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The Negative Affect of Negative Effect of Kompetenz-Kompetenz on International Arbitration: Notes from the Devas v. Antrix Saga

Sai Anukaran (Avsai Legal) and Niyati Raval · Tuesday, June 9th, 2020

The Prolonged saga of enforcement of the ICC commercial arbitration award of 2015 in *Devas v. Antrix (ICC Case No. 18051/ CYK of 2011)* has not only raised several interesting questions in respect of pathological arbitration agreements but has also highlighted the ineffectiveness of the "Negative Effect" of the doctrine of Kompetenz-Kompetenz, given the possible annulment of the arbitral award based on a jurisdictional challenge that could have been resolved at the very outset by the national courts. This post highlights the drawbacks of the said doctrine and proposes an alternative approach of positive Kompetenz-Kompetenz based on concurrent jurisdiction between arbitral tribunal and national courts.

Background

The arbitration clause provided that the disputes are first to be referred to the senior management of both parties for resolution within three weeks, failing which they were to be heard by an arbitral tribunal seated in New Delhi, under ICC or UNCITRAL rules.

Devas instead of referring the matter to the senior management for resolution or notifying Antrix, unilaterally approached the ICC with a request to initiate arbitration. Consequently, ICC wrote to Antrix inviting it to appoint its arbitrator. However, instead of responding to ICC's letter, Antrix wrote to Devas insisting that the matter be resolved through a senior management meeting. The senior management meeting remained inconclusive and subsequently, Antrix initiated arbitration under the UNICITRAL rules, asking Devas to nominate its arbitrator. At this juncture, ICC sent another letter to Antrix informing that:

> *"…Should the Court decide that this arbitration shall proceed pursuant to Article 6(2) of the Rules, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself."*

ICC also informed Antrix that the arbitration clause substantially departed from the ICC rules and that the institution would conduct the arbitration following its rules unless the parties objected.

However, Antrix responded by filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 to the Supreme Court of India (SC) *inter alia* seeking to adjudicate the question that whether Chief Justice can constitute a Tribunal in supersession of the Tribunal already in the stage of constitution under the ICC Rules, notwithstanding the fact that one of the parties had proceeded unilaterally in the matter (Supreme Court of India, Arbitration Petition No. 20 of 2011).

The SC relying upon the negative effect of Kompetenz-Kompetenz refused to intervene in the issue by holding that since the ICC arbitration proceeding had already commenced, it did not have the power under Section 11 of the Act to appoint an arbitrator in a second arbitration and to determine the validity of the ICC proceedings.

Subsequently, with the SC refusing to interfere in the matter, Antrix pursued its dispute regarding the jurisdiction of the tribunal on the ground of a pathological arbitration clause, before the ICC tribunal. The tribunal in its final award held that the clause was not pathological, and therefore it had the jurisdiction to adjudicate the dispute between the parties. Subsequently, Devas obtained an ex parte confirmation of the award from the Paris Court of Appeal, which was subsequently challenged by Antrix on the ground that the arbitration agreement provided for ad hoc arbitration and hence the arbitral tribunal was irregularly composed. This was initially granted by the Paris Court of Appeal, however, the French Cour de Cassation has recently set aside the judgement and remanded it back to the Paris Court of Appeal. The case is now pending before the Paris Court of Appeal.

Moving towards Positive Kompetenz-Kompetenz based on Concurrent Jurisdiction

The doctrine of Kompetenz-Kompetenz grants power to arbitrators to decide upon their own jurisdiction. However, the negative effect of Kompetenz-Kompetenz allows the courts to consider a jurisdictional challenge only on a prima facie basis while allowing for a complete review only by an arbitral tribunal. While Article II of the New York Convention merely allows for the positive effect of Kompetenz-Kompetenz, domestic arbitral legislations and case laws in many jurisdictions are increasingly opting for the negative effect.

Prof. Stavros Brekoulakis while rejecting the negative effect, has suggested a distinction in treatment between disputes relating to existence and validity of an arbitration agreement and other disputes against the jurisdiction of a tribunal, including disputes on the scope of an arbitration agreement or arbitrability. According to him, concurrent jurisdiction should be accorded to national courts and arbitral tribunals in the former, while arbitral tribunals may have exclusive jurisdiction to determine the latter. This is because the issues in the latter are closely intertwined with the merits of the case.

Any risk of conflicting determinations by national courts and arbitral tribunal on the validity of the same arbitration agreement would then be avoided by the *res judicata* effect of a national decision or arbitral award, which would preclude a second determination on the same matter.

This post argues for a positive Kompetenz-Kompetenz with concurrent jurisdiction between national courts and the arbitral tribunal (with a condition of issuing a partial award on jurisdiction before considering issues of merits). If the national court is first to arrive at a decision then, its decision would be final against that of an arbitral tribunal and any other national court. On the

other hand, if a partial award is first rendered, the court would determine its validity within the limited scope of grounds for setting aside of arbitral awards. It is important to allow the courts to determine the validity of the partial arbitral award so rendered within the grounds for setting aside of arbitral award which are confined only to the procedural fairness and do not question the decision of the tribunal itself.

Furthermore, it should be considered to grant parties the autonomy to mutually opt-out of the principle of concurrent jurisdiction, either at the stage of entering into the arbitration agreement, or at the stage of determination of the issue by either the court or the arbitral tribunal, and choose the determination of such disputes by either court or arbitral tribunal exclusively. This would ensure that the parties not only choose the forum for resolving their disputes but also choose the pitfalls that come with each approach.

Applying the Principle of Concurrent Jurisdiction to the case

The SC in the instant case did not exercise its jurisdiction to adjudicate the question of the legality or otherwise of the continuation of the arbitral proceedings before ICC, even though there was a case set up in the pleadings by Antix to address the larger issue of the validity of the ICC arbitration itself. The SC instead chose to tread the narrow path of going by the strict construction of the wording of Section 11(6) of the Arbitration Act, whilst leaving the parties to dispute the jurisdiction before the ICC tribunal. The SC instead could have seized this opportunity to clarify the validity of ICC arbitration in consonance with Indian law, given that SC had superintendence over the arbitration since India was the seat of arbitration. While the SC, obviously would have been very chary to issue an anti-arbitration injunction, it nevertheless could have opted to apply the principle of concurrent jurisdiction, given that the instant case fell within the field of validity and operability of arbitration clauses, as the case involved the interpretation of an alleged pathological arbitration clause which created confusion as to the forum of arbitration.

Following the positive effect of Kompetenz-Kompetenz, the SC should have concurrently determined the operability of the arbitration agreement with the ICC tribunal. If SC was first to decide the issue, then the judgement of the court would had operated as *res judicata* over the tribunal. On the other hand, if the tribunal was first to issue a partial award, then the courts could have merely considered the issue within the limited grounds of New York Convention and consequently either grant recognition or set aside the partial award and direct the parties to start new arbitration proceedings.

This would have resulted in an earlier resolution of the dispute between the parties, conferred greater legitimacy on the subsequent arbitral proceedings by removing uncertainty, and helped save additional costs of setting aside and enforcement proceedings after arguing the whole dispute. Furthermore, it would have also allowed Antrix to exercise its procedural rights of appointing its arbitrator in the arbitral proceedings before ICC. This approach is even more beneficial in cases where the arbitral tribunal has not yet been constituted, as it would ensure the swift and timely determination of issues affecting operability and validity of arbitration agreement.

Pitfalls in the Applicability of the Suggested Approach

Even the principle of concurrent jurisdiction does not come without pitfalls. It might result in increasing the burden on already overburdened national courts in large jurisdictions such as India. It might also lead to replication of arguments before two forums and resultant additional costs. More importantly, it might result in an enquiry into merits of the disputes by national courts, if the jurisdictional issues are intertwined with issues on merits. However, in cases like *Devas*, where the issues of jurisdiction are not intertwined with issues of merits or in cases where the arbitral tribunal has not yet been constituted, the advantages in favour of concurrent jurisdiction outweigh the pitfalls for the courts to assume concurrent jurisdiction. Furthermore, if the parties are granted the autonomy to choose between either of the approaches, then the risk of these pitfalls would already be expected by the parties and this would ensure greater certainty in dispute resolution.

Therefore, as is succinctly put by Professor Brekoulakis, the verdict for the negative effect of Komptenz-Kompetenz has to be negative, based on the principle of concurrent jurisdiction and party autonomy.

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