Kluwer Arbitration Blog

IFFCO v. Bhadra Products: Increasing Confusion or Clarifying on Matters of Jurisdiction?

Pragya Chandak, Harsh Salgia (National Law University, Jodhpur) · Monday, January 7th, 2019

Section 16 (1) of the Arbitration and Conciliation Act, 1996 [“**the Indian Act**”] confers power upon the arbitral tribunal to decide on matters relating to its jurisdiction. Under section 16 (5), a decision accepting the plea of lack of jurisdiction shall be an appealable order; while decision rejecting the same plea can be challenged only with the final award. Though the term *jurisdiction* has not been defined, the courts in India have interpreted it to include *inter alia* scope of the arbitration agreement and arbitrability of disputes.

Recently, the Indian Supreme Court [“**the Court**”] in *M/s Indian Farmers Fertilizers Co-operative Limited v. M/s Bhadra Products (Civil Appeal No. 824 of 2018)* [“**Bhadra Products**”] restricted the scope of section 16 (1), declaring that issue of limitation is not covered under the primitive sense of the term ‘jurisdiction’. It is important to distinguish matters of jurisdiction from that of the merits of claims, as the former goes to the root of the dispute and absence of the same can render the ultimate decision null and infructuous. While relying heavily on English jurisprudence, the Court in *Bhadra Products* gave a very narrow interpretation to the term ‘jurisdiction’. It was held by the Court that similar to the Arbitration Act, 1996 [“**the English Act**”] matters of only substantive jurisdiction such as the validity of arbitration agreement and/ or of arbitral tribunal and arbitrability of disputes shall be considered within the scope of section 16(1) of the Indian Act. However, the reasoning is inaccurate on various fronts:

At first, the term jurisdiction derives its meaning from the context in which it is used. The Indian Act provides the tribunal with the power to pass a ruling on any issue that is related to its jurisdiction. In the case of *National Thermal Power Corporation v Siemens Atkeingesellschaft* [1)], it was reasoned that any refusal to go into the merits of the claim lies within the realm of jurisdiction. Like any other issue of jurisdiction, the issue of limitation is decided without going into the merits of the particular claim. In other words, while determining the issue of limitation, the tribunal enquires only into the fundamental facts such as when the claim arose and the time period which has lapsed and nothing more.

Secondly, section 16 (1) of the Indian Act is wide enough to permit the tribunal to decide any matter, including any issue relating to jurisdiction which goes to the root of the matter. In *Pandurang Dhoni Chougule v. Maruti Hari Jadhav*[2)], the Court held that plea of limitation is an issue that goes to the root of the matter and affects the jurisdiction of the tribunal conducting the proceedings. Applying the rationale in a case, the Bombay High Court determined that while ruling

on the issue of limitation, the tribunal shall be ruling on its jurisdiction.

Thirdly, the English Act restricts the principle of Kompetenz-Kompetenz by using the term 'substantive' jurisdiction. However, the Indian Act has no such restriction and provides for wider amplitude as it reflects tribunal's power to determine any issue relating to its 'own' jurisdiction.

Further, it has been held in the case of *Union of India v. East Coast Builders* [3] that guidance should not be taken from the English Act when the Indian Act expressly deviates from it. Therefore, issue of limitation must be construed as an issue of jurisdiction as provided under section 16(1) of the Indian Act.

Decision on limitation: Order or Interim award?

Section 31(6) of the Indian Act lays down that an interim award can be passed on any matter on which a final award can be passed. In *Bhadra Products*, the Court held that as issue of limitation is one of the matters raised by parties at dispute, a decision on the same would be an interim award. The Court arrived at this conclusion by wrongly interpreting the term 'interim award', as issue of limitation is not a matter on which a final award can be passed. Though the term interim award has not been defined in the Indian Act, the courts have consistently ruled that for a decision to be an interim award, it must finally settle one or few of the claims or issues of liability raised by the parties. For instance, a decision on breach of the contract can be an interim award on which a final award clearly specifying the amount of damages can be passed subsequently. However, adjudication on an issue of jurisdiction does not settle any claim or issue of liability and is a necessary step to be undertaken before determining the substantial relief sought by parties. It is for this reason that under the Indian Act, a ruling on jurisdiction has been classified as an order.

Anomaly based on a different decision on the issue of jurisdiction

A lot of confusion hovers around the tribunal's decision with respect to its jurisdiction, that is, whether it is an award or an order. This arises primarily because the Indian Act is silent on this aspect. In other words, when an objection regarding tribunal's lack of jurisdiction is accepted, it has been termed as an appealable order under section 37 of the Indian Act. However, the Indian Act does not expressly categorize the decision of the tribunal accepting its jurisdiction as an order. It is for this reason it had been argued various times that such decision shall be an interim award so that the court can be approached to set aside the same. However, such contention should be rejected for the basic reason that the order under section 16 cannot change its nature based on different outcome that is become an interim award if the tribunal rejects plea of no jurisdiction and is only appealable if plea of no jurisdiction is allowed.

Removing the discrepancy

Section 37 of the Indian Act does not provide a right to appeal against the order if the tribunal accepts its jurisdiction and it can be challenged only later with the ultimate final award. It is believed that such a distinction was created to reduce the role of the courts in the proceedings. But this can result in a waste of time and money in arbitral proceedings in case the court determines

that tribunal did not have jurisdiction in the first place. To fill this gap, it is suggested that preferably an *amendment* should be introduced in section 37 wherein (i) any order whether accepting plea of lack of jurisdiction or rejecting the same shall be appealable and (ii) that the court should decide the matter expeditiously.

However, this might lead to a dilemma of whether the arbitral proceedings should continue or come to a standstill. In such a situation, the arbitral tribunal should have the prerogative to decide whether to continue with the proceedings or not. In this way, a balance can be attained between parties having right to appeal against the order and having an efficient arbitral proceeding.

References

?1 (2007) 4 SCC 451
?2 AIR 1966 SC 153
?3 1998 (47) DRJ 333

This entry was posted on Monday, January 7th, 2019 at 1:43 am and is filed under Arbitrability, Arbitration Agreement, India, kompetenz-kompetenz
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.