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Jurisdictional Issues: Court Intervention vis-à-vis Competence of Arbitral Tribunal

Jayanth Balakrishna LL.M. (International Arbitration, Global Energy and Environmental Law) U.S.A., LL.B. (Hons.) U.K., M.C.E. (Water Resources and Environmental Engg.) U.S.A., B.E. (Civil Engg.) Bangalore, formerly licensed as Professional Engineer (P.E.) U.S.A.

Conflict of Laws

- International commercial arbitration (ICA) involves more than one system of law or legal rules. They may include

- The law governing the agreement to arbitrate and its performance:

- may be set out in the arbitration agreement (to settle future disputes) or in a purpose made submission agreement (to settle existing disputes). When seat or place of arbitration is India and the arbitration is not an ICA, the tribunal is required to apply Indian law in deciding the dispute. In the case of an ICA the rules of law designated by the parties is applied as applicable to the substance of the dispute.
- Courts have held that the proper law of the arbitration agreement is the same as the proper law of the contract – or could also be the same as the law of the seat
- the 'separability' presumption postulates 2 separate agreements which could be governed by 2 separate set of laws.
- A valid agreement must be in writing; a defined legal relationship contractual or otherwise - may be governed by principles of tort liability rather than contract; whether the dispute is a subject matter capable of arbitration (arbitrability); affected by both NY Convention and national law, …The *lex arbitri* is not necessarily only procedural governing the matters internal to the arbitration such as appointment of arbitrators, but also the external relationship between the arbitration and the courts, and also the broader external relationship between arbitration and the public policy of that place including matters of arbitrability.

- The law governing the conduct of the arbitration itself or the proceedings of the arbitration tribunal (the *lex arbitri or the curial law*). This can be the law of the place where the arbitration is seated or takes place (the *lex loci arbitri*) Ex: The ACA 1996, the Singapore Arbitration Act, etc.

Latin terms used in the concept of conflict of laws

- *Lex fori*: "The law of the forum or court in which a case is being tried. More particularly the law relating to procedure or the formalities in force ... in a given place.”
- All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs.

  "While procedure is governed by *lex fori*, matters of substance are governed by the law to which the court is directed by its choice of law rule (*lex causae*)... The difficulty in applying this rule lies in discriminating between rules of procedure and rules of substance. The distinction is by no means clear cut.” … *Dicey and Morris on the Conflict of Laws*
- The proper law: The law that is assigned to a dispute (choice of law) when one or more laws could be used (conflict of laws). An example can be in the case of a dispute in overseas sales. The proper law will be the one from the sellers country of origin.

Conflict of laws, choice of laws

❑(Contd.)

- The law governing the substantive issues of the dispute – alternatively referred to as the applicable law, the governing law, the proper law of the contract, or the substantive law. Could be the law of the contract from which the dispute has arisen (the law of a national legal system), and the intention of the parties.
- The law governing the recognition and enforcement of the award. This would be the law of the country where enforcement is sought.
- The law governing conflict of laws:

✓ Say, if the disputants are Indian nationals or in the case of companies if both are incorporated in India, the tribunal may apply only Indian law to the substance of the dispute.

✓ Or, the disputants may either make an express choice of law or the proper law may be interpreted from the contractual terms. The concept of the closest connecting factor which may include nationality of the parties, place of performance of the contract, place of execution of the contract, place of payment under the contract, etc. can help determine the intention of the parties.

- The ACA 1996 (2015) states that the tribunal is not bound by the Indian Evidence Act, 1872 and the CPC 1908, however tribunals frequently employ some of the provisions of the Evidence Act.

✓ For ex. in relation to expert evidence on what the foreign law is in a dispute (s. 45 of the EA); public documents for the purpose of proving foreign law (s. 78 of the EA). Assistance of the court is also sought by a party (S. 9 of the ACA) for the purpose of interim orders.

Doctrine of kompetenz-kompetenz (or competence-competence)

- Int'l arbitral tribunals have the power to consider and decide disputes concerning their own jurisdiction. i.e. the "who decides" question
- Virtually all national legal systems recognize the competence principle (or kompetenz-kompetenz principle)
- Some jurisdictions such as France and India provide that an arbitral tribunal generally has C-C to initially decide virtually all jurisdictional disputes, subject to eventual judicial review. National courts in these jurisdictions are generally not permitted to consider jurisdictional objections on an interlocutory basis, but must await the arbitrator's initial jurisdictional decisions.
- Helps avoid delaying tactics when a respondent institutes a challenge to the tribunal's jurisdiction

The competence-competence principle and the separability presumption

- The competence-competence (C-C) principle:
  - The usual practice under modern international and institutional rules of arbitration is to spell out in express terms the power of an arbitral tribunal to decide upon its own jurisdiction.
  - It is often said: it is the competence to decide upon its own competence.
- It is also said that the principle is derived from or dependent on the separability presumption (SP).
- Many national arbitration statutes such as the ACA, 1996 incorporate provisions which link the separability presumption with the competence-competence of arbitral tribunals.
  - It is S. 16 in the ACA, 1996 which reads " … an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract".
    - ✓ In other words, it is the separability of the arb. clause which explains the tribunal's power to rule on its own jurisdiction – it may be said that the competence-competence principle is a function of, or is dependent on the separability presumption.

Incorporation of Article 16 of the UNCITRAL Model Law, 1985 into S. 16 of the ACA, 1996

JURISDICTION OF ARBITRAL TRIBUNALS

- S. 16. Competence of arbitral tribunal to rule on its jurisdiction.

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall he raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub- section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34 [Note: similar to article 34 in the UNCITRAL Model Law, 1985].

- S.17. Interim measures ordered by arbitral tribunal.—(1) A party may, during the arbitral proceedings [~~or at any time after the making of the arbitral award but before it is enforced in accordance with section 36~~,] apply to the arbitral tribunal— ……. Note: the striking out of the line is the proposed deletion in the ACA amendment Bill No. 100/2018

More on the C-C and Separability doctrines

- Article 21 of the 1976 UNCITRAL Arbitration Rules also provides similar reading as that of S. 16 of the ACA, 1996

- Legal authority, Gary Born, however distinguishes the C-C doctrine from the SP opining that the 2 are analytically distinct concepts:
  - The SP is about the substantive existence and validity of the arbitration clause/agreement.
  - The C-C doctrine is about a tribunal's power to decide jurisdictional issues when the existence, validity or scope of the arbitration agreement is challenged.
  - That a tribunal may have C-C regardless of whether the arbitration agreement is separable from the underlying contract, and regardless of whether the arbitration agreement itself is challenged.
- The arb tribunal's C-C to review challenges to the existence or validity of an arb agreement is derived from the applicable law which governs the arb tribunal's authority (ACA, 1996 and international law/treaty – external rules), rather than merely the separability doctrine.
- Purpose of the C-C doctrine: Greater efficiencies and better justice even if non-binding; and enforcement of parties' agreements to arbitrate – reference also to the NY Convention.

The ACA, 1996 – S. 16 – Judicial Review

- S. 16 taken as a whole is consistent with the NY Convention.
- The arb tribunal may decide challenges to their own jurisdiction, subject to judicial review of the jurisdictional award within 3 months … as stipulated in S. 34 of the ACA, 1996.

- Other developments:
  - INTERIM MEASURES PENDING ENFORCEMENT OF FOREIGN AWARDS

- Adopting the pro-arbitration spirit of the Amended Act, the Bombay High Court in the case of *Aircon Beibars FZE* v. *Heligo Charters Pvt. Ltd.*, 2017 SCC Online Bom 631 has secured the amounts due from a judgment debtor under a foreign award, pending enforcement of the award in India, by way of S. 9 of the ACA (Amended) Act, 2015. The Bombay HC through this order sought to ensure that the interests of a foreign award holders are protected pending enforcement.
- On the other hand is it arguable that of course, it is possible for a party to obtain interim measures from the arb. tribunal or the courts at the arbitral seat, but it would likely encounter significant challenges in enforcing any such orders in India in the absence of an international convention or the application of the 2006 version of the UNCITRAL Model Law (Arts. 17, & 17A to 17J). It is hoped that legislative amendment will rectify this anomaly, but until such time, contracting parties should be conscious of this when selecting a seat of arbitration.

Competence-competence - case law

- Merely because the contract has come to an end by its termination due to the breach, the arbitration clause does not perish nor become inoperative; rather it survives for the resolution of disputes arising ‘in respect of’ or ‘with regard to’ or ‘under’ the contract … *M/s Magma Leasing & Fin. Ltd. V Potluri Madhavilata*, AIR 2010 SC 488, para 18.
- The jurisdiction of the arbitrator to determine his own jurisdiction is on the basis of that arbitration clause which may be treated as an agreement independent of the other terms of the contract and his decision that the contract is null and void shall not entail *ipso jure* the validity of the arbitration clause. But the question would be different where the entire contract containing the arbitration agreement stands vitiated by reason of fraud of this magnitude … *India Household & Healthcare Ltd v LG Household & Healthcare Ltd*, AIR 2007 SC 1376, 1379.

✓ Arbitration petition/appln filed u/s 11 (5) & (6) of the ACA 1996 for appointment of an arbitrator on the respondent’s purported failure to do despite receiving notice.

✓ an agreement was allegedly entered into by the parties, which contained an arbitration clause.

Issues of formation, validity and scope of the arbitration agreement -ACA S.8 vs S.45 (equivalent to Art. 8 of the UNCITRAL Model Law, 1985) - Shin Etzu Chemical Co. – interim judicial review

- *Shin-Etsu Chemical Co. v Aksh Optifibre Ltd. et al* Vol. XXXI Y.B. Comm. Arb. 2006, p 747 (Yearbook Commercial Arb. – Int'l Council for Commercial Arbitration - ICCA); Civil Appeal No. 5048 of 2005 (Arising out of SLP (C) No. 3160/2005), decided on 12.08.2005

- Facts: In Nov. 2000, *Shin-Etsu* entered into a sale agreement with *Aksh*, containing an arb clause providing for ICC arb in Tokyo. The clause also stated that the agreement was governed by the laws of Japan. *Shin-Etsu* terminated the agreement in Dec. 2002, and initiated arb proceedings in Japan. *Aksh* initiated litigation in Indian courts seeking an injunction for cancellation of the agreement or a declaration that the agreement , including the arb. clause, was void, inoperative, and incapable of performance and could not be given effect. *Shin-Etsu* applied under s. 8 of the ACA 1996 for an order that *Aksh* submit to the ongoing arb in Japan. The Indian trial court allowed the appln. *Aksh* challenged the order and the HC set aside the decision of the trial court holding that s. 45 of the Act applied. *Shin-Etsu* appealed to the SC.

- S. 45 ACA 1996

- The issue was about:

  Whether the concerned judicial authoritywhile exercising its power u/s 45, decide the objection on a *prima facie view* of the matter and render a *prima facie* finding OR on a *final finding on merits* based on the facts of the case?

- The dissenting opinion of 1 of 3 judges was that:

Judicial authority is to dispose off expeditiously, and that a fast track resolution is required, with a determination u/s 45 of the ACA, based on the merits, final and binding and not on *prima facie* finding. Parties to submit documents and affidavits by way of evidence. Oral evidence ? maybe ... 2 months timeline ... Should be treated differently than a regular civil suit. The American approach favours final review of the court (justified on the basis of arb case law).

ACA case law – S.8 vs S.45 – Shin Etzu – Contd.

- Majority opinion held that:

If it were to be held that the finding of the Court u/s 45 should be a final, determinative conclusion, then it is obvious that, until such a pronouncement is made, the arbitral proceedings would have to be in abeyance. This defeats the credo and ethos of the ACA 1996, which is meant to enable expeditious arbitration, without avoidable intervention by judicial authorities.

Yes, as observed by the dissenting judge, s. 8 (under Part I) leaves no discretion with the court in respect of the matter of referring parties to arb. Insofar as s. 45 (under Part II) is concerned, there is discretion with the court that it can refuse reference to arb if it "finds" that the AA is "null and void, inoperative or incapable of being performed".

An *ex visceribus* (from the bowels) interpretation of the statute indicates that the prima facie approach is to be taken, and nothing prevents the AT from trying the issue fully and rendering a final decision. Neither the court nor the AT would be bound by the prima facie view. Delays and costs may ensue if a full fledged finding by the court was to be resorted to depending on the facts and situation. Remand back to trial court for prima facie consideration … decide in few months (expeditiously).

ACA case law – S.8 vs S.45 – Shin Etzu – contd.

- The majority opinion observed:

A number of foreign precedents including the French Code of Civil Procedure, The Swiss Federal Tribunal (Federal SC of Switz – apex court); and in common law jurisdictions Ontario and Hong Kong which have based their law on the Model Law (like India) the courts have adopted the *prima facie* view (jurisdiction)… as to the existence and non-vitiation (impair/destroy) of the arb agreement.

Also, affidavit evidence without oral evidence cannot aid in making a final determinative finding on the issue (bogus assertions without verification). Therefore, this route is not expeditious in relation to the arbitration process and procedures.

Therefore, in respect of the pre-reference stage contemplated by s. 45 of ACA, the court is required to take only a *prima facie* view for making the reference regarding the validity or otherwise of the AA, still leaving the parties to a full trial either in the matter before the AT or before the court at the post-award stage (u/s 48(1)(a)) …

Doctrine of separability – case law

- An int'l arbitration agreement is typically treated as presumptively separable or autonomous from the commercial or other contract within which it is contained.
- SC of India held that an arbitration clause is a separate and independent agreement (*Ashapura Mine-Chem Ltd vs Gujarat Mineral Development Corp*, Civ. App. 3702/15 (arising out of SLP (C) 1963/14)) [MANU/SC/0467/2015]

✓ Facts: The appellant and respondent entered into a MOU, wherein the appellant proposed to enter into a JV with a Chinese Co. as well as the respondent for setting up an alumina plant. The MoU however was not finalised, with the respondent blaming the appellant for the latter's non-compliance with the MoU.

✓ Held: The arbitration clause in the MoU survives and does not necessarily come to an end, even if the MoU did not materialise into a full fledged agreement

✓ The parties are bound to refer disputes arising out of and in relation to the MoU to arbitration if provided in the dispute resolution clause

- S. 16 (1) (a) & (b) of the Arb and Conciliation Act 1996 provides support for the doctrine of separability = Art. 16 of the UNCITRAL model law, 1985

Separability - the ACA, 1996 applied

- In *Swiss Timing Limited vs. Organising Committee, Commonwealth Games 2010* (SC Arbitration Petition No. 34 of 2013) 28.05.2014 [MANU/SC/0516/2014, para 26]:

➢ The concept of separability of the arbitration clause/agreement from the underlying contract has been statutorily recognised by this country under S. 16 of the ACA, 1996.

➢ Having provided for resolution of disputes through arbitration, parties cannot be permitted to avoid arbitration, without satisfying the Court that it will be just and in the interest of all the parties not to proceed with the arbitration.

➢ S. 5 of the ACA provides that the Court shall not intervene in the arbitration process except in accordance with the provisions contained in Part I of the Arbitration Act.

➢ This policy of least interference in arbitration proceedings recognises the general principle that the function of Courts in matters relating to arbitration is to support arbitration process. S. 16 (Kompetenz-Kompetenz of the arb. tribunal to rule on its jurisdiction) read with S. 5 (extent of judicial intervention) makes it clear that all matters including the issue as to whether the main contract was void/voidable can be referred to arbitration. Otherwise, it would be a handy tool available to the unscrupulous parties to avoid arbitration, by raising the bogey of the underlying contract being void.

Judicial intervention - MOUs and survival of the arbitration clause

- *Ashapura Mine-Chem Ltd* v. *Gujarat Mineral Development Corporation* 2015 (5) SCALE 379 [MANU/SC/0467/2015, para 30] has addressed the issue of separability and survival of an arbitration clause contained in a Memorandum of Understanding ("**MoU**"). The Supreme Court held that the arbitration agreement in the MoU was valid as it constitutes a stand-alone agreement independent from its underlying contract.

- The Supreme Court found that irrespective of whether the MoU fructified into a full-fledged agreement, the parties had agreed to subject all disputes, arising out of and in connection to the MoU, to arbitration. Such an agreement would constitute a separate and independent agreement in itself. Since no consensus was reached on the appointment of a Sole Arbitrator, it would be open to the parties to invoke S. 11 of the ACA, 1996. Based on this ground alone, the Supreme Court set aside the order of the Gujarat HC, and appointed a Sole Arbitrator due to existence of a valid arbitration agreement

- **LEGAL OBSERVATIONS:**

- In respect of an application filed under S. 45 of the ACA, 1996 for reference to arbitration, it was opined that: The position with respect to whether an arbitration agreement contained in a contract is separable is settled law and the separability doctrine is respected by all courts … *Enercon (India) Ltd & Ors v Enercon GMBH & Ors*. Civil Appeal No. 2086 of 2014 (Arising out of SLP (C) No. 10924 of 2013) and Civil Appeal No. 2087 of 2014 (Arising out of SLP (C) No. 10906 of 2013) 14.02.2014 [MANU/SC/0102/2014, para 80]. However, there continues to be instances where the court finds exception. Such exceptions are often raised in the context of MoUs or agreements claimed to be unconcluded by one of the parties. The contention is essentially that MoU is a contract *non-est* i.e. it is a **contract that has not come into existence**.

Judicial intervention - MOUs and survival of the arbitration clause

- Survivability and **separability** of arbitration clauses contained in agreements that are **novated** or **superseded** by subsequent agreements have also been tested to ascertain their validity. In *Mulheim Pipecoatings* v. *Welspun Fintrade* (Appeal (L) No. 206 of 2013 in Arbitration Petition No. 1070 of 2011 in Suit No. 2287 of 2011) 16.08.2013 [MANU/MH/1285/2013, para 29], which was a dispute regarding an application under s. 45 of the ACA, 1996 for reference to arbitration. The Bombay HC while dealing with this issue held that the separability presumption enshrined in the Act **requires the impugned arbitration agreement to be directly impeached (say, on the grounds of say a forged signature or signed by a pretended agent) in order to be considered inapplicable**. Therefore a superseding agreement not containing an arbitration clause would not invalidate the arbitration clause in the previous one.
- However, the Supreme Court in *Young Achievers* v. *IMS Learning Resources* Civil Appeal No. 6997 of 2013 (Arising out of SLP(C) No. 33459 of 2012) 22.08.2013 [MANU/SC/0852/2013, para]gave a **completely contradictory** view in relation to s. 8 (judicial power to refer parties to arbitration) read with s. 5 (extent of judicial intervention) of the ACA, 1996 that: "*an arbitration clause in an agreement cannot survive if the agreement containing an arbitration clause has been superseded/novated by a later agreement*." The reasoning of the Supreme Court was that in superseded contracts the accompanying arbitration agreement falls with it, and the existence of the arbitration agreement depends on the existence of the contract and its validity.
- The latest decision in *Ashapura* (2015) currently holds with respect to issue of separability of arbitration clauses in MOUs.