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Challenging the Validity of An International Arbitration Agreement at the Pre-Arbitration Stage: Is There a Remedy Available under the Pakistani Arbitration Laws?

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In Pakistan, the law governing international arbitrations resulting in a foreign award is the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("**2011 Act**"). To those who are unfamiliar with the 2011 Act, it may come as a surprise that it does not provide any remedy to an applicant challenging the arbitration agreement at the pre-arbitration stage. But there is a way out!

When promulgating the 2011 Act, the legislature intended to design a law which limits judicial intervention in order to create a pro-foreign investment climate in Pakistan. A brief overview of the 2011 Act reveals that it significantly restricts the discretion of the courts to declare the arbitration agreement invalid prior to the commencement of arbitration.

The dilemma of which provision to apply for a challenge to the validity of an international arbitration agreement first arose in Pakistan before the High Court of Sindh in Karachi Development Company Limited v. IM Technologies Pakistan (Private) Limited, 2017 CLCN 157, in which Justice Shafi Siddiqui held that a possible remedy available for the applicant to challenge an international arbitration agreement is under Section 9 of the Civil Procedure Code, 1908 ("**C.P.C.**"), which relates to residuary proceedings of the court.

In the author's opinion, there is a lacuna in the 2011 Act which fails to provide opportunity to the applicant to challenge the validity of the international agreement and the answer to it does not lie by invoking Section 9 of the C.P.C. This is for two reasons:

- Firstly, under the Arbitration Act, 1940 ("**1940 Act**") which is applicable to domestic arbitration agreements, Section 33 allows the applicant to challenge the arbitration agreement at the pre-arbitration stage. Such a provision is completely missing under the 2011 Act leaving an applicant without a remedy at the pre-arbitration stage.
- Secondly, C.P.C. is general law and Section 9 is a procedural provision as opposed to a substantive one. It confers jurisdiction upon courts and does not grant a substantive right of action. The right of action is to be established by reference to substantive law which in this case is the 2011 Act.

Interestingly, under the 2011 Act, an applicant can challenge the validity of the arbitration agreement both post commencement of arbitration and again once an arbitral award has been

rendered under Section 4 and Section 6 respectively. One of the reasons to explain the scheme of the 2011 Act to allow challenge to the validity of the arbitration agreement during and post arbitration may be to allow the arbitrator to decide the question of jurisdiction as opposed to the courts deciding it. This is because in Pakistan, court cases tend to proceed at a slow pace due to overcrowded dockets and inherent delays in the system. Another reason would be to give effect to the purpose of the New York Convention incorporated under the 2011 Act which is summarised by the Lahore High Court in Louis Dreyfus Commodities Suisse S.A. v. Acro Textile Mills Ltd., PLD 2018 Lahore 597 as follows:

> "*The general pro-enforcement bias which permeates the 2011 Act is the policy of the law and must be the underlying thrust to liberalise procedures for enforcing foreign arbitral awards. The courts, on a proper objective analysis must give effect to the intention of the legislature and the purpose of the New York Convention, in the enforcement of foreign arbitral awards. The centrality of the statutory enterprise consists in shunning a tendency to view the application with scepticism and to consider the arbitral award as having a sound legal and foundational element."*

The legal position in Pakistan can be juxtaposed with that in India, which shares common history with Pakistan in relation to the 1940 Act up until 1996 when India enacted its Arbitration and Conciliation Act, 1996 ("**1996 Act**"). Unlike the 2011 Act, the 1996 Act codifies the principle of competence-competence in the statute itself under sub-section (1) of section 16 which provides that the "*the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement."*

In principle, pursuant to an application under sub-section 3 of section 16 of the 1996 Act,[1)] an Indian court cannot refuse the arbitral tribunal to determine its own jurisdiction if a party wishes to challenge the validity of the arbitration agreement. In case an arbitral tribunal upholds a challenge to its jurisdiction, the aggrieved party can immediately file an appeal against the said order under section 37(2)(a) of the 1996 Act.[2)] This is a marked distinction from the 2011 Act which does not contain any provision authorising the arbitral tribunal to rule on its own jurisdiction.

In this author's opinion, the approach adopted under the 1996 Act is much more preferable given that it acts as a deterrence for frivolous claims raised by the party before the courts of its home jurisdiction. In Pakistan, it is a standard practice for a party which fears an unfavourable award may be passed against it, to adopt obstructionist and dilatory tactics. If Pakistan were to codify the principle of competence-competence under the 2011 Act, the legislature could indirectly ensure that only genuine claims challenging the validity of the arbitration agreement are raised before the arbitrators.

So, what is the solution under the 2011 Act to challenge an international arbitration agreement prior to the commencement of arbitration? The answer is that one may institute a suit for declaration and injunction in a Pakistani court pursuant to the provisions of the Specific Relief Act, 1877 without challenging the arbitration agreement at all. The opposing counsel would then file an application under Sections 3 and 4 of the 2011 Act to stay the legal proceedings. Such an application would then have to be contested under the limited grounds provided under Section 4 of the 2011 Act which are confined to an arbitration agreement being null and void, in operative or incapable of being performed.

Recently, in Ovex Technologies (Private) Limited v. PCM PK (Private) Limited and others, PLD 2020 Islamabad 52 = 2020 CLD 15, the Lahore High Court discouraged the practice of filing cases in court by roping in other parties who are not signatories to the arbitration agreement alongside those who are party the arbitration agreement as co-defendants in a suit to avoid the proceedings in the court from being stayed. The reasoning given by the court was that this results in abuse of process as the matter which is supposed to be resolved through arbitration is unnecessarily dragged to the court.

On the contrary, in Aroma Travel Services (Pvt.) Ltd. v. Faisal Al Abdullah Al Faisal Al-Saud and 20 others, PLD 2018 Sindh 414 = 2017 YLR 1579, the High Court of Sindh dismissed an application under Sections 3 and 4 of the 2011 Act to stay the legal proceedings on the grounds that an unwritten and unsigned arbitration agreement would result in a futile exercise of referring the matter to the arbitrator. Thus, the discretion of the courts to stay the legal proceedings depends on the facts and circumstances of each case and whether or not the grounds provided under Section 4 are met with certainty.

Overall, it appears that the real issue lies with poor drafting of the 2011 Act. Ultimately, it is the Parliament which through an amendment to the 2011 Act should legislate on whether or not challenge to the arbitration is permissible at the pre-arbitration stage.

References

?1 *A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

?2 ***37. Appealable orders –*** *… (2) An appeal shall also lie to a court from an order of the arbitral tribunal – … Accepting the plea referred to in sub-section (2) or sub-section (3) of section 16.*

This entry was posted on Friday, November 20th, 2020 at 7:00 am and is filed under Arbitration Agreement, Jurisdiction, Pakistan
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