

Jurisdiction of Arbitral Tribunal

Arbitration was devised as a method to circumvent the ills plague the process of civil litigation in courts. In India it existed early on in the form of panchayats. The British, for the first time under their rule, made use of the principle of arbitration in the Bengal regulations of 1772 and 1780. And in 1940, the Arbitration Act was enacted. But over a period of time it was found that the Arbitration Act of 1940 was not enough to meet the needs of a fast-changing India. Therefore in 1996 it was replaced by the Arbitration and Conciliation Act. The Arbitration and Conciliation Act, 1996 provides the parties abundant freedom in matters such as the matter of choosing the place of arbitration, fixing the number of arbitrators, appointment of arbitrators etc. They are even free to determine the matters which they want to submit to the arbitral tribunal formed by their choice. But sometimes a problem whether the Arbitral tribunal has jurisdiction, may arise. under the Arbitration and Conciliation Act, 1996 power has been given to the Arbitral Tribunal under Section 16 (1) to rule on its jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. But does the Arbitral Tribunal have the competence to make a binding decision on its own jurisdiction, including the decision ruling on any objections with respect to the existence or validity of an arbitration agreement? Will the Arbitral Tribunal lose jurisdiction if the contract in which the arbitration agreement (clause) is inserted, is declared void? It is the answers to these questions that are sought to be found out.

COMPETENCE OF ARBITRAL TRIBUNAL TO MAKE A BINDING DECISION ON ITS OWN JURISDICTION

There was no provision under the Arbitration Act of 1940 which allowed the Arbitral Tribunal to make a decision on its own jurisdiction and it was the job of the court to decide on the jurisdiction of the arbitral tribunal. But under Section 16 of the Arbitration and Conciliation Act, 1996 the Arbitral Tribunal has been granted the power to make a ruling on its own jurisdiction. Section 16 (1) of the Arbitration and Conciliation Act states that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement.

Section 16 of the Arbitration and Conciliation Act incorporates the principle of competence-competence. It has two aspects: first, that the tribunal may decide on its jurisdiction without support from the courts and secondly, that the courts are prevented from determining this

issue before the tribunal has made a determination on this issue. But does this determination by the Arbitral Tribunal have a binding effect? Can it not be challenged in courts?

In the case of Union of India vs. M/s. East Coast Boat Builders & Engineers Ltd. It was stated:

“From the scheme of the Act it is apparent that the legislature did not provide appeal against the order under section 16(5) where the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such case, the arbitral tribunal shall continue with the arbitral proceedings and make an award without delay and without being interfered in the arbitral process at that stage by any court in their supervisory role.”

In the case of Nav Sansad Vihar Coop. Group Housing Society Ltd. (Regd.) vs. Ram Sharma and Associates it was stated that if a plea is rejected by the Arbitral Tribunal under section 16(5) of the Arbitration and Conciliation Act the arbitral proceedings shall continue, an award shall be given and the aggrieved party shall have to wait till the giving out of the award and there is no separate remedy against such order. But under section 37(2) of the Arbitration and Conciliation Act a decision of the tribunal accepting the plea that it does not have jurisdiction or is exceeding its scope of authority is appealable. In the case of Pharmaceutical Products of India Ltd. vs. Tata Finance Ltd. it was stated: “Where the Arbitral Tribunal decides to reject the plea regarding its jurisdiction, sub-section (5) clearly empowers the Tribunal to continue with the arbitral proceedings and make an arbitral award. Sub-section (5) provides for the manner in which such an arbitral award may be challenged. It provides that such an award can only be challenged in accordance with section 34

JURISDICTION OF ARBITRAL TRIBUNAL WHEN CONTRACT CONTAINING ARBITRATION CLAUSE DECLARED VOID

In the case of Jawaharlal Burman vs. Union of India [AIR 1962 SC 378] it was stated:

“It is, therefore, theoretically possible, that a contract may come to an end and the arbitration contract may not. It is also theoretically possible that the arbitration agreement may be void and yet the contract may be valid; and in that sense there is a distinction between the arbitration agreement and the contract of which it forms a part; but... in the present case, the challenge to the contract itself involves a challenge to the arbitration agreement; if there is a concluded contract the arbitration agreement is valid. If there is not a concluded contract the

arbitration agreement is invalid... indeed, we apprehend that in a very large majority of cases where the arbitration agreement is a part of the main contract itself, challenge to the existence or validity of one would mean a challenge to the existence or validity of the other."

Then in the case of *Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Ltd.* it was stated:

"A dispute as to the validity of a contract could be the subject-matter of an agreement of arbitration in the same manner as a dispute relating to a claim made under the contract. But such an agreement would be effective and operative only when it is separate from and independent of the contract which is impugned as illegal. Where, however, it is a term of the very contract whose validity is in question, it has, as held by us in *Khardah Co. Ltd.* case, no existence apart from the impugned contract and must perish with it."

LOSS OF COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS OWN JURISDICTION

There may be certain instances when the Arbitral Tribunal may lose the competence to rule on its jurisdiction.

Section 11(6) of the Arbitration and Conciliation Act states that a party may request the Chief Justice or his designate to take required steps when under an appointment procedure agreed to by the parties, one of them fails to act as required under the procedure, or the parties or the two arbitrators fail to reach an agreement expected of them under the procedure, or a person or institution fails to perform a function entrusted to him under such procedure. And section 11(7) states that a decision taken by the Chief justice or his designate under section 11(4), section 11(5) or section 11(6) shall be final. Which means that the arbitral tribunal cannot look into the question of its own jurisdiction when the Chief Justice has looked into it earlier.

In the case of *Konkan Railway Corporation Ltd. vs. Rani Construction Pvt. Ltd.* [13] it was stated by the court that the constitution of the Arbitral tribunal by the Chief Justice may be challenged before the Arbitral Tribunal on the ground of being in violation of the Act

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- The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award. At present, there exist three different versions of the Arbitration Rules: (i) the 1976 version; (ii) the 2010 revised version; and (iii) the 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration.
- The UNCITRAL Arbitration Rules were initially adopted in 1976 and have been used for the settlement of a broad range of disputes, including disputes between private commercial parties where no arbitral institution is involved, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. In 2006, the Commission decided that the UNCITRAL Arbitration Rules should be revised in order to meet changes in arbitral practice over the last thirty years. The revision aimed at enhancing the efficiency of arbitration under the Rules without altering the original structure of the text, its spirit or drafting style.
- The UNCITRAL Arbitration Rules (as revised in 2010) have been effective since 15 August 2010. They include provisions dealing with, amongst others, multiple-party arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of innovative features contained in the Rules aim to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs, and a review

mechanism regarding the costs of arbitration. They also include more detailed provisions on interim measures.