

# Jurisdictional Issues in International Arbitration with Special Reference to India

Dr. Mukesh Kumar Malviya \*

---

*It bids us remember to settle a dispute by negotiation and not by force; to prefer arbitration to litigation for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity.<sup>1</sup>*

- Aristotle

## Introduction

Industrial revolution bringing into existence international commercial transactions led to a search for finding a forum outside the municipal law courts involving protracted and dilatory legal process for simple, uninhibited by intricate rules of evidence and legal grammar.<sup>2</sup> An international commercial arbitration may involve the application of different provisions of law at different stages. Different and distinct laws may govern the contract, the arbitration agreement and the arbitration proceedings. Therefore, an international commercial arbitration can be described as a hybrid. For instance, the goal of the New York Convention as stated in the decision of the US Supreme Court in *Fritz Scherk v. Alberto-Culver Co.*<sup>3</sup> is: "The goal of the Convention was to encourage the recognition and enforcement of commercial agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

International Commercial Arbitration was emphasized for the first time in the Resolution on the United Nations Conference on the international Commercial Arbitration in the year 1958. The inevitable phenomenon of 'development' has engulfed within its fold varied aspects of humanity. The wider diffusion of information

---

\* Assistant Professor, Law School, Banaras Hindu University, Varanasi (U.P.) India.

1 Aristotle, *The Rhetoric of Aristotle* 77; (Bk I, 1932) as cited in O.P. Malhotra and Indu Malhotra, *Arbitration and Conciliation* at xxxvii. (2nd ed. 2003).

2 L.M. Sharma, "International Commercial Arbitration", 3 *Company Law Journal* 55 (1994).

3 417 US 506.

in commercial arbitration laws has contributed materially to progress in the field of International Commercial Arbitration. The mélange of the concepts like liberalization, globalization, and consumerism has brought in a schematic change in the outlook of trade and its related concepts. Booming, multilateral, bilateral and transnational treaties and policies have made an inevitable impact across frontiers. Thus, international arbitration is considered as an excellent means of settling commercial disputes.<sup>4</sup>

International arbitration has enjoyed the reputation of being the most preferred method of resolution of a dispute over a long period of time between the transnational contracting parties.<sup>5</sup> Dispute Settlement by an arbitral tribunal is preferred over the litigation mechanism of the national courts since comparatively the former provides for a more neutral forum, an award which can be easily enforced, quick and more economical.<sup>6</sup>

As it is said that every coin has two sides so apart from all the advantages of the international commercial arbitration, certain basic fallacies do exist. The jurisdictional issue is one of the major hindrances and it is the main focus of this paper. In this paper, an attempt is made to understand arbitration. The reasons behind the development of international commercial arbitration focusing on both its advantages and fallacies are put forth. The issue of jurisdiction which is one of problems is dealt at length in the paper. The governing doctrines of jurisdiction i.e., the Separability and the *Kompetenz Kompetenz* doctrines have been elucidated and its applicability in the Indian scenario. The position taken by the Indian courts have been analyzed. The judgment pronounced in the *Bhatia International v. Bulk Trading S.A. and Anr.*<sup>7</sup> and its progenies have been examined. The *BALCO v. Kaiser Aluminum Technical Services Inc.*<sup>8</sup> which overruled the *Bhatia International* and brought in a pro-arbitration approach in the Indian jurisdiction has been dealt in detail. The researcher has tried to analyze and understand the present existing position in India as

---

4 P.T. Kamala Priya and S. Karpaga, "International Commercial Arbitration- A New Dimension", 13 *Madras Law Journal* 203 (2001).

5 Michael F. Hoellering, "Managing International Commercial Arbitration: The Institution's Role", 49 *Dispute Resolution Law Journal* 12 (1994). L. Yves Frontier, "International Arbitration on the Eye of the New Millennium", 1 *International Arbitration Law Review* 1 (1997).

6 Margaret Wang, "Are Alternative Dispute Resolution Methods Superior to Litigation in Resolving Disputes in International Commerce?", 16 *Arbitration International* 189 (2000).

7 (2002) 4 S.C.C. 105.

8 (2012) 9 S.C.C. 552.

far as jurisdictional issues in India in matters of arbitration is concerned.

## Arbitration

*Arbitration is a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it.*<sup>9</sup>

Arbitration is a method of dispute resolution, alternative to judgment in the courts, wherein a dispute is referred to 'an impartial (third) person chosen by the parties who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard.'<sup>10</sup> The spirit behind arbitration is that the dispute is referred to a forum which the parties choose for themselves and not the court.<sup>11</sup> It is gaining more and more importance owing to its consensual nature, flexibility as compared to most of the court proceedings and a binding award capable of enforcement.<sup>12</sup>

A marked increase in the role played by international trade in the economic development of any country has been associated with the simultaneous increase of the commercial disputes.<sup>13</sup> The contracting parties to the transnational contract are from different nationalities so national courts of one would be foreign to the other.<sup>14</sup> Therefore, there is a strong dissent to be subjected to the jurisdiction of the laws of the other party's country owing to the fear of 'home court advantage' that might be enjoyed by the other party. This led to recognizing arbitration as the most preferred way for a cross-border commercial dispute.<sup>15</sup>

## International arbitration

Recent years, a surge has been seen in the arbitration of the cross border transactions and so it could be said that an international

---

<sup>9</sup> David Hay (ed.) 2 *Halsbury's Laws of England* 1201 (5<sup>th</sup> edn., 2008).

<sup>10</sup> M.A. Henry Campbell Black, *Black's Law Dictionary*, 96 (5<sup>th</sup> edn., 1979).

<sup>11</sup> Francis Russell, *Russell on Arbitration*, 1 (Sweet and Maxwell Ltd, UK, 19<sup>th</sup> edn.).

<sup>12</sup> Gary B. Born, *International Commercial Arbitration* 1 (Kluwer Law International, 2001).

<sup>13</sup> Neeraj Tiwari, "Critical Issues in International Commercial Arbitration", 4 *Arbitration Law Reporter* 18 (2012).

<sup>14</sup> Nigel Blackaby, Constantine Partasides et.al., *Redfern and Hunter on International Arbitration* 31 (Oxford University Press, 2009).

<sup>15</sup> Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* 1 (Cambridge University Press, 2008).

flavor has been attached to it. International Commercial Arbitration evolved as a private transnational system of dispute resolution composed of multilateral conventions, bilateral treaties, national arbitration norms, and principles and norms of private informal dispute resolution.<sup>16</sup> The decade of 1920s saw the growth of the modern law governing the international commercial arbitration.<sup>17</sup> And in 1958 the Convention on the Recognition and Enforcement of Foreign Arbitral Awards commonly known as the New York Convention<sup>18</sup> was adopted. Following that, there was a harmonization of the arbitral procedure in the form of the UNCITRAL Arbitration Rules of 1976 and the UNCITRAL Model Law on the International Commercial Arbitration of 1985.

International Commercial Arbitration was emphasized for the first time in the Resolution on the United Nations Conference on the international Commercial Arbitration in the year 1958. The inevitable phenomenon of 'development' has engulfed within its fold varied aspects of humanity. The wider diffusion of information in commercial arbitration laws has contributed materially to progress in the field of International Commercial Arbitration. The mélange of the concepts like liberalization, globalization, and consumerism has brought in a schematic change in the outlook of trade and its related concepts. Booming, multilateral, bilateral and transnational treaties and policies have made an inevitable impact across frontiers. Thus, international arbitration is considered as an excellent means of settling commercial disputes.<sup>19</sup>

International arbitration has enjoyed the reputation of being the most preferred method of resolution of a dispute over a long

---

<sup>16</sup> *Supra* note 11.

<sup>17</sup> The Geneva Protocol on Arbitration Clauses was adopted in the year 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards in 1927 and the Organization of the ICC International Court of Arbitration in 1923.

<sup>18</sup> The New York Convention was passed to recognize the growing importance of international arbitration as a means of settling international commercial disputes and to provide common legislative standards for the recognition of arbitration agreements and court recognition and the enforcement of foreign and non-domestic arbitral awards. The Convention's principle aimed not to discriminate against foreign and non-domestic arbitral awards and it obliges the parties to ensure that such awards are recognized and generally capable of enforcement in their jurisdiction in the same manner as domestic awards. Also the courts of the member nations are to give full effect to arbitration agreements by requiring courts to deny the parties the access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

<sup>19</sup> *Supra* note 4.

period of time between the transnational contracting parties.<sup>20</sup> Dispute Settlement by an arbitral tribunal is preferred over the litigation mechanism of the national courts since comparatively the former provides for a more neutral forum, an award which can be easily enforced, quick and more economical.<sup>21</sup>

The determination of jurisdiction of international arbitration depends upon the as it is said that every coin has two sides so apart from all the advantages of the international commercial arbitration, certain basic fallacies do exist. With the International Commercial Arbitration, a need was felt that there must be a denationalization, that the national laws should be seen separately and the entire regime of International Commercial Arbitration be governed by the system of *lex mercatoria*. But this could not be achieved. At the same time, the national laws could also not be kept in total indifference. There was a convergence seen in the national laws. An effort was there for the unification and the harmonization of the international commercial arbitration law despite the different approaches to arbitration by the national courts.<sup>22</sup> Even today a supervisory role is done by the national jurisdictions and this can be inferred from the fact that many national jurisdictions do provide for arbitration mechanism under their respective civil procedure codes.<sup>23</sup> Nonetheless, the burden lies on the nation states to define as to what constitutes 'international' and 'commercial' as far as international commercial arbitration is concerned.<sup>24</sup>

Another issue that exists with the international commercial arbitration is the subject-matter. It is the prerogative of the state to prepare the list of arbitrable matters under the concerned domestic laws.<sup>25</sup> The subject-matter can be varied owing to the development of science and technology. It may include transfer of technology, electronic commerce, entertainment and sports

---

<sup>20</sup> Michael F. Hoellering, "Managing International Commercial Arbitration: The Institution's Role", 49 *Dispute Resolution Law Journal* 12 (1994). L. Yves Frontier, "International Arbitration on the Eye of the New Millennium", 1 *International Arbitration Law Review* 1 (1997).

<sup>21</sup> *Supra* note 6.

<sup>22</sup> Katherine L. Lynch, "Globalization and International Commercial Arbitration", available at: [http://www.law.stanford.edu/publications/dissertations\\_theses/diss/LynchKatherine1997.pdf](http://www.law.stanford.edu/publications/dissertations_theses/diss/LynchKatherine1997.pdf). (Visited on October 15, 2013).

<sup>23</sup> Section 89 of the Civil Procedure Code, 1908.

<sup>24</sup> Julian D. M. Lew, QC, Loukas A. Mistelis *et al.*, *Comparative International Commercial Arbitration*, 49 (Kluwer Law International, New Delhi, 2003).

<sup>25</sup> *Supra* note 12.

including sponsorship, genetic engineering, commercial use of outer space, telecommunication etc.<sup>26</sup>

International transactions in itself is a very complicated thing since it involves multiple parties and in arbitration there cannot be a multi-part dispute together before the same arbitral tribunal and consolidation of actions like a court of law is not permissible. Therefore, multiple proceedings need to be initiated and also the principle of *res judicata* is also not applicable.<sup>27</sup>

Another issue involved with the international commercial arbitration is the conflict of awards. The conflict of awards majorly crops up since there is no relevance of doctrine of precedents as far as arbitration is concerned. There is no rule which means that an award on a particular issue, or a particular set of facts, is binding on arbitrators confronted with similar issues or similar facts. Each award stands on its own.<sup>28</sup> This heads to a situation of uncertainty and hesitation.

It is argued that at times it turns out to be pretty expensive<sup>29</sup> and decision is not quick<sup>30</sup>. The situation gets worse in case the jurisdiction of the tribunal is challenged.<sup>31</sup> In the contemporary times, it is seen that the jurisdiction of the tribunal is challenged even if there is a pre-signed written agreement to arbitrate. And therefore, it becomes pivotal to solve the same since the award passed in an arbitration lacking jurisdiction would be an unenforceable one.<sup>32</sup>

It is fundamental to state that for any valid judgment or award that is to be given by any adjudicating authority, the existence of jurisdiction is a must. Jurisdiction is the first thing to be settled in any dispute resolution, since it can be challenged at any stage of the proceedings. It is an important facet of arbitration,

---

<sup>26</sup> *Supra* note 11.

<sup>27</sup> *Id.*

<sup>28</sup> In *CME v. Czech Republic*, 42 ILM 919 (2003), a single investment dispute involving virtually undisputed facts produced conflicting awards from arbitral tribunals in London and Stockholm, as well as giving rise to litigation in the Czech Republic, the United States and Sweden.

<sup>29</sup> John Y. Gotanda, "Awarding Costs and Attorneys' Fees in International Commercial Arbitration", 21 *Mitchell Journal of International Law* 1 (1999).

<sup>30</sup> Gary B. Born, "Planning for International Dispute Resolution", 17 *Journal of International Arbitration* 61 (2000).

<sup>31</sup> John Yukio Gotanda, "An Efficient Method for Determining Jurisdiction in International Arbitrations" 40 *Columbia Journal of Transnational Law* 11 (2001).

<sup>32</sup> *Id.*

irrespective of whether it is a domestic one or an international one.<sup>33</sup>

Parties entering into any contract are free to choose the scope of the arbitral tribunal. The specific terms are included under the contract. The choice of conducting the arbitration and the rules and procedures relating thereto are pre-decided. Besides, the independent arbitration institutions provide for their separate rules and procedures for conducting the arbitration proceedings.<sup>34</sup>

A valid contract entered into by the parties, containing a provision for referring the disputes arising thereto for arbitration, and a request made by either of the party, the dispute shall proceed with arbitration. Two issues that need to be resolved at the preliminary stages are whether there is a valid contract and that it contains a valid arbitration provision or not?<sup>35</sup>

In the view of a distinguish French Commentator “the autonomy of the arbitration clause and the principal contract does not mean that they are totally independent one from the other, as evidenced by the fact that acceptance of the contract entails acceptance of the clause, without any other formality”.<sup>36</sup>

An arbitration clause is taken to be autonomous and to be separable from other clauses in the agreement.<sup>37</sup> It is this separability of an arbitration clause that opens the way to possibility that it may be governed by a different law from that which governs the main agreement.

### **Determination of jurisdiction**

It has been already discussed in the preceding chapter that arbitration is of two types domestic or international. Therefore, depending upon it being either domestic or international, the determination of its jurisdiction differs.

The determination of jurisdiction of a domestic arbitration is dependent upon the fulfillment of the following pre-conditions.

---

<sup>33</sup> Mitchell L. Lathrop, “Jurisdiction Issues in International Arbitration”, 2 *The Global Business Law Review* 29 (2011).

<sup>34</sup> For instance, AAA, ICC, LCIA.

<sup>35</sup> *Supra* note 33.

<sup>36</sup> Derains, the ICC International Court of Arbitration Bulletin, Vol. 6, No. 1, 10, at 16-17.

<sup>37</sup> *Fiona trust and Holding Corp. and Others v. Privalov and Others*, (2007) EWCA Civ 20.

- There must be a valid contract existing between the parties.
- The contract entered into by the parties must contain an arbitration clause which must be valid as well as enforceable.
- The dispute in question must be arbitrable, that is, it should be included in the subject-matter.

The determination of jurisdiction of international arbitration depends upon the factors enumerated as follows:

- The agreement between the parties must be written.
- The arbitration should be provided in a country whereby the country is a signatory to the convention.
- The dispute in question must be arbitrable, that is, it should be included in the subject-matter.
- It cannot be entirely domestic in scope.

Understanding the basic differences between the determination of jurisdiction in a domestic and international arbitration, the question that needs to be answered is whether the national courts have a supreme position over the process of arbitration? And how far a sovereign country can tolerate international commercial arbitration as exclusion to the jurisdiction of national courts?

With the International Commercial Arbitration, a need was felt that there must be a denationalization, that the national laws should be seen separately and the entire regime of International Commercial Arbitration be governed by the system of *lex mercatoria*. But this could not be achieved. At the same time, the national laws could also not be kept in total indifference. There was a convergence seen in the national laws. An effort was there for the unification and the harmonization of the international commercial arbitration law despite the different approaches to arbitration by the national courts.<sup>38</sup> Even today a supervisory role is done by the national jurisdictions.

So long as the concept of state sovereignty enjoys phenomenal existence, decisions in respect of any transnational dispute can only be enforced through sovereign national courts, a fact clearly stressed in the provisions of the New York Convention. This is so because even a unanimous decision of an international forum has no greater force than a gracious appeal, sovereign nations still being really sovereign.

---

<sup>38</sup> *Supra* note 22.



Thus, it will not be an exaggeration to say that the effective existence of international commercial arbitration is entirely dependent on the abidance of the Convention obligations by the member states. Though the executive and legislative wings of the member states definitely have some role to play in light of their peculiar municipal setup; the entire mechanism of the Convention and other prominent arbitration law instruments requires the cooperation of national courts. Reciprocal confidence lies at its core. If a court extends favor to its own nationals, this reciprocity is damaged, and a bad precedent is set. Thus, the eventual growth of the rule of law, the increasing utilization of international arbitration for resolving cross-border disputes and enforcement of arbitral awards depend on the genuine spirit and efforts of sovereign national courts.

Fortunately, it is witnessed that courts around the globe have been implementing the Convention in an increasingly cohesive and synchronized manner; and in doing so, they serve global trade and commerce. With respect to the Convention, there are indications that an international standard has emerged at numerous points. All this has contributed greatly in securing the harmonization of international arbitration law, which in turn, assists in achieving certainty, the quality much desired by the international trading community.

Accordingly, in our country, any discussion on the New York convention is not complete without appreciating the mosaic of judicial pronouncements by the Apex Court. Learning from a few past mistakes, all endeavors are now made to make India an arbitration-friendly jurisdiction. Recent decisions pertaining to international commercial arbitration, for illustration, *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services* are consistent with the ethos of the New York Convention and UNCITRAL Model Law which would be discussed at length in the last part of the paper.

### **Jurisdiction vis-à-vis arbitration**

The expression 'jurisdiction' has not been defined in the Model Law or under the Indian Act of Arbitration. However, the jurisdiction of the arbitral tribunal has been variously referred to as 'authority, mandate or competence'. The English Arbitration Act of 1996 has defined the expression substantive jurisdiction<sup>39</sup> of the arbitral tribunal to rule on its own jurisdiction as to (i) whether there is a valid arbitration agreement; (ii) whether the

---

<sup>39</sup> Section 31 of the English Arbitration Act, 1996.

tribunal is properly constituted; and (iii) what matters have been submitted to arbitration in accordance with the arbitration agreement.<sup>40</sup> The term jurisdiction has been comprehensively described in *Stroud's Judicial Dictionary*<sup>41</sup> as:

“Jurisdiction is a dignity which a man hath by a power to do justice in causes of complaint made before him. In its narrow and strict sense, the jurisdiction of a validly construed court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue or (ii) to the persons between whom the issue is joined or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense, it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determines issues which fall within its jurisdiction or as to the circumstances in which it will grant a particular kind of relief which it has jurisdiction to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances.”

The authority to take cognizance and decide the matters subsequently by the court or the tribunal is referred to as the jurisdiction.<sup>42</sup> Parties agreeing to submit their dispute to arbitration confers jurisdiction on the arbitral tribunal for the determination of the disputes.<sup>43</sup> The Andhra Pradesh High Court in the case of *United Steel Allied Industries Pvt. Ltd. v. Fair Growth Financial Services Ltd.*,<sup>44</sup> explained as:

“One of the settled principles of law is that a court, tribunal and authority of limited jurisdiction can decide upon its own jurisdiction. In case it decides and assumes jurisdiction, the superior court in exercise of its power of judicial review, can always examine the jurisdictional facts. It can also decide whether the issue of limited jurisdiction has been properly determined by the court, tribunal or authority of limited jurisdiction or not.”

The real importance of jurisdiction in an arbitration proceeding is the scope and ambit of the power of an arbitral tribunal in relation

---

<sup>40</sup> Sections 30 and 82(1) of the English Arbitration Act, 1996.

<sup>41</sup> Frederick Stroud, *Stroud's Judicial Dictionary* 3 (Sweet & Maxwell, 5<sup>th</sup> edn., 1986).

<sup>42</sup> Jaya V.S., “Competency and Jurisdiction of Arbitral Tribunals: Some Issues”, 26 *Delhi Law Review* 96 (2004).

<sup>43</sup> G. K. Kwatra, *Arbitration and Alternative Dispute Resolution* (Mudrak Printers, New Delhi, 2008).

<sup>44</sup> (1998) 94 Comp Cas, 212 (A.P.).

to the examination and determination of facts, interpretation and the application of law and the issuance of the written judgment. The parties' contract generally stipulates the jurisdiction of a tribunal, along with the substantive law<sup>45</sup> and the procedural law<sup>46</sup> governing the contract.<sup>47</sup> Language of the arbitration agreement is one of the parameter which determines that whether a particular arbitral tribunal has jurisdiction or not.<sup>48</sup> A specific mention in the agreement that only the quantum disputes would be a matter of arbitration by the arbitral tribunal ousts the disputes relating to the liabilities.<sup>49</sup>

In the common law countries, the tendency to determine the jurisdiction of an arbitral tribunal depends upon the detailed analysis of the arbitration agreement. Whereas in the civil law countries the specific interpretation of the words, would be given a secondary meaning as compared to the intention of the parties. For instance, under the Swiss law, the common intention of the parties to arbitrate has to be established by the parties. The declarations of intent made by the parties hold them.

It is noteworthy that the jurisdiction of the arbitral tribunal is always limited by actual 'reference' and therefore whatever is not under reference shall be beyond the scope of the authority of the arbitral tribunal. The question of jurisdiction is of vital importance since in its absence no arbitration proceedings can commence, and in case it commences, it shall be null and void.<sup>50</sup>

### **Jurisdiction of Arbitral Tribunal in India**

The distribution of power between a court and arbitrator in case of any arbitration, be it domestic or an international for the determination of the validity and the scope of arbitration clause is of prime importance. The power of arbitrators are derived from the agreement and therefore, the requirement of the intervention of the courts for the determination of whether the agreement is effective for the sole purpose of establishing that the designated arbitral tribunal has jurisdictional authority to resolve disputes arising under that same agreement, it seems in practice, at least

---

<sup>45</sup> Substantive law is referred to as that part of law that creates, defines and regulates rights.

<sup>46</sup> Procedural law is referred as the body of law that prescribes the formal steps to be taken in the enforcement of the legal rights.

<sup>47</sup> Ozlem Susler, "Jurisdiction of Arbitration Tribunals in France", available at: [http://works.bepress.com/ozlem\\_susler/2](http://works.bepress.com/ozlem_susler/2). (visited on October 23, 2013).

<sup>48</sup> Food Corporation of India v. Achilles Halcoussis, (1988) 2 Lloyd's Rep 56.

<sup>49</sup> *The Ioanna*, (1978) 1 Lloyd's Rep 238.

<sup>50</sup> N.V. Paranjapae, *Law Relating to Arbitration and Conciliation in India*, (Central Law Agency, 5<sup>th</sup> ed., 2013).

to an extent, inconvenient and against the objective of the ADR that is 'Judicial Minimalism'.

In order to resolve the same, there are two legal solutions. Firstly, by adopting the 'separability' or the 'autonomy' doctrine, the agreement is accorded a different status to that of the contract itself and thereby ignoring the validity of the contract. Secondly, it is by adopting the *Kompetenz-Kompetenz* doctrine.

The separability doctrine widens the scope of the arbitration clause. The arbitration clause can survive the breach of contract. The nullity, frustration, non-performance, defects of the contract can be overlooked.<sup>51</sup> Total breach of substantive stipulations, even if it is accepted by the other party, does not abrogate the arbitration clause and even the party in default may invoke that clause.<sup>52</sup> The contract being void, the arbitration clause is severable from the contract and it is open to the arbitrator to decide the same.<sup>53</sup> An arbitration agreement has the ability to survive and live a separate life from that of substantive contract in which it is embedded.<sup>54</sup> Survival of arbitration clause, even if the substantive contract in which it is embedded is held to be null and void, is a legal fiction essential for efficient working of the arbitral process.<sup>55</sup> Indeed, it would be the most inconvenient if breach of contract or a claim that the contract was voidable would be sufficient to terminate the arbitration clause as well; this is one of the situations in which arbitration clause is most needed.<sup>56</sup> Instead, it survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purpose of contract has failed, but the arbitration clause is not one of the purposes of the contract.<sup>57</sup>

The upholding of the separability doctrine is necessary not only because it prevents parties from raising frivolous challenges to delay the arbitration proceedings but also because it prevents an artificial and inefficient reduction of the arbitrator's authority. In its absence, the arbitrators would be allowed to hear only claims where parties do not question the existence, validity or actuality of

---

<sup>51</sup> Madhusudan Kesharwani, "Jurisdiction of Arbitration Tribunal Inherent Principle and Indian Perspective" 6 *Madras Law Journal* 138 (2008).

<sup>52</sup> *Union of India v. Kishori Lal Gupta*, A.I.R. 1953 Cal. 642.

<sup>53</sup> *Gopinath Daulat Dalvi v. State of Maharashtra*, 2005 (2) RAJ 515 (Bom).

<sup>54</sup> Mustill and Boyad, *Commercial Arbitration* ( LexisNexis, UK, 2<sup>nd</sup> edn. 2001).

<sup>55</sup> *Renusagar Power Co. v. Geneal Electric Co.*, (1984) 4 S.C.C. 679.

<sup>56</sup> Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 162 (Sweet and Maxwell, London, 4<sup>th</sup> edn., 2004).

<sup>57</sup> *Heyman v. Darwins, Ltd.*, (1942) 1 AllER 337.

the main agreement, which is unrealistic and inefficient on its face. It is quite practical to understand that when parties agree to resolve all disputes arising from their legal relationship by means of arbitration, unless expressly agreed to the contrary, they intend arbitrators to resolve even disputes concerning the validity of the arbitration agreement itself.<sup>58</sup>

Arbitrators must be allowed to rule on their own jurisdiction and this is commonly known as the arbitrators' 'competence on (their) competence' or the *Kompetenz-Kompetenz* doctrine.<sup>59</sup> The term *Kompetenz-Kompetenz* originated in West Germany in the context as to whether the parties to contract entrust the arbitrator with the power of making an abiding decision concerning their own jurisdiction.<sup>60</sup> Unless and until there is a specific agreement conferring upon the arbitrators an exclusive power to decide on jurisdictional challenges, the competent courts will always have the last say on the matter. When such an exclusive clause does exist, the courts should generally be prevented from interfering with or reviewing the arbitral decision, although this is not an accepted rule in all legal systems.<sup>61</sup>

The competence of any arbitral tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement,<sup>62</sup> is described as competence-competence. The principle of competence-competence has two aspects, i.e., firstly an authentication to the arbitrators to decide the jurisdiction without the help of the Court and secondly the arbitral tribunal gets an upper hand to decide the issue first before the court interferes. A third dimension to the same also exists. The judicial authority is empowered to confine itself to the existence of the arbitration agreement and to refer the parties to arbitration in case there is a premature issue of the arbitral tribunal's existence.<sup>63</sup>

---

<sup>58</sup> *Supra* note 51.

<sup>59</sup> The competence of the arbitral tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement is the doctrine of *Kompetenz Kompetenz* commonly known as competence-competence doctrine. This principle has two aspects. Firstly, it confirms to the arbitrators that they may decide on their jurisdiction without need for support from the court. Secondly, it prevents the court from determining the issue before the arbitral tribunal has decided it.

<sup>60</sup> Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swidd, U.S. and West German Law* 178 (Schulthess, 1989).

<sup>61</sup> *Supra* note 51.

<sup>62</sup> Section 16(1) of the Arbitration and the Conciliation Act, 1996.

<sup>63</sup> Robert Merkin, *Arbitration Law*, 323 (LLP, 2004).

Separability and the doctrine of competence-competence work in tandem. It provides that the arbitral tribunal has the authority to rule on the questions pertaining to the principle and scope of its jurisdiction. The tribunal can also decide claims that the dispute in question is not covered by arbitral clause. The tribunal's ruling on jurisdictional matters is subject to the judicial scrutiny either at the time of pronouncement or at the enforcement stage of the process. The existence of arbitral tribunal's jurisdiction is of vital importance because it decides whether the parties are bound by the resulting award. An arbitration agreement is the source of power and the authority of the arbitral tribunal and what is not contemplated to be settled in the arbitration by the parties cannot be made subject-matter of the arbitration. In other words, arbitral tribunal derives its authority from the arbitration agreement and will not do that which the parties have not authorized it to do.

If the party allowed an arbitrator to proceed with the reference without objecting to his jurisdiction or competence, it would not be subsequently heard to say that the award should be set aside on the ground that the arbitrator was not competent to decide the dispute in question.<sup>64</sup>an arbitrator has the jurisdiction to decide any dispute arising between the parties in respect of additional work done by the contractor in connection with and as a part of the main work.<sup>65</sup> Where the arbitration clause is fairly wide and covers all differences, the contention that on some particular issue there was inherent lack of jurisdiction of the arbitrators is untenable.<sup>66</sup>

The doctrines of Separability and *Kompetenz-Kompetenz* are generally accepted in India as the basis for allowing the arbitral tribunals to confirm and to some extent decide their jurisdiction to hear the cases submitted to them. An arbitration agreement is the source of the power and authority of the arbitral tribunal and what is not contemplated to be settled in the arbitration by the parties cannot be made the subject matter of arbitration. Like the UNCITRAL Model Law, Section 16 of the Arbitration and Conciliation Act also provides for both the Separability and *Kompetenz-Kompetenz* doctrines.

Thus, in arbitration at the international level, the issue of jurisdiction is the most important and it needs to be resolved before proceeding ahead. And after understanding its pivotal role,

---

<sup>64</sup> New India Assurance Co. Ltd. v. Dalmia Iron and Steel Ltd., A.I.R. 1965 Cal. 42.

<sup>65</sup> State of Orissa v. G.C. Kanungo, A.I.R. 1980 Ori. 157.

<sup>66</sup> *Supra* note 64.

its existence in the Indian parlance would be analyzed in the forthcoming chapter.

### Arbitration in India

The UNCITRAL Model Law on International Arbitration came into being in 1985. The Model Law aimed to provide for an effective and expeditious means of the commercial dispute resolution. As per the Model Law, the domestic countries were empowered to decide the powers in respect of their courts for granting interim measures. It was provided that the court having any such power would not be deemed 'incompatible' with the arbitration agreement.<sup>67</sup>

In order to give effect to the Model Law, the Arbitration and the Conciliation Act, 1996 was passed. It replaced the 1940 Act. The 1940 Act provided that wherein the arbitration clause contained in the contract was null and void then the arbitration agreement would also be ipso facto null and void. But as per the 1996 Act, under section 16 (a) it is provided that an arbitration clause forming the part of the contract shall be treated independent of the other terms of the contract and hence the decision of the arbitral tribunal treating the contract as null and void would not render the arbitration clause ipso facto invalid.

Section 16<sup>68</sup> of the Arbitration and the Conciliation Act of 1996 provides for the competence of the arbitral tribunal to rule on its own jurisdiction. In *Olympus Infrastructures Pvt. Ltd. v. Meena Vijay Khetan*,<sup>69</sup> it was observed that under the Arbitration and conciliation Act, 1996 the arbitral tribunal is vested with powers under section 16(1) to rule on its own jurisdiction including ruling on any objection with respect to its existence or validity of arbitration agreement and for that purpose the arbitration clause which forms part of the contract shall be treated as an agreement independent of any terms of the contract and any decision of the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

---

<sup>67</sup> Chapter IV-A of the UNCITRAL Model Law on International Commercial Arbitration.

<sup>68</sup> Section 16 of the Arbitration and the Conciliation Act, 1996 corresponds to Article 16 of the UNCITRAL Model Law (Competence of arbitral tribunal to rule on its own jurisdiction) and also to Article 21 (Pleas as to the jurisdiction of the arbitral tribunal) of the UNCITRAL Arbitration Rules. Section 7, 30, 31 and 32 of the English Arbitration Act, 1996 also contain similar provisions.

<sup>69</sup> (1999) 5 S.C.C. 651.

The 1996 Act is divided in three parts. The first part provides for arbitration having their seat in India. Part 2 provides for the recognition and the enforcement of the foreign arbitral awards in India and Part 3 deals with conciliation. Section 9 of the 1996 Act provides for the interim measures by the court and is included under Part 1 of the Act, which is applicable to arbitration that takes place in India.<sup>70</sup>

The arbitral tribunal may rule on its own jurisdiction like a court. It can also decide any objection with regard to the existence or validity of the arbitration agreement. The plea of lack of jurisdiction of the arbitral tribunal shall be raised not later than the submission of statement of defence. A party, may, however, raise such a plea even if he has appointed or participated in the appointment of, an arbitrator. Similarly, a plea may be raised that the arbitral tribunal is exceeding the scope of its authority during the course of arbitral proceedings. The arbitral tribunal may raise any such plea even at a later stage if sufficient cause of delay is shown to be justified. Where the arbitral tribunal takes a decision rejecting the plea, the arbitral tribunal shall continue with the arbitral proceedings and make an arbitral award. A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34 of the Act.<sup>71</sup>

So, an uncertainty crops up wherein the place of arbitration is not in India. And then in that circumstance, whether the Indian Courts would be able to exercise their jurisdiction or not?

### The long set trend

Initially, the spheres of operation of parts 1 and 2 were considered to be distinct and to be mutually exclusive.<sup>72</sup> However, in the case of *Bhatia International* case the Supreme Court of India observed that:

“Part 1 is to apply also to international commercial arbitration which takes place out of India, unless the parties by an agreement express or implied, exclude it or any of its provisions.”

---

<sup>70</sup> Section 2(2) of the Arbitration and Conciliation Act, 1996.

<sup>71</sup> Section 16 (2), 16(3), 16(4), 16(5) and 16(6) of the Arbitration and Conciliation Act, 1996.

<sup>72</sup> Tejas Karia, Karan Mehra and Bahaar Dhawan, “Judicial Intervention in Foreign Arbitration: Redefined by the Supreme Court of India”, *available at*: <http://www.inhouselawyer.co.uk/index.php/india/10014-judicial-intervention-in-foreign-arbitration-redefined-by-the-supreme-court-of-india>. (Visited on September 23, 2013).



In *Bhatia International* case there was a contract that was entered into containing an arbitration clause providing for arbitration as per the ICC Rules. A sole arbitrator was agreed upon by the ICC on a request that was made by the respondent and then the parties agreed for arbitration to be held in Paris. Thereafter, an application under section 9 of the Act was filed by the respondents in the District Court of Indore for the grant of an interim injunction to restrain the appellant from transferring the business assets and properties located in India. The application was resisted by the appellant on the contention that section 9 which is contained under Part I of the Act, applies only to the arbitrations conducted in India. The lower court dismissed the objection and provided that Part I of the Act would apply. Thereafter, a writ petition was filed before the Madhya Pradesh High Court by the appellant which was dismissed subsequently and then an appeal filed before the Supreme Court of India to decide whether the Indian Court has the jurisdiction to provide for an interim relief as far as an international commercial arbitration held outside India is concerned.

The jurisdiction of the court was invoked for the grant of interim measures in relation to arbitration under ICC. Section 9 of the 1996 Act which is contained in Part I, provided for the interim reliefs to be granted by Indian courts. It was held that Section 2(2) of the Arbitration and Conciliation Act, 1996, provides that Part-I of the Act would apply where the place of arbitration is in India, it did not provide that Part-I would not apply where the place of arbitration is not in India. The exclusion of the same could be done either in explicit or an implicit manner. Even in respect of international commercial agreements, which are to be governed by the laws of another country, the parties would be entitled to invoke the provisions of Part I of the aforesaid Act. The court observed that section 9 of Part I of the 1996 Act would be applicable in the cases where seat of arbitration is outside India, in the absence of which:

*..leave the party remediless in as much as in international commercial arbitrations which take place out of India, the party would not be able to apply for interim relief in India even though the properties and assets are in India.*<sup>73</sup>

There is a practical need which requires that the Indian courts should have the power and jurisdiction to grant the interim measures in cases of arbitrations seated in the foreign country.

---

<sup>73</sup> *Bhatia International v. Bulk Trading S. A.*, (2002) 4 S.C.C. 105, 116.

But, at the same time, it could be seen as a deviation to the enacted law. Prior to this settlement, the different High Courts varied in their approach. It was observed by certain high courts that interim measures cannot be granted since the act did not provide for the same,<sup>74</sup> while others viewed that since Part I can be applied to outside arbitrations therefore, interim measures could be ordered.<sup>75</sup>

In certain cases, it has been put forth that that Part I is not excluded irrespective of the fact that venue of arbitration was outside India, foreign law was chosen as the substantive law of contract and the Act was not taken as the procedural law.<sup>76</sup> But in some decisions, it was taken that such cases fell in the category of implied exclusion.<sup>77</sup> And in some, it has been observed that the implicit exclusion of Part I was taken only in the instance when there is a foreign seat of arbitration and the Act is not the procedural law.<sup>78</sup>

Alternate observations had been put forth by the courts regarding the interpretation of the Act. In *J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh*,<sup>79</sup> it was observed that: "in the interpretation of statutes the courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect."<sup>80</sup> And a plain reading of the section 2(2) of the Act shows that Part I of the Act unambiguously does not apply to international arbitrations seated outside India. In *Shreejee Traco (I) P Ltd. v. Paperline International Inc.*<sup>81</sup> it was observed by the

---

<sup>74</sup> East Coast Shipping v. M. J. Scrap, 1 Cal HN 444. Marriot Hotels v. Ansal International, 2000 (3) Arb LR 369 (Delhi). Kitechology NV v. Unicor GmBH Rahn Plastmaschinen, 1999 (1) Arb LR 452 (Delhi).

<sup>75</sup> Olex Focas Pty. Ltd. v. Skodaexport Co. Ltd., 1999 (Suppl.) Arb LR 533 (Delhi).

<sup>76</sup> Venture Global Engineering v. Satyam Computer Services Ltd., (2008) 4 SCC 190. National Aluminium Co. Ltd. v. Gerald Metals, 2004 (2) Arb LR 382 (AP). Citation Infowares Ltd. v. Equinox Corporation, (2009) 7 SCC 220.

<sup>77</sup> Max India v. General Binding Corporation, (2009) 112 DRJ 611. Liverpool and London Steamship Protection and Indemnity Association Ltd. v. Arabian Tankers Co., 2003 (3) Arb LR 537 (Bom). Dozco India P. Ltd.v. Doosan Infracore Co. Ltd., (2011) 6 S.C.C. 179.

<sup>78</sup> Hardy Oil and Gas Ltd. v. Hindustan Oil Exploration Co. Ltd., 2006 (1) Arb LR 61 (Guj). In this case, the Indian law was the substantive law of the contract, the arbitration agreement was according to the English law and the arbitration was to be conducted as per the London Court of International Arbitration to be held in London.

<sup>79</sup> A.I.R. 1961 S.C. 1170.

<sup>80</sup> See also: Aswini Kumar Ghosh v. Arabinda Bose, A.I.R. 1952 S.C. 369; Nathi Devi v. Radha Devi Gupta, A.I.R. 2005 S.C. 648; Ghanshyamdas v. Regional Assistant Commissioner, A.I.R. 1964 S.C. 766.

<sup>81</sup> (2003) 9 S.C.C. 79.

Supreme Court of India that it is implicit in the language of the Act that Part I will not apply when the place of arbitration is not in India.

The observation that was put forth by the Supreme Court in the *Bhatia International* case actually paved way to more doubts and problems. It actually extended the scope of the courts and the arbitrations seated offshore were brought under its ambit. Therefore, an undefined situation arises whereby there is an overlap of the jurisdiction of the seat of the arbitration and the Indian courts.

This opened the gates to future litigations. Consequently, in *Intel Technical Services v. WS Atkins*,<sup>82</sup> an arbitrator was appointed by the Supreme Court for an arbitration seated outside India in a situation whereby there was a deadlock in the parties. In *Citation Infowares Ltd. v. Equinox Corporation*<sup>83</sup> that if parties in an international commercial transaction wish to exclude the provisions of the Arbitration Act they should in express terms. In *Venture Global Engineering v. Satyam Services Ltd and Anr.*,<sup>84</sup> the Supreme Court set aside the arbitration award made in London, under section 34 of the Act. Therefore, the Indian courts intervened in the foreign arbitrations which were regulated by the courts of the place of arbitration.

The *Bhatia International* case and the subsequent cases reiterating the same had been subject to varied criticisms at the national and the international level for exercising a long-arm jurisdiction by the Indian courts and spreading uncertainty. Owing to the distortion caused by the judgment, the Ministry of Law and Justice in India issued a consultation paper in the year 2009<sup>85</sup> for the amendment of the 1996 Act and to do away with effects of the *Bhatia International*.

### The turning point

The undesirable consequences of the *Bhatia International* and its subsequent progeny came to the forefront with case of *White Industries Australia Ltd. v. Republic of India*<sup>86</sup> decided by the

---

<sup>82</sup> (2008) 10 S.C.C. 308.

<sup>83</sup> 2009 (5) UJ 2066 (S.C.).

<sup>84</sup> (2010) 8 S.C.C. 660.

<sup>85</sup> Proposed amendment to the Arbitration and Conciliation Act, 1996: A Consultation Paper, 4-15 available at: <http://lawmin.nic.in/la/consultationpaper.pdf>. (visited on October 11, 2013).

<sup>86</sup> Award of November 30, 2011, available at: <http://ilcurry.files.wordpress.com/2012/02/white-industries-award-ilcurry.pdf>.) (visited on October 11, 2013).

UNCITRAL arbitral tribunal. The White Industries got an award in its favour by the ICC against Coal India, a state owned mining company. The award was connected with a contract which was for the supply of equipment related to a coal mine. As per the agreement, the arbitration was to take place in Paris and in that circumstance, the jurisdiction of the Indian courts should have been ousted as far as the award was to be challenged. Any such matter related to the award was to be decided by the arbitral seat. But, relying on the decision of *Venture Global*, the Coal India challenged the award in the Indian courts. The White Industries, on the other hand came up with the enforcement proceedings which was stayed by the Indian courts owing to the pendency of the proceedings challenging the award. The non-enforcement of the ICC award and its subsequent challenge thereto rendered the White Industries frustrated. The UNCITRAL tribunal therefore observed thereafter that India failed to provide the investors with an “effective means of asserting claims and enforcing rights” as there were undue delay for the proceedings to be enforced. The undue delay was assigned to the long set trends of *Bhatia International* and its progenies.

On this premise, a need was felt by the apex court of our country to review its position. The Constitution Bench of the Supreme Court decided the long awaited *BALCO* judgment. In the case, the Court overruled the long standing judgment of *Bhatia International* basing on the legislative intent and the scheme of the 1996 Act and observed that the courts at the seat of arbitration had all the exclusive rights to regulate the arbitration proceedings.

The Supreme Court in course of deciding the case defined the jurisdiction of the courts in cases wherein the seat of arbitration is in India or offshore respectively. The court held that in case of arbitral seat in India, the Indian courts can exercise all powers as enumerated under part I of the 1996 Act for supervising, supporting the arbitration process and the enforcement of the award of the arbitration. As far as the case of arbitration seated offshore is concerned, the court's role is highly circumscribed only to the extent of the enforcement of the arbitration agreement and the recognition and enforcement of the arbitral award.

The principle of territoriality<sup>87</sup> was accepted as provided in the UNCITRAL model law and that was taken to be the governing force

---

<sup>87</sup> The territoriality principle is a public international law under which a sovereign state can prosecute criminal offences that are committed within its borders.

behind the arbitration act.<sup>88</sup> Therefore, the seat of the arbitration would be the determining factor for jurisdiction and the Indian courts could only be concerned with supervision of arbitration process only in the circumstance when the seat is in India. The offshore arbitrations are out of the scope of the Indian courts.

Part I of the Act is applicable only for arbitrations that take place in India.<sup>89</sup> The Indian courts will have a broad jurisdiction to supervise, support and set aside the arbitral award in respect of any domestic or international arbitration seated in India as the supervisory courts at the seat of arbitration. Any Indian Court will not have the jurisdiction to hear any challenge to an award that has been made offshore. The courts could simply give effect to the powers entrusted to it under Part II<sup>90</sup> of the Act. Moreover, the jurisdiction of the Indian courts would not depend upon the explicit exclusion of Part I by the parties. It was also observed that as per the 1996 Act, the Indian courts cannot order interim measures for any arbitration seated outside India and also any civil suit for seeking interim relief in aid of foreign-seated arbitrations under the civil procedure code, 1908 would also not be maintainable.<sup>91</sup> This is provided because such an interim relief is not at all a substantive cause of action for the institution of a civil suit under Indian law.

As a result, the Indian Courts do not have the jurisdiction to interfere in matters relating to arbitrations seated offshore and that the Supreme Court has given utmost importance to the autonomy of the parties in choosing their seat of arbitration. Thus, the interim measures would not be granted by the Indian courts. It can be seen as a disability in a circumstance whereby the assets needs to be preserved or the *status quo* of the properties in India need to be maintained before the passing of any arbitral award. Here, the court observed that there existed a void in the legislation which needed the attention of the Parliament. It cannot be denied at this juncture that interim measures could be sought from the arbitral tribunal or the seat of arbitration but in the absence of any international convention to

---

<sup>88</sup> *Supra* note 8, at ¶ 198.

<sup>89</sup> *Supra* note 8, at ¶ 200.

<sup>90</sup> Part II of the Act deals with the enforcement of the foreign arbitral awards. The provisions provide for giving effect in India to an agreement referring disputes to arbitration in another country, pursuant to the New York Convention and also to enforce the foreign arbitral awards in India, in accordance to the provisions of the New York and the Geneva Conventions.

<sup>91</sup> *Supra* note 8, at ¶ 197.

enforce the same or the application of 2006 UNCITRAL Model Law, it would again pose a problem.

The Supreme Court in the *BALCO* judgment provided for the prospective application.<sup>92</sup> All the arbitration agreement that were executed before September 6, 2012 would still continue to be governed by the law that was settled in the *Bhatia International* case. On one hand the court observed that the judgment in the *Bhatia International* case was a mistake and that the Indian courts had no jurisdiction to interfere in arbitration seated offshore as per the scheme of the 1996 Act and on the other it actually justified the same for the arbitration agreement executed before September 6, 2012. Thus, the court took different stands. If the *Bhatia International* judgment was wrong and subsequently overruled then, how could the same be continued to be followed in respect to the agreements which might end up for arbitration.

### **The way forward**

With the *BALCO* judgment, the jurisdiction of the Indian Courts has been restricted. The Supreme Court has paved a pro-arbitration path. The arbitrations seated offshore will be insulated from the interference of Indian Courts. The arbitration law in India got in tuned with the other existing jurisdictions. The minimal legal intervention by the courts which is the guiding force behind arbitration has been reinforced.

### **Concluding remarks**

International Commercial Arbitration has garnered much importance with the commencement of the World Trade Organization, as it has accelerated the globalization pace, thereby leading to the integration of countries. With the integration of economies, international arbitration has become the established method of determining international commercial disputes. Arbitration is a private method of dispute settlement, chosen by the parties themselves as an effective way of putting an end to disputes among themselves, without any interference and recourse to the national courts. As far as the international commercial arbitration is concerned, the most important thing to be considered is the issue of jurisdiction. Since jurisdiction can be challenged at any stage of the proceedings, it is pertinent that jurisdiction be determined as one of the first order of business in any dispute resolution forum.

---

<sup>92</sup> *Supra* note 8, at ¶ 201.

It is fundamental to state that for any valid judgment or award that is to be given by any adjudicating authority, the existence of jurisdiction is a must. Jurisdiction is the first thing to be settled in any dispute resolution, since it can be challenged at any stage of the proceedings. It is an important facet of arbitration, irrespective of whether it is a domestic one or an international one.<sup>93</sup> For resolving the same, the doctrines of Separability and *Kompetenz Kompetenz* are adhered to, which have also been incorporated under the Indian Arbitration Act.

The position in India was settled for a very long time by the pronouncement of the Supreme Court in the *Bhatia International* which observed that arbitrations seated offshore were also brought within the ambit of the Indian jurisdiction. This was a subject of major criticism since the Indian courts were given a long-arm owing to the wide interpretation accorded by the court which was not even contemplated under the Act. With the *White Industries* case, this problem was projected at the international level and the *BALCO* case has made an attempt to make the Indian laws in tune with the international standards and to be pro-arbitration. The *BALCO* judgment has clearly stated that the Indian Courts do not have the jurisdiction to interfere in matters relating to arbitrations seated offshore and that the Supreme Court has been given utmost importance to the autonomy of the parties in choosing their seat of arbitration. This has its own implication which has been dealt in detail in the paper. The jurisdiction of the Indian courts has been restricted. It is only to entertain those cases whereby the seat is not offshore. The contentions that if Part I does not apply to the foreign seated arbitrations, section 9 would also not come into play owing to its having no special status. Thereby an apprehension is adhered that a party in need of urgent-interim relief would be without a remedy is totally misconceived as in that case the Parliament is not to decide and not upon the courts.<sup>94</sup>

Arbitration is a dispute-settlement mechanism that is different from the litigating scheme and that the two stand on two different pedestals. Therefore, a need exists that in an era of globalization, there exists an internationally accepted standards of conduct of the arbitrators, rules of arbitration and the national courts are allowed the minimal interference. The autonomy of the parties should be of foremost importance.



---

<sup>93</sup> *Supra* note 33.

<sup>94</sup> *Supra* note 8, at ¶¶ 167, 168.