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Jurisdictional Challenges: Balancing the role of Courts and Arbitral Tribunals

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Overview

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- Challenges to tribunal's jurisdiction;
- Invalid or non-binding agreement; and
- Excess of authority.

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CHALLENGES TO TRIBUNAL'S JURISDICTION

INTRODUCTION

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Section 5 - Extent of judicial intervention

- *"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

- Part I provides for intervention of Courts in the following cases:

- Section 8 - Making reference in a pending suit;
- Section 9 - Passing interim orders;
- Section 11 - Appointment of Arbitrators;
- Section 14(2) - Terminating mandate of arbitrator;
- Section 27- Court assistance in taking evidence;
- Section 29A-Time-limit for arbitral award.
- Section 34 - Setting aside an award; and
- Section 37 - Entertaining appeals against certain orders and

SECTION 16

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- Section 16 of the Act – *kompetenz kompetenz*.
- A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
- 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
- A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

Arbitrability of Disputes

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- ***Booz Allen Hamilton v. SBI Home Finance Limited*** – (2011) 5 SCC 532
- Categories of non-arbitrable disputes:
- Disputes relating to criminal offences; Matrimonial disputes; Guardianship matters; Insolvency and winding-up matters; Testamentary matters; Eviction or tenancy matters.

- ***A. Ayyasamy v. A. Paramasivam*** – (2016) 10 SCC 386
- Allegations of fraud are arbitrable unless they are serious and complex in nature.

ARBITRABILITY OF DISPUTES

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- ***Shri Vimal Kishore Shah v. Mr. Jayesh Dinesh Shah***, (2016) 8 SCC 788
- Disputes arising out of trust deeds and the Indian Trusts Act, 1882 cannot be referred to arbitration.

- ***Vidya Drolia & Ors. v. Durga Trading Corporation***, 2019 SCC OnLine SC 358
- Supreme Court refers the question of whether landlord-tenant disputes are arbitrable to a larger bench.

CHITTARANJAN MAITY

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- ***Chittaranjan Maity v. Union of India,*** (2017) 9 SCC 611:

- The Supreme Court held that since the Respondent had not raised the plea of arbitrability either before the arbitral tribunal or before the Single Judge, it was held that the Division Bench was not justified in considering the arbitrability of disputes for the first time while hearing an appeal under Section 37 of the Arbitration Act.

CHALLENGES TO JURISDICTION

- ***M/s Indian Farmers Fertilizer Co-operative Limited v. M/s Bhadra Products***, (2018) 2 SCC 534

- It was held that as the arbitrator had disposed of one matter between the parties, i.e., the issue of limitation finally, the Award is an "interim award" within the meaning of Section 2(1)(c) of the Act and being subsumed within the expression "arbitral award", could therefore have been challenged under Section 34 of the Act.

- Difference between 'errors of law' and 'errors of jurisdiction'. It was held that an award on limitation does not relate to the arbitral tribunal's own jurisdiction under Section 16 of the Act, and can be separately and independently challenged under Section 34.

PLEA NOT RAISED BEFORE TRIBUNAL

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- ***M/s Lion Engineering Consultants v. State of M.P. and Ors.***, 2018 SCC OnLine SC 327.

- The Appellant relied on the judgment of the Supreme Court in *MSP Infrastructures Ltd. v. Madhya Pradesh Road Development Corporation Ltd.* (2015) 13 SCC 713, wherein it was observed that the phraseology used in Section 34, i.e., "the subject matter of dispute is not capable of settlement by arbitration" does not refer to objection to jurisdiction and only refers to a situation where a dispute by reason of its subject matter is not capable of settlement through arbitration.

- The Court held that there is no bar to the plea of jurisdiction being raised by way of objection under Section 34 of the Act even if no such objection was raised under Section 16. The Court also held that the observations in *MSP Infrastructures* do not lay down correct law.

Challenge to Tribunal's finding

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- Whether a Court dealing with a Petition under Section 34(2)(a)(ii) r/w Section 16(6) of the Act can independently determine the jurisdiction of the Arbitral Tribunal without being bound by the findings in the award passed by the Arbitral Tribunal?

- ***Cruz City 1 Mauritius Holdings v. Unitech,*** (2017 (3) ArbLR 20 (Delhi)

- *"It stands to reason that where the inherent jurisdiction of the arbitral tribunal to render an award is challenged, the enforcing Court would have to examine the challenge raised and it would not be open for the Court to simply rely on the finding of the arbitral tribunal. Where the authority of the arbitral tribunal to make an award is challenged, its decision would not have any evidential value".*

Challenge to Tribunal's finding

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- ***Falcon Progress Ltd. v. Sara International Ltd.***, AIR 2018 Delhi 5

- Although the Arbitral Tribunal can rule on its own jurisdiction in the first instance, the same would be amenable to judicial review.

- The Hon'ble Court also observed that there is no presumption that the decision of the Arbitral Tribunal as to the existence of an agreement is valid, and held that the court must be independently satisfied by sufficient evidence of such agreement.

SECTIONS 12 AND 14

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- ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL India Limited.***, (2018) 12 SCC 471

- If arbitrator falls in any one of the categories specified in the Seventh Schedule [r/w S.12(5)], he becomes "ineligible" to act as arbitrator and therefore under Section 14(1)(a), becomes *de jure* unable to perform his functions.
- Ineligibility goes to the root of the appointment. In such a case, it is not necessary to go to the Tribunal under Section 13.
- Instead, an application may be filed under Section 14(2) to the Court to decide on the termination of his/her mandate on this ground.

SECTIONS 12 AND 14

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- ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL India Limited.***, (2018) 12 SCC 471

- In a challenge where grounds stated in the Fifth Schedule are disclosed, which give rise to justifiable doubts as to the arbitrator's independence or impartiality, such doubts have to be determined by the Tribunal under Section 13.
- If the challenge is unsuccessful and Tribunal makes an award, the party may make an application for setting aside the award in accordance with Section 34 on the aforesaid grounds.

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INVALID OR NON-BINDING AGREEMENT

SECTION 8(1)

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Pre 2015 Amendment	Post 2015 Amendment
A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.	A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

SECTION 8

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- Section 8 of the 2006 UNCITRAL Model Law provides that:

  "… unless it finds that the agreement is null and void, inoperative and incapable of being performed."

- One view is that amended Section 8 appears to dilute the interpretation of courts in relation to the arbitrability of disputes at the stage of Section 8. A corollary of amended Section 8 could be that the courts can only determine the prima facie existence of a valid arbitration agreement and leave the rest to be determined by the arbitral tribunal by virtue of the principle of *kompetenz-kompetenz* as enshrined under Section 16 of the Act.

SECTION 45

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- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it *prima facie* finds that the said agreement is null and void, inoperative or incapable of being performed.

- "*Unless it finds*" has been substituted by "*unless it prima facie finds*" vide 2019 Amendment.

CHLORO CONTROLS

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- ***Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.,*** (2013) 1 SCC 641

> *"84. … positive effect of kompetenz kompetenz principle, which requires that the arbitral tribunal must exercise jurisdiction over the dispute under the arbitration agreement. Thus, challenge to the existence or validity of the arbitration agreement will not prevent the arbitral tribunal from proceeding with hearing and ruling upon its jurisdiction...*
>
> *The negative effect of the kompetenz kompetenz principle is that arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an arbitral tribunal, the Court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative or incapable of being performed."*

CHLORO CONTROLS

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- Section 8(3) of the Act permits commencement or continuation of an arbitral proceeding notwithstanding pendency of any application under Section 8 of the Act.

- *"85. … We must take note of the aspect of Indian law that Chapter I of Part II of the 1996 Act does not contain any provision analogous to Section 8(3) under Part I of the Act. In other words, under the Indian Law, greater obligation is cast upon the Courts to determine whether the agreement is valid, operative and capable of being performed at the threshold itself. Such challenge has to be a serious challenge to the substantive contract or to the agreement, as in the absence of such challenge, it has to be found that the agreement was valid, operative and capable of being performed; the dispute would be referred to arbitration"*

WORLD SPORT GROUP

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- ***World Sports Group v. MSM Satellite (Singapore) Pte. Limited***, (2014) 11 SCC 639

> *"33. …. The words "inoperative or incapable of being performed" in Section 45 of the Act have been taken from Article II (3) of the New York Convention … :*
>
> *"… an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time-limit, or where the parties have by their conduct impliedly revoked the arbitration agreement.*
>
> *By contrast, the expression 'incapable of being performed' appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal.""*

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"The words 'null and void' may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.

The word 'inoperative' can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.

The words 'incapable of being performed' would seem to apply to those cases where the arbitration cannot be effectively set into motion…"

HALDIA PETROCHEMICALS

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- ***Chatterjee Petrochem Company v. Haldia Petrochemicals Limited,*** (2014) 14 SCC 574

> *"31. It has been further argued by the learned Senior Counsel for the respondents that Section 5 of the A&C Act… will not be applicable to international agreements such as the present case. We are inclined to reject this contention by placing reliance upon the legal principle laid down by this Court in Venture Global Engg. Case…, the relevant paragraph of which reads as under:*
>
> *"25. Section 5 of the Act makes it clear that in matters governed by Part I, no judicial authority shall intervene except where so provided. Section 5 which falls in Part I, specifies that no judicial authority shall intervene except where so provided. The Scheme of the Act is such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act."*

SASAN POWER

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- ***Sasan Power Limited v. North American Coal Corporation (India) Private Limited,*** (2016) 10 SCC 813

> *""81. Mere reading of Section 45 would go to show that the use of the words "shall" and "refer the parties to arbitration" in the section makes it legally obligatory on the court to refer the parties to the arbitration once it finds that the agreement in question is neither null and void nor inoperative and nor incapable of being performed. In other words, once it is found that the agreement in question is a legal and valid agreement, which is capable of being performed by the parties to the suit, the court has no discretion but to pass an order by referring the parties to the arbitration in terms of the agreement."*

VIKRAM BAKSHI

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- ***McDonald's India Private Limited v. Vikram Bakshi and other,*** 2016 SCC OnLine Del 3949

> *"35. …... Under the 1996 Act, whether Part I thereof or Part II is applicable, the focus seems to have shifted towards directing the parties to arbitration rather than deciding the same subject matter as a civil suit. This is clearly discernible from Section 8 of the 1996 Act as also Section 45 thereof. In both eventualities, in an action which is brought before a court and which also happens to be the subject of an arbitration agreement, on the request made by one of the parties, the court is duty bound to refer the parties to arbitration. Unless, of course, in a case where Section 45 of the 1996 Act applies, the arbitration agreement is null and void, inoperative or incapable of being performed. "*

CONTD..

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- ***McDonald's India Private Limited v. Vikram Bakshi and other,*** 2016 SCC OnLine Del 3949

> *"40. It is important to note that the present case pertains to an anti-arbitration injunction and the principles governing the present case cannot be the same as one governing a case of an anti-suit injunction. This is so because of the principles of autonomy of arbitration and the competence-competence (Kompetenz-kompetenz) principle."*

> *"63. Courts need to remind themselves that the trend is to minimize interference with arbitration process as that is the forum of choice… while courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely and only on principles analogous to those found in sections 8 and 45, as the case may be, of the 1996 Act"*

PARAMETERS FOR ANTI ARBITRATION INJUNCTION

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- ***Himachal Sorang Power Private Limited & Anr. v. NCC Infrastructure Holdings Limited,*** 2019 SCC OnLine Del 7575

- Issue in this case was whether an anti-arbitration injunction can be sought against a subsequent/second arbitration for being barred by res judicata?

- The High Court observed that the determination of whether or not constructive res judicata applies with respect to the issue of incentive payments was undoubtedly a mixed question of fact and law, requiring at least appreciation of evidence. Since the Plaintiffs in effect aim to have a mini-trial in the garb of an anti-arbitration injunction suit, the relief so sought cannot be granted by the Court as it did not have jurisdiction to do so.

PARAMETERS FOR ANTI ARBITRATION INJUNCTION

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- The Court encapsulated the following parameters for the grant of anti-arbitration injunctions:

  (i) principles governing anti-suit injunctions are not identical to those governing anti-arbitration injunctions;

  (ii) courts are slow in granting antiarbitration injunctions unless they come to conclusion that the proceeding is vexatious and/or oppressive;

  (iii) the court has the power to disallow commencement of fresh proceedings on the ground of res judicata or constructive res judicata;

  (iv) the fact that in the court's assessment a trial would be required, would weigh against the grant of an anti-arbitration injunction;

  (v) the aggrieved party should be encouraged to approach either the arbitral tribunal or the court which has supervisory jurisdiction; and

  (vi) the arbitral tribunal could adopt a procedure to deal with a "re-arbitration complaint" (depending on the rules or procedure governing the proceeding) as a preliminary issue.

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EXCESS OF AUTHORITY

SECTION 11(6A)

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- Section 11(6A) was introduced vide 2015 Amendment:

> *"The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."*

- Section 11(6A) has now been omitted vide 2019 Amendment.

SBP & Co

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- ***SBP and Co. v. Patel Engg. Ltd.***, (2005) 8 SCC 678

> *"39. … Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement…and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection."*

BOGHARA POLYFAB

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- ***National Insurance Company Limited vs. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267***

  "The issues (first category) which Chief Justice/his designate will have to decide:

  (a) Whether the party making the application has approached the appropriate High Court.
  (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

BOGHARA POLYFAB

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- ***National Insurance Company Limited vs. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267***

  "The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the arbitral tribunal) are:

  (a) Whether the claim is a dead (long barred) claim or a live claim.
  (b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

BOGHARA POLYFAB

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- ***National Insurance Company Limited vs. Boghara Polyfab (P) Ltd. (2009) 1 SCC 267***

  "The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

  (a) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
  (b) Merits or any claim involved in the arbitration."

DURO FELGUERA

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- ***Duro Felguera, S.A. v. Gangavaram Port Limited,*** (2017) 9 SCC 729

- It was observed that the position of law as laid down in *SBP & Co* and *Boghara Polyfab* shall continue till the amendment was brought about in 2015 and "*after the amendment, all that the courts need to see is whether an arbitration agreement exists - nothing more, nothing less. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.*"

SWATANTRA PROPERTIES

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- ***Swatantra Properties v. Airplaza,*** High Court of Allahabad, judgment dated 28 May 2018.

  "18(e). While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section."

SWATANTRA PROPERTIES

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"18(g). But where the issue of "arbitrability" arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability will have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator… the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal".

UPSK v. Northern Coal

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- ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited***, 2019 SCC OnLine SC 1518

  The Supreme Court held that the order of the High Court refusing to refer parties to arbitration on ground of limitation was wrong given wording of Section 11(6A) of the Act. The Court came to the conclusion that subsequent to the 2015 Amendment, a court, while exercising its power under Section 11, was only required to consider if an arbitration agreement existed.

  The Court reiterated that an arbitral tribunal has the power to determine its own jurisdiction based on the concept, *kompetenz-kompetenz*.

SECTION 11(6A)

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- In view of the 2015 Amendment and subsequent judgments, all questions which could have been decided by the Court previously in a Section 11 application had been taken away and the Court was denuded of its jurisdiction to decide such questions which otherwise were available to the Court under the unamended Act as indicated in *SBP* and *Boghara* (which were legislatively over-ruled).

- Even under the unamended provisions, the consistent view of the Court is to have minimum supervisory jurisdiction over the arbitral tribunal. This received statutory recognition in various amended provisions carried out in 1996 Act, one of which was Section 11(6A).

MAYAVTI TRADING

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- ***Mayavti Trading Pvt. Ltd. v. Pradyuat Deb Burman,*** 2019 SCC OnLine SC 1164

  The Supreme Court, relying on the report of the High Level Committee headed by Justice B.N. Srikrishna dated 30 July 2017, further held that although Section 11(6A), inserted in the Act by 2015 Amendment was omitted by way of the 2019 Amendment, such omission did not resuscitate the law that was prevailing prior to the 2015 Amendment.

  The provision was omitted only on account of the 2019 Amendment requiring that appointments of arbitrators be made by arbitral institutions and not courts.

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