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Proposed Repeal of Section 11 (6A) of the Arbitration and Conciliation Act, 1996: Who Decides the Question of Existence of an Arbitration Agreement?

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Introduction

Section 11 of the Arbitration and Conciliation Act of India, 1996 (**the Act**), demonstrates in detail the procedure for appointment of arbitrators. It empowers the court to examine the existence of an arbitration agreement while deciding the application for such appointment. The gravity and significance of such proceedings is vast, in both domestic and international arbitrations, as they ascertain that any inadvertent or conscious failure to constitute an arbitral tribunal does not hold up the commencement of arbitral proceedings.

With the Arbitration and Conciliation (Amendment) Bill, 2018 (**the 2018 Bill**), progeny of the Justice B.N. Srikrishna Committee (**the Committee**), the legislature proposes to bring about significant changes to Section 11, to augment the growth of institutional arbitration in India which also include doing away with the requirement of examination of the existence of an arbitration agreement by the courts. Certain amendments proposed at diminishing the role of the judiciary may, however, lead to counter-intuitive ramifications.

I attempt to reason here that some degree of judicial intervention, especially when it comes to the question of determining the existence of an agreement, is necessary to ensure that the dispute resolution process does not become unnecessarily protracted.

The scope of existing Section 11(6A)

Since the decision in *SBP vs. Patel Engineering AIR 2006 SC 450*, it was within the powers of the court to preliminarily decide its own jurisdiction to entertain the arbitration petition and also the existence of a live claim i.e. one not hit by limitation. Distinct categories of issues, which are within the domain and competence of the Court while exercising powers under Section 11, were discerned by the Supreme Court (**the SC**) in the subsequent case of *National Insurance Company Limited v. Boghara Polyfab Private Limited (2009) 1 SCC 267*, vis-à-vis (i) issues which the Chief Justice or his designate is bound to decide i.e. decisions on the jurisdiction and existence of a valid arbitration agreement; (ii) issues which he can also decide i.e.

whether the claims made by the parties are tenable., and (iii) issues which should be left to the Arbitral Tribunal to decide.

The position hereinabove was narrowed down altogether under the 2015 Amendment Act with the insertion of Section 11(6A) and the power of the court is now confined *only to the examination of the existence of an arbitration agreement*. While every other power of the Court under Section 11 was curtailed by the 2015 Act, the legislature thought it appropriate, and rather necessary, to insert clause 6A, leaving it to the court to decide on the existence of a valid arbitration agreement, no more and no less.

In the case of *Duro Felguera, S.A. v. Gangavaram Port Limited (2017) 9 SCC 729*, one of the initial cases on Section 11 (6A), the SC succinctly analysed its scope and effect. While the factual matrix of the case was rather complex, involving disputes arising out of six agreements, the Court took a simplistic view in appointment of tribunals, limiting itself to deciding the existence of a valid arbitration agreement, strictly in terms of Section 11 (6A). Since there were six arbitrable agreements, each containing an arbitration clause, the SC appointed six separate tribunals.

The SC has, however, redefined the scope of Section 11 in a recent judgment in *United India Insurance Co. Ltd. & Anr. vs. Hyundai Engineering and Construction Co. Ltd. & Ors. Civil Appeal No. 8146 of 2018,* pronounced on 21.08.2018. The apex court elucidated on the ambit of Section 11(6A) and clarified that holding that no other enquiry (apart from that on the mere existence of an arbitration agreement) can be made by the Court while examining the arbitration agreement, would be misreading the decision in *Duro Felguera* and the amended provision.

Recommendations of the Committee and the 2018 Bill

A cardinal recommendation of the Committee is the constitution of the Arbitration Council of India (**the ACI**) that would grade arbitral institutions in India and set benchmarks for their performance. The 2018 Bill has finally assigned the pivotal role of appointment of arbitrator(s) to arbitral institutions designated by the Supreme Court.

The 2018 Bill, while specifying that the appointment shall be made by the arbitral institution designated by the SC, proposes to delete Section 11(6A), taking away even, what can be termed, the residual powers of the Court to decide the question of the existence of an arbitration agreement. This recommendation is in consonance with the *kompetence-kompetence* principle of an arbitral tribunal ascertaining its own jurisdiction.

Who decides on the existence of an arbitration agreement?

The question which begs consideration now is, with the power to appoint an arbitrator being divested to arbitral institutions and the contemporaneous deletion of Section 11 (6A), will an arbitration commence without any decision as to the existence of a valid arbitration agreement on a mere reference to the arbitral institution?

Deciding on the existence of an arbitration agreement is, a small, but a significant

power exercised by the Courts. Section 11 (6A) was inserted with the intent to provide relief against frivolous and misconceived actions by implementing a system for actual costs as is implemented in the UK and other jurisdictions. The decision of the Supreme Court in *United India Insurance* has further clarified that in order to avoid any prejudice being caused to a party, it is not only vital to determine the existence of an arbitration agreement, but it is also imperative that the arbitration clause and the dispute raised may be examined. The repeal of Section 11(6A) would entail automatic appointment of tribunals even for claims that are not legally arbitrable *vis-a-vis* tenancy, guardianship, insolvency, winding up of companies and various matters which cover rights *in rem*. The appointment may eventually be rendered futile if the arbitral tribunal were to ultimately conclude that there does not exist a valid arbitration agreement, leading to further delays.

Loopholes in the Committee's recommendations

The Committee recognized that examining whether a valid arbitration agreement exists or not, could lead to delays as extensive evidence and arguments may be led on the same, and hence recommended the deletion of clause (6A). The committee, with an aim to reduce interference of the judiciary in the arbitration processes, drew inspiration from various regimes vis-à-vis Singapore, Hong Kong, United Kingdom etc., while recommending that similar systems be embraced in India as it would circumvent any delays and set the momentum for institutional arbitration in India.

The Committee has however ignored the provisions of Section 18 of the English Arbitration Act, 1996 (which is in consonance with Section 11 of the Indian Act) which requires that the party applying to the court for appointment of arbitrator must establish a "*good arguable case*" that a tribunal would have jurisdiction to hear the case, and emphasises that any jurisdictional arguments remain matters for the tribunal to decide in accordance with the principle of *kompetenz-kompetenz*. (*Silver Dry Bulk Company Limited v Homer Hulbert Maritime Company Limited* [2017] EWHC 44 (Comm). Thus, there is an initial threshold test that must be met in order for an application under section 18(3) to succeed. In the Indian context, with the proposed deletion of Section 11(6A), the requirement of meeting the initial threshold of the existence of a valid arbitration agreement has been done away with. The consequences of this could be precarious.

Conclusion

The recommendations of the committee, propounded at a) divesting the power of appointment of arbitrators entirely to the arbitral institutions and b) the omission of Clause 6(A) which necessitates a court seized to delve into the existence of an arbitration agreement before progressing with an application filed under Section 11, does carry with it an element of uncertainty and ambiguity. The most common problem likely to arise will be a party challenging the validity of the arbitration agreement as a counter-blast to one party filing an application under Section 11. Explicit rules and guidelines will have to be formed and implemented if the above task is to be deputed to arbitral institutions.

The status quo is insufficient and suffers from various infirmities. The 2018 Bill does

not specifically detail the scope of the ACI's role and its powers, which is rather indispensable if the ACI is to be entrusted with the responsibility of accreditation of institutions which will ultimately be designated by the Supreme Court and the High Court to appoint arbitrators, and may even be ascertaining the existence of a valid arbitration agreement (if so provided in the future). Furthermore, the course of action to be adopted in the event where a party is objecting to the validity of the arbitration agreement itself needs to be specified.

Repeal of Section 11(6A) of the Act is likely to result in more litigation and will rather defeat the aim of expeditiously resolving applications for appointment. In the absence of any legislative clarity on the above aspects, speedy resolution cannot be ensured.

While it is important to minimize intervention of the courts to achieve prompt and expeditious results through arbitration, in the absence of a coherent system in place, some amount of judicial interference is imperative to render a degree of certainty and reduce the number of appeals and challenges arising out of pre-arbitration decisions. One hopes that the Indian judiciary endeavours to provide the requisite clarity on the controversies which inundate the instant situation.

This entry was posted on Thursday, December 27th, 2018 at 1:14 pm and is filed under Appointment of arbitrators, India, Judicial intervention
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