"Role of Appointing Authority in the Appointment of Arbitrators"

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The main object of the project is to analyse the role of appointing authority under the Arbitration and conciliation Act 1996 and whether it is different from the role of appointing authorities in the general practice of international arbitration.

Modern commercial transactions including the transfer of assets, tangible and intangible, and services across boundaries, for wealth-creation, are important to the international economic order. The complex nature of commercial intercourse and the divergent interests throw up a plethora of disputes. International Arbitration has become a preferred means of resolving these disputes.

The Arbitration and Conciliation Act[1] in India was passed to comprehensively provide a fair, efficient and capable procedure, inter alia for international arbitrations and enforcement of foreign awards[2]. The act, based on the UNCITRAL Model Law for International Commercial Arbitration [3], significantly provides for a unified legal framework for dispute settlement by international arbitration (hereinafter 'arbitration')[4].

It may sometimes be necessary to entrust the task of appointing arbitrators to somebody or authority. Though parties may agree to the choice of the appointing authority (AA), the non-cooperative conduct of a party, may cause a deadlock, frustrating the arbitration agreement. The Act provides for the Chief Justice of India (CJI) to be requested to make the appointment. This research contrasts the role of the CJI as an AA with that of AAs in the general practice of arbitration under institutional rules. In doing so, section 2 lays out a general overview of arbitration. Section 3 and 4, then examine the role of AAs under the Act and in the general practice of arbitration. Section 5 attempts to identify the differences between the two and to answer the question at the core of this research.

PART II – A GENERAL OVERVIEW OF ARBITRATION

2.1. ARBITRATION

[1] *The Arbitration and Conciliation Act, 1996,* [Act 26 of 1996]
[2] Part I provides the law for arbitration.
[3] *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 1985,* Article 11, [Adopted by UNCITRAL on 21.06.1985, and by the United Nations General Assembly Resolution 44/72, dated 11.12.1985].
[4] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Preamble.

> "*The process by which the parties to a dispute submit their differences to the judgment of an impartial person or group appointed by mutual consent or statutory provision*[5]*".*

Arbitration is voluntary submission of a dispute to an impartial third party referee for a final, binding decision[6].

2.2. CHARACTERISTICS OF ARBITRATION

a. Agreement: Agreement between parties is a sine qua non for resort to arbitration[7] and can either be in the form of:

- an arbitration clause in the main contract, or,
- a 'submission to arbitration' agreement.

Agreements are procedural arrangements, subject to public law[8] independent of the validity of the main contract[9]. The only exceptions to this are 'arbitration without privity'[10] and Statutory or Compulsory Arbitration[11].

b. Freedom of Choice of:

i. Tribunal/Arbitrator: Parties to arbitration are free to choose the arbitrators, and arbitral tribunal, that is, institutional or[12] ad hoc[13], so that the dispute may be resolved by independent, impartial judges of their choice. The choice may however sometimes need to be delegated[14] to an AA[15]. A tribunal can thus be constituted with experts, ideal to decide the dispute[16], able grasp all aspects of the

[5] The Free Dictionary, [http://www.thefreedictionary.com/arbitration]
[6] Premera Blue Cross, *Glossary,* [https://www.premera.com]
[7] Redfern, A., *et al,* Law and Practice of International Arbitration, (4th Ed), 6, (London: Sweet & Maxwell, 2004)
[8] Rubino-Sammartano, M., International Arbitration Law and Practice, (2nd Rev. Ed), 195, (The Hague, Kluwer Law International, 2001).
[9] *Id,* at 196.
[10] Paulsson, J., *Arbitration without Privity,*424, in Walde, T., (Ed.), The Energy Charter Treaty, [Hague: Kluwer Law International, 1996]; Paulsson, J., *Arbitration Without Privity,* 232, ICSID Rev-FJIL, Vol. 12(2), 1995.
[11] Rubino-Sammartano, M., *Supra*, Note 8, at 25.
[12] Redfern, A., *Supra*, note 7, at11
[13] Redfern, A., *Supra,* note 7, at 216
[14] This being the core of this project is discussed in detail, *infra*.
[15] Redfern., A., *Supra,* note 7, at 11
[16] Smith, R.M., *About ADR: Arbitration Overview,* [Available at http://www.robertmsmith.com/about_adr/arbitration_overview.asp]

dispute fast and pass a sensible award[17]. Difficulties like unfamiliarity with issues, erroneous order[18] or delays in familiarizing arbitrators with the issues are reduced[19].

ii. Law and Jurisdiction: Parties are free to choose the lex arbitri that regulates proceedings and the place of arbitration[20]. The lex arbitri need not be connected, either with the place of the transaction/dispute or the seat of the arbitration. The parties can choose a neutral place and law[21], compatible with the lois de police and ordre public[22] of the place of arbitration.

c. Privacy and Confidentiality: Arbitration is generally a private and confidential process[23], privacy, a consequence of the agreement on private adjudication, the exclusion of strangers, implicit therein[24] and confidentiality, the duty of non disclosure of participants including (inter alia) arbitrators, parties, counsel, clerical and administrative staff and witness[25].

d. Enforceable Awards: The award of a tribunal binds both parties, is enforceable locally and internationally, and has lasting legal consequences[26]. A plethora treaties and conventions, like the New York Convention guarantee their recognition and enforcement[27], providing a well developed framework that makes awards easier to enforce than foreign judgements[28]

e. Neutrality of the Tribunal: Parties in International Arbitration being of different nationalities, each party would be apprehensive of litigation in the courts of other's country fearing its inclination to decide in favour of the local party[29]. There would also be concerns with the 'local party's' awareness of the lex loci, lex fori, the legal environment and the nuances of local litigation[30], as well as litigation process in an unfamiliar language[31], and retaining counsel, unfamiliar with their business. International Arbitration ensures a choice of a neutral venue, neutral arbitrators and

[17] Redfern, A., *Supra,* note 7, at 26
[18] Moss, G.C., International Commercial Arbitration, 150, [Norway: Tano Aschehoug, 1999].
[19] *Id*
[20] Redfern, A., *Supra,* note 7, at 90; See also Rubino-Sammartano, M., *Supra,* note 8, at 477
[21] Redfern, A., *Supra,* note 7, at 92
[22] Rubino-Sammartano, M., *Supra,* note 8, at 504
[23] Redfern, A., *Supra,* note 7, at 32.
[24] Rubino-Sammartano, M., *Supra*, note 8, at 799.

[25] *Id.*
[26] Rubino-Sammartano, M., *Supra,* note 8, at 12
[27] *Id.*
[28] Redfern, A., *Supra,* note 7, at 518
[29] Moss, G.C., *Supra,* Note 18
[30] *Id*
[31] Redfern, A., *Supra,* note 7, at 26

neutral lex arbitri, alleviating apprehensions of an imbalance[32]. Delays due to courts declining jurisdiction based on the forum non conveniens doctrine are also avoided.

2.3. NEED FOR APPOINTING AUTHORITIES

Though arbitration is intended to be a voluntary process, once a dispute has arisen, even parties acting bona fide find it difficult to agree, ex post facto[33]. Parties may attempt to obstruct the appointments to delay the arbitration. This can frustrate the agreement[34]. AAs are a means of breaking deadlocks that render agreements inoperable[35]. Many arbitration rules provide for AAs to appoint arbitrators, if the tribunal is not constituted within a prescribed period[36]. It is not just a fallback mechanism; it is useful in several cases which include where the appointment of sole arbitrators is necessary, under the agreement, or under arbitral rules[37].

The advantage of AAs is that they usually have a better overview of the suitability of arbitrators. The choice of AA impacts the choice of the arbitrator as every organisation has its preferences and guidelines as to relevant considerations and procedure. A skilled and experienced arbitrator is a key element of a fair and effective arbitration as 'arbitration is only as good as the arbitrators'[38]. Therefore the choice must be made carefully. Prior agreement as to the AA is important, especially in ad hoc arbitrations where there is no institutional framework to provide for it[39].

PART III - INDIAN LAW

3.1. CONSTITUTION OF THE TRIBUNAL UNDER THE ACT

The Act gives parties the freedom to agree on selection of arbitrators, the number of arbitrators and their nationality[40]. If parties do not indicate the number of arbitrators, the arbitral tribunal will consist

[32] *Id.*
[33] Lew, J., Comparative International Commercial Arbitration, 237, [London: Kluwer Law International, 2003].
[34] *Id.*
[35] Redfern, A., *Supra,* Note 7, at 225.
[36] Lew, J., *Supra,* Note 33, at 239.
[37] *The London Court of Arbitration* (*LCIA*) *Arbitration Rules*, *1998,*Article 5
[38] Redfern, A., *Supra,* Note 7, at 11.
[39] Lew, J., *Supra*, Note 33, at 240.
[40].*The Arbitration and Conciliation Act,* 1996, *Supra*, Note 1, Sections 10(1), 11(1)(2).

of a sole arbitrator[41]. Usually, each party appoints arbitrators, who then appoint the presiding arbitrator[42].

A request may be made to the CJI[43] to make the appointment, where

i. any party fail(s) to nominate their arbitrator(s) or to act according to the procedure agreed,

ii. the nominated arbitrators fail to agree on the presiding arbitrator,

iii. the parties are unable to agree to the choice of a sole arbitrator.

The CJI can act as necessary to constitute the tribunal, keeping in mind the nationality of parties and the desired qualifications of the arbitrator(s), after satisfying himself that the conditions for exercise of the power exists[44]. The decision made is final and cannot be challenged in appeal[45].

3.2. THE CHIEF JUSTICE AS AN APPOINTING AUTHORITY

The Supreme Court ruled previously, that the CJI performed an administrative function, not a judicial nor quasi-judicial one. No contentious issues could be decided[46]. The Court was not required to pass a judicial order[47]. The legislative intent being that the CJI only aids the expedient commencement of arbitration, by appointing the tribunal, it would be inappropriate for the CJI to determine issues, which the tribunal was empowered to determine[48]. The Court held that the Act did not contemplate either an adjudication or a response from the other party in the process[49]. The Court was persuaded by the Act's enunciated objective of minimising the Court's role in arbitration[50].

A previous bench had opined otherwise[51], and referred the matter to a larger bench, resulting the judgement supra, the ratio decidendi of which operated as law till it was overruled in the S.B.P. &

[41] *Id*, Section. 10(2).
[42] *Id*, Section. 11(3). .
[43] *Id*, Section. 11(12)(a): *In International Arbitration, any reference to 'Chief Justice' shall mean the Chief Justice of India*
[44] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section. 11(4)(5)(6).
[45] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section. 11(7).
[46] *Konkan Railway Corpn. Ltd. & anr. v. Rani Construction Pvt. Ltd.*, [Supreme Court of India], 30.01.2002, [(2002) 2 SCC 388].
[47] *Sundaram Finance Ltd. vs. NEPC India Ltd.*[Supreme Court of India] [1999(2) SCC 479].
[48] *Konkan Railway Corporation Ltd. vs. Mehul Construction Co.*, [Supreme Court of India], 21.08.2000, [2000 (7) SCC 201]' See also *Supra,* Note 1, Section 16.
[49] *Konkan Railway Corpn. Ltd. & anr. v. Rani Construction Pvt. Ltd.*, *Supra*, Note 46.
[50] *Nimet Resourcs Inc. & Anr. Vs.Essar Steels Ltd.*, .[Supreme Court of India] , [(2000 (7) SCC 497)].
[51] *Konkan Railway Cooperation Ltd. vs. Rani Construction Pvt. Ltd,* [Supreme Court of India], 14.10.2000, [2000 (8) SCC 159].

Co[52] case. The appointment of an arbitrator against the opposition of one of the parties on the ground(s) that:

i. the CJI had no jurisdiction,

ii. there was no arbitration agreement,

iii. there was no arbitrable dispute subsisting, or that,

iv. the conditions for exercise of power do not exist[53],

v. the arbitrators qualifications, contemplated by the parties cannot be ignored and has to be borne in mind,

are adjudications which affect the rights of parties. Going to arbitration, in the absence of an agreement or arbitrable dispute, affects the parties' rights and imposes the burden of expenses even if jurisdiction objections are upheld by the arbitral tribunal.

In SBP & Co, supra, the Court ruled that it is difficult to view the power of the CJI as purely administrative and not judicial, and did not require the opposite side to be heard. Administrative orders, directed at regulation or supervision, were distinguished from judicial orders, deciding the rights of parties involved in the dispute. Where two opposing points are contended and the Court's decision vitally affects the rights of party, the order is judicial, not administrative. The appointment of arbitrators by the CJI involves adjudication on the rights of the parties, which cannot be decided either way without an adjudicatory process. It is pertinent that such determination be designated as a 'decision'[54]. The notice to the opposite party is not a mere intimation of the request for the appointment, but an opportunity to be heard, reflective of the audi alteram partem principle of natural justice. The Court was also guided by the general principle that the Country's highest judicial authority, unless shown otherwise, must act judicially[55].

It was also observed that if the CJI adjudicates and determines jurisdictional issues with finality, the tribunal can decide the dispute on merits, unimpeded by them. Where he refuses the appointment of arbitrators on upholding jurisdictional objections, the costs of having the tribunal decide the same issues is avoided[56].

[52] *M/s S.B.P. & Co. v. M/s Patel Engineering Ltd. & Anr.*, [Supreme Court of India], 26.10.2005 [Unreported Judgement in Appeal (Civil) 4168 of 2003 Available at www.judis.nic.in]. The rest of section is based largely on the ruling of the court in this judgement.

[53] As laid out in *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section 11.

[54] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section. 11(7).

[55] *M/s S.B.P. & Co. v. M/s Patel Engineering Ltd. & Anr.*, *Supra*, Note 52.

[56] *Id*.

The existence of conditions for the exercise of the power be verified ex ante. The CJI must decide, with finality the preliminary aspects, viz[57].,

i. his own jurisdiction, to entertain the request,

ii. the existence of a valid agreement,

iii. the existence or otherwise of a valid claim,

iv. the existence of the conditions for the exercise of his power, and,

v. the qualifications of the arbitrator or arbitrators.

He can consider affidavits and documents produced, or take such evidence as necessary. When seized with the question of the nationality of the arbitrator, the designated judge ruled in MSA Nederland B.V. v. M/s Larsen and Tourbro Ltd., that the Act[58]only persuaded the appointment of a neutral arbitrator, but it was open to the judge acting as the AA to appoint any arbitrator it deemed suitable[59].

The power of the CJI to delegate the power is restricted. The power was conferred specifically on the CJI and can only be delegated to judges of the Supreme Court, as judicial functions can only be performed by judges[60]. Non-judicial bodies cannot ordinarily be entrusted with the entire function as envisaged by the act function and can only assist in the identification of suitable arbitrator(s). They may however sometimes be entrusted with only the actual appointment after the CJI has determined jurisdictional issues and dispensed with the element of adjudication. The role cannot be entrusted to the District Court either. This is implicit in the fact that the Act gives District Courts other powers to act under the Act, but reserved this power for the highest judicial authority in the country[61]. Once the tribunal is seized of the claim, however, the Courts would not interfere with the arbitration[62].

3.3. EFFECT ON THE KOMPETENZ-KOMPETENZ DOCTRINE

[57] *Id*.

[58] *The Arbitration and Conciliation Act,* 1996, *Supra* Note 1, Section 11(9): *In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities*

[59] *MSA Nederland B.V. v. M/s Larsen and Tourbro Ltd.*, [Supreme Court of India], 29.11.2005, [Unreported judgement in Arbitration Petition 22 of 2005, available at www.judis.nic.in].

[60] Observations of the *Court* in paragraphs in *Supreme Court Advocates on Record Association Vs. Union of India* [(1993) 4 SCC 441 at 668] support the argument that the expression *Chief Justice* is used in the sense of collectivity of judges of the Supreme Court and the High Courts.

[61] *M/s S.B.P. & Co. v. M/s Patel Engineering Ltd. & Anr.*, *Supra*, Note 52.

[62] *Id*.

The Act recognises the competence of tribunals, to rule on their jurisdiction, including on the existence or validity of the agreement and an arbitrable dispute[63]. The rejection of objections only be appealed after the award[64]. However, if the tribunal accepts the objection and declines jurisdiction an immediate appeal is permissible[65].

The Kompetenz-Kompetenz doctrine fully applies only when the tribunal is constituted without the CJI's intervention. His decision on preliminary objections binds the parties, who must participate in arbitration, only on the merits of the claim[66].

Tribunals are not conferred with exclusive jurisdiction to determine jurisdictional issues. The recognition of kompetenz-kompetenz[67] does not exclude the CJI's power to determine the preliminary issues, as it would be absurd to constitute tribunals where no agreement exists.[68] It would also be absurd to refuse to consider the competence of judicial and quasi-judicial authorities, seized of legal actions, before referring the parties to arbitration[69]. Such authorities must act judicially, not mechanically. Tribunals cannot ignore ex ante judicial decisions[70].

PART IV - GENERAL PRACTICE

4.1. APPOINTMENT OF ARBITRATORS

Agreement is the essence of arbitration. The agreement of parties is the most common means of appointing arbitrators. Party autonomy is widely recognised. However, problems may arise in the appointment of sole or presiding arbitrators, or from the obstructive conduct of a party. The UNCITRAL Arbitration Rules, 1976[71], and the Arbitration Rules of the Permanent Court of Arbitration[72] (PCA) provide,

[63] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section. 16.
[64] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section. 34.
[65] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section. 37.
[66] *M/s S.B.P. & Co. v. M/s Patel Engineering Ltd. & Anr.*, *Supra,* Note 52.
[67] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section. 16.
[68] *Wellington Associates Ltd. vs. Kirit Mehta*, [Supreme Court of India], ,[2000 (4) SCC 272]
[69] *The Arbitration and Conciliation Act,* 1996, *Supra,* Note 1, Section. 8.
[70] *M/s S.B.P. & Co. v. M/s Patel Engineering Ltd. & Anr.*, *Supra,* Note 52.
[71] *United Nations Commission on International Trade Law Arbitration Rules,* 1976*,* [Adopted by UNCITRAL on 28.04.1976, and by the United Nations General Assembly Resolution 31/98, dated 15.12.1976], Article 6, 7, 8.
[72] *Permanent Court Of Arbitration Optional Rules For Arbitrating Disputes Between Two States.*, [Entry into effect: 20.10.1992], Article 6, 7, 8.; *Permanent Court Of Arbitration Optional Rules For Arbitrating Disputes Between Two Parties Of Which Only One Is A State*., [Entry into effect: 03.07.1993], Articles .6, 7, 8.; *Permanent Court Of Arbitration*

i. where a sole arbitrator to be appointed, for parties to choose either the arbitrator or the AA by agreement, or,

ii. where three arbitrators are to be appointed, for each party to nominate an arbitrator who choose the presiding arbitrator, or an AA.

If parties fail to nominate an AA, the Secretary General of the PCA may be requested to designate anyone to make the appointment with due regard to considerations necessary to ensure the appointment of independent arbitrators. The Model Law, however envisages that the judicial body, competent to perform the functions of assistance and supervision, will perform this function[73].

The Arbitration Rules of the International Chamber of Commerce (ICC), permit parties to nominate their arbitrators, subject to confirmation by the Secretary General[74]. The International Court of Arbitration (ICA)[75] intervenes as an AA[76]:

1. Where any party fails to nominate its arbitrator, and,

2. To appoint a presiding arbitrator, if no alternate method is agreed.

Where the Secretary General decides not to confirm a party appointed arbitrator, he may refer the issues to the ICA[77]. The London Court of International Arbitration (LCIA) Arbitration Rules give the LCIA Court the exclusive power to appoint arbitrators[78]. The International Convention for Settlement of Investment Disputes (ICSID) provides that the Secretary General may request the Chairman of the Administrative Council to appoint the arbitrators where parties fail to appoint arbitrator(s) or where nominated arbitrators fail to choose a presiding arbitrator, and to designate the presiding arbitrator where all the arbitrators are appointed as such by the Chairman of the Administrative council[79]. Similarly the World Intellectual Property Organisation's (WIPO) Arbitration Rules, empower the WIPO Arbitration and Mediation Centre to make the appointment[80].

Optional Rules For Arbitration Involving International Organizations And States., [Entry into effect: 01.07.1996], Articles 6, 7, 8.; *Permanent Court Of Arbitration Optional Rules For Arbitration Between International Organizations And Private Parties,* [Entry into effect: 01.07.1996], Articles 6, 7, 8.

[73] *UNCITRAL Model Law on International Commercial Arbitration*., *Supra*, Note 3, Article 11.

[74] *International Chamber of Commerce Arbitration Rules, 1998,* Entry in to effect: 01.01.1998]. Articles 8,9(2)

[75] *Id,* Article 1.

[76] *Id,* Article 8(4)

[77] *Id,* Article 9(2).

[78] *The London Court of Arbitration* (*LCIA*) *Arbitration Rules*, *1998,*Article 5, [Entry into effect: 01.01.1998]

[79] *Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States,* Article 38; See also *ICSID Rules Of Procedure For Arbitration Proceedings (Arbitration Rules),* Rule 4.

[80] *World Intellecutal Property Arbitration Rules,* Article 19.

4.2. APPOINTING AUTHORITIES

The General Practice of Arbitration envisages different AAs to ensure the appointment of arbitrators and expedient commencement of arbitration. These AAs intervene on the expiry of a prescribed period[81]. Time may however, sometimes be extended. The ICC may permit parties to continue the search for suitable arbitrators[82]. The LCIA rules however envisage that appointment of arbitrators is the exclusive prerogative of the LCIA Court.

4.2.1. Arbitral Institutions

Most Arbitral Institutions are empowered to act as AAs by their rules[83]. They even offer services as AAs in arbitration not conducted under their rules[84]. The advantage of using Institutions as AAs is that they are more familiar with the suitability of arbitrators than other AAs[85]. 4.2.2. Professional Institutions.

The governing bodies or such other offices of professional institutions may serve as AAs, to appoint the sole or presiding arbitrator, if necessary[86].

4.2.3. Trade Associations

Trade associations or 'marketplace clubs' may also serve as AAs. The advantage of such a choice is that the dispute is decided by persons familiar with the trade, and time is not spent on familiarising them with technicalities[87].

4.2.4. National Courts

Where parties have not agreed to an AA, before the dispute, and cannot choose one ex post facto, national courts may have the jurisdiction and the power to make the appointment, and these courts in such given circumstances maybe the only fora that can break the consequent deadlock. Any party may approach the court, sans consent of the other, to make the appointment. Courts, viewed as lacking the necessary experience, are rarely chosen for this purpose. They are usually default mechanisms in

[81] This period varies under different rules, from 30 days to 90 days.
[82] Lew, J., *Supra*, Note 32, at 244.
[83] See *Supra,* 4.1. Appointment of Arbitrators.
[84] Redfern, A., *Supra,* Note 7, at 223.
[85] *Id*.
[86] Redfern, A., *Supra,* Note 7, at 225.
[87] Redfern, A., *Supra,* Note 7, at 225.

municipal arbitration law[88]. The Model Law regards courts as fora of last resort where all other methods have failed[89].

4.3. RESORT TO APPOINTING AUTHORITIES

Parties may not always agree on a choice of an AA. When parties attempt to obstruct the appointment, two ways of approaching an authority sans agreement are envisaged.

4.3.1. By Default

Where parties choose institutional arbitration, the rules of the institution will provide for the institution to take necessary steps to appoint the arbitrator(s). This power of the institution accrues by default and can usually be exercised suo moto[90].

4.3.2. By Designation

Arbitration rules may empower officials of institutions to designate the AA. The UNCITRAL Rules and the Optional Rules of the PCA permit the Secretary General of the PCA to designate the AA. The Secretary General reviews necessary documents and then makes his decision[91]. National arbitration laws also permit Courts to designate the AA. Designation is useful in ad hoc arbitrations, with no institutional framework to confer default powers on an AA.

4.4. DETERMINATION OF JURISDICTIONAL ISSUES

4.4.1. Kompetenz-Kompetenz.

Determination of preliminary objections and jurisdictional issues is usually taken in its sweep by powers inherent in a tribunal's appointment[92]. The possible reason is that parties having chosen the tribunal to adjudicate on their dispute, they must have intended it to decide all disputes, including issues of jurisdiction[93]. Kompetenz-kompetenz, while often implicit and inherent, finds recognition in arbitral rules. The UNCTRAL rules empower tribunals to rule on such jurisdictional objections[94]

[88] Lew, J., *Supra*, Note 33, at 241.
[89] *UNCITRAL Model Law on International Commercial Arbitration*., *Supra,* Note 3, Article 11(3).
[90] See *Supra,* 4.1. Appointment of Arbitrators.
[91] Redfern, A., *Supra,* Note 7, at 229.
[92] Redfern, A., *Supra,* Note 7, at 29.
[93] Tweeddale A., & Tweeddale K., Arbitration of Commercial Disputes., 289, [United States: Oxford University Press, 2009]
[94] Redfern, A., Supra, Note 7, at 300

Parties can object to the jurisdiction on various grounds[95]:

i. There exists no valid agreement,

ii. The dispute is not arbitrable, being beyond the scope of the agreement, or prohibited by law for the purpose of resolution by arbitration,

iii. The party seeking arbitration has waived its right to arbitrate or estopped from claiming it,

iv. A party to a multilateral arbitration is not a proper party[96].

A tribunal must determine its jurisdiction in determining claims coming before it in order to confer legitimacy on its award[97]. In deciding jurisdictional issues it may[98]:

i. Rule on jurisdiction at the outset,

ii. Issue an interim award on jurisdiction, or,

iii. Proceed with arbitration and rule on jurisdiction in the final award[99].

If there is no valid agreement tribunals must decline jurisdiction. Though, this could arguably mean that, jurisdiction being a creation of agreement, it lacked jurisdiction to decide the validity of the agreement[100], the doctrine of Kompetenz-kompetenz is widely recognised[101]. Similarly the tribunal must decline jurisdiction where no arbitrable dispute exists[102]. Where the tribunal rules that it has no jurisdiction, the arbitration, and the tribunal itself ceases to exist[103]. Some rules envisage that prima facie existence of an agreement, be determined ex ante. If objections are raised as to the existence or validity of an agreement, the ICC court, ICSID secretariat and LCIA Court first determine prima facie existence[104]. Where the prima facie existence of an agreement is apparent, the tribunal is constituted and makes the rules on jurisdictional objections itself[105]. Where the Tribunal accepts jurisdiction it can then proceed to adjudicate on claims.

4.4.2. Role of Courts

[95] Barcelo, J.J., *Who Decides the Arbitrators' Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 1117, 36 Vand. J. Transnat'l L. 1115 (2003) .
[96] Lew, J., *Multiparty Arbitrations,*
[97] Lew, J., *Supra*, Note 33, at 329.
[98] Redfern, A., *Supra,* Note 7, at 305.
[99] *United Nations Commission on International Trade Law Arbitration Rules,* 1976*, Supra*, Note 71, Article 21(4).
[100] Lew, J., *Supra*, Note 33, at 332.
[101] Lew, J., Lew, J., *et al*, *Multiparty Arbitrations*,
[102] Lew, J., *Supra*, Note 33, at 331.
[103] Redfern, A., *Supra*, Note 7, at 305
[104] Howell, D., *Making of Decisions, Directions, Orders and Awards In an Arbitral Insitution: Institutional Role over Decisions, Directions, Orders and Awards*
[105] Redfern, A., *Supra*, Note 7, at 301.;

Recourse to courts may on jurisdictional issues be made at three stages:, before, during or after the arbitration.

i. Before: Courts may determine jurisdiction, in deciding whether to decide the action brought before it or to refer the parties to arbitration. A court may also be approached to determine jurisdiction, where a party alleges the non-existence or lapse of an agreement[106]. Approaching a court to decide the issue is probably more economical[107].

ii. After: During judicial review of the award, either in a proceeding challenging the award or for its recognition and enforcement, courts can refuse recognition and enforcement of the award, where they find that the tribunal wrongly assumed jurisdiction[108].

iii. During: Arbitration law in some jurisdictions empowers Courts to entertain a challenge to the determination of jurisdictional issues and stay the arbitration. This is referred to as concurrent control[109].

The tribunal's determination is usually open to a full judicial review[110]. There are exceptions to the rule in some national laws, for instance in France, Courts are enjoined not to adjudicate on jurisdictional issues[111].

PART V – DIFFERENCE BETWEEN INDIAN LAW AND THE GENERAL PRACTICE OF ARBITRATION

A number of differences can be seen between the approaches of the Act and the general practice to AAs, where parties have not designated one in their agreement.

5.1. DEPARTURE FROM THE MODEL LAW

[106] Reisman, W.M., *et al,* International Commercial Arbitration. Cases, Materials and Notes on the Resolution of International Business Disputes., 646, [New York: The Foundation Press, Inc., 1997].
[107] *Id*.
[108] Redfern, A., *Supra*, Note 7 at 309,310.
[109] Jason Ju, X.L., *A Brief Introduction to the "Kompetenz-Kompetenz" Principle in International Commercial Arbitration*
[110] Redfern, A., *Supra*, Note 7, at 229, see also Lew, J., *Supra*, Note 33, at 337.
[111] *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [New York, 10.07.1958], Article 11; See also Barcelo, J.J., *Supra,* Note 95.; and Redfern, A., *Supra*, Note 7 at 309.

While the Act has adopted the Model Law, it has made some substantial departures from it. The Act empowers the District Court to perform other functions under its provisions, including the grant of interim reliefs and hearing of appeals, it specifically empowers only the CJI or his designate to appoint the arbitrator in International Arbitration. This is a deviation from the Model Law which envisages that both of these functions would be performed by the same court[112].

5.2. MODE OF INTERVENTION

As seen above, the general practice usually envisages that an organ of an Institution would intervene as an AA, by default, where the appointment of the tribunal is not completed within a prescribed period. The only exception to this would be in ad hoc arbitrations under the UNCITRAL rules, where the Secretary General of the PCA must be requested to appoint the authority.

The Act has no provision for the default intervention by the CJI. If the appointment of the tribunal cannot be achieved, one of the parties must request the CJI to make the appointment. He can only so act to appoint arbitrators when requested by one of the parties.

In the case of default assumption of the role, the question of the conditions for the exercise of the AA's power is usually open and shut as the issue is already settled it being provided for by the relevant rules. The CJI is however expected to first adjudicate into the existence of circumstances justifying the exercise of his powers in response to the request for appointment.

5.3. NATURE OF THE FUNCTION

The role of the CJI in the appointment of arbitrators is judicial in nature, involving adjudication on parties' rights and interests. The function being judicial in nature, the competence of professional or trade organisations to perform it is severely restricted. The CJI can only leave the actual appointment to such non-judicial bodies, after he determines jurisdictional issues. Thus adjudication by the CJI is a sine qua non and cannot be avoided.

In contrast, the role envisaged in the general practice of international arbitration appears to be administrative in nature. While literature is largely silent on this aspect, it is safe to argue that AAs not being judicial bodies, cannot perform judicial functions. If judicial proceedings were envisaged, the function would have been entrusted to a competent judicial authority. However, most arbitration rules envisage that the role would be performed by an arbitral institution or designated to professional or trade organisations. Entities offered a designation as AAs usually only decide whether to accept the

[112] *UNCITRAL Model Law on International Commercial Arbitration., Supra,* Note 3, Articles 6, 11.

appointment or not, and not whether the circumstances call for their intervention. That the Model Law regards Courts as fora of last resort, indicates an AA's function is not intended to be judicial.

5.4. EXTENT OF POWERS

The Act, as interpreted by the Court gives the CJI wide, sweeping powers[113] to adjudicate over jurisdictional issues, including his jurisdiction to intervene in the appointment of an AA, question of existence of an agreement, question of existence of an arbitrable dispute and the failure of the parties to achieve the appointment of the arbitrators according to the agreement. He cannot appoint the arbitrators without determining these issues. His determination on these issues is given finality, restricting the arbitrator's power to rule on them ex post facto under the kompetenz-kompetenz doctrine, which fully applies only when the CJI's intervention is not sought.

AAs under the general practice of international law are not empowered to rule on jurisdictional issues. Some institutions like the ICC and LCIA, require the AA to make a prima facie determination, but the final decision, being an adjudication is left to the Tribunal or to National Courts.

While the CJIs decision on jurisdictional issues has finality and cannot be challenged, putting the issues to rest, a tribunal's ruling on jurisdiction is open to judicial review at different stages of the arbitral process.

PART VI – CONCLUSION

6.1. CONCLUSION

The role of the CJI as an AA is a substantial departure from the general practice of international arbitration. He has been given the power to adjudicate on jurisdiction issues including the existence of an agreement, an arbitrable dispute and the qualifications of the arbitrator, which most AAs are not empowered to do.

It appears that Parliament intended to confer the power on the country's highest judicial authority, that is, the CJI, to give superlative credibility to the arbitral process. To this end it did not confer the power on non-judicial bodies, the District Court, or the original jurisdiction of High Courts entrusted with other function by the Act. The interpretation of the court has broadened the scope of the CJI's

[113] *Supra, Section 3,* Indian Law.

powers, while substantially reducing the permissibility of non-judicial bodies being involved in the process of appointing AAs[114].

When the Act is chosen as the Lex arbitri, the CJI has wide powers of adjudication and discretion in the appointment of an arbitrator. This factor is very important for the parties to put into consideration in choosing the lex arbitri. Though the Judges of the Court can be relied on to appoint impartial and independent arbitrators, parties may want jurisdictional issues decided by the tribunal. If the CJI is requested to intervene in the constitution of the tribunal, he is bound to adjudicate on jurisdictional issues. His determination having finality, it is not open to the tribunal to rule to the contrary, ex post facto. Further, arbitral institutions and other AAs contemplated by the general practice are likely to be more familiar with the suitability of arbitrators. The wide powers given to the CJI as regards his functions as an AA can lead to the appointment of arbitrators who are only suitable in his own perception, but inconsistent with the qualifications or nationality envisaged by the parties, like the MSV Nederlands case (supra).

Parties must therefore be specific about their choice of an AA, particularly they should state whether their desire is to have preliminary jurisdictional issues adjudicated upon by the tribunal itself and not the CJI. They must be express in such stipulation either by choosing a lex arbitri other than that of India, or by adopting the particular set of arbitral rules which will preserve the right of determining jurisdictional issues on the tribunal itself.

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[114] *M/s S.B.P. & Co. v. M/s Patel Engineering Ltd. & Anr.*, *Supra*, Note 52.

ABBREVIATIONS

1.	AA	Appointing Authority.
2.	CJI	Chief Justice of India.
3.	ICA	International Court of Arbitration.
4.	ICC	International Chamber of Commerce.
5.	ICSID	International Centre for Settlement of Investment Disputes.
6.	LCIA	London Court of International Arbitration
7.	PCA	Permanent Court of Arbitration.
8.	UNCITRAL	United Nations Commission on International Trade Law.
9.	WIPO	World Intellectual Property Organisation.

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