

**GUJARAT NATIONAL LAW UNIVERSITY
GANDHINAGAR**

Course: Alternative Dispute Resolution
Semester-V (Batch: 2012-17)



End Term Examination: Oct-Nov. 2014

Date: 27th October, 2014

Duration: 3 hours

Max. Marks: 50

Instructions:

- Read the questions properly and write the answers in the given answer book.
- The respective marks for each question are indicated in-line.
- Do not write any thing on the question paper.
- Indicate correct question numbers in front of the answers.
- No questions or clarifications can be sought during the exam period, answer as it is, giving reason, if any.
- **Bare Act is not allowed.**

- | | Marks |
|---|-------|
| <p>Q.1 <i>“The Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed to be independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration agreement void. Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity”.</i></p> <p>Discuss the nature of power conferred on the Court under Section 11 of the Arbitration and Conciliation Act, 1996 and substantiate your answer with the help of judicial decisions of the apex court of India.</p> | (10) |
| <p>Q.2 <i>Background:</i></p> <p>The Honourable Supreme Court of India had consistently refused to allow fraud allegations to be heard before an arbitral tribunal, arguing that this was in the interest of justice, due to the complex fact scenario and evidentiary requirements of such cases. These earlier cases concerned domestic arbitrations and it was unclear whether this <i>principle of Arbitrability</i>, also extended to international arbitrations. The Honourable Supreme Court clarified the issue by ruling that there is no such bar on issues of fraud being determined by tribunals in international arbitrations.</p> <p><i>Fact:</i></p> <p>There was a Facilitation Agreement between the parties concerning media rights for the Indian Premier League broadcasts. The Facilitation Agreement was governed by English law and contained an ICC, Singapore arbitration clause. This clause granted the parties the right to seek equitable relief prior to the appointment of the arbitrator or remedies beyond the jurisdiction of the arbitrator in the courts in Singapore or in any other court with jurisdiction over the parties.</p> <p>Following a dispute between the parties, the respondent filed for a declaration that the Facilitation Agreement was null and void on the grounds of fraud before the High Court. The appellant initiated ICC arbitration proceedings in Singapore as per the agreement. The respondents successfully applied to the High Court for an anti-arbitration injunction, this was granted on the ground that the substantive aspects</p> | (10) |

(*subjective 'Arbitrability'*) of the case raised allegations of fraud, concerned public funds and involved a public body.

Answer the following questions:

- a. Whether the High Court has jurisdiction to grant an injunction restraining a foreign seated arbitration between non-Indian residents?
- b. Whether the Honourable Supreme Court required (*as an apex court in jurisdiction*) to defer to an agreement to arbitrate between parties to an international arbitration where the contract containing the arbitration agreement was alleged to have been vitiated by fraud?

For your reference:

S. 45 : Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Discuss the '*Arbitrability*' in the subject matter of Arbitration.

- Q.3 "In a case where the judgment and decree is challenged before the appellate court or the court exercising *revisional jurisdiction*, the jurisdiction of such court would be wider. Therefore, in a case where the validity of the award is challenged, there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the arbitral tribunal could be set aside". (10)

Discuss the *Public Policy* with Judicial decisions of apex court of India.

- Q.4 *Fact:* (10)

The Petitioner was in the business of developing a bio-mass plant in Gujarat and entered into a project development agreement dated May 2, 2014 with the respondent, which is a wholly owned subsidiary of a French company. The parties agreed on an Engineering Procurement and Construction (EPC) contract and the respondent wanted for the contract to be split into three, being the Supply Contract, the Works Contract and the Service Contract for tax purposes. All these three collective Contracts dated September 8, 2013 set out the rights and responsibilities of the parties and one Synchronization and Co-ordination Agreement (SAC Agreement) on the same date was entered into to tie in the three collective contracts and memorialize the responsibility of the respondents for completing the entire contract as a single whole.

In August 2014, the petitioner got to know that the respondent was planning to cease its operations in India. Relying on the existing contracts, the petitioner had approached various banks for loans and all of this financing would be jeopardized if the respondent shut shop midway and the agreements fell through. As a result of which, the petitioner invoked arbitration under Clause 13.2 of the SAC Agreement and the respondent in reply disclaimed the existence of any agreement and any arbitration agreement. The petitioner sent the respondent a notice and after the expiry of 30 days filed this petition under section 11 of the Arbitration & Conciliation Act, 1996 (Act) for appointment of arbitrator.



Upon the filing of the petition the respondent contested the existence and / or validity of the SAC Agreement and the collective contracts stating that the same had either expired or never come into effect. The petitioner sought the appointment of the arbitrator on the ground that the SAC Agreement was valid and binding while the respondent sought to challenge the very existence of the SAC agreement and thereby questioned the existence of the arbitration agreement. The petitioner also argued that it had made several onward commitments on the basis of the respondent's presence in the project.

Court held:

The High Court held that where the existence or non-existence of an arbitration agreement is not clear, it is settled law that it would be proper for the arbitrator to determine the question under Section 16 of the Act. The Court observed, "*It is because the power that is exercised by the Court under Section 11 is in the nature of an administrative order.*" The Court observed that it is the arbitral Tribunal which would rule on its own jurisdiction including the existence and validity of the arbitration agreement. "*The Arbitral Tribunal authority under Section 16 is not confined to width of its jurisdiction but goes also to the root of its jurisdiction.*"

The Court accordingly went on to appoint a retired judge of the High Court as a sole arbitrator (despite the fact that the arbitration clause under the SAC Agreement prescribed for a 3 member tribunal) who was to determine questions relating to the existence of the arbitration agreement and accordingly disposed of the Section 11 Petition.

On the basis of the above fact, analyze the negative effect of the principle '*Kompetenz-Kompetenz*' by discussing the power of judicial authority as administrative or judicial u/s 11 of the Arbitration and Conciliation Act, 1996 and position in India with regard to the plea of jurisdiction.

Q.5 Write short notes on **any four** of the following:

(4x2.5
=10)

- a. National and Most Favored Nation treatment as principle of Investment protection
- b. Concept of Expropriation
- c. Mediation as mode of Alternative Dispute Resolution
- d. *Lok-Adalat* under the Legal Service Authority Act, 1987
- e. *Option Clause in Arbitration Agreement*
- f. *ICSID and India*

