Blowing Hot and Cold: Assessing the Permissibility of Fresh Jurisdictional Challenges During Setting-Aside Proceedings

Kluwer Arbitration Blog
November 19, 2018

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Please refer to this post as: Anirudh Lekhi, 'Blowing Hot and Cold: Assessing the Permissibility of Fresh Jurisdictional Challenges During Setting-Aside Proceedings', Kluwer Arbitration Blog, November 19 2018, http://arbitrationblog.kluwerarbitration.com/2018/11/19/blowing-hot-cold-assessing-permissibility-fresh-jurisdictional-challenges-setting-aside-proceedings/

The Supreme Court of India ("**SC**") in its recent decision ***M/s Lion Engineering Consultants v. State of M.P. & Ors.*** ("**Lion**") has held that a party that had failed to raise a jurisdictional challenge before the arbitral tribunal under Section 16 of the Arbitration and Conciliation Act, 1996 ("**Act**"), would yet be permitted to raise such a challenge during setting-aside proceedings under Section 34 of the Act. The sole reason for this inference is that setting-aside proceedings are independent of proceedings before an arbitral tribunal. However, Lion's observations are ostensibly against the scheme of Section 16, which allows jurisdictional challenges to be raised only before the arbitral tribunal. Additionally, the decision is in conflict with existing judicial precedents addressing the same issue.

In order to resolve this ensuing confusion, it is imperative to appreciate the distinct nature of each jurisdictional challenge and the objects underlying Section 16. In this light, I explore whether new jurisdictional challenges can be urged during setting-aside proceedings.

Anatomy of Section 16

The relevant part of Section 16 reads as follows:

> *16. Competence of arbitral tribunal to rule on its jurisdiction-*
>
> *(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement...*
>
> *(2) A plea that the tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence;*

It is evident from the above that a tribunal may determine any objection to its jurisdiction on its own. The appearance of the word "including" in Section 16(1) denotes that jurisdictional challenges to the existence or validity of the arbitration agreement are merely illustrative and not exhaustive. Thus, various kinds of jurisdictional challenges are permissible under Section 16. In order to appreciate the varying facets of jurisdictional challenges, it would be useful to refer to the International Arbitration Practice Guideline on Jurisdictional Challenges ("**Practice Guideline"**).

According to Article 2 of the Practice Guideline, most jurisdictional challenges arise in relation to whether—(i) the arbitration agreement exists; (ii) the parties to the dispute are the same as the parties to the arbitration agreement; (iii) the arbitration agreement is defective; (iv) the arbitration agreement was made in the required form; (v) the subject-matter falls within its scope; and (vi) the arbitrators have the necessary powers. Therefore, jurisdictional challenges akin to those envisaged in the Practice Guideline may also be raised before the arbitral tribunal under Section 16.

Further, as per Section 16(2), objections to the jurisdiction of the tribunal can only be raised prior to the submission of the statement of defense. The objectives of this provision are two-fold. *First*, it ensures that the tribunal determines its jurisdiction at the very threshold. This precludes belated adjudication on questions of jurisdiction and preserves time and expense of the parties. *Second,* the provision reduces the supervisory role of Courts if parties fail to raise jurisdictional

challenges within the period prescribed under Section 16(2). Consequently, the inability of Courts to revisit certain questions of jurisdiction may encourage parties to raise jurisdictional challenges promptly. Any interpretation of Section 16 should not lose sight of these objects.

Conflict in judicial precedents

The SC's observations in Lion are at odds with its previous decision in ***Narayan Prasad Lohia v. Nikunj Kumar Lohia & Ors.*** ("**Lohia**"). The jurisdictional challenge in Lohia pertained to the composition of the arbitral tribunal. It was not raised before the tribunal and urged for the first time during setting-aside proceedings. In this regard, the SC observed— "*Such a challenge must be taken under Section 16(2), not later than the submission of the statement of defence…If a party chooses not to so object, there will be a deemed waiver under Section 4.*" Therefore, Lohia opined that a party's failure to raise a jurisdictional challenge before the arbitral tribunal would result in a waiver of its right to raise such challenge subsequently. Since Lohia and Lion have been decided by benches of equal strength (three judges), it is unclear which of the two decisions holds the ground.

The SC in ***Gas Authority of India Ltd. v. Keti Constructions (I) Ltd.*** **("GAIL")** also determined a similar issue. Negating a jurisdictional challenge during setting-aside proceedings, GAIL held that since the objective of the Act is to secure expeditious resolution of disputes, such challenges must be made before the arbitral tribunal itself. However, the SC qualified its conclusion by observing— "*If a plea of jurisdiction is not taken before the arbitrator as provided under Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.*" Thus, GAIL permitted fresh jurisdictional challenges during setting-aside proceedings if good reasons were shown. However, GAIL was decided by a smaller bench of two judges and to that extent, its qualification appears to ignore Lohia.

Additionally, two decisions of the High Courts of Bombay and Allahabad have offered very compelling reasons for allowing parties to raise jurisdictional challenges for the first time during setting-aside proceedings. These decisions opine that an inherent lack of jurisdiction cannot be sanctified by the failure of a

party to raise an objection promptly. Accordingly, since questions of jurisdictions go to the root of the matter, a party may raise a jurisdictional challenge at any stage.

Way Forward

It is true that the lack of a tribunal's jurisdiction cannot be rectified by a party's failure to raise a jurisdictional challenge. However, it is also essential to keep an unscrupulous party from delaying proceedings through frivolous challenges during setting-aside proceedings. Therefore, an intermediate view may be deduced by recalling the different kinds of jurisdictional challenges provided under the Practice Guideline.

These jurisdictional challenges can be classified into two categories—(i) challenges relating to a defect in the jurisdiction and (ii) challenges on account of a lack of jurisdiction. This classification is rooted in the decision of the Privy Council in ***Ledgard v. Bull***, which postulates that though a consent or waiver may cure a defect in the jurisdiction, it cannot cure an inherent lack of it. Therefore, jurisdictional challenges raised due to a defect in the jurisdiction must be distinguished from those based on an inherent lack of it.

In this regard, a jurisdictional challenge that the subject matter is not arbitrable is an illustration of a ground based on an inherent lack of jurisdiction. For instance, an objection that the subject matter relates to penal laws should be permitted during setting aside proceedings under Section 34, even if it was not urged before the tribunal under Section 16. This is because a party's failure to raise this challenge before the tribunal, cannot confer jurisdiction upon the tribunal when the claim itself is not arbitrable.

However, the same latitude may not be given to fresh jurisdictional challenges relating to defects in the jurisdiction. Since jurisdictional defects are capable of a cure, the Courts should permit fresh jurisdictional challenges relating to defects in jurisdiction only if "good reasons are shown". For example, jurisdictional challenges questioning the constitution of an arbitral tribunal or the existence of an arbitration agreement are illustrations of challenges based on defects in the jurisdiction. In such cases, a party's failure to raise a challenge before the tribunal under Section 16(2) may lead to a waiver of the right to object subsequently.

The SC in ***Prasun Roy v. Calcutta M.D.A*** considered a fresh challenge to the constitution of an arbitral tribunal during setting-aside proceedings and surmised—"*The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the (arbitral) proceedings precludes such a party from contending that the (arbitral) proceedings are without jurisdiction.*" In this light, it appears that the conduct of a party and the time taken to raise a jurisdictional challenge may be considered by the Court to ascertain whether there was a waiver or not.

In view of the above, the Court's inquiry into the existence of "good reasons" may also include a determination of whether there was a waiver of the right to object or not. This would be in keeping with the SC's verdict in GAIL as well as the objectives of Section 16 as parties would now have to establish cogent reasons for raising new jurisdictional challenges during setting-aside proceedings.

Conclusion

The arbitral regime in India is clogged with decisions that do not appreciate the unique nature of each jurisdictional challenge. Evidently, decisions such as Lion and Lohia have painted every jurisdictional challenge with the same brush and yet reached plainly opposite conclusions. It is, therefore, crucial to distinguish jurisdictional challenges based on an inherent lack in the jurisdiction from those founded on defects in the jurisdiction. Their nature would determine whether a party would be precluded from raising such challenges or be allowed if "good reasons" so warrant. This intermediate approach may resolve the prevailing confusion and preclude parties from employing dilatory tactics.