ASSIMILATING THE NEGATIVE EFFECT OF *KOMPETENZ-KOMPETENZ* IN INDIA: NEED TO REVISIT THE QUESTION OF JUDICIAL INTERVENTION?

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Abstract

The principle of kompetenz-kompetenz has been recognized under Section 16(1) of the Indian Arbitration and Conciliation Act, 1996. As a theoretical principle, it is widely accepted to have a dual effect. While its positive effect confers upon an arbitral tribunal the power to rule on its jurisdiction, the negative effect establishes a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions.

Stemming from what appears to be an inherent distrust in the arbitration machinery, the Indian Courts have been reluctant in acknowledging this negative effect while assessing the myriad questions put before it. The consequence is the adoption of a not so pro-arbitration approach that is plagued with judicial interventions at every stage.

The present paper attempts to analyse the implications of the principle of kompetenz-kompetenz, when considered in its entirety and determine the permissible extent of judicial intervention in the arbitral process. In particular, two concerns are sought to be addressed – the first of which pertains to the necessity and extent of judicial intervention permitted by law while entertaining an application under Sections 8, 9 or 11 of the Act. Therein, the authors commence with a critique of the decision of the Supreme Court of India in Patel Engineering, which marked a discernible shift in the attitude of Courts. Subsequently, the authors make a reasoned argument as to the limited jurisdictional facts that can be assessed by the concerned Courts or judicial authorities or the Chief Justice, as well as the prima facie standard of review that ought to have been adopted by the apex Court.

The second concern pertains to the consequences of a party's failure to raise a timely challenge to the jurisdiction of a tribunal under Section 16 of the Act. Whether a party, having not raised a jurisdictional objection during the arbitration proceedings, can be permitted to raise the same as a ground

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for setting aside the award under Section 34 of the Act? Relying upon the doctrine of deemed waiver, the jurisprudence relating to the 'wait-and-see' approach in commercial arbitration, and the negative effect of kompetenz-kompetenz, the authors endorse the view that limits the defaulting party's opportunity under Section 34 of the Act. In other words, if a party fails to raise any jurisdictional objection before the tribunal, it shall be prohibited from challenging the arbitral award on the same grounds in a proceeding before the appropriate Courts.

I. Introduction

The Arbitration and Conciliation Act, 1996 ['the Act'][1] recognizes the principle of *kompetenz-kompetenz*. Section 16(1) of the Act empowers an arbitral tribunal to "rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement". This, along with the principle of separability,[2]operates to give primary responsibility to the tribunal to determine its own jurisdiction.

The *kompetenz-kompetenz* principle is closely related to rules regarding the allocation of jurisdictional competence between arbitral tribunals and national Courts and to rules concerning the nature and timing of judicial consideration of challenges to an arbitral tribunal's jurisdiction.[3] The actual scope of the aforementioned principle often raises disagreements amongst scholars and judges alike. While the principle is widely recognized to possess a positive and a negative effect,[4] there is almost equally broad disagreement and uncertainty concerning its precise scope and consequences.[5] In India, the application of this principle divides opinion as to the extent of judicial intervention in the arbitral process. It is this very divide that the authors seek to reconcile.

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[1] The Arbitration and Conciliation Act , 1996, No.26, Acts of Parliament, 1996 (India) [hereinafter "TACA"].
[2] *Id*,§ 16(1)(a).
[3] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 852 (2010).
[4] FOUCHARD GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 397 (Emmanuel Gaillard & John Savage eds., 1999); STEPHEN SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 2 (1987).
[5] BORN, *supra* note 3, at 853.

In order to do so with clarity and brevity, the authors recognize the interaction between an arbitral process and the Courts to be three-staged; the analysis being conducted accordingly. The first stage refers to the pre-arbitration litigation; the second stage encompasses decision making by the arbitrators on merits of the dispute during the arbitral proceedings; and the third stage refers to post-award enforcement or proceedings to set aside the award.[6]

It is sufficient to state that an arbitral process usually poses myriad convoluted challenges across the aforementioned three stages. However, the scope of the present paper is confined to examining the effect of *kompetenz-kompetenz* on the arbitral process in India. In particular, the question sought to be addressed is who decides the issues of arbitral jurisdiction and how? Answering this question involves addressing two concerns; the *first* of which is the necessity and extent of judicial intervention permitted by law while entertaining an application under Sections 8, 9 or 11 of the Act. This concern is limited to the first stage of an arbitral process.

In this regard, the Courts have drifted from an initial reluctance to interfere with the arbitral process to imposing upon itself the duty to consider, and decide questions pertaining to the jurisdiction of the arbitral tribunal. This transition, however, have endangered the very characterization of commercial arbitration as an efficient method of alternate dispute resolution. Consequently, for reasons discussed in Part III of the paper, the authors endorse the view that the negative implications of the aforementioned judicial shift far outweigh the possible positive ones.

The *second* concern meriting academic attention, which arises during the third stage of the arbitral process, is whether a party to a dispute, having not raised a jurisdictional objection during the arbitration proceedings under Section 16 of the Act, can be permitted to raise the same as a ground for setting aside the award under Section 34 of the Act.

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[6] The categorization is similar to, and influenced by, the distinction drawn by the House of Lords in Coppee-Lavalin SA/NV v. Ken-Ren Chemicals and Feritilizers Ltd., [1994] 2 All..E..R. 449.

On the one hand, one may argue that an action cannot be permitted by reason of a 'deemed waiver' operating against the party pursuant to Section 4 of the Act. On the other hand, few Courts have allowed such applications, asserting that the right to object to violations of mandatory jurisdictional requirements can never be subject to a waiver. This dichotomy of opinion is addressed by the authors in Part IV of the paper, wherein an attempt is made to arrive at an effective solution.

As is often the case, it is considered best to address each concern individually in the chronology of their probable occurrence. The authors, thus, find it fit to first address the concerns arising during the first stage of the arbitral process before proceeding to those pertaining to the third stage. However, prior to the same, it is imperative to understand and appreciate the true meaning and scope of the principle of *kompetenz-kompetenz*.

The Principle of Kompetenz-Kompetenz

It is generally accepted that an arbitral tribunal has the power to investigate its own jurisdiction.[7]The principle that arbitrators have jurisdiction to consider and decide the existence and extent of their own jurisdiction is variously referred to as the competence-competence doctrine or the *kompetenz-kompetenz*principle or the 'who decides' question.[8]

While the said principle was first recognized in India through the enactment of the Act in 1996, the position in English law has been well settled since the decision of Mr. Justice Devlin in *Brown* v. *Genossenschaft Osterreichischer Waldbesitzer*[9].Therein, it was laid down in no uncertain words that,

> "[Arbitrators] are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because they cannot do so – but for the purpose of satisfying themselves as a

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[7] ALAN REDFERN ET. AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 346 (5th ed., 2009).
[8] BORN, *supra* note 3, at 853.
[9] [1954] 1 Q..B. 8.

> preliminary matter about whether they ought to go on with the arbitration or not."[10]

In a nutshell, the principle of *kompetenz-kompetenz* recognizes the competence of an arbitral tribunal to rule on its own jurisdiction.[11] It is accepted widely as is evidenced by its express incorporation in Article 16 of the UNCITRAL Model Law ['Model Law'],[12] as well as the arbitration statutes in developed jurisdictions including those that have not adopted the Model Law.[13] Further, international tribunals have developed a tendency to recognize or affirm this principle regardless of the applicable law of the arbitral seat.[14] However, the authors consider the above description of *kompetenz-kompetenz* to be incomplete; a mere recognition of its positive effect.

Many scholars, most notably Emmanuel Gaillard, Professor Philippe Fouchard, Dr. Sebastien Besson and Jean-Francois Poudret, argue in their respective commentaries on commercial arbitration that in order to give full effect to the *kompetenz-kompetenz* principle, the arbitral tribunal ought to be given priority over the Courts as far as issues of its jurisdiction are concerned. "In other words, the arbitral tribunal should be able to decide [the jurisdictional issues] first, subject to a possible judicial review of its decision."[15] This order of priority is known as the negative effect of *kompetenz-kompetenz*.[16] "This negative effect implies not only a priority in favour of the arbitral tribunal in the event of *lis-pendens* with Court proceedings concerning the same subject

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[10] *Id.,* at 12 and 13.
[11] JEAN-FRACOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 385 (2007).
[12] H. HOLTZMAN & J. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 478 (1989).
[13] Swiss Law on Private International Law, art.186(1) [hereinafter "Swiss"]; Belgian Judicial Code, art. 1697(1); French New Code of Civil Procedure, art. 1466 [hereinafter "French"]; Netherlands Code of Civil Procedure, art.1052(1); Italian Code of Civil Procedure, art. 817(1), hereinafter "Italian"]; Swedish Arbitration Act, section 2; German Z.P.O., § 1040, [hereinafter "German"]; Spanish Arbitration Act, art. 22(1); Japanese Arbitration Law, art. 23; Korean Arbitration Act, art. 10.
[14] BORN, *supra* note 3, at 871.
[15] POUDRET, *supra* note 11, at 387.
[16] Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 S.C.C. 641, at ¶77, 129.

matter, but also the exclusion of a direct action aimed at confirming or denying the validity of the arbitration agreement and, more broadly, the jurisdiction of the arbitral tribunal. The latter could only be controlled by the Courts in an application to set aside the decision – preliminary or final – of the arbitral tribunal or at the enforcement stage."[17]

Accordingly, while the positive effect of *kompetenz-kompetenz*refers to an arbitral tribunal's power to rule on its jurisdiction[18], the more controversial negative effect takes the said principle a step further by establishing a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions.[19] It is on an understanding of this premise that the authors discuss the controversial 'who-decides' question in the context of arbitration laws of India.

Despite the abundance of literature available with regard to the scope of *kompetenz-kompetenz*, the authors are mindful that "the precept that arbitrators may rule on their own authority possesses a chameleon-like quality that changes color according to the national and institutional background of application."[20] Therefore, the subsequent discussions as to the principle and its implications across the three stages of an arbitral process are confined to the arbitration laws of India; with references to the principles evolved in other jurisdictions few and infrequent.

The first stage of the arbitral process

The first stage of pre-arbitration litigation may arise either as a consequence of an application made to a 'judicial authority' under Section 8 of the Act for referring a dispute to arbitration, or to a 'Court' under Section 9 of the Act for an interim measure, or to the Chief Justice of India or of the appropriate High Court for the appointment of an arbitrator under Section 11 of the Act. During this stage, Courts or judicial authorities or the concerned Chief Justices are often faced with a dilemma - whether to decide the

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[17] GAILLARD, *supra* note 4, at 660.
[18] Amokura Kawharu, *Arbitral Jurisdiction*, 23 N.Z.UNIV. L. REV., 238, 243 (2008).
[19] GAILLARD, *supra* note 4, at 401.
[20] William Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law,* 8 NEV. L.J. 135, 136 (2007).

jurisdictional issues raised by a party by themselves or notwithstanding the same, refer the entire matter, along with the jurisdictional objections, to the arbitral tribunal?

Initially, Courts were reluctant to delve into these contentious issues of jurisdiction and were content with referring the matter to an arbitral tribunal after taking a *prima facie* review of the procedural compliances.[21] However, post the decision of a seven judge bench of the Supreme Court of India in *M/s. S.B.P. & Co.* v. *Patel Engineering Ltd.,*[22] Courts are now empowered to take up a full and final review of intricate jurisdictional issues.[23] The subsequent heads assess this gradual shift and comment upon its incorrectness and inconsistency with the very spirit of commercial arbitration.

A. The Initial Reluctance to Judicial Intervention

In 1998, a two judge bench of the Supreme Court of India, in *Ador Samia Pvt. Ltd.* v. *Peekay Holdings Ltd.*[24] held that the Chief Justice or his designate, acting under Section 11 of the Act, acted in an administrative capacity and such order did not attract the provisions of Article 136 of the Constitution of India. However, the decision was referred to a bench of higher strength for reconsideration. Subsequently, in 2000, a three judge bench of the Apex Court in *Konkan Railway Corp. Ltd.* v. *Mehul Constructions*[25] ['*Konkan I*'] arrived at the same conclusion.

The decision was then upheld, in 2002, by a five judge Bench of the Apex Court in *Konkan Railway Corp. Ltd.* v. *Rani Construction Pvt. Ltd.*[26] ['*Konkan II*']. Additionally, the Constitution bench also held that all jurisdictional questions, including questions pertaining to the validity of the arbitration agreement, were to be taken before the arbitral tribunal.

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[21] Sundaram Finance Ltd. v. N.E.P.C. India Ltd., 1999 (2) S.C.C. 479; Nimet Resources Inc. &Anr.v.Essar Steels Ltd., 2000 (7) S.C.C. 49; Ador Samia (P.)Ltd. v. Peekay Holdings Ltd., (1999) 8 S.C.C. 572; Konkan Railway Corp. Ltd. v. Mehul Construction Co., (2000) 7 S.C.C. 201; Konkan Railway Corp. Ltd. v. Rani Construction (P.)Ltd., (2002) 2 S.C.C. 388.
[22] (2005) 8 S.C.C. 618.
[23] *Id.*, at ¶46(iv).
[24] 1999 (8) S.C.C. 572.
[25] (2000) 7 S.C.C. 201.
[26] (2002) 2 S.C.C. 388.

The said decision was based on the rationale that to make a decision or an act judicial, the following three-fold criterion must be satisfied[27]:

(i) It is a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rule;

(ii) It declares rights or imposes upon parties obligations affecting their civil rights; and

(iii) The investigation is subject to certain procedural attributes if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact.

Against this threshold, it was distinctly laid down that since the exercise of power under Section 11 of the Act did not involve any 'determination' by way of application of mind; it failed to satisfy the aforementioned criterion.

The Constitution bench further held that the Chief Justice or his designate under Section 11 of the Act neither performed an adjudicatory function nor exercised the power of the State; thereby, not being akin to tribunals. This meant that their orders under Section 11 could not be made the subject of petitions for leave to appeal under Article 136 of the Constitution, as under Article 136, an appeal lies to the apex Court only from adjudications of Courts and Tribunals.[28]

Accordingly, the Court had then concluded that,

> "[T]he only function of the Chief Justice or his designate under Section 11 is to fill the gap left by a party to the arbitration agreement or by the two arbitrators appointed by the parties and nominate an arbitrator. This is to enable the arbitral tribunal to be expeditiously constituted and the arbitration proceedings to commence. The function has been

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[27] Jaswant Sugar Mills Ltd. v. Lakshmichand & Ors., (1963) Supp. (1) S.C.R. 242.
[28] The Hind Cycles Ltd. &Anr. v. The Hind Cycle Ltd., (1963) Supp. (1) S.C.R. 625.

> left to the Chief Justice or his designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is nominated."[29]

This interpretation is consistent with the understanding associated with the UNCITRAL Model Law, wherein the decision of a Court under Art. 11 of the Model Law is widely acknowledged to be an administrative decision.[30]

The Decision in 'Patel Engineering Ltd.'

In 2005, the Apex Court was required to re-assess the legal position laid down in *Konkan II* and determine the nature of function of the Chief Justice or his designate under Section 11 of the Act. It was also to decide whether the Chief Justice should decide any contentious jurisdictional issues before referring the parties to arbitration.

After much deliberation, the Apex Court, through the majority judgment, came to the following three conclusions:

(i) When a statute confers power on the highest judicial authority, the authority has to necessarily act judicially unless the statute states otherwise. Therefore, the Chief Justice, under Section 11 of the Act, performs a judicial function.

(ii) Before exercising jurisdiction, a tribunal has to be satisfied with the existence of conditions, known as jurisdictional facts, which permit it to do so. Moreover, when under Section 8 a Court decides on the existence of the arbitration agreement, it is inappropriate that the highest judicial authority cannot decide under Section 11 on the existence of the arbitration agreement.

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[29] Konkan II, at ¶27.

[30] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE, ANALYTICAL COMMENTARY ON DRAFT TEXT OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Doc.A/CN.9/264, 29(1985) [hereinafter "UNCITRAL"]

(iii) If the highest judicial authority decides on a jurisdictional question, the tribunal cannot have the power to decide to the contrary on the same question. The decision of the Chief Justice is binding on the parties and the tribunal. In order to make a decision, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary.

The said conclusions had been subsequently followed and reiterated, most notably in 2008, by a two-judge bench of the Supreme Court in *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*[31] However, despite being a reasoned judgment of a seven judge bench of the highest judicial authority in the country, the decision in *Patel Engineering* was, and still is, subjected to intense criticism. The authors herein examine the precise reasons relied upon by the Apex Court in *Patel Engineering* to arrive at the above three conclusions. This shall also aid in addressing the concerns involving the principle of *kompetenz-kompetenz* arising during the first stage of the arbitral process.

Accordingly, the authors conduct further discussion under the following two heads – (i) power to decide the contentious issues of jurisdiction; and (ii) the Full and Final Review Approach.

Power to decide contentious issues of jurisdiction

The Apex Court in *Patel Engineering* categorically opined on the extent of judicial intervention permissible under Section 8, 9 and 11 of the Act. In unambiguous terms, it held that the Chief Justice or the designated Judge would have the right to decide preliminary issues with respect to the existence of a valid arbitration agreement.[32]

The rationale behind this conclusion is not disputed. The exercise of power by a Chief Justice or a judicial authority shall be futile if upon commencement of arbitration proceedings, the tribunal holds that there was no arbitration agreement in the first place. To this extent, the Chief justice or other authorities cannot be expected to merely

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[31] (2009) 1 S.C.C. 267.

[32] Patel Engineering, *supra* note 22, at ¶46(iv).

perform a mechanical function. However, the above concern must also be balanced against the purposive extension of the principle of *kompetenz-kompetenz* to an arbitral tribunal. Pursuant to the negative effect of the principle, any judicial authority should defer all jurisdictional issues pertaining to the arbitration proceedings to the arbitration tribunal itself at the first instance.[33] In fact, the basic requirement that the parties to an arbitration agreement honour their undertaking to submit to arbitration any dispute covered by their agreement entails the consequence that the Courts of a given country are prohibited from hearing such disputes.[34] Therefore, if the Chief Justice is permitted to undertake a full and final review of any jurisdictional concern before it in a manner binding upon the arbitral tribunal, it renders the tribunal's power to assess its own jurisdiction redundant.

As to the reasons relied upon by the Apex Court, it completely disregards the negative effect of the *kompetenz-kompetenz* principle; choosing to neither opine upon the same nor consider its implications on determination of the questions before it. Such an approach is inexplicably surprising especially considering the observations of the Apex Court in *Konkan I*. Therein, the two judge bench of the Court had acknowledged that the negative effect of the *kompetenz-kompetenz* principle, which confers powers on the arbitrator, has been considered in several countries.[35] It is, thus, implausible that the highest judicial authority of the country was unaware of this negative effect.[36]

Therefore, one can only speculate the reasons that may justify the lack of reference to the negative effect of the principle and consideration of its implications on the issue at hand by the Apex Court in *Patel Engineering*; rendering its decision susceptible to criticism.

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[33] E. Gaillard, *The Negative Effect of Competence-Competence,* 17(1) MEALY'S INT'L. ARB. RPT. 27 (2002).
[34] E. Gailard & Y. Banifatemi, *Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators,* in EMMANUEL GAILLARDET. AL. (EDS.)., ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE, 257 (2008).
[35] Konkan I.
[36] *See also* Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 S.C.C. 641, at ¶129; Indeen Bio Power Limited v. Dalkia India Pvt. Ltd., 2013 I.I.A.D. (Delhi) 580.

Notwithstanding the same, such reluctance defies logic; allowing the authors an opportunity to reassess the same question afresh.

A similar question had arisen before the United Kingdom Court of Appeals in 2007. In *Fiona Trust & Others v. Yuri Privalov & Others*, [37] the Court of Appeals held that considering the negative aspect of *kompetenz-kompetenz,* the presumption is that an arbitral tribunal should be left to determine its own jurisdiction at the first instance. Consequently, in response to the challenge to the tribunal's jurisdiction on the ground that that the underlying contract was procured by bribery, the Court declined to decide the jurisdiction issue itself and referred the matter instead to the arbitrators.

On the same point, Russel on Arbitration notes that,

> "Even if the underlying contract is alleged to be void or voidable, the parties are presumed to have wanted their disputes resolved by an arbitral tribunal. In the light of the presumption of 'one-stop adjudication', the Court will usually strive to give effect to the arbitration agreement by… allowing the tribunal to investigate whether the contract is valid…"[38]

Borrowing from the same, the authors believe that a mere perusal of principles applicable to commercial arbitration prohibits any conclusion that empowers a Court or judicial authority to entertain every challenge to the tribunal's jurisdiction under Section 8, 9 and 11 of the Act. *Per contra*, the Courts, judicial authorities or the concerned Chief Justices ought to limit the grounds of enquiry under the aforementioned provisions *only* to the questions involving the following:

(i) Procedural requirements of the invoked provision;
(ii) Existence of the arbitration agreement;
(iii) Procedural requirements of the arbitration agreement; and
(iv) Formal validity of the arbitration agreement;

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[37] [2007] E.W.C.A. 20.
[38] DAVID ST. JOHN SUTTON ET. AL., RUSSEL ON ARBITRATION, 361 (23rd ed., 2009).

The above categorization is based partially on the decision of the Supreme Court in *Wellington Associates Ltd.* v. *Kirit Mehta*,[39] and partially on its interpretation in *Patel Engineering*. The Court in *Wellington Associates* had observed,

> "In my view, in the present situation, the jurisdiction of the Chief Justice of India or his designate to decide the question as to the 'existence' of the arbitration clause cannot be doubted and cannot be said to be excluded by Section 16."

Interestingly, as is evident from the above extract, the Apex Court had only affirmed the jurisdiction of the Chief Justice, while acting under Section 11 of the Act, to decide questions pertaining to the 'existence' of an arbitration agreement without extending the same to other jurisdictional challenges that may be raised by a party. This allows us to infer, not without controversy, that a challenge to the jurisdiction of an arbitral tribunal based on the 'existence' of an arbitration agreement was viewed independently, not being comparable with other jurisdictional challenges, in particular, to the validity of the arbitration agreement.

The inference is not unique to India. In *Premium Nafta Products Ltd. & Ors.* v. *Fili Shipping Co. Ltd. & Ors*, Lord Hoffmann remarked "it is very unlikely that rational businessmen would intend that the question of whether the contract was repudiated should be decided arbitrators but the question of whether it was induced by misrepresentation should be decided by a Court."[40] Thus, the distinction between the existence of an arbitration agreement and its validity is not devoid of a sound legal basis.

Further, many scholars, such as Julian Lew, distinguish between 'substantive' and 'formal' validity of arbitration agreements.[41] The categories of substantive invalidity of arbitration agreements are limited to cases where such agreements are invalid on generally-applicable contract law grounds, such as mistake, fraud, impossibility, waiver

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[39] (2000) 4 S.C.C. 272.
[40] Premium Nafta Products Ltd. & Ors. v. Fili Shipping Co. Ltd. &Ors., [2007] U.K.H.L. 40., at ¶17.
[41] Julian M. Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause,* in ALBERT JAN VAN DEN BERG ED., ICCA CONGRESS SERIES NO. 9, 119 (1998).

etc.[42] Formal validity, on the other hand, refers to those form requirements that are relevant to the validity of an arbitration agreement, that is, if these requirements are not met, then the agreement to arbitrate is invalid.[43] The most significant and universally-accepted of these is the 'writing' or 'written form' requirement, together with the signature and/or an exchange of written communications.[44]

Therefore, "while [substantive validity] relates to the question whether there was a valid meeting of the minds of the parties with respect to dispute settlement through arbitration, [formal validity] concerns special formal validity rules established to ensure that the parties are aware that by concluding the arbitration agreement, they oust the jurisdiction of the otherwise competent State Courts."[45] Importantly, the conclusion that a putative arbitration agreement satisfies applicable form requirements does not necessarily mean that it constitutes a validly-formed and enforceable arbitration agreement.[46]

In this regard, the authors believe that while the Courts are acknowledged to have the jurisdiction to assess the formal validity of an arbitration agreement, any questions pertaining to its substantive validity are better left to be decided by the arbitral tribunal, pursuant to the *kompetenz-kompetenz* principle.

The rationale is such that the jurisdictional challenges concerning the substance of an arbitration agreement are often complex in nature and thereby, incapable of being adjudicated without resorting to the trial procedure. The Apex Court in *Patel Engineering* had expressly stated that for the purpose of taking a decision on the issues raised before it, "the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be

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[42] BORN, *supra* note 3, at 705.
[43] *Id.*, at 581.
[44] *Id.,* at 580; *See also* TACA, *supra* note 1,§. 7; UNCITRAL Model Law on International Commercial Arbitration ["Model Law"], art. 7(1); Swiss, *supra* note 13, art. 178(1); French, *supra* note 13, art. 1443; German Z.P.O.,*supra* note 13,§ 1031(1); Austrian Z.P.O., s. 577(3); Italian, *supra* note 13, art. 807; Algerian Code of Civil Procedure, art.458 bis 1, ¶2; Peruvian Arbitration Law, art.5(1); Egyptian Arbitration Law, art. 12(1)..
[45] ALBERT JAN VAN DEN BERG ED., ICCA CONGRESS SERIES NO. 13, 302 (2006).
[46] BORN, *supra* note 3, at 582.

necessary."[47] The natural consequence of the same is the occurrence of tedious litigation proceedings, often spanning across decades, for the purpose of addressing only the preliminary issues of jurisdiction. Therefore, consistent with the spirit of arbitration, Courts or appropriate judicial authorities ought to limit their interference in the arbitral process only to the determination of jurisdictional issues that concern the form of the arbitration agreement, and not its substance.

This approach, based on an artificial differentiation of the different grounds of challenges to the jurisdiction of an arbitral tribunal[48], finds support in Russel on Arbitration,

> "Unless otherwise agreed by the parties, an arbitral tribunal is expressly given the power to rule on its own substantive jurisdiction, as to (i) whether there is a valid arbitration agreement, (ii) whether the tribunal is properly constituted, and (iii) what matters have been submitted to arbitration in accordance with the arbitration agreement."[49]

Therefore, pursuant to such classification, and in a stark deviation from the decision in *Patel Engineering*, the authors endorse the view that jurisdictional concerns pertaining to the substance of the arbitration agreement ought to be considered on first occasion by the arbitral tribunal; with that decision being subject to review by the Courts under Section 34 of the Act.

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[47] Patel Engineering, *supra* note 22, at ¶ 38.
[48] The approach is similar to the position under the International Chamber of Commerce Rules of Arbitration; wherein, a two-stage procedure is followed when any question is raised as to the jurisdiction of the arbitral tribunal. At the first stage, if one of the parties raises one or more pleas concerning the existence, validity or scope of the agreement to arbitrate, the ICC Court must satisfy itself only of the *prima facie* existence of such an agreement. If it is satisfied that such an agreement may exist, it must allow the arbitration to proceed so that, at the second stage, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. *See*REDFERN,*supra* note 7, at 347.
[49] RUSSEL, *supra* note 38, at 145.

The Full and Final Review Approach

The apex Court in *Patel Engineering* noted that a judicial authority under Section 8, as well as a Court under Section 9 of the Act is empowered to take up a full and final review of intricate jurisdictional issues. As a corollary, in the opinion of the Apex Court, a similar approach was to be adopted by the Chief Justice while acting under Section 11 of the Act.

The particular question as to the extent of judicial intervention at a pre-arbitration stage was also addressed by a three-judge bench of the Supreme Court in *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd. & Anr.*,[50] albeit with respect to Section 45 of the Act. Though the Apex Court therein did uphold the traditional approach of conducting full and final review with respect to Part II of the Act, it laid down the key points of distinction between Section 8 and 45 of the Act,

> "Unlike Section 45, the judicial authority under Section 8 has not been conferred the power to refuse reference to arbitration on the ground of invalidity of the agreement. It is evident that the object is to avoid delay and accelerate reference to arbitration leaving the parties to raise objection, if any, to the validity of the arbitration agreement before the arbitral forum and/or post award under Section 34 of the Act… The apparent reason is that insofar as domestic arbitration is concerned, the legislature intended to achieve speedy reference of disputes to arbitration tribunal and left most of the matters to be raised before the arbitrators or post award."[51]

Consistent with the above dicta, it shall not be incorrect to say that the majority judgment in *Patel Engineering* arrived at a conclusion that overlooks the purposive distinction between Section 8 and 45 of the Act. The Apex Court proceeded on the assumption that a judicial authority, under Section 8, has the power to dwell even into the contentious issues of jurisdiction; and hence, it would be inconceivable to not extend

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[50] (2005) 7 S.C.C. 234.
[51] Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. &Anr., (2005) 7 S.C.C. 234, ¶63, 82.

such authority to the Chief Justice while acting under Section 11. However, the said assumption has no previous legal basis. In fact, it is contrary to the above-quoted observation of the three-judge bench of the Apex Court in *Shin-Etsu*.[52]

Moreover, any assertion on the issue of the extent of judicial intervention permissible during the first stage of the arbitral process under Part I of the Act is essentially a choice between two recognized approaches - the traditional approach of conducting a full and final review at a pre-arbitration stage or the pro-arbitration approach of allowing only a *prima facie* assessment by the concerned judicial authorities. While the said choice divides opinion across the globe, in the Indian context, it cannot be independent of two factors – the scheme of the Arbitration Act of 1996 and the legislative intent behind its enactment.

Firstly, the conclusion arrived at in *Patel Engineering* to adopt the full and final review approach is inconsistent with, and travels far beyond what was envisaged by the scheme of the 1996 Act.[53] The objective behind the 1996 Act was to prevent the widespread abuse of the arbitral process under the old 1940 Act which gave scope for "interminable, time consuming, complex and expensive Court procedures";[54] and to achieve expedition and effective disposal of the arbitral matters.[55] The underlying principle was "to minimize the supervisory role of Courts in the arbitral process",[56] which is most evident from a bare reading of Section 5 of the Act.

Section 5 curtails the extent of judicial intervention to areas mentioned in the Act itself.[57] Based on Article 5 of the UNCITRAL Model Law, "it is a clear recognition of the policy of party autonomy underlying the Act and the desire to limit and define the Court's role

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[52] *Id.*
[53] O. P. Malhotra, *Opening the Pandora's Box: An Analysis of the Supreme Court's Decision in S.B.P. v. Patel Engineering,* (2007), http://www.manupatra.co.in/newsline/articles/Upload/30693C83-676B-4CD5-9D46-73C1810E46BC.pdf
[54] Guru Nanak Foundation v. Rattan Singh and Sons, A.I.R. 1981 S.C. 2075.
[55] Union of India v. Singh Builders Syndicate, (2009) 4 S.C.C. 523; N.B.C.C. Ltd. v. J.G. Engineers Pvt. Ltd., (2010) 2 S.C.C. 385.
[56] TACA, *supra* note 1, Statement of Objects and Reasons.
[57] TACA, *supra* note 1, §5.

in arbitration so as to give effect to that policy."[58] The use of the word "shall" in Section 5 of the Act, as opposed to "should" in Section 1(c) of the UK Arbitration Act, 1996, also emphasizes upon the restricted role that Courts play in support of the arbitral process. It is in this light that the other provisions of the Act must be interpreted.

Both, scholars and legal practitioners, consider the propensity of recalcitrant respondents to bring Court proceedings in hopes of delaying the resolution of claims fairly subject to arbitration on the merits as the greatest single threat to modern commercial arbitration.[59] It is indeed unwise to be ignorant of the fact that litigating parties often seek tactical advantages,[60] and consider challenging jurisdiction as an effective way to delay an arbitration proceeding for tactical reasons.[61] Yet, the endorsement of a full and final review approach by the Apex Court provides an incentive to the parties to indulge in dilatory tactics.[62]

Further, the scheme of the Act, centered on minimizing judicial intervention, nowhere mandates a detailed enquiry of the sort as suggested by the majority judgment in *Patel Engineering*. Thus, where a *prima facie* assessment would have sufficed, the Courts or appropriate judicial authorities are now unnecessarily mandated to conduct a detailed assessment of the jurisdictional concerns raised by a party. Accordingly, in the authors' opinion, the decision in *Patel Engineering* is anomalous to the scheme of the Act since the interpretation of the provisions of the Act do not further its purpose and objective. This view finds ample support in the dissenting opinion of C.K. Thakker, J. as well,

> "Before exercising the power to appoint an arbitrator, the Chief Justice must peruse the relevant record relating to an agreement and failure by one party in making an appointment which would enable him to act. There is, however, no doubt in my mind that at that stage, the

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[58] RUSSEL, *supra* note 38, at 345.
[59] Jack Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WILLIAM& MARY BUS. L. REV. 227, 242 (2011).
[60] William Park, *Arbitration's Discontents: Of Elephants & Pornography*, 17(2) ARB. INT'L.363 (2001).
[61] JULIAN M. LEW ET.AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, 331 (2003).
[62] Malhotra, *supra* note 53.

> satisfaction required is merely of prima facie nature and the Chief Justice does not decide any contentious issues between the parties. Section 11 neither contemplates detailed inquiry, nor trial nor findings on controversial or contested matters."[63]

Secondly, the decision in *Patel Engineering* does not conform to the legislative intent behind the 1996 enactment. A statute is an edict of the Legislature[64] and the conventional way of interpreting or construing a statute is seeking the intention of its maker.[65] It is to be construed according to the intent of those who make it.[66] This intention may be derived from the language of the provision, or by a reference to the discussions prior to the enactment of the statute.[67] After all, interpretation must depend on the text and the context; they are the bases of interpretation.[68]

Pursuant to the same, a reference to Article 8(1) of the Model Law shall be of immense assistance because the Indian Parliament enacted the 1996 Act as a measure of fulfilling its obligations under the international treaties and conventions;[69] and drafted the legislation with the Model Law as the basis.[70] Therefore, it is of wide acceptance that if the Act contains such provisions which are capable of two or more different interpretations, then the internal aid of the Preamble to the Act as well as the corresponding provisions of the Model Law ought to be taken to arrive at an appropriate interpretation of the statutory text.[71]

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[63] Patel Engineering, *supra* note 22, at ¶ 13.
[64] Vishnu Pratap Sugar Works (Private) Ltd. v. Chief Inspector of Stamp, U.P., A.I.R. 1968 S.C. 102; Institute of Chartered Accountants of India v. Price Waterhouse, A.I.R. 1998 S.C. 74.
[65] G. P. SINGH, J., PRINCIPLES OF STATUTORY INTERPRETATION, 3 (2010).
[66] R. M. D. Chamarbaugwala v. Union of India, A.I.R. 1957 S.C. 628; Chief Justice, Andhra Pradesh v. L.V.A. Dikshitulu, A.I.R. 1979 S.C. 193.
[67] InnamuriGopalan&Ors.v. State of Andhra Pradesh and Anr., [1964] 2 S.C.R. 888.
[68] Reserve Bank of India v. Pearless General Finance and Investment Co., (1987) 1 S.C.C. 424.
[69] Vikrant Tyres Ltd. v. Techno Export Foreign Trade Co. Ltd., 2005 Supp. Arb. L.R. 465 (Kar.).
[70] P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 11 (8th ed., 2013).
[71] Union of India v. East Coast Boat Builders & Engineers Ltd., A.I.R. 1999 Del. 44.

Article 8(1) of the Model Law provides,

> "A Court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

As to its interpretation, few commentators argue, on the basis of the then Article 17 of the early drafts of the Model Law, that the legislative history of the Model Law is either inconclusive or supportive of a mandatory *prima facie* judicial review standard in all cases.[72]*Per contra*, many commentators believe that the Model Law strongly suggests that a full judicial review of the jurisdictional objection is appropriate, at least in some circumstances.[73]

Though the 1996 Act is based upon the Model Law, with its Article 8(1) corresponding to Section 8 of the Act, it is certainly not identical.[74] There have been key departures from the language adopted in the text of the Model Law. Quite notably, the expression "unless it finds that the agreement is null and void, inoperative or incapable of being performed", present in Article 8(1) of the Model Law, has been omitted in Section 8 of the 1996 Act. Even more surprisingly, the expression, despite its omission from Section 8, finds mentions in Section 45 in Part II the Act pertaining to the 'power of judicial authority to refer parties to arbitration'.

An omission of such nature is an accepted indicator of the legislative intent behind the enactment.[75] While adopting most of the Model Law, the Indian Parliament chose to make additions, deletions and modifications therein. These appear to be deliberate acts borne out of a conscious decision to make the Model Law suitable to the Indian

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[72] Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction,* 22 ARB. INT'L 463, 473 (2006).
[73] UNCITRAL,*supra* note 44, art. 8(1); BORN, *supra* note 3, at 881.
[74] MARKANDA*supra* note 70, at 11.
[75] M/s Dagi Ram Pindi Lall & Anr. v. Trilok Chand Jain, (1992)2S.C.C.13.

industrial climate.[76] Therefore, judicial discipline requires that Courts do not tamper with the provisions of the statute, especially when the deviation from the Model Law, is clearly a result of a conscious decision.[77]

Accordingly, one may view the omission of the aforementioned phrase from Section 8 of the Act as an intentional departure from the practice under the Model Law. Whereas Article 8 of the Model Law expressly permits a detailed inquiry into the jurisdictional facts pertaining to the validity of the arbitration agreement, no such conclusion can be reached with respect to Section 8 of the Indian Act; an opinion strongly echoed by the Law Commission of India.[78]

If a statutory provision is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the Legislature.[79] With respect to the 1996 Act, the appropriate interpretation of Section 8, and hence Section 11, appears to permit only a *prima facie* review of the jurisdictional objections raised during the First stage of the arbitral process.

The authors' stance is akin to the dissenting opinion of Srikrishna, J. in *Shin-etsu*, wherein he observed - "the object of dispute resolution through arbitration… is expedition and that the object of the Act would be defeated if proceedings remain pending in the Court even after commencing of the arbitration…At the pre-reference stage contemplated by Section 45, the Court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the arbitral tribunal or before the Court at the post-award stage."

Consequently, the decision of the Apex Court in *Patel Engineering*, favouring a full and final review approach, fails to find agreement with the authors.

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[76] MARKANDA, *supra* note 70, at 12.
[77] Kotak Mahindra Bank Ltd. v. Sundaram Brake Lining Ltd., 2008 Supp. (1) Arb. L.R. 702.
[78] Law Commission of India, *176th Report on the Arbitration and Conciliation (Amendment) Bill*, 37 (2001).
[79] Venkataswami Naidu R. v. Narasram Naraindas, A.I.R. 1966 S.C. 361; District Mining Officer v. Tata Iron and Steel Co., A.I.R. 2001 S.C. 3134.

The third stage of the arbitral process

The *second* concern sought to be addressed by the authors is confined to the third stage of the arbitral process and pertains to the consequences of a party's failure to raise a timely objection to the jurisdiction of a tribunal under Section 16 of the Act. In other words, whether a party to a dispute, having not raised a jurisdictional objection during the arbitration proceedings, can be permitted to raise the same as a ground for setting aside the award under Section 34 of the Act? While the principle of *kompetenz-kompetenz* is central to any discussion as to the posed question, it also encompasses a perusal of the doctrine of deemed waiver as envisaged under the Act.

As stated before, the negative effect of *kompetenz-kompetenz* contemplates a rule of priority in favour of the arbitral tribunal[80] with respect to questions of arbitral jurisdiction. As a natural corollary to this prioritisation, every party has the right to object to jurisdictional irregularities during proceedings before the arbitral tribunal, that is, during the second stage. The question that arises at this juncture, and the one addressed in this part, is whether a party to arbitration proceeding has a corresponding obligation to raise a jurisdictional objection before the tribunal. In other words, what is the consequence if a party does not exercise its right to object during the arbitral proceedings and instead seeks to raise the jurisdictional objection as a ground for setting aside or challenging the enforcement of the award?

In this regard, Indian Courts have shared, at best, a perturbed relationship with the concept of the negative effect of *kompetenz-kompetenz*, as evidenced by the stark difference of opinion amongst Indian Courts regarding the aforementioned question. On the one hand, numerous judicial decisions are of the view that a failure to exercise the right to object during the second stage leads to a deemed waiver that operates to preclude the party from raising a jurisdictional challenge for the first time during the third stage.[81]On the other hand, many Courts have also held that the right to raise a jurisdictional

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[80] Banifatemi, *supra* note 34, at 260.

[81] Krishna BhagyaJala Nigam Ltd. v. G. Harishchandra Reddy & Anr.,(2007) 2 S.C.C. 720; S.N. Malhotra & Sons v. Airport Authority of India & Ors., 2008 (2) Arb. L.R. 76 (Delhi); Karnataka State Road Transport Corporation v. M.Keshava Raju, 2004 (1) Arb. L.R. 507 (Kar.); Shyam Telecom Ltd. v. A.R.M. Ltd., 113 (2004) D.L.T. 778.

objection can, in no circumstance, be waived because such a fundamental defect in the proceedings should never be subject to a rule of deemed waiver.[82]It is best to scrutinise both lines of argument.

A. The Argument of Waiver

i. Principle of Deemed Waiver under the 1996 Act

Provisions in a statute can be broadly categorised as being either mandatory, that is provisions from which the parties cannot derogate, or derogable, which are provisions from which the parties may by agreement derogate. Undeniably, mandatory provisions are known to occupy a consecrated position in the entire arbitral process as they provide protection against fundamental procedural irregularities,[83] which are violations of due process.[84] In this regard, it cannot be disputed that the provisions providing for jurisdictional requirements, for instance section 7 of the Act, are mandatory provisions.

The argument that parties cannot derogate from mandatory provisions either by agreement or by waiver[85] is anchored in the premise that mandatory provisions are indispensable in nature. This argument appears to be further strengthened by Section 4 of the Act, corresponding to Article 4 of the Model Law,[86] which codifies the rule of deemed waiver.

According to this provision, if a party who is aware of a non-compliance of a derogable provision, proceeds with the arbitration without stating his objection to such non-compliance within the prescribed or a reasonable time as the case may be, the party shall be deemed to have waived its right to object. Evidently, the rule of waiver as stipulated under Section 4 of the Act extends only to derogable non-mandatory provisions. This

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[82] Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd, A.I.R. 1963 S.C. 90; Atul R. Shah v. Vrajlal Lallobhai, A.I.R. 1999 Bom. 67; Vinay Bubna v. Yogesh Mehta, 1998 (4) Bom.C.R.849 (India).

[83] Paul Stretford v. Football Association Ltd, [2007] E.W.C.A. Civ. 238.

[84] Fabrisio Fortese, *Is an Irregularly Composed Tribunal a Tribunal at All,* 78 INT'L J. ARB. MED. & DISP. MANAG'T 86, 90 (2012).

[85] Vinay Bubna v. Yogesh Mehta, 1998 (4) Bom.C.R. 849.

[86] B. P. SARAF& S. M. JHUNJHUNWALA, LAW OF ARBITRATION AND CONCILIATION 78 (3rd ed., 2001).

view also seems to find favor in the UNCITRAL Working Group's Report on Article 4 of the Model Law,[87] according to which the rule of waiver, if it were to cover fundamental procedural defects, would be extremely rigid.[88]

However, it must be kept in mind that the principle of deemed waiver does not emanate solely from Section 4 of the Act and that it may also operate independent of it. Consequently, it is possible to contemplate a waiver of mandatory provisions in certain circumstances, and the questions regarding the scope of section 4 are extraneous to this proposition.

Waiver of a Mandatory Provision

The applicability of the doctrine of waiver to mandatory statutory provisions has been subjected to considerable judicial scrutiny in the past. However, the Supreme Court of India, on a number of occasions, has held in unequivocal words that a mandatory provision can be waived by an individual, provided that the provision was enacted for the benefit of the individual and not the public.[89] High Courts have also complied with the Apex Court's view.[90] Therefore, it is only if the mandatory provision serves to protect public interest that the provision is rendered incapable of being waived.

Whether or not these rulings hold good in the context of delayed jurisdictional challenges in arbitral proceedings is a question that came up for consideration before a two-judge bench of the Supreme Court in *M/s Dodsal Pvt. Ltd.* v. *Delhi Electric Supply Undertaking of the Municipal Corporation of Delhi.*[91] Therein, the bench, after relying on the Apex Court's finding in *Krishan Lal* v. *State of Jammu and Kashmir,*[92] decided that the matter

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[87] A. BROACHE, COMMENTARY ON THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, 27 (1990).
[88] UNCITRAL, *supra* note 30, at57.
[89] Dhirendra Nath Gorai & Subal Chandra Shaw and Ors v. Sudhir Chandra Ghosh & Ors., A.I.R. 1964 S.C. 1300; State Bank of Patiala & Ors. v. S.K. Sharma, (1996) 3 S.C.C. 364; Graphite India Ltd. & Anr. v. Durgapur Project Ltd. & Ors., (1999) 7 S.C.C. 645.
[90] Modern Builders v. Hukmatrai N Vadirani, A.I.R. 1967 Bom.373; Madan Pal Singh v. Smt. Pushpa Lata Pandey & Ors., A.I.R. 1998 All. 372; Texmaco Ltd. v. Appellate Authority &Ors., (2003) I.I..L.L.J. 567 Cal.
[91] (1996) 2 S.C.C. 576.
[92] (1994) 4 S.C.C. 422.

be placed before a five-judge bench. The Constitutional bench, however, opined that it was not necessary to delve into the referred question and decided the matter on other grounds.

Although the Constitutional bench kept the issue open, the Apex Court once again encountered the question of maintainability of a first-time jurisdictional challenge in a setting aside proceeding, in the matter of *Krishna Bhagya Jala Nigam Ltd.* v. *G. Harishchandra Reddy and Anr.;*[93] and this time the Court did not shy away from answering it. The Court noted,

> "The plea of 'no arbitration clause' was not raised in the written statement filed by Jala Nigam before the Arbitrator … It submitted itself to the authority of the Arbitrator … It filed its written statements to the additional claims made by the contractor. The executive engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the arbitral tribunal. He did not call upon the arbitral tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the arbitral tribunal. It also filed written arguments … Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now allowed to contend that Clause 29 of the Contract did not constitute an arbitration agreement."[94]

Therefore, the Supreme Court has taken a firm stand that the right to object to a jurisdictional irregularity, if not exercised before the tribunal, shall be deemed to be waived and the party cannot be permitted to raise such a plea at a later stage. This decision has been squarely followed by the Delhi High Court in *S.N. Malhotra and Sons* v. *Airport Authority of India and Ors.*,[95] where-in it was held,

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[93] (2007) 2 S.C.C. 720.
[94] *Id.,* at ¶8.
[95] 2008 (2) Arb.L.R. 76 (Delhi) [hereinafter "Malhotra v. AAI"].

> "On an analysis of the provisions of section 16(1) to (6), in our view, it is clear that the legislative intent was that a plea as to jurisdiction of the arbitral tribunal or as to exceeding of its authority must be raised at the threshold and cannot be entertained at a subsequent stage. In other words, a plea in terms of sub-section (2) or sub-section (3) of Section 16 of the Act not having been taken at the initial stage must be deemed to be waived."[96]

While examining Section 16, the Delhi High Court went on to point out the following indicators, which make it certain that the intention of the legislature was to have all questions of jurisdiction raised and decided at the earliest,[97]

- The use of the words '*shall* be raised not later than the submission of the statement of defense' in sub-section (2).
- The use of the words 'as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings' in sub-section (3).
- The discretion given to the tribunal under sub-section (4) to 'admit a later plea if it considers the delay justified'. In other words, the tribunal must, after examining the matter, rule that the delay in raising objection in terms of sub-section (2) or sub-section (3) is justified. If the delay is not justified in the view of the arbitral tribunal, the tribunal will be at liberty not to admit the objection with regard to its jurisdiction and/or the scope of its authority, by passing an order refusing to admit the plea on the ground that there was unjustified delay.
- A ruling of the arbitral tribunal on the acceptance or rejection of the objection to its jurisdiction/competency is mandatory as is evident from a reading of sub-section (5), and particularly by the use of the words '*shall* decide on a plea referred to in sub-section (2) or Sub-section (3)'.
- Where the arbitral tribunal rejects the plea and proceeds to make an award, the aggrieved party pursuant to sub-section (6) 'may make an application for setting aside such an arbitral award' in accordance with Section 34. The use of words

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[96] *Id.,* at ¶12.
[97] Malhotra v. AAI, *supra* note 95.

> 'such an arbitral award' is of significance. The legislative intent quite clearly is that the arbitrator will rule on the objection raised before the Tribunal in terms of sub-section (2) or sub-section (3) and it is only 'such an arbitral award' which can be set aside in accordance with section 34. The words 'such an arbitral award' thus have direct reference to an award rejecting the plea of want of jurisdiction of the arbitral tribunal to deal with the matter. 'Such an award' can only exist if the plea is raised before the arbitrator himself and not at any subsequent stage.

Additionally, it must be noted that before these two judgments, the Karnataka High Court in the matter of *Karnataka State Road Transport Corporation* v. *M.Keshava Raju*,[98] had undertaken a similar analysis of the intention of the legislature. While dismissing an appeal under Section 37 of the Act, directed against an order of the City Civil Judge under Section 34, the Court laid down the law regarding the applicability of the doctrine of waiver to mandatory provisions,

> "Though, in order to apply the doctrine of waiver by invoking section 4, the first condition is that the non-compliance must be of a non-mandatory provision of Part I or of any requirement under the arbitration agreement, certain mandatory provisions of the Act also provide for a grant of waiver in the event of failure to object. For example, sub-sections (2) and (3) of section 16 are two of such mandatory provisions."[99]

This passage finds agreement in the Delhi High Court decision in *Shyam Telecom Ltd* v. *ARM Ltd.*[100] The Karnataka High Court, in to this conclusion, placed strong reliance on the UNCITRAL Working Group Report on the draft Article 16, wherein it was observed that "a party who failed to raise the plea as required under Article 16(2) should be precluded from raising such objections not only during the later stages of the arbitration

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[98] 2004 (1) Arb.L.R.507 (Kar.) [hereinafter "KSRTC v. Raju"]
[99] *Id.,* ¶17.
[100] 113 (2004) D.L.T. 778.

proceedings, but also in other contexts, in particular in setting aside proceedings, or enforcement proceedings."[101]

Therefore, the view taken by the aforementioned decisions are in consonance with the opinion of the drafters of the Model Law. In fact, it shall be shown that this line of argument is endorsed even internationally, by Courts and scholars alike.

The 'Wait and See Approach': An International Perspective

It is almost unanimously accepted that "if a party waits until the award is handed down before it objects to the tribunal's jurisdiction; it may well have lost its opportunity to challenge."[102] In this regard, Professors Alan Redfern and Martin Hunter in their treatise on Arbitration note,

> "Two possibilities are open to a party wishing to challenge the jurisdiction of the arbitral tribunal. The first is to challenge jurisdiction at the outset of an arbitration (or at the latest, as soon as the reasons for objection are known) and ask the tribunal to deal with this challenge, either by means of an interim award or as part of its award on merits. The second is to wait until the award is made and then challenge it, or attempt to resist enforcement, on the basis that the tribunal had no jurisdiction and so its award has no validity. The second course is usually adopted by a party that has decided to 'boycott' the arbitration – that is, to take no part in the proceedings … parties that take part in an arbitration but fail to raise a jurisdiction issue when they may have been entitled to do so, risk losing their right to object."[103]

A party, who is aware of a jurisdictional defect in the proceedings but chooses to not raise an objection to the same, may do so either by participating in the proceedings without bringing the jurisdictional defect to the tribunal's knowledge or by boycotting

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[101] *supra*note 30, at39.
[102] MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 205 (2nd ed., 2012).
[103] REDFERN, *supra* note 7, at 409.

the proceedings. The former course of action guarantees the loss of right to object, while in the latter scenario the right to object may survive in certain jurisdictions.

Participating in the arbitration without voicing one's objections is often termed as an 'ambush strategy' whereby the party deliberately decides to let the arbitration proceed, and chooses to 'wait and see' if the award is made in its favor before challenging the jurisdiction.[104] Such a wait and see approach is condemned almost universally because it amounts to an absolute disregard of good faith participation. Good faith participation demands that a party who is aware of a reason to doubt that its rights are respected in the arbitral proceedings should submit the objection immediately, before he has taken any step in the proceedings.[105] Parties cannot wait until the arbitration turns against them and then rely on a ground for challenge.[106]

In this regard, it is essential to reproduce Section 73 of the English Arbitration Act, 1996 titled 'loss of right to object', which can be considered to be a codification of the above line of argument,

> "(1) If a party to the arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection –
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> (a) that the tribunal lacks substantive jurisdiction,

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[104] CLARE AMBROSE ET. AL., LONDON MARITIME ARBITRATION 121 (1996).

[105] A.W. Rovine, *Contemporary Issues in International Arbitration and Mediation,* Presented at the Fordham Law School Conference in New York, 115 (2008); GABRIELLEKAUFMANN-KOHLER ET. AL., INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 46 (2004).

[106] JULIAN LEW ET. AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 241 (2003).

> (b) that the proceedings have been improperly conducted,
>
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
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> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
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> he may not raise that objection later, before the tribunal or the Court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

The unmistakable clarity of the provision leaves absolutely no scope for any differing opinion. Voluntary participation in proceedings manifests a waiver of the right to object, and in order to rebut the presumption that the right to object has been waived, the challenging party must show that it did not know, and could not with reasonable diligence have discovered, the grounds for objection.[107]

Further, it is pertinent to note that many scholars are also of the opinion that it is not open for a party to challenge the existence or validity of the arbitration agreement after having participated in the arbitration (by submitting written submissions etc.) without raising a timely jurisdictional objection, because such participation amounts to establishing a fresh arbitration agreement in itself.[108]

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[107] William W. Park, *The Arbitrator's Jurisdiction to Determine Jurisdiction,* in ALBERT JAN VAN DEN BERG ED., ICCA CONGRESS SERIES NO. 13, 47 (2006).
[108] SIMON GREENBURG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA PACIFIC PERSPECTIVE 237 (2011).

Therefore, it is agreed across jurisdictions that voluntary and unreserved participation leads to a deemed waiver of the right to object. However, the consequence that entails from non-participation in the arbitral proceedings is different in different jurisdictions. Whereas in England the right to object survives if the party does not participate in the arbitration, in Switzerland, as is evident from the decision in *Westland Helicopters* v. *Emirates Arabs Unis, Arabie Saoudite, Etat du Qatar,* the challenging party is deemed to have lost his right to object, not only when it participates in the proceedings without stating its objections, but even when the party chooses to boycott the arbitral proceedings.

The Argument of non-waivability of the Right to Object

Having gone through the argument of waiver in detail in the previous section, the authors now turn to highlight the tenets of the counter-argument. There exist a compelling number of cases that back this counter-argument, the crux of which is that jurisdictional defects are in the nature of fundamental procedural irregularities, and the argument of waiver cannot operate to effectively regularize a fundamental irregularity.[109] Consequently, a challenge to the award on the ground of want of arbitral jurisdiction is maintainable even if a jurisdictional challenge was not raised under Section 16.

This opinion was first endorsed by the Apex Court in the case of *Waverly Jute Mills Co. Ltd.* v. *Raymon and Co. (India) Pvt. Ltd,*[110] in the following passage,

> "[A]n agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction."[111]

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[109] Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd., A.I.R. 1963 S.C. 90; Atul R. Shah v. Vrajlal Lallobhai, A.I.R. 1999 S.C. 565; M/s Gas Authority of India Ltd. and Anr. v. Keti Constructions (I) Pvt. Ltd. and Ors., (2007)5 S.C.C. 38.
[110] A.I.R. 1963 S.C. 90.
[111] *Id.,* at ¶18.

It is important to note that this matter arose under the old Act,[112] which was significantly different from the new statute, primarily on the point that it did not specifically recognise *kompetenz-kompetenz*. The Supreme Court in *M/s Sundaram Finance Ltd.* v. *M/s N.E.P.C. India Ltd.*[113] has held that owing to the dissimilarities between the 1996 Act and the Arbitration Act, 1940, the provisions of the new Act must be interpreted and construed independently, "uninfluenced by the principles underlying the 1940 Act."[114] However, the Bombay High Court in *Atul R. Shah* v. *Vrajlal Lallobhai,*[115] when faced with a first-time jurisdictional challenge under a Section 34 application, went on to apply the exact rationale that was advanced by the Court in *Waverly Jute Mills*. It is sufficient to state, this decision had no discussion whatsoever on the concept of *kompetenz-kompetenz*. The Court held,

> "[T]he fact that an Arbitral Tribunal is not properly constituted and objection has not been raised by the petitioner before the Tribunal, cannot result in the Arbitral Tribunal exercising jurisdiction if its constitution was in contravention of … the Arbitration & Conciliation Act, 1996. Courts cannot confer jurisdiction on themselves, by consent of the parties and clothe themselves with jurisdiction. A Court without jurisdiction merely on account of non-objection by the parties cannot assume jurisdiction in itself. The same is to also true of Arbitral Tribunals."[116]

Another judgment wherein the Supreme Court came to an almost identical conclusion was in the matter of *M/s Gas Authority of India Ltd. and Anr.* v. *Keti Constructions (I) Pvt. Ltd. and Ors.*[117] However, the Court on this occasion was not oblivious to the concept of *kompetenz-kompetenz*, and therefore qualified its finding accordingly. The Court opined that when a plea of jurisdiction had not been taken up before the arbitral tribunal as

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[112] Arbitration Act, 1940, Act No. 10 of 1940.
[113] A.I.R. 1999 S.C. 565.
[114] *Id.,* at ¶9.
[115] A.I.R. 1999 Bom. 67.
[116] *Id.,* at ¶5.
[117] (2007)5 S.C.C. 38.

provided in Section 16 of the Act, the party "must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2)(v) of the Act."[118] The Court however, did not elucidate upon what amounted to a strong enough case in order for a Section 34 application on grounds of want of jurisdiction to be maintainable. In substance, what the Apex Court said in this matter was that a party cannot be deemed to have waived its right to object to a jurisdictional violation, even though the same was not exercised before the tribunal.

The argument of non-waivability of the right to object has been advanced, based on the premise that: (a) the doctrine of waiver, as stipulated under section 4 of the Act, does not apply to mandatory provisions;[119] and (b) that voluntary participation cannot confer jurisdiction.[120] However, the authors are not in agreement with any of these judgments, primarily because all of these cases were decided without even considering, let alone discussing, the principle of *kompetenz-kompetenz* and the jurisprudence surrounding it. The authors' stance is accurately explained in the afore-quoted passage of the Karnataka High Court judgment,[121] in *Karnataka State Road Transport Corporation* v. *M. Keshava Raju.*[122]

Conclusion

The objective of the present paper was to analyse the implications of the negative effect of *kompetenz-kompetenz* on the arbitral process in India. In particular, the authors sought to comment upon two questions. The *first* pertains to the permissible extent of judicial intervention across the three stages of an arbitral process, and the *second* concerns the consequence of a failure to raise a jurisdictional challenge before the arbitral tribunal, despite an opportunity to do so.

The authors' analysis is equally reliant on the judicial decisions across India and the United Kingdom, as well as the dark realities of the litigation process in India. It was also felt pertinent to not restrict the discussions to a literal interpretation of the text of the

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[118] *Id*, at ¶19.
[119] VinayBubna v. Yogesh Mehta and Ors., 1998 (4) Bom. C.R. 849.
[120] Atul R. Shah, *supra* note 113.
[121] KSRTC v. Raju, *supra* note 98.
[122] 2004 (1) Arb.L.R.507 (Kar.).

Arbitration & Conciliation Act of 1996, but give equal emphasis to its object and purpose, as well the legislative intent behind its enactment. However, despite their individual opinions, the authors endeavored not to compromise their objectivity while arriving at their conclusions.

Firstly, in determining the extent of judicial intervention in the arbitral process permissible under the arbitration laws of India, the authors share an unsurprising disagreement with the decision of the apex Court in *Patel Engineering*.

It is inconceivable to empower the concerned judicial authority or the Chief Justice, acting during the first stage of the arbitral process, to examine every challenge to the jurisdiction of an arbitral tribunal. While there is indeed a need for the concerned judicial authorities to satisfy themselves of the necessary jurisdictional facts, those must be limited to the ones which do not require a complete trial. Therefore, an artificial distinction ought to be made segregating the various grounds of challenges to an arbitral tribunals' jurisdiction.

During the first stage, the judicial authority must be satisfied on issues such as the existence of an arbitration agreement, its formal validity and adherence to the procedural requirements of the underlying statutory provision or the arbitration agreement itself. However, in recognition of the negative effect of *kompetenz-kompetenz*, challenges to the substantive validity of the tribunal, arbitrability of the subject matter, impartiality and independence of the constituted tribunal and other convoluted objections must be decided by the arbitral tribunal itself in the first instance.

Moreover, in continuation of the above, there is a need to reassess the standard of review adopted by the concerned judicial authorities during the first stage of the arbitral process. Consistent with the dissenting opinion of C. K. Thakker, J in *Patel Engineering*, preference must be given to the practice of assessing the necessary jurisdictional facts through *prima facie* assessment, as opposed to conducting a full and final review. The assertion is not only intrinsically related to the previous conclusion as to the nature of jurisdictional challenges that may be raised before a judicial authority, but also derives its strength from the absence of any express statutory requirement as to the applicable standard of review, the scheme of the 1996 Act and the legislative intent behind its enactment.

Secondly, with respect to the party's failure to raise a timely jurisdictional objection before the tribunal, the authors endorse the view in support of the doctrine of deemed waiver. The rule of waiver under the 1996 Act is based not only on Section 4 of the Act, but also operates independent of it through Section 16(2). Therefore, a proposition to the effect of limiting this rule to only derogable or non-mandatory provisions lacks adequate legal basis. While acquiescence to an arbitral proceeding may not be capable of granting a tribunal the jurisdiction it apparently lacks, one cannot overlook the inter-relation between the conduct of a party and its right to raise a jurisdictional objection. Such an approach is consistent with the international practice of condemning the 'wait and see approach' adopted by parties as a dilatory tactic.

Therefore, if a party fails to raise any jurisdictional objection before the arbitral proceedings, then such grounds of objection are deemed to be waived. Consequently, the defaulting party shall be prohibited from challenging the arbitral award on the same grounds in a proceeding before the appropriate Courts.

The above assertion also appreciates the principle of *kompetenz-kompetenz* in its entirety. In other words, adopting a stance to the contrary nullifies the negative effect of *kompetenz-kompetenz*. After all, empowering an arbitral tribunal to address the questions as to its own jurisdiction would serve no purpose if a party is permitted to raise a challenge to the arbitral award, if unfavourable, despite having had an opportunity to do so before the tribunal itself.