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Is Arbitrability of a Dispute a Pre-Condition for an Order Under Section 11 of the Act?

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INTRODUCTION

Perceived as a private dispute resolution mechanism, arbitration frequently finds itself at cross-roads with judicial intervention. In this article, the author will deal with one main question- whether the courts can intervene to decide arbitrability of a dispute at the referral stage. To answer this, the article is divided into five parts. The first part will analyze the concept of arbitrability from a jurisdictional perspective; oscillating between the authority of arbitrator and the judge. The second part will highlight the issue of determining the existence of an arbitration agreement in view of the *kompetenz kompetenz* principle. Thirdly, the extent of judicial intervention at the stage of reference will be critically analyzed while also making a case for *crucial* intervention. Fourthly, the article will deal with the question of whether deciding arbitrability is a precondition for an Order under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as **"the Act**"). Finally, the article will suggest two approaches to maintain a balanced and methodical technique to simplify and ease out the process of arbitration.

THEORIZING ARBITRABILITY- WHO DECIDES?

The suffix '-ability' seems to denote the ability of doing something. For example, 'ignitability' means the ability for something to be ignited. This is perhaps instinctive; however, in contrast, arbitrability does not merely mean the ability for something to be arbitrated. A dispute regarding arbitrability arises when parties to a contract with an arbitration clause have a dispute regarding the subject matter of the contract or the quasi-jurisdictional issue of whether their dispute falls under the contract.

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The thorniest question regarding arbitrability is the "who decides" question- the arbitrator or the court-whether a dispute can be arbitrated. It presents the complex dispute whether parties bound by an arbitration agreement (or a clause) should be required to raise an issue over the scope of that agreement before an arbitrator or a judge. In India, by virtue of Section 8 of the Act, the courts have the power to refer a dispute to arbitration if a prima facie arbitration agreement exists, implying that the courts usually have the first say in deciding the arbitrability of the dispute.

The problem lies in the fact that an arbitration agreement is a voluntary agreement. So, if the parties did not agree to submit a specific matter to arbitration (or quarrel over whether they did), one may argue that it is prudent for the court to decide such disputes as a pre-condition to arbitration. However, by approaching the court to decide threshold dispute may defeat the very purpose of choosing arbitration as a mode of dispute resolution- non judicial and speedy resolution of disagreements.

The discourse around arbitrability in India has largely been limited to the subject matter involved in the dispute. For instance, in Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd. & Ors., the Court identified two broad branches of non-arbitrable disputes- first, subject matters which are reserved specifically to be decided by the courts and secondly, matters which give rise to rights *in rem* or affects the public at large. The Court further gave a few examples of non-arbitrable disputes like insolvency matters, matrimonial disputes regarding divorce, judicial separation, child custody or restitution of conjugal rights [¶22-23].

Before the Booz-Allen judgment, the courts generally have ordered arbitration to proceed devoid of concrete evidence of the parties intending the matter to be arbitrable. This presumption of arbitrability has been extended to various contracts. In Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd, an agreement provided for settlement of disputes by referring the same to adjudication. The Supreme Court held that notwithstanding the word "adjudication", the clause indicates that the parties intended to resolve their disputes through arbitration [¶26].

It is safe to say that the presumption of arbitrability arises only after it is established by the court that a proper arbitration agreement exists in the first place. Implying, at referral stage, a strong

judicial confirmation of the properly formed agreement is needed before ordering for arbitration. However, determining the scope of judicial inquiry in examining the existence of the agreement requires a balanced approach so as to not usurp the mandate of the arbitral tribunal.

EXISTENCE TEST UNDER SECTION 11(6A)

Arbitration and Conciliation (Amendment) Act, 2015 inserted sub-section 6A which limits the power of the courts to review the arbitration agreement only to the 'existence' of the agreement. This amendment follows the approach of the *kompetenz kompetenz* principle whereby a premium is attached to party autonomy and judicial intervention is kept to a minimum. After the amendment, in the words of J. Banumathi, the courts only need to investigate whether an agreement contains a clause that provides for resolution of disputes through arbitration, and "Nothing more, nothing less" [¶13].

However, the question of the 'existence' of the arbitration agreement is still a contested issue. To understand the judicial interpretation of 'existence', it is important to look at the relevant statutes. Under section 2(h) of the Indian Contract Act states that a contract is an enforceable agreement and section 7(2) of the Arbitration and Conciliation Act states that an arbitration agreement can either be in the form of a clause in a contract or a separate agreement. Thus, it logically follows that an arbitration clause contained in an unenforceable contract is not valid. The written agreement will have no value if the parties are not bound by it.

Very befittingly, in Vidya Drolia v. Durga Trading Corporation, it was observed that a valid arbitration agreement must satisfy the requirements of both the Indian Contract Act and the Arbitration and Conciliation Act to allow both the parties to sue and claim rights [¶92]. In situations where the agreement is said to be void or voidable, the arbitration clause would also be rendered meaningless [¶68]. In such cases, arbitration agreements cannot be considered as 'existing'. Moreover, in various other contracts, arbitration clauses are conditional in nature and require certain pre-requisites to be fulfilled first. In such situations as well, the arbitration agreement cannot be deemed to 'exist' if those pre-requisites are not satisfied. In this context, it is crucial to note the overlap between 'validity' and 'existence' of arbitration agreements.

Before dealing with the question of how much can the courts interfere, it is essential to first establish the authority which has the right to interfere in determining arbitrability. The Supreme Court in 2022 reaffirmed the *kompetenz-kompetenz* principle in Mohammad Masroor Shaikh v. Bharat Bhushan Gupta which held that the issue of non-arbitrability is to be decided by the arbitral tribunal [¶11]. The Court also stated the general rule where the courts are conferred with the power to have a 'second look' on issues of non-arbitrability post the award. If the dispute is prima facie arguable, the court should refer it to the arbitration tribunal [¶10].

MINIMAL CURIAL INTERVENTION OR CRUCIAL INTERVENTION

As reiterated in Vidya Drolia, the arbitrability of the dispute can be decided by the Court to "cut off the deadwood". It further held that to prevent wastage of public resources, the courts can conduct an intense yet brief review of the arbitration agreement. Following Vidya Drolia, there is support for the proposition that courts must apply their mind to the issue in question and examine whether a prima facie arguable case is made out. This implies that the fate of the arbitration agreement would be determined without first bringing an action on the actual arbitrable dispute.

Few months after Vidya Drolia, the Supreme Court in Pravin Electricals v. Galaxy Infra and Engineering Private Ltd. took a contrasting stance. It held that when a deeper examination than just a prima facie review is required, the same must be left for final decision to the arbitral tribunal [¶27]. In particular, this judgment has taken a major step in retuning *kompetenz kompetenz* principle to its core concept- arbitration tribunals are empowered and capable of deciding the validity of arbitration agreement including determining jurisdictional issues.

Moreover, there is huge room of doubt whether judicial intervention in arbitration proceedings would serve a useful purpose. After the parties have agreed to bound themselves by contract to refer their disputes to arbitration, it is irrational if the courts should exercise dispensing power over such contracts. This irrationality cannot be defended on the pretext of evolving a more efficient arbitration by eliminating irregularities because an arbitration proceeding does not oust the jurisdiction of the courts but only delays it. And in any event, if the arbitration proceeding fails, the dissatisfied party has the option to approach the court and address his grievances.

Recently, the Singapore Court of Appeal set aside the Singapore High Court's decision on the ground of natural justice and suggested that the principle of minimal curial intervention applies even if there is a serious error in law. The court further made certain observation to build a pro-arbitration stance-

1. The substantive merits of the arbitration proceedings cannot find recourse to the court.
2. For allegations of breach of natural justice, the court is not needed to conduct a highly critical or a deeply analytical examination of the arbitral award.
3. The courts should beware of parties trying to criticize the arbitrator for failing to consider arguments which were never before the arbitrator.

These observations make it clear that the court should be the last resort for arbitration proceedings. The parties should not approach the court if they have not exhausted the remedies before the tribunal. This also reminds us that the arbitral awards are binding and final and the courts should not interject unless there is an exceptional situation.

IS ARBITRABILITY A PRE-REQUISITE FOR AN ORDER UNDER SECTION 11?

After analyzing all the relevant aspects of judicial intervention in deciding arbitrability of a dispute, this part will finally deal with the authority of courts to intervene for an Order under Section 11 of the Act. Section 11 of the Act makes a case for judicial intervention if the parties fail to appoint an arbitrator or are unable to act upon a mutually agreed appointment procedure. However, after the Court's decision in Vidya Drolia, the question is 'when can the courts intervene' rather than 'whether the courts can intervene'. Additionally, the insertion of subsection (6A) was a pro-arbitration stance, but its rigid stature was reduced after Vidya Drolia.

After the insertion of subsection (6A), the courts have repeatedly attempted to escape the 'hands-off' approach by expanding the scope of judicial inquiry. Justifying judicial intervention on grounds of weeding out vexatious matters and saving time and money is a counterintuitive argument for arbitration. One of the essential reasons to choose arbitration is that parties want a more efficient and time saving recourse to solving disputes. They want the decision to be final and binding and if they lose, they can approach the courts and fix the arbitrator's mistake, if any.

It is important to remember that arbitration does not oust the jurisdiction of the courts but only delays it.

Nevertheless, since there is no consensus on the extent of permissible prima facie review, it is essential to also underline the benefit of a minimal curial intervention at the stage of reference. In DLF v. Rajapura, the Court very aptly put the essence of *crucial* intervention while dealing with a Section 11 application. The Court stated, "it is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator…this exercise is not intended to usurp the tribunal's jurisdiction but to streamline the arbitration process." [¶19] Therefore, a limited review would not always amount to defeating the *kompetenz kompetenz* principle but would rather maintain the effectiveness of the arbitration process. Moreover, it is hard to ignore the fact that if arbitrators are given complete authority to decide whether the dispute belongs in arbitration carries with itself the risk of compelling unwilling parties to arbitrate.

As far as deciding the arbitrability of a dispute is concerned, the decision in VGP Marine Kingdom Pvt. Ltd. v. Kay Ellen Arnold while dealing with a Section 11(6A) application is the appropriate example for determining the extent of judicial inquiry. In this case, Madras High Court had dismissed an application to appoint an arbitrator stating that at the time the application was filed, there were already arbitral proceedings pending. On this Order being appealed in the Supreme Court, it was observed that the High Court should have allowed the application and left the issue of arbitrability to be decided by the arbitrator [¶5]. Thus, it is fair to say that a sporadic approach is being followed by courts in attempting to find the balance between minimal judicial intervention and streamlining the arbitration process.

THE WAY FORWARD

The question of 'when can the courts intervene' stands unanswered due to the inconsistent decisions of the courts on referring a dispute to arbitration. To remedy the subjectivity, it is best to have a categorical methodology for both- arbitrators and judges.

Inspired from the Dell Computer case in Canada, a distinction can be made between 'applicability' and 'validity' of the arbitration agreement. The challenges which concern the 'validity' of the agreement, should be dealt with by the courts and the disputes which simply concern the 'applicability' of the agreement can be resolved by the arbitrators. However, for such an approach to be consistent with minimal judicial intervention at the stage of referral, it should be borne in mind that in situations where deeper examination is required to determine the arbitrability, should be left to the arbitrators. To further streamline the process, a moratorium ban can be explored for parties to not approach the court unless the arbitral tribunal has had its first say. In such a scenario, the power of referral will be bestowed on the arbitral tribunal.

Another solution of clearly dividing the role of arbitrators and judges can include a distinction between law and fact. Under this approach, questions of law regarding arbitrability will come under the jurisdiction of the courts and mixed questions of law and fact would go to the arbitrator. This will also allay the fear of the question of law being sent to arbitrators with little to no legal training.

Therefore, maintaining the balance between both the authorities will not only help streamline the process of arbitration but also ensure that the jurisdiction of arbitral tribunal would not be usurped. So, for an application under Section 11, deciding the arbitrability of the dispute would be condition precedent for going ahead with arbitration, however, keeping in mind the division of role will facilitate a more harmonious and meaningful mode of dispute resolution.