



Status of domestic and international commercial arbitral jurisdiction in Iran which is Originated from English Law

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Abstract. If there is alleged invalidity of the contract, Limits and scope of arbitration referee. This issue calls “competence-competence” principle and we seek to investigate whether the possibility of accepting the competence to judge. It means making decision about competence of referee. Competency of arbitration board is inherent and it is created by law and it is separate from competency of public arbitration. Arbitration ritual theory is differences as a separate method of dispute resolution in international commercial transactions. However, Consistent with the dominance of the national authority on private equity, the entity is located at the foot of the rights of nature into the public law; although, private perspective is dominance.

Keywords: Referee, English Law, Rule of jurisdiction, Independent arbitration clause, Civil Procedure

1. INTRODUCTION

For each referee is very important to ensure that the role and the fact that his official position is clear and infallible. Therefore, before the judge; referee should be able to convince him that it is possible to perform this task both professionally and competency. Thus, the most important components of referee are competency for referee. Concentration on this issue can convenience referee for avoiding interferences in this issue. As an example, referee if has private relationship with one party, he could not interfere in the issue. In other issue, may referee whether or not the authority to perform the task and he should hesitate and contemplation as well as assess their overall status. This issue call competency of referee. One major innovation in international commercial arbitration law enacted in 1997 of Iran and accepts of this issue. Admission to the previous laws of British rule which was not recognized, but it is now recognized in Article 39 of the Arbitration Law of 1996. There are three theories about the meaning of the rule of jurisdiction of the competent. There is three perspectives about competency law. First, Judges have limited his comments about his decision-making power is expressed, without limiting the jurisdiction of the court too. In fact, the court's make decision under national law. Second, court of any involvement in the issues of competence will stay away until a decision. Second, court will stay away of any involvement in the issues of competence until make decision. In this regard, the judges will first talk about the competence. The third meaning of this rule, the court of jurisdiction jury will have no right to interfere. Furthermore, judges as the first letter give the last word to express. Therefore, it can be concluded that, judges first determine the parties and then make decision about making decision. Thus, this research tries to investigate whether referees are competence or not?

2. LITERATURE REVIEW

Reflecting the ambiguity in the text, judicial approaches to the standard of review required by Article 8(1) Model Law have varied, so that arbitral authority has been given greater

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deference in some Model Law jurisdictions as compared to others. Negative effect has been endorsed by courts in some Model Law jurisdictions,⁷⁸ and has received particular support in Canada, although practice between different jurisdictions within Canada itself is inconsistent.⁷⁹ Two Canadian cases illustrate how courts dealing with applications under Article 8(1) of the Model Law can prioritise the tribunal's competence. In the first case, *Rio Algom Ltd v Sammi Steel Co Ltd*,⁸⁰ the Ontario Court of Justice confined the Court's review to determining the validity of the arbitration agreement in terms of the grounds in Article 8(1). Questions relating to construction of the agreement were held not to fall within these grounds, and were instead matters for the tribunal to determine in the first instance, subject to later recourse to the court. On the facts, the question whether disputes between the parties over a closing balance sheet were within the scope of the arbitration clause was therefore referred to arbitration. In reaching its decision, the Ontario Court was influenced by the Model Law's emphasis in favour of arbitration.

3. APPLICATION IN NEW ZEALAND

There are also Model Law jurisdictions whose courts have approached Article 8(1) applications by undertaking a full and final review of arbitration agreements.⁸⁴ This has been the practice in New Zealand, where courts have not hesitated to finally determine questions relating to the validity and/or scope of arbitration clauses.⁸⁵ In several cases, the courts themselves have noted the length of time spent hearing argument and dealing with large amounts of material before them for the purpose of deciding whether to send the parties to arbitration.⁸⁶ The level of review issue was raised, briefly, in *The Property People Ltd v Housing New Zealand Ltd*.⁸⁷ The plaintiff initially sought an interim injunction to restrain the defendant from terminating the contract between them. The injunction was refused. The plaintiff then commenced proceedings in the High Court, pleading various causes of action against the defendant. Relying on the arbitration clause in the contract, the defendant sought a stay under Article 8(1). The two questions that arose for determination were (a) whether the stay application was filed within the time limit prescribed by Article 8(1), and (b) whether the disputes were within the scope of the arbitration clause. The Court held that the application was submitted out of time and disposed of the application on this ground. In the course of its argument, counsel for the defendant referred the Court to *Gulf Canada*, including the passage quoted above in which the British Columbia Court of Appeal established the "arguable" standard for the purpose of deciding whether or not to grant a stay. Salmon J responded that the main issue was one of interpreting the time limit in Article 8(1), and that the role of the Court was to determine the meaning of the words used ("not later than when submitting the party's first statement on the substance of the dispute"), so that on that issue, once the determination is made the issue will no longer be "arguable". From this response, if the time limit had been met, it is unclear whether the Court would have decided to rule on the scope question, or whether it would have applied an "arguable" or prima facie review test. There is no mention of the tribunal's power to rule on scope questions in the judgment. Whether reasons in favour of a prima facie approach to stay applications are outweighed by the risk of duplication is not addressed in *The Property People*, and it has not been directly addressed in other New Zealand cases under Article 8(1) either.

4. JURISDICTIONAL BASICS

4.1. **The Nature of Arbitral Authority**

In commercial disputes, several terms get pressed into service almost interchangeably to address which (if any) aspects of the controversy should be decided by arbitrators rather than courts. The labels include “jurisdiction”, “authority”, “power”, “mission” and “arbitrability”. Each might be applied, for example, to describe the nature of disagreements over a parent company’s duty to arbitrate pursuant to a clause signed by its subsidiary, or an arbitrator’s power to decide tort claims and to award punitive damages.

To reduce the risk of simply presuming one’s own conclusions about what is or is not jurisdictional, it might be helpful to suggest three common categories of defects in arbitral authority related to: (i) the existence and validity of an arbitration agreement; (ii) the scope of authority (substantive and procedural); and (iii) public policy. There is no magic in this classification, which commends itself only as a starting point for analysis.

The first two flaws relate to the contours of the parties’ contract. The third has an effect regardless of what the contract might say.

4.2. **The “competence-competence” principle:**

It is supported by the separability principle, also found in Article 16(1), which treats an arbitration clause in an underlying contract as distinct from the contract, allowing the clause, and therefore jurisdiction, to survive invalidity or termination of the contract. Although they serve different functions, these principles are together intended to give primary responsibility to the tribunal with respect to determining whether it has jurisdiction.¹ Courts are not excluded however, and for tactical or genuine reasons parties often challenge the validity and scope of arbitration agreements in judicial proceedings. Intervention by the court on jurisdiction questions is necessary to protect the parties against participation in an arbitration which is founded upon a defective arbitration agreement. Nonetheless, the extent of the court’s intervention can have important consequences on the efficiency of arbitration.

4.3. **The “negative effect” of competence-competence**

The who decides first question can be analysed in terms of the so-called “negative effect” of competence-competence, which advances the third option above. The positive effect of competence-competence refers to the tribunal’s power to rule on its jurisdiction, which has already been described. The negative effect, more controversially, takes the competence-competence principle a step further than its positive effect by establishing a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions. It has a negative or restraining effect on the court, whose role is generally deferred to subsequent review of the tribunal’s decision. When applied to stay applications, negative effect obliges the court to conduct a provisional and high level review of the arbitration agreement, and refer the parties to arbitration if satisfied of the agreement’s prima facie effectiveness. Applying negative effect, in most cases, the tribunal will have the first opportunity to hear full substantive argument as to its jurisdiction. At first, negative effect might seem excessive, or too zealous, in its proarbitration inclination. However, the reasons for negative effect are largely driven by efficiency considerations, and the commercial imperative for an efficient dispute settlement mechanism is highly relevant to shaping arbitration law. Rules and procedures should minimise, as much as possible, the extent to which time and energy is consumed with jurisdiction questions. The

leading proponent of negative effect, Emmanuel Gaillard, has focused on the prevention of obstruction as justification for embracing the concept. His argument recognises that it is well known that litigating parties seek tactical advantages, and that challenging jurisdiction is an effective way to delay an arbitration for tactical reasons. Once a dispute has arisen, a party who is bound by an arbitration agreement will often contest the tribunal's jurisdiction because it now finds arbitration inconvenient for some reason, or because it simply wants to interfere with the progress of the proceedings. If the party objecting to jurisdiction is able to fully argue the matter in court, and the court rules in favour of jurisdiction, the arbitration may well be delayed for months or even longer.

The Court's Powers The "who decides" question asks whether a court or tribunal should decide if arbitral jurisdiction is established or not. Under the Act, if a court is seised of a dispute, a party may seek a stay of the litigation under Article 8(1) on the ground that the parties agreed to arbitrate, and the court must decide whether to send them to arbitration. A tribunal, for its part, may respond to a jurisdiction challenge in a preliminary ruling, or in its final award (Article 16(3)). Both preliminary rulings and awards are reviewable by the court. Since both the courts and tribunals have roles to play under the Act's regime, the short answer to the "who decides" question is both courts and tribunals, with the courts having the last word to satisfy the requirements of logic and justice. Beyond this remain important unresolved issues, such as who should decide first, and how much deference should be given by a court to a ruling on jurisdiction made by a tribunal. This article deals with these two specific issues in turn, focusing on the first in Part II, and on the second in Part III. There is now a strong policy internationally to encourage and facilitate arbitration as an autonomous dispute settlement mechanism. There is also a strong policy in favour of retaining the residual supportive role of the courts in the arbitration process. These policies can easily come into conflict – an expansive judicial sphere of influence in arbitrations will typically have unhelpful practical consequences on the cost, duration and privacy of dispute resolution, and on party autonomy, while a confined one risks a loss of confidence in arbitration and the court system. Lord Mustill once described the relationship between national courts and arbitral tribunals as being mutually supportive, as giving rise to a "relay race" in which one passes the baton to the other according to the nature of the task. He also conceded however, that in practice, "the position is not so clear-cut"

4.4. Challenges to Arbitral Jurisdiction

A challenge to jurisdiction may arise over the validity of an arbitration agreement and attack the whole basis on which the tribunal purports to act. For example, a challenge may question the legality or proper execution of the agreement, or assert a waiver of the right to arbitrate or failure to observe requirements in the underlying contract with respect to assignment or time limits.⁴ Or, a challenge may only concern the tribunal's jurisdiction over certain subject matter, and question whether some of the claims before the tribunal are included within the scope of the arbitration agreement, or whether the tribunal has gone beyond the particular questions submitted to it for resolution. At a very applied level, resolution of doubt over arbitral jurisdiction is important, because it determines whether or not the arbitration can go ahead. The legal question can be simply put, "is there an agreement to arbitrate this dispute", but answering the question in any given case may consume as much time and energy as resolution of the underlying dispute. An arbitration agreement usually takes the form of a clause in an underlying contract between the disputing parties, or less frequently, a separate submission entered into after a dispute has arisen. Limited forms of statutory arbitration aside,⁵ without an arbitration agreement, there can be no valid arbitration; neither the parties nor the courts can be expected to defer to a tribunal in respect of matters that were never submitted to it. Conversely, a valid

agreement establishes the exclusive jurisdictional basis for the tribunal to give its ruling in a legally.

4.5.

Scope of Authority

By contrast, the arbitrator's power to address the scope of his or her authority might often be addressed in the initial arbitration clause itself. At the time of concluding their transaction, foresighted parties could give arbitrators explicit power to adjudicate, in a final way, challenges related to the range of matters covered by the arbitration clause.

Frequently invoked questions of scope relate to the arbitral jurisdiction over tort claims and statutory causes of action. An arbitrator might be asked to decide questions that one side asserts were never submitted to arbitration. Or it might be asserted that certain remedies (such as attorneys' fees or punitive damages) fall outside the arbitrator's mission. Procedural powers constitute a particularly fertile ground for jurisdictional conflict, including the arbitrator's right to consolidate proceedings, to punish non-production of documents, or to award compound interest.

4.6.

English Tribunal's Powers:

Two principles provide a platform for the tribunal to deal with disputes over arbitral jurisdiction. The first is "competence-competence", which confers on the tribunal jurisdiction to rule on its jurisdiction when the validity or scope of the agreement to arbitrate is in doubt. The power is necessarily derived from the applicable national law, rather than the disputed arbitration agreement, as it provides a basis for the tribunal to rule the agreement is invalid without contradicting itself. Competence-competence is widely codified into national arbitration laws¹⁰ and institutional rules, although, as discussed below, the extent of its application under different laws varies. As a consequence of the tribunal having power to rule on its jurisdiction, neither the parties nor the tribunal is required to ask a court to resolve jurisdiction questions. The second principle is separability, which treats the arbitration clause as an autonomous agreement that survives the invalidity or termination of the main underlying contract, and requires argument in jurisdiction challenges to be addressed to facts and law relevant only to the validity of the clause. The independent existence of the arbitration agreement maintains the tribunal's jurisdiction to render a valid award even if that award finds the underlying contract to be invalid for some reason. Separability is also widely adopted, in some form, in national arbitration laws and institutional rules. It has its common law origins in *Heyman v Darwins Ltd*, in which Lord MacMillan accepted that repudiation of a contract would not affect the effectiveness of the arbitration clause contained within it. The prevailing view after *Heyman* was that separability did not empower arbitrators to decide whether a contract was void, since nothing could come from nothing. However, such logic gave way to pragmatism in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd*, in which the English Court of Appeal held that separability does enable a tribunal to decide whether a contract is void *ab initio* for reasons including initial illegality. The separability principle is now codified in England of the Arbitration Act 1996, and was recently considered by the House of Lords in *Fiona Trust & Holding Corp v Privalov*. According to Lord Hoffmann, section "shows a recognition by Parliament that, ... businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and that the law should not place conceptual obstacles in their way". It is unlikely that commercial expectations of arbitration have changed that much over recent decades, but the law now recognises the need to give greater deference to those expectations, to further the prevailing

policy objectives in favour of promoting arbitration. Thus litigation on jurisdictional grounds is discouraged, by the strong endorsement of separability, to further those objectives. The culmination of *Harbour v Kansa and Fiona Trust* is that an arbitration clause can be void or voidable only on grounds that relate directly to the clause. There may be instances where the ground on which the contract is invalid also extends to directly impeach the arbitration clause, but these seem to be limited to grounds that deny the contract's initial existence for total absence of any "meeting of the minds", such as forgery, or non est factum.

In the New Zealand Arbitration Act, the separability principle appears in Article 16(1) of Schedule 1, to support the exercise of the tribunal's power to rule on its jurisdiction (also contained in Article 16(1)). As codified in the Act, the device is available to the tribunal and not the court. Despite this apparent limitation, the only sensible approach to separability must be that it applies to the validity of an arbitration clause regardless whether a court or tribunal is asked to rule on jurisdiction. The location of the principle in Article 16 does however support the general contention developed below that the tribunal should ordinarily have primary responsibility to respond to jurisdiction challenge

5. CONCLUSION AND DISCUSSION

Competency of arbitration board is inherent and it is created by law and it is separate from competency of public arbitration. Arbitration ritual theory is differences as a separate method of dispute resolution in international commercial transactions. However, Consistent with the dominance of the national authority on private equity, the entity is located at the foot of the rights of nature into the public law; although, private perspective is dominance. Along with national judicial system should be recognized as independent identity arbitration and it used as strong tool in order to make private justice without any condition. Repair defects in the existing provisions in arbitration are one of important duty of policy making. Among these tasks, the approval authority of the arbitral tribunal to determine its jurisdiction as well as determine the validity of the arbitration agreement. Among these tasks, the approval authority of the arbitral tribunal to determine its jurisdiction to determine the validity of the arbitration agreement. Because if we consider the fact that the alleged incompetence of the judges in courts and to reject or accept the view that it should decide.

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