourse against and arbitral award through an action of setting aside as mentioned in Section 34 of the Arbitration and Conciliation Act, 1996 are ostensibly narrower than the grounds mentioned in Section 30 of the Arbitration Act, 1940, it is justifiably felt that an arbitral award, in given circumstances, can still be set aside by the court if there is an error apparent on the face thereof and/or the arbitral tribunal misconducts itself or the proceedings before it.

Doctrines under Indian arbitration and conciliation act, 1996 [5]

The following three doctrines are given under the Act. Among them, the Researcher has focused only on the Doctrine of *kompetenz-kompetenz (i)* Doctrine of Separability/ Doctrine of Severabilitty (ii) Doctrine of Kompetenz-Kompetenz (iii) Doctrine of Group of Companies

Meaning of the doctrine of kompetenz-kompetenz

Under the principle of *Kompetenz-Kompetenz,* the arbitral tribunal, while exercising the power to rule on its own jurisdiction, decides any objections with respect to the existence or validity of the arbitration agreement. Apart from providing the theoretical basis for the arbitrators' jurisdiction and authority, unaffected by the existence or validity of the agreement from which such jurisdiction and authority are sourced, it works on the practical level as well. Every time an issue arises concerning the existence or validity of the arbitration agreement, it allows the arbitrator to decide such an issue, at least in the first instance, without the parties having to go to national courts for such a decision. The emphasis, after all, of modern-day arbitration law is to retain the party autonomy to the fullest measure possible and keep the inference of the ordinary courts, correspondingly to the minimum. The doctrine of kompetenz-kompetenz implies that the arbitral tribunal's power and authority to rule in its own jurisdiction to try the cases including the validity or the existence of the arbitration agreement which is defined under section 7 of the Arbitration and Conciliation Act, 1996. According to Russell"-"It can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction had been fulfilled. However, an arbitrator is always entitled to inquire whether or not he had jurisdiction. An umpire faced with a dispute whether or not there was a contract from which alone his jurisdiction, if any, can arise can adopt one of a number of courses. He can refuse to deal with the matter at all and leave the parties to go to the court or he can consider the matter and if he forms the view that the contract upon which the claimant is relying and from which, if established, his jurisdiction can arise is in truth the contract, he can proceed accordingly." [6]

Doctrine of kompetenz-kompetenz and doctrine of separability

Almost as a logical corollary to the doctrine of *Kompetenz-Kompetenz,* the law had to invent the principle of separability of the arbitration agreement from the 'main' or 'underlying' contract. The doctrine goes hand-in-hand with the power of the arbitral tribunal to determine its own jurisdiction, in that it requires treating the arbitration clause as an agreement independent of the other terms of the contract. "The doctrine of separability establishes that the arbitration agreement has a separate life from the contract for which it provides the means of resolving the disputes. This enables the arbitration agreement to survive the breach of the contract of which it is a clause [7]. The matter goes to the national courts only after the award is rendered, in a challenge to the award [8].

Principles of kompetenz-kompetenz and separability form the bedrock of the arbitrator's jurisdiction

The principle of separability, by affirming the separate existence of the arbitration agreement, allows the arbitrator to decide the disputes under the main contract even if the latter is null and void. But this is on the footing that such invalidity does not affect the arbitration agreement itself.If and to that extent, however, such invalidity affects the agreement itself, it is the principle of *kompetenz-kompetenz*, rather than the separability principle, which allows the arbitrator to rule on his jurisdiction. The separability principle, essential as it is to provide the theoretical basis of the arbitrator's jurisdiction, is still insufficient in a fundamental sense to enable the arbitration agreement to survive any invalidity which goes to the very root of the contract or to the making of it. The difficulty is then gotten over through the statutory interdict of the principle of *Kompetenz-Kompetenz*, giving the arbitrator the power to rule nevertheless on his jurisdiction [9].

Early roots of the doctrine of kompetenz-kompetenz

The early decisions of the English courts seem to restrict the application of arbitration clause where the 'underlying' contract, for some reason or the other, has come to an end. The House of Lords, in the case of *Johannesburg Municipal Council vs. Stewart* [9] dealt with an action for damages brought by a municipal council, averring repudiation of the contract for supply of a plant by the defendant. The contract had an arbitration clause. The question was whether the clause was applied. One of the grounds of the decision, formulated by Lord Loreburn L.C. was, 'If the course of action which is established be that there has been repudiation or a breaking of contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause'. In *Jureidini vs. National British and Irish Millers Insurance Company Limited* [11] Viscount Haldane, L.C. made the following observations: 'Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance to the whole contract, I do not see how the person setting up the repudiation can be entitled to insist on a subordinate term of the contract still being enforced'. Then came the decision of the Judicial Committee in *Hirji Mulji vs. Cheong Yue Steamship Company Limited* [12]. In this case, a ship on a time charter was requisitioned on behalf of His Majesty's Government before the date at which she was to have entered upon the performance of the Charter. The dispute was whether such requisition frustrated the performance of the charter party. The conclusion of the Judicial Committee was that such dispute was not 'a dispute arising under this charter'. The arbitration clause under the charter party was, thus, held to be inapplicable. Lord Sumner, who delivered the judgment for the court, held that the execution of the contract had not begun and that the dispute first arose when the charter` no longer existed.

Development of the rule of kompetenz-kompetenz upto the case of Heyman vs. Darwins limited

The law then was the judgment delivered by House of Lords in the celebrated case of *Heyman vs. Darwins Limited* [13]. That was a case arising under a sole selling agency agreement. The appellants who were sole selling agents of the respondents, claimed that the respondents 'have repudiated and/or evinced an intention not to perform' the agreement (an allegation which the respondents denied). A writ was issued, directing the court to make a declaration that the defendants have repudiated an intention and also claiming damages. The defendants opposed the action, citing the arbitration clause forming part of the agreement. The clause ran in the following terms: "If any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising here out the same shall be referred for arbitration in accordance with the provisions of the Act" [14]. The House of Lords treated this case as a widely drawn arbitration agreement. Viscount Simon, L. C. observed as follows: 'Ordinarily speaking, there seems no reason at all why a widely drawn arbitration clause should not embrace a dispute as to whether a party is discharged from future performance by frustration, whether the time for performance has already arrived or not'. The learned Lord Chancellor proceeded to lay down the law in the following words: "An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, and must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is *void ab initio*, the arbitration clause cannot operate, for on this view the clause itself also is void".

Aftermath of the case of Heyman vs. darwins limited

The principles of *kompetenz-komptenz* and separability were taking a firm shape by Lord Macmillan in one case [14].

The case of ***Heyman vs. Darwins Limited*** was the first authoritative statement of the principle and paved the way for further developments in this regard. It was this case which guided Indian Courts in construing the arbitration clauses under the framework of the Arbitration Act, 1996.

Further strides: the case of harbour assurance company

The case of *Harbour Assurance Company (UK) Limited vs. Kansa General International Assurance Company Limited* [16] held by the court that, "Under English Law, if the contract in which the arbitration clause is contained is void ab initio, and therefore nothing, so also must the arbitration clause in the contract. That is the proposition that nothing can come of nothing, ex nihil nil fit'. Cases of non est factum or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples. A curious example is the decision of the Court of Appeal of *Bermuda in Sojurnznefeexport vs. Joc Oil Limited* [17], in which a signatory to an agreement containing an arbitration clause had no authority to bind the plaintiff to the substantive obligations but was authorized to sign an arbitration agreement. The court held that the arbitration clause was separable and binding. With these dicta, the separability principle received its fullest consent. It was firmly entrenched in English law on the basis of the arbitrator's jurisdiction. It was now left to the advent of the principle of

Kompetenz-Kompetenz to overcome the last barrier, namely, unworkability of the arbitration clause where the initial illegality struck at its very root. The law had to await for the formation of the UNCITRAL Model Arbitration Law, which was followed up by various jurisdictions by amending their respective domestic laws.

Contribution of uncitral model law to the principle of kompetenz-kompetenz via article 16

This model law is probably the single-most important contribution by the United Nations to international arbitrations. It is this law which has greatly influenced the making of the new Act of 1996 in India, namely, the Arbitration and Conciliation Act, 1996. The Model Law took the separability principle one notch above and combined with it the principle of *Kompetenz-Kompetenz.*

Article 16 of Uncitral [18]**:** Paragraph (1) of Article 16, which in substance formulates the amalgam, is in the following terms:"The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause". Paragraph (1), apart from affirming that the arbitration clause forming part of the contract shall have a separate existence from the other terms of the contract, grants the arbitral tribunal the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. That is precisely the principle of *Kompetenz-Kompetenz*. The separation of the arbitration clause is not only complete and pervasive, but the arbitrator appointed under it has, by a statutory fiction, the authority to rule on it even if the initial illegality of the contract undermines the very arbitration clause.

Un concern over article 16 of Uncitral: When the power of the arbitral tribunal was expressed in such widest terms, a concern was expressed in the UN that, "The provision would not be acceptable to certain States which did not grant such power to arbitrators or to those parties who did not want the arbitrators to rule on their own jurisdiction. It was stated in reply that the principle embedded in the paragraph was an important one for the functioning of international commercial arbitration; nonetheless, it was ultimately for each State, when adopting the Model Law, to decide whether it wished to accept the principle and. if so, possibly to express in the text that parties could exclude or limit that power"[19].

Status of recognition of article 16 in all other nations

Each contracting state had a different response to this Article. The US has traditionally been rather reluctant to acknowledge the principle of *Kompetenz-Kompetenz.* The Federal Arbitration Act of the Act empowers the courts to decide all arbitrability issues but makes no mention of the principle [20]. On the other hand, under Section 3, US Supreme Court and the most commentators acknowledged the fullest jurisdiction in this behalf to the federal court till the landmark decision of the U.S. Supreme Court in the case of *Fit Options of Chicago, Inc. v. Kaplan* [21]. In First Options' case, the court held that arbitrability is an issue that has to be decided in courts 'unless the parties clearly and unmistakably provide otherwise'. The courts, ruled the First Options' case, would respect the parties' choice to unambiguously contract for *Kompetenz-Kompetenz.* The question, to be asked, is: Whether the parties unambiguously agreed to submit the arbitrability question itself to arbitration? The French view the matter in an entirely different manner. The rule of *Kompetenz Kompetenz*, codified in Art. 1465 and 1448 of the French Code of Civil Procedure, provides for an exclusive jurisdiction of the arbitral tribunal to rule on objections to its jurisdiction and an intervention of the court only when the arbitration agreement is manifestly void or manifestly not applicable, though even in that case, the review of the court is possible only if the arbitral tribunal is not seized of the dispute. Once the arbitral tribunal is constituted, it is for the tribunal to exclusively resolve challenges to its own jurisdiction, whatever the basis of the objections. Once the award is rendered, however, all inquiries into the arbitral jurisdiction are open to French Courts. The English Arbitration Act, 1996, modelled on UNCITRAL Law, whilst accepting in the fullest measure the principle of Article 16(1), leaves it to the parties to apply for stay of proceedings before the arbitral tribunal, whilst an application is made to the Court under Section 32 (determination of preliminary point of jurisdiction)". Section 32, in turn, provides for the power of the court to determine questions 'as to the substantive jurisdiction of the tribunal' on an application made by a party to arbitral proceedings with the agreement in writing of all the other parties to the proceedings or made with the permission of the tribunal and the court is satisfied, (a) that the determination of the question is likely to produce substantial savings in costs, (b) that the application was made without delay, and (c) that there is good reason why the matter should be decided by the court. Indian law, on the other hand, has no such reservation. It states the principle on exactly the same terms as Article 16(1). However, as we shall see in the following section, judicial inroads still continued to be made under the Indian Arbitration Act of 1996, particularly under powers reserved to the courts under Sections 8, 11, and 45 of that Act.

Recognition of doctrine of kompetenz-kompetenz under the Indian arbitration and conciliation act, 1996 under section 16 [22]**: Uncitral is the foundational base for the Indian law of arbitration** [23]

The Arbitration and Conciliation Act, 1996, which notes in its preamble the significant contribution made by the Model Law and Rules of UNCITRAL to the 'establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations' and acknowledges the expediency of making a law 'respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules', fully adopts the principles of separability and *Kompetenz-Kompetenz* in UNCITRAL Model Law and Rules.

Demystification of section 16 of Indian arbitration and conciliation act, 1996: These are contained in Section 16 of the act, Competence of Arbitral Tribunal to Rule on its Jurisdiction. The pivotal provision, sub-section (1) of that section is in the following terms: (1) The arbitral tribunal

may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null, and void shall not entail ipso jure the invalidity of the arbitration clause [24]. The doctrine of *Kompetenz-Kompetenz* was envisaged under Article 16(1) of the Arbitration and Conciliation Act, 1996. The doctrine was incorporated based upon the UNCITRAL Mode Law.

Comparing article 16 of Uncitral and Indian arbitration and conciliation act, 1996: The provision is cast in the same terms as Article 16(1) of the Model Law. Complementing the power and authority of the arbitrator to rule on his own jurisdiction is the lack of power in any judicial authority to rule on such jurisdiction at any time before the arbitrator ruling on it. This is achieved by Section 16(5) and (6) read with Section 34 and Section 5. Under Section 16(5) and (6), the arbitrator has to decide the plea that he either lacks the jurisdiction or is exceeding it and where he takes a decision rejecting the plea and continues with the arbitral proceedings and make an award. Such award can be challenged only under Section 34. (Acceptance of the plea calls for an appeal under Section 37) Section 5 prohibits any intervention by a judicial authority in a matter governed by Part I except where so provided in the Part. [Sections 16(1), (5), and (6) 34, and 37 come within Part I.][25]

Remarks made by the apex court of india in wellington associates limited vs. Krit Mehta [26]**:** The Supreme Court noted in *Wellington Associates Ltd. v. Krit Mehta* [27] that the disability resulting from Section 3 from Section 33 of the Old Act, that any question as to the 'existence' of the arbitration agreement was to be decided only by application to the and not by the arbitrator, was now removed by Section 16 of the new Act. Section 16, corresponding to Article 16 of the UNCITRAL Model Law and Article 21 of the UNCITRAL Arbitration Rules, provides for the power of the arbitral tribunal to decide whether there is in 'existence' an arbitration clause. Though the power of the arbitral tribunal to decide issues of arbitrability was, thus, fully recognized in the arbitration law of India, by means of the provisions of the new Act of 1996, the exclusive power of the arbitral tribunal to rule on its jurisdiction in the first instance was not recognized. In Wellington Associates' case itself, the Supreme Court observed that the language of Section 16 of the new Act showed that it was only an 'enabling' provision; the section permits the arbitral tribunal to rule on the 'existence of the arbitration clause, but does not declare that except the arbitral tribunal none else could do so. In particular, the court held that Section 16 did not take away the jurisdiction of the Chief Justice or his designate to decide the question of 'existence' of the arbitration agreement whilst considering an application for appointment of the arbitral tribunal under Section 11.

Relevance of section 11 with respect to the doctrine of Kompetenz-Kompetenz: The immediate question which arose out of this position, particularly in the context of Section 11 of the new Act, was what really the nature of the jurisdiction is exercised by the Chief Justice or his designate under that provision: is it really adjudicatory or is it something akin to an administrative function. In *Konkan Railway Corporation Ltd. v. Rani Construction P. Ltd* [28] the Supreme Court held that the order of the Chief Justice or his designate under Section 11 nominating an arbitrator is neither an adjudicatory order nor those functionaries could be held to be a tribunal to make such a decision the subject matter of an appeal under Article 136 of the Constitution of India. Adverting to Section 16 of the 1996 Act, the Constitution Bench held that the questions relating to improper constitution of an arbitral tribunal or its want of jurisdiction or objections with respect to the existence or validity of the arbitration agreement are matters which should be canvassed before the arbitral tribunal itself which has been specifically empowered to rule on such issues and on its own jurisdiction, as well.

Landmark case laws decided under the regime of the doctrine of Kompetenz-kompetenz [29]**:** The decision in *Konkan Railway Corporation Ltd. u. Mehul Construction Co* [30], rendered sometime before Rani Construction's case [31], also proceeded on the basis that at a time when the matter comes before the Chief Justice or his nominee under Section 11, it would not be appropriate for them to entertain any contentious issues between the parties and decide the same; their decision is merely an administrative order. Based on these two decisions, the Supreme Court in *Food Corporation of India v Indian Council of Arbitration* struck down a Delhi High Court order where the High Court had adopted an adjudicatory role and 'returned a verdict recording reasons as to the very existence or otherwise of the agreement as well as the tenability and legality or otherwise of making a reference to an arbitrator'. The court held that even if there be any infirmity in the arbitration clause which goes to the root of the arbitrator's jurisdiction, it had to be adjudicated by the arbitral tribunal itself, under Section 16 of the Act. This position was, however, overturned by the momentous decision of a Seven Judge Constitution Bench in the case of *S.B.P. & Co. Patel Engineering Ltd.* [32] In that case, after surveying all previous authorities on the subject, the Supreme Court held that the exercise of the power by the Chief Justice or his designate under Section 11 was a 'Judicial' act. The net result of the decision was that the Chief Justice or his designate, whilst considering the question of appointment of an arbitrator, was required to go into the questions of existence and validity of the arbitration agreement, all of which are jurisdictional matters covered by Section 16. This position further gave rise to a distinction between three types of issues: (a) issues which have to be decided under Section 11, which included the question of 'existence' of an arbitration agreement, (b) issues which may be decided by the Chief Justice or his designate, which included issues as to limitation, and accord and satisfaction, and (c) issues which have to be left to the arbitral tribunal to decide, such as arbitrability of a claim (whether it falls within the arbitration clause) and merits of a claim. This was recognized in a lucid judgment of the Supreme Court in *National Insurance Co. Ltd. Boghara Polyfab Pvt.Ltd* [33]. That was the ruling position in respect of Section 11, but even under Section 8, the court or judicial authority it was held, had to decide the questions of existence and validity of the arbitration agreement under the new Act. Though unlike Article 8 of the UNCITRAL Model Law, the power of a

judicial authority under the Act of 1996, to refer the parties to arbitration, when a matter covered by an arbitration agreement was brought before it, was not circumscribed by the qualification 'unless it finds that the said agreement is null and void, inoperative, or incapable of being performed, there was a divergence of authority in India relating to the scope and nature of powers under Section 8, in this behalf. Some courts took a view that these decisions of a judicial authority would be binding on the arbitral tribunal, and to that extent, excluded the power of the arbitral tribunal under Section 16 [34]. The other view was that these jurisdictional issues must be left to be determined by the arbitral tribunal [35]. Yet another provision of the new Act, which retained the power of judicial authorities to rule on the arbitrator's jurisdiction before he did so, was Section 45 of the Act which came under Part II dealing with 'enforcement of certain foreign awards'. Section 45 required a judicial authority, when seized of an action in a matter covered by an international commercial arbitration agreement to which the New York Convention applied, to refer the parties, at the request of one of them, to arbitration, unless it finds that the said agreement is null and void, inoperative, or incapable of being performed. Thus, in order to relegate the parties to arbitration, the court had to be satisfied that the agreement is valid, operative, and capable of being performed. This section was interpreted by the Supreme Court in *Shin-Etsu Chemical Co. Ltd. u. Aksh Optifibre Ltd* [36]. to the effect that the review by the court to determine the validity of the arbitration agreement must be on a prima facie basis. The court's view was that any other interpretation would defeat the basic principle of the new Act, namely, enabling expeditious arbitration with limited court interference. In case of an affirmative finding with respect to the existence of an arbitration agreement, the party challenging it could still argue otherwise before the arbitral tribunal, since it was competent to rule on its jurisdiction under Section 16. The issue could be raised. Once again, under Section 48(a) whilst opposing the enforcement of the award. In case of a negative finding, on the other hand, there was a right to appeal under Section 50 [37]. Dharmadhikari J., in a concurring judgment, explained the matter in the following words: "The main issue is regarding the scope of power of any judicial authority including a regular civil court under Section 45 of the Act in making or refusing a reference of dispute arising from an international arbitration agreement governed by the provisions contained in Part III [sic Part II] Chapter of the Act of 1996. I respectfully agree with learned Brother Srikrishna, J. only to the extent that if on a prima facie examination of the documents and material on record including the arbitration agreement on which request for reference is made by one of the parties, the judicial authority or the court decides to make a reference, it may merely mention the submissions and contentions of the parties and summarily decide the objection if any raised on the alleged nullity, voidness, inoperativeness, or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter, which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is 'null and void' or 'inoperative' or 'incapable of being performed'' within the meaning of Section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like trial of a preliminary issue on jurisdiction or limitation in regular civil suit and pass an elaborate reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1) (a) of the Act and further appeal to this Court under sub-section (2) of the said section" [38] Once again, the position was overturned by the three judge bench ruling of the Supreme Court in the case of *Chlore Controls India Private Limited v Severn Trent Water Purification Inc.* [39] The Supreme Court appears to have based its decision on two grounds. First, it applied the law laid down by the Supreme Court in S.B.P. & Ca's case on Section 11 to an application under Section 45 of the 1996 Act. Just as the decision of the Chief Justice or his designate on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the arbitral tribunal, it would be so in the case of a decision of the judicial authority under Sections 8 and 45. "The underlining [or] underlying principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45 Secondly, the court observed that there was an absence in Chapter I Part II of the 1996 Act of any provision like Section 16 appearing in Part I of the same Act, suggestive of the requirement for the court to determine the question referred to in Section 45, namely, the nullity, voidness, inoperability, or incapability of performance of the arbitration agreement, at the threshold itself. As for the rule of *Kompetenz-Kompetenz*, this is what the court had to say [40]: "We are not oblivious of the principle *'kompetenz-kompetenz'*. It requires the Arbitral Tribunal to rule on its own jurisdiction and at the first instance. One school of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own juris diction as it widely recognized international arbitration. However, the negative effect is equally important, that the courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The *kompetenz kompetenz* rule, thus, concerned not only is the positive but also the negative effect of the arbitration agreement". The resulting position presented a peculiar picture. Though the arbitral tribunal had unbridled power to rule on its jurisdiction and whilst doing so, determine the existence, validity, and effect of the arbitration agreement under Section 16 of the Act, the court could still usurp that function (a) under Section 8, having to inquire into the existence and validity of the agreement possibly finally (though there are contrary views expressed), (b) under Section 11, whilst considering the appointment of the arbitral tribunal, having compulsorily to consider some questions bearing on the jurisdiction of the arbitrator, whilst optionally so in case of others, and (c) under Section 45, having to consider finally the issues of existence and validity whilst hearing an application for reference of the parties to arbitration. It was now left to the legislature to intervene and correct some of the anomalies. This is

precisely what the Amending Act 3 of 2016 purports to do. We shall presently see how far is succeeds in that. The non-interference of the judicial courts results in the efficient and effective administration of justice in speedy manner comparable to litigation.

Amendment act number 3 of 2016: arbitration and conciliation (amendment) act, 2016: Some of these issues have now been addressed by the Arbitration and Conciliation (Amendment) Act, 2015 (that is, Amendment Act 3 of 2016), which makes extensive amendments to the Arbitration Act, 1996. In the first place, it makes a far-reaching alteration in Sections of the 1996 Act insofar as the power of any judicial authority to refer the parties to arbitration, when an action is brought before it in a matter which is the subject matter of an arbitration agreement, is concerned. Though Section 8, as it originally stood prior to that amendment, did not in terms prescribe any such requirements for the judicial authority, by judicial interpretation, as we have seen above, the authorities were required to consider if the arbitration agreement is null and void or inoperative or incapable of being performed. As we have noted above, this introduced a certain dilution of the principle of *Kompetenz-Kompetenz* and separability and allowed the court to practically rule on the arbitrator's jurisdiction before the arbitrator himself could do it. Now under the amended provisions of Section 8, judicial authorities, whilst considering an application under Section 8, are merely required to consider if prima facie a valid agreement exists. The section now mandates judicial authorities to refer the parties to arbitration, if the matter before them is the subject of an arbitration agreement and a party thereto applies to them within time as provided in Section 8, unless it finds that prima facie no valid arbitration agreement exists. It is now for the arbitral tribunal to consider finally, in the first place, the question of its jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, even when the parties are referred to it under a court order passed under Section 8. With that the principle of Kompetens-Kompetens is taken one step ahead to reach its fullest potential. Insofar as the appointment provisions of the Arbitration Act. 1996 are concerned, namely, Section 11 of the Act, the Amendment Act, 2015 now restricts the inquiry of the Supreme Court or the High Court, whilst considering an application for appointment of an arbitrator, to 'the examination of the existence of an arbitration agreement. The questions of validity, it would appear are now beyond the pale of the court whilst considering the arbitrator's appointment. The matter, however, is by no means clear, since by judicial interpretation, it is still possible to expand the meaning of the word 'existence' so as to take into its fold the 'legal' existence of an arbitration agreement. It would have been far better, as we shall presently see, if the determination of the existence of the arbitration agreement and consequently, the jurisdiction of the arbitral tribunal thereunder, would have been left to be determined by the court on a prima facie consideration, as in the case of amended Section 8. The net effect of the amended Section 11, as it is presently worded, is that unlike in the case of an arbitration without reference to court, in the event of appointment of an arbitral tribunal is being sought from the court under Section 11 of the Act, it is the court which rules on the 'existence' of the arbitration agreement and thereby, on the jurisdiction of the arbitral tribunal, such determination being then binding on the arbitral tribunal. As for Section 45 of the Act, which comes within Part II relating to the enforcement of certain foreign awards, the position remains the same as in the case of the unamended Act of 1996. As earlier, under Section 45 of the Act, a judicial authority, when seized of an action in a matter in respect of which parties have made an arbitration agreement to which the New York Convention applies, shall at the request of any of the parties refer them to arbitration unless it finds that the said agreement is 'null and void or inoperative or incapable of being performed'. Such determination would, on the principle of the Chloro Controls' case, be binding on the arbitral tribunal. In the case of an international commercial arbitration, thus, in a matter brought before a judicial authority in India, if it is covered by an arbitration agreement within the meaning of Section 44, the parties are required to be referred to arbitration subject to the consideration of the questions of existence, validity, and enforceability of the arbitration agreement.

Conclusion

At present on account of rapid commercial/civil activities and transactions in the era of globalization, the commercial/civil disputes alarmingly increased in recent past. Taking recourse to the regular court's proceedings is a "Herculean Feet" in the present scenario, it is to be mentioned that about pending civil cases in all the courts in India is of nearly 4,29,9,954 as of 2022 [41] are pending and waiting for its adjudication. It is to be noted that the third/fourth generation of the original litigants are contesting the cases at present sued by their ancestors. On the other hand, "Alternative Dispute Resolution" (ADR) machinery is an effective tool to the aforesaid judicial deed like situation. Now, most of the contractual agreements contain a negotiable rather than arbitration clause therein and in case of dispute arising out of such relationship may be effectively and adversely resolved by adopting ADR system and through its various components. Understandably, ADR mechanism is recognized and practiced throughout the world. Specially, in apex countries like U.S.A., U.K and Canada, etc., who are holding dominant position in the field of ADR system. In this context, the scope and interpretation of ADR system is also wide. The alternative to state-imposed litigation, that is, adjudication, is generally projected to be arbitration. The Arbitration and Conciliation Act, 1996 has brought in basic reforms in arbitration to reduce the interference of judiciary and provide more viability to the process as consensual, voluntary, binding, quick and inexpensive. Nevertheless, the judicial interventions are not totally ruled out and thus arbitration has grown into such an expensive and complicated mechanism that it stands at par with the litigation even in terms of time consumption. Except that arbitration is an exclusive forum to deal with a particular litigation only at a time, there is no mechanism better than litigation in all general aspects. The law equally provided for conciliation, but still after almost a decade had passed, there is not enough encouragement and people's participation in it. The law prefers an arbitrator to refer to conciliation and if that fails, to come back to arbitration. The Civil Procedure Code (1908) is amended to make it possible for the court to be annexed, the court referred, and court encouraged

alternative dispute resolution. The Indian Arbitration Law envisages that the arbitrator shall have the jurisdiction to decide upon all or any of the issues arising out of the legal relationship between the persons traceable to the statutory law, the common law and also to the contracts, the parties are willingly enter into or implied as between them by reason of circumstances in which they are placed. Therefore, just as all the subjects arising out of the legal relationship can be entertained and adjudicated upon by the Civil Courts, they all can be the subjects of arbitration as well. However, there are some subjects which the Civil Court alone can adjudicate upon; there are others which the Civil Court will not entertain but tribunals only will decide upon; there are subjects which can be entertained and adjudicated upon by the Government and several administrative bodies and neither the Civil Courts nor the tribunals have a right to decide on them. Notwithstanding the fact that those matters are finally adjudicated upon by the authorities other than the Courts, still the Civil Courts have jurisdiction over them for correcting the errors committed by the tribunal and administrative authorities. The several jurisdictions referred to are strictly governed by the law which created them. The doctrine of *kompetenz-kompetenz* is not absolutely recognized in India. The French Court of Appeal, long before the international recognition of the principle of *Kompetenz-Kompetenz,* in the 1957 case of *Jules Buck et Louis Dolivet vs. Eddie Constantine et Gaston Terminet dit Allain,* [42] put the matter thus: *When the parties attributed the competence to arbitrators alone to decide on the validity of the arbitration clause…such arbitration, which is not contrary to any principle of the order public, takes the place of the law for the parties... and cannot be derogated from…were the rule otherwise, a party in bad faith to the arbitration could paralyze the proceeding".* After all, thus viewed, namely, as a rule of chronological priority, the principle of kompenz-kompetenz is open to only one criticism and that is the waste of time and money in an arbitral proceeding, which might have no legal existence or validity. But then even a seemingly existing arbitration agreement can be questioned by a party with bad faith, requiring the courts to deliver a final verdict on the arbitrability, and as a result, involving a lot of judicial time and avoidable expense to the parties. We have to simply choose here between the two options. In Indian context, considering the law's endemic delays and the propensity of the Indians to litigate, one may rather err on the side of a party having to go through the arbitral machinery in an undeserving case than unsuspecting parties in practically every case having at the outset to go through and final review of arbitrator's jurisdiction at the hands of the national courts. The preferred option, of course, would leave out cases where there is manifestly no arbitration agreement in place. As in the case of amended Section 8, an inquiry into the arbitrator's jurisdiction on a prima facie basis would obviate a futile resort to arbitration in such cases. Cases where the court finds that there is not even a prima facie valid arbitration agreement in existence need not go to arbitration through courts either under Sections 8, 11 or 4. Considering the amended provision of Section 8 and its parity in a fundamental sense with Section 45, it should not be difficult to go back to the Shin-Estu principle laid down by the Supreme Court. It is possible to judicially interpret Section 45 as it would restrict the scope of judicial scrutiny at the stage to determination of the validity of an arbitration agreement only on a prima facie basis. Insofar as Section 11 is concerned, it would more appropriately need a statutory intervention to restrict the inquiry to a purely prima facie consideration. The original principle of the two Konkan Railway Compensation cases [43], having been already overturned by a seven-judge bench, in S.B.P & Co., it may be more opposite for the legislature to intervene than to wait for an even larger bench to reconsider the whole law on the subject. Introduction of a prima facie consideration in all the three provisions. Section 8, 11 and 45, lends not only a distinct rationality to the approach to the principle of *kompetenz-kompetenz* but also plain simplicity and consistency to it. While it avoids recourse to arbitration through courts in cases where the arbitration agreement manifestly does not exist, it allows the arbitration proceedings to conclude expeditiously in all cases, giving party autonomy its fullest content and yet preserves all post-award remedies to aggrieved parties, uninfluenced by the arbitrators' own agreement of his jurisdiction.

Suggestions and recommendations: Although some of the anomalies under the unamended Act of 1996, as interpreted by courts, are removed by the Amending Act of 3 of 2016, the law still does not propagate the principle of *Kompetenz-Kompetenz* in its fullest expression. The fullest expression, which one possibly finds in the French approach, requires the arbitral tribunal to have the first exclusive right to rule on its own jurisdiction before any court does so, with the only exception being a case where the arbitration agreement is manifestly void or inapplicable. In this sense, the principle not only has a positive dimension reserving the arbitrator's power to rule on his own jurisdiction, but also a negative one, namely, restricting the national court's power to do at the outset. The Indian law is yet to recognize this negative aspect completely. First, the dicta of the Supreme Court in the case of Wellington Associates case [44] of Section 16 being an 'enabling' provision and not an 'excluding' provision, still continues to be valid and reflected in the amended provisions of the Act. Secondly, there is now an uneven handling of the statutory provisions for judicial inquiries into the arbitrator's jurisdiction before he rules on it. Section 8 of the Act [45] requires the court to determine the arbitrator's jurisdiction only on a prima facie consideration, whilst Section 45 mandates the court, on the principle of Chloro Controls' case [46], to finally determine the questions of existence, validity, and effect of the arbitration agreement, such determination being binding on the arbitrator. The appointment provision of Section 11, on the other hand, restricts the courts to the determination of questions of 'existence' of the arbitration agreement, possibly a throwback to the rule of ***Harbour Assurance Co.*** Besides, this different treatment of statutory intrusions into the arbitrator's authority does not appear to be based on any principle. For example, there is no discernible principle why a judicial authority should refer the parties to arbitration after taking a prima facie view of the existence, validity and effect of the arbitration agreement acting under Section 8, but the court whilst acting under section 11, should take a final and binding view of the existence of the arbitration agreement. After all, in Chloro Controls' case, the Supreme Court had felt the need to place Sections 8, 11 and 45 on the same footing as a matter of principle. How does one go from here? Whether we approach the solutions judicially or by the statutory route, it is important, as in the case of most

solutions to complex issues, to go to the very basics or fundamentals of the issue. The principles of *Kompetenz-Kompetenz* and separability, in a fundamental or basic sense, simply mean that the arbitral tribunal has the exclusive jurisdiction, though not exclusive in the sense that it cannot be called in question in a court of law, to first rule on its jurisdiction before any national court is called upon to do so. The rule, as the French clearly understand it, is merely a 'rule of chronological priority'. All that it means in every case, it is for the arbitral tribunal to first rule on its jurisdiction, when the parties ordain it so. The national courts may come in only after the ward is rendered, in a challenge to the award of its enforcement. That way the national courts are not in any way handicapped to review the exercise of the jurisdiction by the arbitral tribunal uninfluenced by the latter's own assessment of it. It achieves expeditious disposal of arbitrations with east interference by the national courts. It prevents unscrupulous persons from delaying recourse to arbitration, an expressly chosen bipartism remedy. The following are some of the suggestions and recommendations that the researcher has made after conducting extensive research on the research topic: (1) The Indian national courts should limit their interference in the arbitral proceedings; (2) The Arbitration/Arbitral Tribunals exercise their own jurisdiction guaranteed under Section 16(1) of the Arbitration and Conciliation Act, 1996 (Act Number 96 of 1996) legally backed by Section 89 of the CPC. (3) The main purpose of the principle of *"kompetenz-kompetenz"* is "expeditious disposal of cases" and to ensure "fair, effective and speedy justice". (4) The practice of the enforcement of the rule of *"kompetenz-kompetenz"* does not totally oust the jurisdiction of the judicial courts. Any award passed by the arbitral/arbitration tribunal is appealable before. (5) There is no discernible principle that the courts should interfere/refer the parties to the arbitration (6) The doctrine of *kompetenz-kompetenz* acts as a tool for "Implementation of Justice" mentioned under the Preamble of the Indian Constitution, 1950.

(7) There are instances where the arbitral tribunals misuse the doctrine of *kompetenz-kompetenz* as per their discretion which is severely condemnable, and the courts are the appropriate authorities to supervise them and take strict actions. (8) Every coin has two sides. The practical application of the rule of kompetenz-*kompetenz* has both positive and negative facets. The positive aspects are multiple, for example, speedy disposal of cases, cost effective, maintenance of confidentiality, party autonomy, ensuring fair justice, etc. The only negative view, not totally negative, it is the "ousting the jurisdiction of the national courts" violative of the provisions of the constitution and other statutes. The Law of Arbitration is based upon the maxim "generalia specialibus non derogant" [47]. The doctrines of "Group of Companies" and "Separability" are recognized under the Arbitration and Conciliation Act, 1996. The Indian Courts are also welcoming the principle of *"kompetenz-kompetenz"* in many cases by highlighting "the principle of *kompetenz-kompetenz* is not a tool for committing fraud however, to impart justice". (9) The Arbitral Tribunals are established under the ambit of Article 323-B of the Indian Constitution. The arbitral tribunals are constituted as per the arbitration agreement entered by and between the parties.(10) The arbitral tribunals are empowered to rule on its own jurisdiction including the question of validity or existence of the arbitration agreement according to the principle of "competence de law competence" means "law is competent to rule in its own sphere" which is an important element in the law of arbitration.

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