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Nuanced Approach to the Competency of an Arbitral Tribunal

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ABSTRACT

There has been for a while now an upcoming drift towards the alternative dispute settlement procedures as it is naturally preferred by the parties to the dispute in the first instance and secondly due to the fast evolving nature of commercial disputes which can only be resolved by the adoption of these procedures, it signifies the imminent reputation that arbitration enjoys and to complement that the existing arbitration and conciliation scenario in India consists of a robust and efficient structure for the redressal of disputes. This research paper strives to present a diverse and assorted picture with regard to the capability and responsibility of the arbitral tribunals' to cull out any doubts as to the questions and obstacles of their jurisdiction. There has been over the years a healthy debate going on over the principle of Kompetenz-Kompetenz not only in India but also in a majority of other countries. The jurisprudence of these nations have varied interpretations and versions for this doctrine and it has been accompanied by a considerate effort which has been made by scholars and academicians to address these concerns by meticulously following the developments which orbit around this doctrine. The paper portrays the stance taken by the Indian judiciary while dealing with this doctrine along with elucidating its nexus with other pertinent international jurisprudence associated with it. Although this principle is one of the most cherished fragments of arbitration still there is a requirement to delve into the analysis of its potential and an appropriate use of this doctrine.

I. INTRODUCTION

Alternative Dispute Redressal systems and mechanisms have been present in the civilized human societies' since time immemorial. The ancient Greek society was established on the epitome of resolving the minor or major disputes within the community and these conflicts related to the aspects of independence and sovereignty. Moving forward in the middle ages all conflicts were decided upon by the pope, king or emperor who acted in the capacity of a present day arbitrator, but their decisions were often biased in nature and were not based on reason, fact or law. However, if we have a glance from a historical perspective the indications

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of the initial beginning of modern day international arbitration can be found in the Jay Arbitration Treaty which ruled upon the disputes between the United States and the United Kingdom where the award of the arbitral tribunal were based on law and contained reasons after the gruesome end to the American War of Independence which took place in the latter half of the 19th Century. Since the consolidation and implementation of a robust and efficient power structures under the democratic set up of nation states, there have been various instances where the first course of action taken for any issues or disputes which may arise between two individuals is to settle them amicably and peacefully without a recourse being taken to the courts being by the parties. With the imminent digitalization of the arbitration proceedings, there will be a circumstance where the competency of an arbitral tribunal will naturally be challenged. Therefore, it becomes an utmost necessity to have a critical and exhaustive study concerning the proficiency of an arbitral tribunal in resolving any challenge and objections to the precise use of its jurisdiction.

II. THE DOCTRINE: WHAT DOES IT CONNOTE?

Under the Arbitration and Conciliation Act, 1996 ("**Act**"), there are a plethora of reasoned pronouncements that have been in play over the years with regard to the Act along with some of the burning issues and dilemmas that have been dealt with by the courts and judicial establishments. So, taking a significant cue from these developments, we will now have a comprehensive gaze of Section 16[2] ("**Provision**") under Chapter IV titled Jurisdiction of Arbitral Tribunals of the Act vis-à-vis the Principle of ***'Kompetenz-Kompetenz'*** ("**Principle**") or another connotation globally used i.e. ***'Compétence de la Compétence'***.

The Principle which is used universally in International Commercial Arbitration/International Arbitration fundamentally means that a tribunal is authorized to decide as to its own jurisdiction to deal with all of the substantive claims between two parties which are disputed. Nevertheless, the element that a tribunal can define its own jurisdiction does not give it exclusive power to do so and it also certainly does not prevent the court at least at the seat of the arbitration from revisiting the tribunal's jurisdiction. In arbitration proceedings, the arbitrators cannot be solitary judges of their jurisdiction as it is neither logical nor acceptable. Their jurisdiction must be revised by the courts when an action is taken to set aside or enforce the arbitral award ("**Award**").[3] Let us have a deeper look and understand the provision under the Act.

[2] The Arbitration and Conciliation Act, 1996 §. 16.

[3] Christopher Bailey, *The competence-competence doctrine and the enforcement of arbitral awards*, **LEXOLOGY** (Jan. 25, 2011, 10:00 AM), https://www.lexology.com/library/detail.aspx?g=70303764-71b7-4352-babb-6c8c8d399190

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We can after having a look at the provision to a fair degree of uncertainty determine, that the provision enumerates the competency aspect of the Arbitral Tribunal ("**Tribunal**") and it confers to the tribunal absolute authority in determining its capability to rule on its jurisdiction along with deciding any opposition by the parties that comes up with respect to the presence or legitimacy of the arbitration agreement ("**Agreement**") and where a recourse is also available to the parties to challenge the tribunal's jurisdiction to rule on the validity or existence of the agreement accompanied by other vital facets and this ultimately forms the subject matter of Section 16 and which puts it into proficient use. There have been diverse interpretation of the courts and we shall be discussing them as we move further.

The Supreme Court of India has while recognizing the principle has held that it recognizes and enshrines an important norm that initially and primarily the tribunal has the power to rule on its own jurisdiction in a matter before it and it is therefore a rule of ***'Chronological Priority'***. The court also opined that the provision was introduced to prevent dilatory tactics and the abuse of immediate right of a party to approach the court. This only causes to show that if any issues arise before the tribunal, it can and possibly must to decide them.[4]

The Apex Court has subsequent to the previous verdict quite extensively and sumptuously elucidated the principle and held that:

".....The arbitral tribunal must exercise jurisdiction over the dispute under the arbitration agreement. Challenge to the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with hearing and ruling upon its jurisdiction. If it retains jurisdiction, making of an award on the substance of the dispute would be permissible without waiting for the outcome of any court action aimed at deciding the issue of the jurisdiction. The negative effect of the principle is that arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an arbitral tribunal, the Court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative, or incapable of being performed....."[5]

The aforementioned principle was analysed by the court and it was observed that a bulk of the countries consider the positive effect of the principle being comprehensive in nature along with examining the negative effect of the principle which says that the arbitrators are permitted to determine their jurisdiction which can be later reviewed by the court, when there is no action taken to enforce or set aside the award. The principle is contingent on the

[4] S.B.P. and Co. v. Patel Engineering Ltd, A.I.R. 2006 S.C. 450 (India).
[5] Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc, 2013 (1) ABR 563.

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agreement being void, inoperative or incapable of being performed, in which case the court can decline the jurisdiction.

The Supreme Court has also interpreted the term 'Jurisdiction' in the provision which has reference to three things:

a) Whether there is an existence of a valid agreement.

b) Whether the tribunal has been appropriately established.

c) Matters submitted to arbitration should be in accordance with the agreement.[6]

In another landmark verdict the Supreme Court has indicated the meaning of jurisdiction and has said that the decision of a court as to the cause, adjudication, and determination of that cause is deemed to be the power of a court with regard to its jurisdiction along with application of any judicial supremacy.[7]

Moving further along, the Supreme Court on the nexus of limitation and jurisdiction has also pronounced that, any refusal to go into the merits of a claim may be in the realm of jurisdiction. Even the dismissal of the claim as barred by limitation may in a sense touch on the jurisdiction of the court or tribunal. When a claim is dismissed on the ground of it being barred by limitation, it will be, in a sense, a case of the court or tribunal refusing to exercise jurisdiction to go into the merits of the claim.[8]

However, the principle has an exception and which was elucidated by the Supreme Court i.e. the agreement itself is void or invalid if it is obtained by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as a precursor step preceding the execution of the final agreement. The draft agreement would be a mere proposal to adjudicate, and not an unambiguous recognition of the terms of the agreement.[9]

III. GLOBAL STANDPOINT

The United Nations Commission on International Trade Law ("**UNICTRAL**") which was revised in 2013 is the basis of the Act and also for other arbitration legislations of various other countries is the source from where this principle has originated. Article 23 of the UNICTRAL titled *"Pleas as to the jurisdiction of the Tribunal"* expressly says that the tribunal will have the power to rule on its own jurisdiction along with any objections to the

[6] Indian Farmers Fertilizer Co-Operative Limited v. Bhadra Products, A.I.R. 2018 S.C. 627 (India).
[7] Sukhlal v. Tara Chand, (1905) ILR 33 Cal 68.
[8] N.T.P.C. Ltd. v. Siemens Atkeingesellschaft, A.I.R. 2007 S.C. 1491 (India).
[9] Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited, (2020) 2 SCC 455.

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existence or validity of the agreement and the provision is based on these lines itself.

The Permanent Court of Arbitration ("**PCA**") which is based in The Hague, Netherlands and which was established and functions on the basis of the rules enshrined and adopted in the Hague Convention, 1899 ("**Convention**") also known as the Convention for the Pacific Settlement of International Disputes, has also embraced the principle under Article 23 of the PCA Arbitration Rules, 2012 and has the exact same wording and language as Article 23 of UNICTRAL.

Article 21 of the convention also enumerates that the PCA shall have and exercise full competence for all arbitration cases that are brought before it and will be the absolute authority in the determination of these issues.

Article 36 (6) of the Statute of International Court of Justice confers on the International Court of Justice based at the Hague, powers to rule on its own jurisdiction.

Article II clause (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which was adopted in 1958 also has a mention of the principle.[10]

IV. A COMPARATIVE AND DISTINCTIVE APPROACH

The view with regard to the interpretation and analysis of the principle that will be explained and deliberated upon here will be three case studies i.e. the United Kingdom, the Unites States, and France. Through these we will come to know the precise magnitude of the principle as these three case studies encompass within them three different and unique approaches to the jurisprudence with regard to the principle and can definitely further the understanding of the concept.

A. United Kingdom

The English Arbitration Act, 1996 ("**English Act**") also throws some light on the principle. Section 30 and 31 of the English Act supports and embodies within it the imperative features of the principle which can easily ascertained from a plain reading of these sections.[11]

Both pieces of the legislation point towards only one thing and that has been discussed previously and i.e. the interpretation and inference of the term 'Jurisdiction'.[12] English law has always taken the view that the tribunal cannot be the final adjudication of its own jurisdiction. The final decision as per the substantive jurisdiction of the tribunal rests with the Court. However, there is no reason why the tribunal should not have the power, subject to

[10] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, art. II.
[11] The English Arbitration Act, 1996, c. 3, § 30 & 31(Eng.).
[12] Indian Farmers, *supra* note 6.

review by the Court, to rule on its own jurisdiction. Indeed such a power has been generally recognized in other legal systems.[13]

The principle is put into use universally and it is because of a simple fact that its concept is of such a nature that any legislation or law which revolves around the scope of arbitration, accepts it and uses it efficaciously and efficiently.

It has been observed that two essential theories allow the principle to properly function. Separability and the principle itself are the two theories that work together with the common goal of preventing early judicial interference with arbitration and they are explained in the following manner:

1. An arbitral tribunal is given the power to decide its own jurisdiction which is basically the principle explained; and
2. The arbitration clause is treated as separate and independent from the remainder of the contract also known as the theory of separability.[14]

The chief question is the determination of the appropriate extent of the principle and it is the scheduling of judicial interference and the degree of assessment of a tribunal's jurisdiction ruling. The Positive aspect of the principle refers to arbitrators' power to determine their own jurisdiction and is recognized in various nations. In distinction, courts do not unanimously recognise the negative aspect of the principle because it requires the court to lose their judicial authority to hear a dispute regarding arbitral jurisdiction until after the issuance of a final award. Similarly, critics have emphasized diverse attitudes as to the proper approach to the principle and the role of the negative aspect of the principle in international arbitration. The courts here restricted their stand on jurisdiction at the early stages of the proceedings in order for them to decide the issue that whether actually there is an existence of a valid agreement or not and this ultimately makes the arbitrators the sole judges of their jurisdiction.[15]

While the principle empowers the arbitration tribunal to decide its own jurisdiction, the theory of separability affects the result of this decision. The principle conventionally confers to the tribunal an authority to separate the agreement from the main contract where it is confined. This is to facilitate the tribunal's determination a matter where one of the parties is

[13] S.B.P, *supra* note 4.
[14]Ashley Cook, *Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz*, **PEPPERDINE DIGITAL COMMONS**, (Jul. 22, 2020, 20:00 PM), https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2349&context=plr
[15] *Id.* at 21.

challenging its jurisdiction on the grounds of invalidity or termination of the agreement. Supplementary grounds of objection may be that there was no agreement or that parties never concluded the terms of the main contract. A tribunal faced with such a problem would notionally sever the agreement from the entire contract and determine the issue apart the fact from the fact that the agreement is the subject of challenge.[16]

The United Kingdom Supreme Court in the matter of *Dallah Real Estate* & *Tourism Holding Co. v. Pakistan*[17] determined and ruled that verdicts concerning the jurisdiction are not to be given any regard while going through their validity. The court opined that there is a need for an arbitrator to decide the extent up to which their authority will be applied in a dispute along with the fact that it is the parties who decide the capability of the tribunal as to the application of the principle.[18]

After scrutinizing the above dissection of the principle we can without a doubt conclude that Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 simply allows for the positive effect of the principle to be put in to operational use.

B. United States

When we see the application of the principle as a comparative study in the United States ("**US**"), it is perceived that the jurisprudence present there does not provide for the use of the principle. However, on a closer look it can be observed that under the US Federal Arbitration Act, 1925, courts in the US recognize the positive aspect of the principle which although in practice is subject to judicial review. In a case known as *First Options of Chicago Inc. v Kaplan*, it was opined by the courts that through the agreement, the parties may grant the arbitrator in the proceedings competency to rule on its own jurisdiction or let jurisdictional verdicts be pronounced by the national courts. The US identifies the positive aspect of the principle but it also provides authorization for the judicial deliberation of the issues relating to jurisdiction on an interlocutory basis.[19]

C. France

In France, Article 1465 of the French Code of Civil Procedure, 2011 emphasises the principle

[16] Amit Kumar Pathak, *Challenges to the Jurisdiction of Arbitral Tribunal – II*, **INDIAN INSTITUTE OF ARBITRATION & MEDIATION**, (Feb. 2013), https://www.arbitrationindia.com/pdf/tia_5_2.pdf
[17] Dallah Real Estate & Tourism Holding Co. v. Pakistan, (2010) UKSC 46.
[18] Ashley, *supra* note 13.
[19] Aceris Law LLC, *International Arbitration Agreements and Kompetenz-Kompetenz: A Comparative Perspective Between USA and France*, **ACERIS LAW**, (Aug. 9, 2019, 11:00 AM), https://www.acerislaw.com/international-arbitration-agreements-and-kompetenz-kompetenz-a-comparative-perspective-between-usa-and-france/

and it articulates that a tribunal exercises exclusive jurisdiction while ruling on any objections to its jurisdiction which may be raised.[20]

France has espoused the positive effects of the principle through the meticulous and proficient use of the Article, whereby the tribunal has been conferred with absolute jurisdiction to decide all jurisdictional disputes, which are of course subject to judicial review. Furthermore, it reflects that in France, the parties to the disputes are not required to confer authority to the tribunal through their agreement for deciding the facet of jurisdiction.[21]

In another vision, Article 1448 (1) of the French Code of Civil Procedure, 2011 provides that if a dispute between two parties is subject to an agreement and which is brought before a court, then that court will decline its jurisdiction except in a situation where the tribunal has not entertained that dispute yet and if the agreement itself is void or not applicable.[22]

The language of the article exhibits a peculiar aspect of the principle and it shows that the negative effects of the principle are also very much in force, as national courts may not in some situations and circumstances consider some objections raised by the parties to the agreement with regard to the jurisdiction. Judicial establishments must not question the merits of the subject matter of the disputes nor the scope of the arbitration clause. The authority or power which is exercised by the courts is only limited to conducting an investigation onto the validity or existence of the agreement or the arbitration clause.[23]

In *Copropriété Maritime Jules Verne v. American Bureau of Shipping*, an appeal was preferred against a verdict passed by the Court of Appeal in Paris. This appeal was allowed on these grounds that it had failed to acknowledge or consider the negative aspect of the principle. The appellate court which was known as the *Cour De Cassation* held that apparent nullity of the agreement to arbitrate was the only hurdle that was coming in the way of the principle and the chronological priority rule. The appellate court in *Copradag v. Dame Bohin* conducted an arduous construal of Article 1458 of the French Code of Civil Procedure, 2011 and it was observed by the court that once there is a proof of existence that there is a valid agreement which can be enforced, then only that tribunal can exercise jurisdiction and accordingly interpret the legitimacy or perimeter of the agreement and the judicial courts

[20] The French Code of Civil Procedure, art. 1465.
[21] Aceris, *supra* note 18.
[22] The French Code of Civil Procedure, art. 1448.
[23] Aceris, *supra* note 18.

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must not interfere with it.[24]

V. CONCLUSION

After a thorough and analytical study of the principle along with the key areas that play an important role in the determination of the pertinent use of a tribunals' jurisdiction we can without having any sense of reservation conclude, that it is a tribunals' duty and responsibility to ensure the delivery of justice which are based on reasons, fact and law. The predicament that a ruling on the jurisdiction of a tribunal will hamper the rights of the parties to the dispute doesn't show the gravity of the state of affairs with regard to the amount of unnecessary litigations the judicial institutions have had to face because of this matter. The application of the principle in the case of India in tandem with other countries can be shortened to one simple fact that although there have been two aspects of the principle which have been in use, its usage is influenced by the philosophies and ideologies of the jurisprudence which is in force in that particular country. Although we have witnessed that the positive aspect of the principle is put into practice in India there have been instances of international cases where the negative aspect of the principle which gives the arbitrator authority to decide the jurisdiction to hear the matter and whether there is an existence of a valid, enforceable and operative agreement on which the objections are centred upon. Therefore, the courts while deciding that whether the tribunal was erroneous in deeming the agreement inoperative or void, there has to be an appropriate exploration about the unassuming fact that whether this specific decision was in consonance with legal principles or not. With the progressing expansion of arbitration, the use of the principle will be of paramount importance as it will certainly be in practice in the forthcoming future.

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[24] Aniket Ghosh, *Negative Effect Of Kompetenz – The Only Way To Save Arbitral Law In India*, **ROSTRUM LEGAL** (May. 17, 2015, 10:00 AM), https://journal.rostrumlegal.com/negative-effect-of-kompetenz-the-only-way-to-save-arbitral-law-in-india-by-aniket-ghosh/

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