

Is A Delegation Clause the Answer to Pre-Arbitral Judicial Interference in India?

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Most of the contemporary discourses on pre-arbitral judicial interference in India entail the scope of the judicial enquiry required before the constitution of an arbitral tribunal. As it currently stands, Section 8 (for arbitrations seated in India) and Section 45 (for foreign-seated arbitrations) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") have the potential of affecting the functioning of the arbitral proceedings. Both the sections provide that courts should refer the parties to arbitration upon a '*prima facie*' satisfaction that a valid arbitration agreement exists. The scope of the pre-arbitral judicial intervention was also examined by the Law Commission in its 246th Report wherein, it recommended that '*the same test regarding scope and nature of judicial intervention, as applicable in the context of section 11, should also apply to sections 8 and 45 of the Act.*' While only Sections 8 and 45 are the subject of this post, it bears noting that the position of the judiciary (as discussed here) has been vastly inconsistent under each of the three provisions.

In the current schema of things, arbitration agreements governed by the 1996 Act are still susceptible to lengthy judicial interference as Indian courts tend to perform a *de jure* analysis of the existence and validity of an arbitration agreement before

a tribunal is constituted.[fn]See *Garware Wallropes v. Costal Marine Constructions & Engineering*, AIR 2019 SC 2053; *United India Insurance v. Hyundai Engineering*, AIR 2018 SC 3932.[/fn] Thus, two parties who intend to resolve all their contractual disputes, including questions pertaining to the existence and validity of the arbitration agreement itself, through arbitration, do not have a means to avoid the interference of Indian courts.

In the United States, parties willing to avoid this uninvited interference have included specific clause to this effect in their arbitration agreements. This clause acts as an unambiguous reinstatement of their will to delegate all jurisdictional questions, such as existence, scope, validity of the arbitration agreement (and even arbitrability of the dispute) to the arbitrator instead of the courts. Christened by the US courts as a ‘delegation clause’, these clauses can play a significant role in saving time and cost of the parties. In this blog post, the authors make a case for the implementation of delegation clauses in Indian contracts.

The Evolution and Practice of Delegation Clause under the US Federal Arbitration Act

The idea that parties can delegate the question of existence and validity of a domestic arbitration agreement to an arbitral tribunal instead of to courts is not expressly supported by the Federal Arbitration Act (“**FAA**”). Section 4 of the FAA mentions that courts should refer the parties to arbitration upon being satisfied that a valid arbitration agreement existed. However, as is the case with the doctrine of separability and competence-competence, the Supreme Court of the United States (“**SCOTUS**”) read this idea into the FAA (in this case, Section 2) through a series of progressive decisions.

Firstly, the SCOTUS in *AT&T Technologies, Inc. v. Communications Workers of America* (1986) ruled that unless the parties had agreed otherwise, pre-arbitral challenges to the existence and validity of an arbitration agreement should be carried out by the courts. The SCOTUS expanded this opinion in *First Options, Inc. v. Kaplan* (1995) when it ruled that the presumption that challenges under Section 4 of the FAA are decided by the courts could be overcome if there was ‘clear and unmistakable’ evidence of the intention of the parties to proceed otherwise.

While these decisions laid the groundwork for recognition of delegation clauses, it

was only in *Rent-A-Center, West, Inc. v. Jackson* (2010), that the SCOTUS truly empowered such clauses. In *Rent-A-Center*, the SCOTUS held that the provision under Section 4 was a 'default rule' instead of a mandatory one and thus, parties could overcome its application through agreement. Following the separability presumption, it was held that the delegation clause was severable from the rest of the agreement and thus, just as a challenge to the contract did not invalidate the arbitration agreement; a challenge to the arbitration agreement would not invalidate the delegation clause. The SCOTUS characterized the delegation clause as '*a distinct mini-arbitration agreement divisible from the contract in which it resides—which just so happens also to be an arbitration agreement.*'

In order to challenge the delegation of jurisdictional issues to the tribunal, the non-existence of a delegation clause should be expressly alleged, and the party should not generally challenge the arbitration agreement. Recently, arbitration clauses that refer to institutional rules acknowledging 'competence-competence' have also been treated as delegation clauses by the Missouri Supreme Court.

Delegation clauses, in general, have gained immense popularity in the current decade and are becoming a regular fixture in B2B contracts. The authors are of the view that the incorporation of an unambiguous delegation clause in an arbitration agreement may save the parties from the wavering operation of various sections of the 1996 Act. The parties may reflect their 'clear and unmistakable' intention to give the arbitrator *carte blanche* to finally determine issues of invalidity and non-existence of the arbitration agreement.

Importing the U.S. Approach to Delegation Clauses in Scheme of the 1996 Act of India

As far as the compatibility of the said clauses with the scheme of the 1996 Act of India is concerned, the authors note that the judicial, as well as the legislative trend, is towards minimal judicial intervention in the 'conduct' of arbitrations.[fn]See *Mayavti Trading Pvt. Ltd. vs. Pradyut Deb Burman*, AIR 2019 SC 4284; *Duro Felguera S.A. vs. Gangavaram Port Limited*, AIR 2017 SC 5070.[/fn] This is also evident from the recent 2019 Amendment Act which has divested the courts of their power to decide the question of 'existence' of an arbitration agreement while appointing an arbitrator by repealing Section 11(6A) of the 1996

Act. Undoubtedly, the practice of determining the existence of a valid arbitration agreement still continues to exist under Section 8 and Section 45 of the 1996 Act. However, the same can be brought to terms with delegation clauses in the following three ways:

Firstly, the scope of enquiry under both these sections have been incarcerated to only '*prima facie*' satisfaction of the judicial authority. It means that any conclusion made by the judicial authority under Section 8 as to the 'existence' of an arbitration agreement will only remain a factual or *de facto* determination of existence, 'nothing more, nothing less'. The legal analysis of 'existence' can unmistakably be delegated by the parties to the tribunal alone. This was also reflected in the 246th Law Commission's report where it noted that '*if the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal.*'

Secondly, and as already explained above, the SCOTUS has interpreted Section 4 of the FAA, as far as it relates to reference to arbitration, to reflect a 'default rule'. Similarly, in context of Section 8 of the 1996 Act, it must be remembered that it was never the intention of the 1996 Act to mandate the courts to perform a *de jure* analysis of the arbitration agreement before making a reference to arbitration. If that were the case, the original Act would have contained provisions to that effect under the erstwhile Section 8 (or Section 11). The current language in Section 8 exists because courts while dealing with the pre-arbitral challenges, derogated from the objectives of the Act. Thus, the 2015 as well as the 2019 amendments were brought firstly, to ensure that judicial interference, when done, was extremely limited and secondly, to harmonize the standard of review under Sections 8, 11 and 45. This leads us to conclude that the provisions under Section 8 do not speak of a mandatory requirement by the courts to decide on the existence and validity of the arbitration agreement.

Lastly, by affirming concepts such as 'specific question doctrine', the Supreme Court has earlier indicated that courts may give due credence to the terms of the arbitration agreement over the non-mandatory requirements of the Act.[fn]Seth Thawardas Pherumal v. Union of India, AIR 1955 SC 468.[/fn] Such a determination further re-affirms the possibility of having 'delegation clauses' under the Indian arbitration regime.

In sum, delegation clauses can be a vital tool in avoiding unwanted judicial interference before the tribunal takes the baton. Given the scheme of the 1996 Act and its similarity with the FAA provisions that deal with pre-arbitral challenges, the authors believe that the U.S. approach may provide guidance for implementing delegation clauses in India.