Kluwer Arbitration Blog

The Anomalous Case of Sections 8 and 11 of India's Arbitration and Conciliation Act, 1996

Varun Kasthuri (Gujarat National Law University) · Thursday, April 15th, 2021

In a March 2021 decision, *Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd.* ("Pravin Electricals"), a three-judge bench of the Supreme Court (the "Court") shed light on an "anomaly" that exists in the operation of Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 (the "Act"). The Court clarified its prior judgment, *Vidya Drolia v. Durga Trading Corporation* ("Vidya Drolia"), to explain that the role of a judicial authority was restricted to ascertaining the *prima facie* existence of an arbitration agreement in the context of both provisions. However, the Court also drew attention to a seeming irregularity in the law: while the decision of the authority to refuse reference to arbitration is appealable under Section 8, a refusal to appoint arbitrators under Section 11 is immune to judicial review by way of appeal.

This presents two interesting points of discussion: *first*, understanding whether the standard of judicial intervention applicable under Sections 8 and 11 of the Act is identical, and *second*, dissecting whether the differing approaches to appeal are justified. In analyzing these propositions, it is evident that the differential treatment of the two provisions is impermissible. Therefore, to bring Section 11 on par with Section 8, an amendment to Section 37 of the Act is imminently required.

Contextualizing Sections 8 and 11 – the prima facie standard

Sections 8 and 11 of the Act are complementary in nature, a view that was upheld in *Vidya Drolia* (see paragraph 15 thereof). The former is paramount to the initiation of arbitration proceedings, being one of the most commonly resorted to provisions of the Act. It empowers a judicial authority to refer parties to arbitration, so long as it is not *prima facie* satisfied that there is no valid arbitration agreement between the parties. Similarly, in initiating arbitral proceedings, Section 11 plays an equally important role as it facilitates the parties' appointment of arbitrators. More specifically, Sections 11(4)-11(6) empower either the Court or a High Court to take measures for an appointment at the request of either party. After the 2015 Amendments to the Act, Section 11(6A) was introduced and it clarified that for the purpose of the aforementioned sub-sections, the appropriate Court must confine its examination to *"the existence of an arbitration agreement"*. In this regard, one of the themes in both *Pravin Electricals* and *Vidya Drolia* was defining the scope of the judicial authority's examination under Section 11.

In fact, this question has captured the attention of the Indian judiciary for a considerable period of time. *SBP & Co. v. Patel Engineering Ltd.* and *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.,* both decided pre-amendment, laid down that the nature of the role played by the Chief Justice (as the law stood then), in the operation of Section 11, as being one of a judicial nature. Further, both decisions clarified, albeit implicitly, that in ascertaining the existence of an arbitration agreement, the Chief Justice had the authority to examine a wider scope of preliminary issues. Neither of these points is seemingly true anymore: the 2015 Amendment to Sections 11(6A) and 11(6B) has made clear that the appointment of arbitrators is not a judicial function, and that the scope of judicial interference in the appointment of arbitrators is to be minimized – but to what extent? Neither decision makes a tangible comment on the scope of interference by the authority concerned.

Noting this lack of clarity, the Law Commission of India, in its 246th Report, recommended that the same test regarding the scope of judicial intervention (the specifics of which are discussed below) be applied in the context of Sections 8 and 11 of the Act. It was reasoned that both provisions existed to prevent unwilling parties from trying to derail arbitral proceedings by either commencing judicial proceedings or by refusing to appoint an arbitrator. Accordingly, giving judicial authority a different scope of authority in the two cases was impermissible. *In defining what this standard ought to be*, they referred to the case of *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.* where the prima facie standard was applied to applications made under Section 45 of the Act (international commercial arbitrations) and recommended the amendment of both Sections 8 and 11 to reflect this. However, when Parliament passed the Arbitration and Conciliation (Amendment) Act, 2015, it was clear that the legislature had heeded the Commission's recommendation on Section 8, but not on Section 11. Therefore, the ambiguity persisted.

In *Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman,* the Court sowed the seeds of what is now the law of the land. By specifying that it was the role of the appointed arbitrators to handle all preliminary issues and that the Court merely had to look into the *existence* of the agreement, the foundation was laid for the holding in *Vidya Drolia.* Here, for the first time, the aspects of *existence* and *validity* of an arbitration agreement at the pre-arbitration stage were held to be crucially intertwined, since an illegal or invalid agreement was no agreement at all. Crucially, the Court linked Section 11 to Section 8 since their object and purpose was materially identical. Accordingly, in the interests of maintaining the temporal advantages that arbitration boasts and appropriately balancing the roles of the Court and the arbitral tribunal, it was held that the *"scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted."* Finally, there was clarity as to the extent of the Court's role in the operation of both provisions.

The "anomalous" question of appeal

This leads us to the second point of discussion: the appealability of orders made under the two provisions. Section 37 of the Act enumerates those orders made by a judicial authority that may be appealed by parties. In this regard, the 2015 Amendment to clause 1(a) ensured that parties have the right to appeal orders that have refused to refer them to arbitration under Section 8. However, there is no provision that entitles a party to appeal against an order refusing the appointment of an arbitrator under Section 11 of the Act. This position is counterintuitive and lies in direct contrast to what was envisioned by the Law Commission of India. In discussing reforms to the Indian

arbitration framework, their 246th Report dissected Section 37 as well and made it clear that amendments were needed to reflect the appealable nature of orders made under both Sections 8 and 11. Specifically, the Commission recommended the introduction of clause 1(c), which guaranteed the right of parties to appeal the decision of a judicial authority in case the appointment of an arbitrator was refused. However, in keeping with the general attitude of the legislature towards the amendments that were suggested to the scheme of Section 11, the 2015 Amendment only made orders under Section 8 appealable.

Thus, the Court in *Pravin Electricals* was right to analyze and discuss the consequences of the legislature's inaction. By reiterating the findings in *Vidya Drolia*, the Court emphasized that the "prima facie" test of Section 8 is indeed applicable to Section 11, and that the law, as it stands today, is *anomalous*. Accordingly, they recommended that Parliament look into the two provisions concerned and consider amending Section 37 to include appeals against orders made under Section 11.

Conclusion

Sections 8 and 11 are pillars on which the Act is built, and the judiciary has done well to circumscribe its own role in their operation. However, at the same time, it has been let down by the seeming unwillingness of Parliament to heed the recommendations of the Law Commission of India and enact a law that is consistent, and appropriately addresses the mischief of party-induced delay. Hence, the rationale behind the Court's decision in *Pravin Electricals* is simple: when two provisions share a common purpose and prescribe identical roles to the relevant judicial authority in their application, allowing parties to appeal against orders under only one provision is anomalous and, in a sense, arbitrary. Therefore, an amendment to Section 37 of the Act, guaranteeing the right to appeal against orders made under Section 11, is imminently required.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*

This entry was posted on Thursday, April 15th, 2021 at 8:00 am and is filed under Appeal, Appointment of arbitrators, India, Judicial intervention
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.