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Vasanth Rajasekaran
Founder & Head,, Trinity Chambers

Harshvardhan Korada
Counsel, Trinity Chambers

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Competence-Competence Doctrine in Indian Arbitration Law Jurisprudence: An In-Depth Analysis

by Vasanth Rajasekaran* and Harshvardhan Korada**

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Arbitration and arbitration agreement

Arbitration has become one of the most sought-after dispute resolution mechanisms worldwide, often involving individuals, private bodies, corporations, and States.[1] While there may not be a standard or one-size-fits-all approach to defining arbitration, international experts across jurisdictions agree upon certain fundamental elements. Arbitration is predominantly a private mode of dispute resolution which finds its roots in the mutual agreement between the disputants

to submit their differences to neutral, non-State adjudicator(s) (i.e. arbitrators) whose expertise and judgment the disputants trust.[2]

Arbitration has rightly or wrongly gained wide recognition as an attractive alternative to traditional court-based litigation for a variety of reasons. For instance, arbitration is perceived to be a substantially time and cost-effective, neutral, informal, flexible, confidential, efficient, autonomous, and more business-oriented method of resolving disputes.[3]

The parties' agreement to arbitrate across jurisdictions is generally required to be in writing. An arbitration agreement may be contained in a commercial contract in the form of a clause or be a distinct agreement in itself.[4] Sometimes, arbitration agreements are also signed and entered subsequent to a dispute having arisen among the parties. However, the prospect of the parties mutually agreeing to sign on anything, including an arbitration agreement post the disputes is bleak. Thus, it is usually a preferred practice for parties to embed an arbitration agreement as a clause in the underlying contract initially while their commercial relations are still strong and amicable.[5]

When individuals opt for arbitration to settle their disagreements, they forfeit their right/ entitlement to have their conflicts adjudicated within a national court or other competent judicial fora of the State. Instead of approaching the national courts, the disputants mutually consent to resolve the issues confidentially, distinct from the State's judicial system.

In other words, entering into an arbitration agreement signifies the surrender of a significant entitlement i.e. the right to a judicial resolution of disputes — while simultaneously conferring other privileges.[6] These newly established rights encompass, amongst other things, the ability to determine the laws and procedures governing the arbitral process, the seat and the convenient venues (if any) of the arbitration, the language to be used in the arbitral process, and the arbitrators themselves, whom the parties may select based on their specialised knowledge in the subject-matter of the dispute.

The principle of competence-competence

A matter of paramount significance within the realm of international arbitration is the authority vested in an Arbitral Tribunal to deliberate upon and resolve conflicts pertaining to its jurisdiction encompassing matters like the presence, validity, legality, and ambit of the parties' arbitration agreement. This particular

issue forms the core of the competence-competence doctrine, which is alternatively known as the kompetenz-kompetenz principle. The competence-competence doctrine profoundly connects with laws across jurisdictions governing the distribution of jurisdictional authority between Arbitral Tribunals and domestic courts.

Almost all advanced legal systems, especially those that have adopted the UNCITRAL Model Law[7], recognise the power of the Arbitral Tribunal (competence-competence or kompetenz-kompetenz) to examine and rule on challenges to its own jurisdiction, with the possibility of subsequent judicial review during annulment or recognition proceedings.[8] In numerous legal systems, the prevailing consensus is that when parties submit their disagreements and disputes stemming from the primary contract to arbitration, they also consent to present the jurisdictional issues to the Arbitral Tribunal. In essence, the principle of competenceâ€'competence denounces the notion that an Arbitral Tribunal may not be capable of rendering a fair and independent decision on its jurisdiction to adjudicate the disputes referred by the disputants.[9] However, it is important to recognise that not all jurisdictions support the competence-competence principle with equal fervour.[10]

The issue of how thoroughly a court should examine the validity of an arbitration agreement comes into play when one party seeks the court's intervention to refer the matter to arbitration. The level of scrutiny applied in such cases largely depends on the substantive law of the relevant jurisdiction.[11] The doctrine of competenceâ€'competence plays a pivotal role in guiding the court's approach to determine whether it should conduct an exhaustive review or a preliminary assessment of the arbitration agreement's validity. In jurisdictions that have adopted the UNCITRAL Model Law, arbitrators typically hold the ultimate authority to decide on the validity of the arbitration agreement in most instances.

Competence-competence in Indian law

The Arbitration and Conciliation Act, 1996 (Arbitration Act) in India is based on the UNCITRAL Model Law. Section 16 of the Arbitration Act bestows statutory acknowledgement to the principle of competence-competence and confers the Arbitral Tribunal with the important power to adjudicate on matters pertaining to the Arbitral Tribunal's jurisdiction. This includes the authority to address any objections raised concerning the existence or validity of the arbitration agreement. The provision also contains two fundamental principles that guide this process.

Firstly, it recognises that an arbitration clause — a provision specifying arbitration as the method of resolving disputes within a contract, is to be treated as an independent agreement distinct from the other terms and conditions of the contract itself. This means that even if there are disputes or challenges regarding the overall contract, the arbitration clause remains enforceable, and the Arbitral Tribunal can proceed to arbitrate the issues outlined within it.

Secondly, Section 16 establishes that if the Arbitral Tribunal determines that the entire contract is null and void, this decision does not automatically result in the arbitration clause being considered invalid. In other words, the invalidity of the contract as a whole does not ipso jure, or automatically, lead to the invalidation of the arbitration clause. This ensures that disputes regarding the contract as a whole and the arbitration clause within it can be addressed separately, and the arbitration process can continue even if the contract is found to be void.

(*i*) *The applicability, and interplay of competence-competence at different stages of the arbitral process in India*

The competence of an Arbitral Tribunal to determine matters falling in its jurisdiction may have interplay with many issues at different stages of the arbitral process. Some of these issues have been covered in the sections hereinafter.

(*a*) Limitation

The general rule laid in *Uttrakahand Purv Sainik Kalyan Nigam Ltd.* v. *Northern Coal Field Ltd.*

In *Uttrakahand Purv Sainik Kalyan Nigam Ltd.* v. *Northern Coal Field Ltd.*[12] the Supreme Court of India dealt with an important question — whether a court acting under Section 11 of the Arbitration Act could, at the pre-reference stage, consider the issue of limitation. While answering the moot question, the Supreme Court referred to the observations in the 246th Report of the Law Commission of India (Report). In the Report, the Law Commission of India (Commission), while explaining the rationale behind the amendments suggested to Sections 8 and 11 of the Arbitration Act, observed that the amendments pertain to limiting judicial intervention. This limited judicial intervention was envisaged only when the court or judicial authority determined that the arbitration agreement was non-existent or invalid. The Commission believed that if the court or judicial authority is reasonably convinced on a prima facie basis against arguments challenging the arbitration agreement's validity, it should refer the matter to arbitration. The proposed amendment required that the court or judicial authority will refrain

from referring the parties to arbitration only when it concludes that there is no valid arbitration agreement in place. If the court or judicial authority, at first glance, is of the view that the arbitration agreement is valid, it should then direct the dispute to arbitration and defer the final determination of the arbitration agreement's existence to the Arbitral Tribunal.

Based on the above observations, Section 11 of the Arbitration Act came to be amended substantially by the Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendment). In the 2015 Amendment, sub-section (6-A) was added to Section 11, which prescribed that the Supreme Court or the High Court, as the case may be while considering an application seeking reference to arbitration, shall confine its examination to the existence of an arbitration agreement. The introduction of sub-section (6-A) had the effect of legislatively overruling the judgments of the Supreme Court in *SBP & Co.* v. *Patel Engg. Ltd.*[13] and *National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*[14] and other similar decisions which prescribed a much wider scope[15] of judicial intervention at the pre-reference stage.

The Supreme Court in *Uttrakahand Purv case*[16] observed that the doctrine commonly known as "competence-competence", or "competence de la recognised", confers authority upon the Arbitral Tribunal to decide matters concerning its own jurisdiction. This includes adjudicating all questions related to jurisdiction and assessing the existence and validity of the arbitration agreement. The purpose of this doctrine is to minimise judicial interference, ensuring that the arbitration process is not hindered at the threshold, especially when a preliminary objection is raised by one of the parties. There are, however, exceptions to the general application of this doctrine, as acknowledged by the Supreme Court. The principle does not hold in cases where the arbitration agreement itself is impeached on the grounds of fraud or deception. Further, the principle would also not apply to cases where the parties in the course of negotiations may have entered into a draft agreement as a step before the execution of the final contract.

While concluding, the Supreme Court in *Uttrakahand Purv case*[17] observed that the point of limitation was a mixed question of fact and law and is also a question of jurisdiction[18]. In this regard, the Supreme Court relied on the decision in *NTPC Ltd.* v. *Siemens Atkeingesellschaft*[19] to opine that the Arbitral Tribunal would deal with limitation under Section 16 of the Arbitration Act. Hence, the Arbitral Tribunal's competence to rule upon its jurisdiction was upheld.

The decision in *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*[20] — carving out an exception

The general rule in India suggests that the question of limitation is to be referred to the Arbitral Tribunal. But what if the very invocation of the arbitration itself appears to be time-barred?

In *BSNL* v. *Nortel Networks India (P) Ltd.*[21], the Supreme Court of India dealt with a peculiar case. The issue involved in the appeal was whether an application filed under Section 11 of the Arbitration Act was liable to be rejected on grounds of (*i*) the application being time-barred; and (*ii*) the claims being ex facie time-barred. While allowing the appeal, the Supreme Court held that the object of the Arbitration Act is to resolve disputes expeditiously.

While Section 11 of the Arbitration Act did not prescribe any period for filing an application under sub-section (6) for appointment of an arbitrator, the Supreme Court opined that Section 43 of the Limitation Act, 1963 (Limitation Act) clearly provided that the provisions of the Limitation Act would apply to arbitrations as well. Further, since none of the articles in the Schedule to the Limitation Act provided for a time period for filing an application for the appointment of an arbitrator under Section 11, the residual provision under Article 137 was held to be applicable. In terms of Article 137, the limitation for filing an application under Section 11(6) was held to be of three years which would trigger from the date of refusal to appoint the arbitrator, or on the expiry of 30 days in terms of Section 11, whichever is earlier.

While rendering these observations, the Supreme Court was careful to point out that the period of limitation for filing a petition seeking appointment of arbitrator(s) could not be confused or conflated with the period of limitation applicable to substantive claims made under the underlying contract. The period of limitation for such claims would be prescribed under various articles of the Limitation Act. The limitation for deciding the underlying disputes was therefore, held to be necessarily distinct from that of filing an application for the appointment of an arbitrator.

On whether the court acting under Section 11 of the Arbitration Act was mandated to appoint an arbitrator even in a case where the claims are ex facie time-barred, the Supreme Court observed that in view of the legislative mandate contained in amended Section 11(6-A), a court was required to only examine the existence of the arbitration agreement and all other preliminary or threshold

issues were left to be decided by the arbitration under Section 16 which enshrined the principle of kompetenz-kompetenz.

The Supreme Court concluded that it is only in a very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred or that the dispute is non-arbitrable that the Court may decline to refer the disputes to arbitration. However, if there is even the slightest doubt, the general rule would continue to apply, and the matter would be referred to arbitration.

Existence of the arbitration agreement

Following the 2015 Amendment introducing sub-section (6-A) to Section 11 of the Arbitration Act, the Supreme Court in cases such as *Duro Felguera, SA* v. *Gangavaram Port Ltd.*[22] and *Mayavati Trading (P) Ltd*. v. *Pradyuat Deb Burman*[23] held that the courts, when exercising their authority under Section 11 were only required to ascertain the existence of the arbitration agreement. As a result, the courts in India adopted a somewhat routine approach, primarily focused on checking for the prima facie existence of an arbitration agreement. Up until that point, the guiding principle was often described as "when in doubt, refer", which expedited the appointment of arbitrators, especially within the context of the Indian legal system.

However, the tempo and inclination towards referring disputes to arbitration following the 2015 Amendment was so pronounced, that a Supreme Court decision[24] expressed the view that courts acting under Section 11 of the Arbitration Act should not merely function as a conveyor for disputes to reach arbitrators. Nevertheless, the Supreme Court promptly qualified this statement with a cautious reminder that a limited examination, akin to passing through the "eye of the needle", remained essential to safeguard parties from being compelled to arbitrate in cases which evidently were nonâ€'arbitrable.

(a) Arbitral fee

In a landmark judgment in *ONGC Ltd.* v. *Afcons Gunanusa JV*[25], the Supreme Court addressed the limits of an Arbitral Tribunal's authority to decide matters concerning their own remuneration and expenses. The Supreme Court ruled that arbitrators operating under the Arbitration Act do not possess the unilateral power to issue binding and enforceable orders determining their fees.

The Supreme Court emphasised that the independent determination of fees contradicts the principles of party autonomy and the doctrine of in rem suam

decisions. In other words, arbitrators should not adjudicate their own financial claims against the parties involved.

Nonetheless, the Supreme Court was of the view that the Arbitral Tribunal held the discretion to allocate costs, which may encompass arbitrators' fees and expenses, as outlined in Sections 31(8) and 31-A of the Arbitration Act. The Arbitral Tribunal can also request an advance deposit in accordance with Section 38 of the Arbitration Act. If the Arbitral Tribunal, while determining costs or deposits, makes any findings regarding arbitrators' fees in the absence of an agreement between the parties and arbitrators, these findings cannot be enforced in favour of the arbitrators.

Moreover, Arbitral Tribunal can only exercise a lien over the delivery of arbitral award if the payment to it remains outstanding under Section 39(1) of the Arbitration Act. Further, if a party deemed the fee demanded by the arbitrators to be unreasonable, it had the option to approach the court for a review of the fees under Section 39(2) of the Arbitration Act.

The decision in *ONGC case*[26] unambiguously states that a fee increase can only be implemented when all parties agree. If one party disagrees, the Tribunal must either adhere to the previous fee arrangement or refuse to serve as an arbitrator. The key question here is whether violating this rule, and specifically insisting on the fee increase, results in the termination of the Tribunal's mandate or not.

The Supreme Court while answering this point in *Chennai Metro Rail Ltd.* v. *Transtonnelstroy Afcons (JV)*[27] placed reliance upon another decision rendered by it in *NHAI v. Gayatri Jhansi Roadways Ltd.*[28] to observe that an application to terminate the mandate of the Arbitral Tribunal when the Tribunal seeks to raise its fees unilaterally would be entirely disingenuous and not permissible. This is because an arbitrator does not become legally incapable of fulfilling their duties in such a scenario. Hence, a unilateral increase in arbitral fee, though not permissible, shall not have the effect of terminating the mandate of the Arbitral Tribunal to act in the matter.

(b) Unilateral appointment

It is firmly established that the unilateral appointment of sole arbitrators is considered void ab initio, and any consequences stemming from such an appointment are likewise deemed non-existent. Over the years, several legal precedents[29] have established the following fundamental principles settling the

law on the invalidity of unilateral appointments:

(*i*) Generally, the unilateral appointment of a sole arbitrator is inherently void, rendering anyone unilaterally proposed as an arbitrator de jure ineligible under Section 12(5) in conjunction with the Seventh Schedule of the Arbitration Act.

(*ii*) The parties involved in a dispute have the authority to waive the application of Section 12(5) through a written agreement reached after the emergence of the disputes.

(*iii*) When a person's eligibility to serve as an arbitrator is compromised, it fundamentally undermines the entire arbitration process. Consequently, any outcomes or decisions arising from such an unlawful appointment are legally null and void.

(c) Fraud

The jurisprudence concerning the arbitrability of fraud in India has evolved over time. In *N. Radhakrishnan* v. *Maestro Engineers*[30], the Supreme Court while implicitly denying the application of competence-competence principle, ruled that disputes involving allegations of serious fraud and malpractices could not be referred to arbitration. However, in *Swiss Timing Ltd.* v. *Commonwealth Games 2010 Organising Committee*[31], a Single Judge of the Supreme Court pointed out that *N. Radhakrishnan case*[32] did not align with the law established in *Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums*[33], emphasising that mere allegations of fraud should not automatically preclude arbitration.

The tides changed when a Division Bench of the Supreme Court in *A. Ayyasamy* v. *A. Paramasivam*[34], while recognising the competence of an Arbitral Tribunal to determine arbitrability of matters, clarified that parties opposing arbitration must demonstrate genuine non-arbitrability, particularly in cases involving serious fraud with criminal implications. Similarly, another judgment in *Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*[35] firmly established that only cases with very serious fraud allegations in the nature of criminal offences, should be considered non-arbitrable. The following two tests were emphasised by the Supreme Court to determine what constitutes "serious allegation of fraud":

(*i*) whether the plea permeates the entire contract and above all, the agreement of arbitration, rendering it void?; or alternatively;

(*ii*) whether the allegations of fraud touch upon the parties' internal affairs inter se having no implication in the public domain?

Finally, in *Vidya Drolia* v. *Durga Trading Corpn.*[36], a three-Judge Bench of the Supreme Court conducted a comprehensive review of contemporary jurisprudence regarding the arbitrability of legal disputes. While the main issue in that matter pertained to the arbitrability of landlord and tenant disputes, the Court also delved into the question of whether fraud-related matters could be subject to arbitration. The judgment in *Vidya Drolia case*[37] emphasised the importance of not doubting or dismissing arbitration as an inherently flawed or inferior method of dispute resolution when it comes to addressing issues with significant public policy implications. The Supreme Court drew a parallel between the roles of Arbitral Tribunals and traditional courts, underscoring that, arbitrators, like Judges, are duty-bound to maintain impartiality, independence, adhere to the principles of natural justice, and uphold a fair and just procedural approach. Ultimately, the decision in *N. Radhakrishnan case*[38] was overruled and the Supreme Court in *Vidya Drolia case*[39] asserted that allegations of fraud could be referred to arbitration, especially when they pertain to civil disputes. The exception to this rule is if the fraud has the effect of rendering the arbitration clause itself null and void.

(d) Subject-matter arbitrability

In *Vidya Drolia case*[40], the Supreme Court distinguished between a "non-arbitrable claim" and a "non-arbitral subject-matter". The former arises due to the scope of the arbitration agreement or when the claim cannot be effectively resolved through arbitration. An example of the same would be excepted matters, which refers to specific issues or disputes that the parties exclude from the ambit of arbitration. These exclusions are thoughtfully incorporated into the arbitration agreement to delineate the precise limits of the arbitral tribunal's jurisdiction setting out what falls within and outside the purview of the arbitral process. Typically, these carve-outs pertain to certain kinds of disputes and claims in relation to which the parties collectively determine that arbitration is not an appropriate avenue for dispute resolution. In *Harsha Constructions* v. *Union of India*[41], the Supreme Court emphasised that issues expressly defined as excepted or excluded within the arbitration agreement cannot be subjected to arbitration.

On the other hand, non-arbitrable subject-matter primarily refers to disputes that, under applicable laws, are not amenable to arbitration. Regarding the arbitrability of the subject-matter, it is generally acknowledged that almost every civil or commercial dispute, whether contractual or not, that can be adjudicated by a court can also, in principle, be resolved through arbitration. This is unless the Arbitral Tribunal's jurisdiction is explicitly or implicitly excluded. Lawmakers have

the authority to exclusively designate certain categories of proceedings for resolution by courts, tribunals, or other public forums. Thus, when public policy dictates that a dispute is non-arbitrable, a referring court, acting under Section 11 (or Section 8) of the Arbitration Act, would decline an application to refer the dispute to arbitration, even if both parties request it.

Examples of non-arbitrable disputes include matters stemming from (*i*) criminal offences; (*ii*) matrimonial issues related to divorce, judicial separation, conjugal rights, child custody; (*iii*) guardianship matters; (*iv*) insolvency and winding-up proceedings; (*v*) testamentary matters like the grant of probate, letters of administration, and succession certificates; and (*vi*) eviction or tenancy disputes governed by special statutes where tenants enjoy statutory protection against eviction.

Notably, non-arbitrable matters typically pertain to rights and actions in rem, meaning rights enforceable against the world at large, as opposed to rights in personam, which are protected against specific individuals. In addition to disputes involving rights in rem before civil courts, there are certain classes of disputes subject to exclusive jurisdiction conferred upon specialised forums by legislation, which excludes the ordinary civil court. The general rule is that when the jurisdiction of an ordinary civil court is excluded due to the grant of exclusive jurisdiction to a specific court or tribunal for reasons of public policy, such disputes are not amenable to arbitration.

Conclusion

The principle of competence-competence stands as a cornerstone of international arbitration and plays a crucial role in guiding the arbitration process across jurisdictions. This principle entrusts Arbitral Tribunals with the authority to determine their own jurisdiction, including issues related to the existence and validity of the arbitration agreement. It upholds the idea of minimal judicial intervention at the pre-reference stage, promoting the expeditious resolution of disputes through arbitration.

In the context of Indian law, Section 16 of the Arbitration Act firmly establishes the principle of competence-competence, emphasising the primacy of arbitration agreements. Recent decisions of the Supreme Court have provided important insights into the application of competence-competence, offering clarity on interplay of the doctrine with matters such as arbitral fees, limitation, unilateral appointments, allegations of fraud, and subject-matter arbitrability. These rulings

have aimed to strike a balance between party autonomy and public policy concerns, making arbitration a more effective and attractive method of dispute resolution in the Indian legal landscape.

***Founder and Head of Trinity Chambers, Delhi.**

****Counsel at Trinity Chambers, Delhi.**

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10. Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*.
11. Fouchard Gaillard, *Goldman on International Commercial Arbitration* and Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*.
12. (2020) 2 SCC 455.
13. (2005) 8 SCC 618.
14. (2009) 1 SCC 267.
15. In *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618, the Supreme Court held that

the scope of power exercised by a court under Section 11 was to first decide: (*i*) whether there was a valid arbitration agreement; (*ii*) whether the person who has made the request under Section 11 was a party to the arbitration agreement; and (*iii*) whether the party making the motion had approached the appropriate High Court.

16. (2020) 2 SCC 455.
17. (2020) 2 SCC 455.
18. *ITW Signode (India) Ltd. v. Collector of Central Excise*, (2004) 3 SCC 48.
19. *NTPC Ltd. v. Siemens Atkeingesellschaft*, (2007) 4 SCC 451.
20. (2019) 5 SCC 755
21. *BSNL v. Nortel Networks India (P) Ltd.*, (2021) 5 SCC 738.
22. (2017) 9 SCC 729.
23. (2019) 8 SCC 714.
24. *NTPC Ltd*. v. *SPML Infra Ltd.*, 2023 SCC OnLine SC 389
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27. 2023 SCC OnLine SC 1370.
28. *NHAI* v. *Gayatri Jhansi Roadways Ltd.*, (2020) 17 SCC 626
29. *HRD Corpn.* v. *GAIL*, (2018) 12 SCC 471; *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377; *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd.*, (2020) 20 SCC 760; *Bharat Broadband Network Ltd.* v. *United Telecoms Ltd.*, (2019) 5 SCC 755; *Haryana Space Application Centre v. Pan India Consultants (P) Ltd.*, (2021) 3 SCC 103; *Jaipur Zila Dugdh Utpadak Sakhari Sangh Ltd. v. Ajay Sales & Suppliers*, 2021 SCC OnLine SC 730; and *Ellora Paper Mills Ltd. v. State of M.P.*, (2022) 3 SCC 1.
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41. (2014) 9 SCC 246.