Kluwer Arbitration Blog

‘Existential’ Crisis of Section 11(6A) of the Indian Arbitration Act? – Part II

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In Part I of the post, we discussed the position of law on the “existence” test under Section 11(6A) of the Act. In Part II, we aim to provide context to the developments relating to the provision and understand the larger picture of the judicial trend. But first, on the basis of the decisions discussed in Part I, we have taken the liberty to restate the law below. We acknowledge that this restatement is not watertight but nevertheless, it may be a useful reference that could be revised as the law develops on this point.

> §1: The court, when deciding a petition under Section 11 of the Act for the appointment of an arbitrator(s), shall confine to the examination of the existence of the arbitration agreement
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> §2: When examining the existence of an arbitration agreement, the court may find:
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> > §2-1: whether the arbitration agreement exists in fact (factum of existence); and
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> > §2-2: whether the arbitration agreement exists in law (legal existence), that is:
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> > > §2-2-1: whether an arbitration agreement exists that pertains to the dispute(s) which has arisen between the parties to the contract; or
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> > > §2-2-2: whether the arbitration agreement is null and void.
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> §3: Provided, the scope of enquiry of legal existence shall be narrow and that except in an open-and-shut case or when there is no obvious or apparent doubt, all jurisdictional questions of scope remain in the domain of the arbitral tribunal. Further, provided that the scope of enquiry of legal existence under §2-2-2 shall be *prima facie*.
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> §4: When appointing an arbitrator(s), the court shall do so on a *prima facie* satisfaction that an arbitration agreement exists, leaving the final determination to the arbitral tribunal. Such decision is final and no appeal, including Letters Patent Appeal, shall lie against such decision. Except, if the court determines that no arbitration agreement exists as per §2-1 or §2-2, then the determination of the court shall be final and not barred from appeal.

Here, an interesting observation may be made when comparing the pre-2015 Amendment position with the present position. Pre-2015 Amendment, it was generally considered that through *SBP* and

Boghara, the door was left wide open for the court to decide many preliminary aspects, which ordinarily, should have been left to the tribunal. These included the existence of a valid arbitration agreement, existence of a live claim, and whether parties concluded the underlying contract with satisfaction of their mutual rights and obligations. As for issues of the scope of the arbitration agreement and the merits of any claim, these were to be left exclusively to the tribunal.

In comparison, the shift in the present law is remarkable. Post-2015 Amendment, courts have not only determined the factual existence of an arbitration agreement but also its scope, i.e. whether an arbitration agreement is "relatable" to or "pertains to" the dispute(s), while adopting a narrow standard of enquiry (see *NCC Ltd.*). In addition, courts determine threshold issues of enforceability (i.e. null and void) of the arbitration agreement (see *Garware* and *United India*).

We think that the courts have taken a consistent and valid approach vis-à-vis Sections 5 and 16 of the Act. Some may argue that the legislature's use of the term "existence" in Section 11(6A) was to be understood as confining the court's examination to the bare factum of existence of an arbitration agreement, while leaving issues of scope, validity, and time-barred claims to the arbitral tribunal. Such a view, however, possibly neglects various other provisions of the Act. Section 7(1), for instance, defines an arbitration agreement as:

"*an agreement by the parties to submit … disputes which may arise between them in respect of a defined legal relationship …*"

Thus, finding "existence" should not only mean finding the bare factum of the arbitration agreement but also whether it is an agreement by parties to submit disputes in respect of the contract. This explanation also resonates with Section 16, which empowers the tribunal to "*rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.*" There is no inclusion of the term "scope," presumably because "existence" covers issues of scope too, an indication of which appears in Section 16(3) that refers to jurisdictional pleas that the tribunal is exceeding the scope of its authority.

Moreover, where the court makes an appointment under Section 11, the court would have to do so on a *prima facie* satisfaction that an arbitration agreement exists, leaving the final determination to the arbitral tribunal and only after a narrow standard of enquiry, would a court determine that no arbitration agreement exists. Thus, whichever way it goes, it remains compatible with Sections 5 and 16.

As far as the examination of whether an arbitration agreement is null and void is concerned, we are ambivalent in our opinion. At one level, it makes sense that if the arbitration agreement is undoubtedly null and void, it would be futile to appoint an arbitrator only to arrive at the same conclusion, at the expense of time and cost. Similarly, in this context, the pending decision from the larger bench referred to in *Vidya* on the inclusion of subject matter arbitrability in the "existence" enquiry is significant. However, we also recognise that giving the court such power, even if the standard is narrow, could be a double-edged sword, which recalcitrant parties may try and abuse. This is coupled by the fact that "null and void" was never introduced by the 2015 Amendment, and if the legislature so intended, it would have introduced the phrase as it did in Sections 16(1)(b) and 45 of the Act. It would seem that the SC may have gone overboard with the introduction of "null and void" in the enquiry into the existence of an arbitration agreement.

Be that as it may, the present position is far away from what Section 11 of the Act may possibly be

amended to in the near future. In fact, it was the Justice B.N. Srikrishna Committee, which was set up in 2017 to review the institutionalisation of arbitration in India, which recommended that "*to ensure speedy appointment of arbitrators, section 11 may be amended to provide that the appointment of arbitrator(s) under the section shall only be done by arbitral institution(s)…, without the [courts] being required to determine the existence of an arbitration agreement*." This reflects in the Arbitration & Conciliation (Amendment) Bill, 2018 ("**Bill**"), which repeals Sections 11(6A) and 11(7) (the Bill has been passed by the Lower House of Parliament and is currently in the Upper House).

If, and when, this Bill is passed, it will eliminate judicial supervision under Section 11 and direct all power to the arbitral tribunal, without any judicial determination of any threshold issue of existence. This is problematic in our opinion. Primarily, it would lead to extinguishing justified cases where no arbitration agreement exists, whether factually or legally, including situations where the arbitration agreement is *prima facie* null and void or pertains to a non-arbitrable subject matter.

We believe that such gateway issues should remain in the quarters of judicial determinations, in order to ensure that there is some balance between courts and arbitral tribunals, which could be achieved through Section 11(6A). Rather than removing Section 11(6A), a better course of action could be improving its import and application through the introduction of an explanation, perhaps on the lines of the one envisaged by the 246th Law Commission. The complete absence of Section 11(6A) could have significant consequences, including unnecessary expenditure of time and costs, and forcing a party to go through an arbitration proceeding, or any part of it, even when the party had a genuine case against arbitration that was determinable by a court at the threshold stage all along. Referring parties to arbitration has serious civil consequences procedurally and substantively and thus, court supervision under Section 11 is an essential parameter that must not be removed.

So, is Section 11(6A) suffering from an 'existential' crisis? Keeping aside the fact that the provision may not exist at all if the 2018 Bill is passed in its current form, it is evident that the seemingly innocuous term "existence" in the context of judicial appointment of arbitrators has provided much food for thought. Indian courts have been responsible for steering the development of the country's arbitration law and providing much-needed guidance, especially in the recent past; however, when it comes to the scope of judicial intervention under Section 11, the courts may not have offered as much clarity or consistency with international practice as one desires. While we have been able to reconcile the courts' decisions after *Duro* and believe they have a common thread, differing views exist and whether our analysis is an accurate reflection of the judicial intention is anyone's guess. To conclude, Section 11(6A) has proven to be troublesome and fascinating, and its future, both legislative and judicial, is definitely worth observing.

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