

## **A Comparative Study on the Extent of Pre -Arbitration Intervention by Courts**

**Sindhu Soman**

Associate Professor and Vice Principal, Sree Narayana Law College, Poothotta, Kochi, Kerala,  
Email- sindhusoman@ymail.com

### **Abstract**

Every country will have to address this and decide the parameters of court enquiry into such jurisdictional objections. International conventions only provide a limited guidance leaving it to individual countries. Every jurisdiction has to find an optimal balance between the interests of efficacy and legitimacy of arbitral procedure. Courts should be competent to rule on its own jurisdiction which would include existence, validity and applicability of agreement to arbitration.

### **Introduction**

The 2006 International Arbitration Study had identified national court intervention as one of the major concerns for the participants in international arbitrations.<sup>1</sup> When arbitral jurisdiction is challenged in court, the resolution of the original dispute is affected and delayed. Often one person not willing to arbitrate commences litigation and the other would try to invoke arbitration proceedings. If the claimant is opposing the defendant's request then this becomes a dispute that would threaten the effectiveness of arbitral proceedings. So every country will have to address this and decide the parameters of court enquiry into such jurisdictional objections. International conventions only provide a limited guidance leaving it to individual countries. Every jurisdiction has to find an optimal balance between the interests of efficacy and legitimacy of arbitral procedure. Courts should be competent to rule on its own jurisdiction which would include existence, validity and applicability of agreement to arbitration. Now all countries have recognized the power of arbitrator to decide on its own jurisdiction. Thus there is an inherent tension between courts deciding an existence, validity and applicability of agreement and power of arbitrators to decide their own jurisdiction. The parameters of judicial intervention depends on the choice as to the balance between efficacy and legitimacy stated above. Once arbitration is established, courts' jurisdiction gets displaced. So when legitimacy of arbitration is emphasized, courts perform a detailed enquiry on all issues on jurisdiction and agreement. But if efficacy of arbitration is given importance, then courts cannot run a parallel litigation on has to find an optimal balance between the interest of efficacy and that of legitimacy of arbitral procedure. Courts should be competent to rule on its own jurisdiction which would include existence, validity and applicability jurisdictional issues. Here preference of one alone can be a problem, so a balance has to be there between the two. This article intends to look into the courts' review of arbitral jurisdiction in the international scenario when one relies on arbitration and often objects to it. Here at this pre-award stage, the arbitral jurisdiction is determined. The major issue is not whether courts have power to finalise arbitral jurisdiction, but whether arbitrators can primarily decide on such issue. So here it is seen how courts of different jurisdictions inquire into the matter of arbitral jurisdiction in proceedings concerning a substantive dispute in which one party invokes arbitration agreement against the court's jurisdiction over the dispute. There can be three groups of legal systems. First grants arbitrators a

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<sup>1</sup> International Arbitration Study: International Arbitration: Corporate Attitudes and Practices, 2006, pp. 6-7

priority to determine their own jurisdiction subjecting these decisions to subsequent review by courts. The second group opts for an early judicial determination of jurisdictional issue with no priority to arbitrators. The third group offers a middle solution in which priority shall or shall not be given depending on the facts of the case. Here it is intended to analyse and compare the relevant arbitration laws of India, Switzerland, Germany and England.

### *The Indian Scenario*

In 1996, the Arbitration Act, 1940 was replaced by the Arbitration and Conciliation Act in order to reduce excessive court intervention in the arbitral process. The 1996 Act is based on the UNCITRAL Model Law and provides a unified legal framework for the fair and efficient settlement of disputes. However, despite the modernization of arbitral law, the Indian courts were reluctant to apply the new provisions in a pro-arbitration spirit. The 2015 amendments to the 1996 Act were made to minimize the extent of judicial intervention in arbitration. The focus of 1996 Act is on the autonomy of parties by reducing court interference in the arbitral process. This is made possible by the non obstante clause in section 5 as it only permits an intervention as permitted by Part I of the 1996 Act. The object of the 1996 Act is to provide speedy and effective dispute resolution through arbitration. In exceptional situations where arbitration requires court support it is possible but the question is regarding the extent of intervention in such cases. The normal discretion available to a judicial authority is not there in section 5. This intervention should never delay proceedings. Also there can be corrections made in appeals later. So the courts power should be exercised with utmost care and caution. The courts have not intervened in matters like maintainability of arbitral proceedings, granting of interim measures by court after arbitrator's appointment, validity of arbitral proceedings, arbitrability of dispute, jurisdiction of arbitrator etc. Though court's power under sections 9, 11 etc. exists in spite of arbitration clause, section 5 prevails over them and section 5 bars intervention of court in such situations. Thus section 5 operates as a supervisory provision over those of judicial intervention.

The power of courts to refer to arbitration under section 8 of the Act at the instance of a party comes under Part I of the Act and relates to domestic arbitration. This provision also has the specific object of marginalizing judicial intervention as in section 5 of the Act. Here, courts cannot determine the existence and validity of arbitration agreement but these will be left to the decision of the arbitrator under section 16 of the Act. If there is a proper application, the court has to mandatorily refer the matter to arbitration and cannot stay arbitral proceedings thereby preventing delay in arbitration. The Supreme Court has reiterated this mandatory reference under section 8 in many cases leaving the remaining issues to be decided by the arbitrator. By the 2015 amendment the court can make a prima facie enquiry as to the existence and validity of agreement. Thus section 8 is conditioned by the non obstante clause in section 5 and section 16 giving authority to arbitrator to decide issues on jurisdiction and existence and validity of the agreement and the like. Such issues can be decided by courts later in a post award stage.

Arbitration clause is independent and wide to cover all issues relating to it. This is the basis for section 16 of the 1996 Act. If the clause is not wide enough then the separability doctrine empowers the arbitrator to decide such issues on merit which cannot be reviewed by courts. In India, section 16 empowers the arbitrator to decide on jurisdiction, on the validity or existence of agreement which is a

final order that cannot be reviewed by courts. Thus like sections 5,8,9,11 etc., section 16 also restricts courts from intervening with the arbitral proceedings.

Regarding interim measures through court, section 9 measures are available before and after the arbitral proceedings. Once arbitrator is appointed remedies under section 9 and 17 co-exist, though the preference is to section 17. Courts under section 9 has residuary powers to grant any interim measure similar to those under CPC and courts can follow the principles under the CPC for the same. But these measures are to protect rights of party pending arbitral proceedings. This section does not give a substantive right and is not a substitute for the arbitration proceeding. So court cannot exercise this power thereby affecting the power of arbitrator. Thus the discretionary power of court under section 9 must be exercised with caution and only in appropriate cases where the court is justified with adequate material on record.

In appeals from arbitral tribunal's order on interim measures, there is no standard of review provided. Courts either apply the grounds for setting aside under section 34 or treat them as appeals and assess the legality on merits. Indian courts were confused as to the extent of review of the substance of interim measure. In Model Law the appeal regulating review of interim orders is that it discourages an enquiry into the merits of the case. If a full review is made then all parties can appeal and this goes against the Model Law and the objective of 2015 amendment to Sections 9 and 17. Thus Supreme Court was reluctant to conduct a review on the merits of the dispute so that courts are not interfering with interim orders by the tribunal.

But Indian Courts have gone into the merits of the dispute when they are approached with enforcement of interim orders of tribunals and the High Courts have set aside them in appeal. After the 2019 amendment, section 17 measures are granted by arbitrator only during arbitral proceedings. Recently many High Courts and the Supreme Court have reminded district courts that an interim order issued by the arbitrator shall be deemed to be an order of the court and shall be enforceable under CPC as if they were an order of the court. The court in enforcing such order is doing a ministerial act and no judicial order is required for enforcing tribunal's interim order. Moreover under section 37 interim orders are appealable and so there exists a court remedy for that.

In appointment of arbitrators by Court under section 11 of the 1996 Act, the nature of power exercised by courts was always in question. Some cases described it as administrative power, whereas some others as judicial power. The issue was that if the power is judicial, courts would have discretion and they would have to decide on preliminary issues like validity, existence of agreement etc. In one case Supreme Court segregated issues to be decided by court and tribunal. Finally in 2015 the Act made clear by saying that the power of courts under section 11 is not a judicial power, that the court shall confine to the existence of agreement and that the decision of the court is final and non-appealable. In 2019 amendment the Arbitration Council of India is formed to grade and maintain arbitral institutions. Courts under section 11 would now designate such institutions to appoint arbitrators. So now this institutional appointment of arbitrators by courts has limited the scope of judicial intervention under section 11 of the 1996 Act taking the spirit of the UNCITRAL Model Law.

After analyzing the statutory provisions in India with respect to judicial intervention before arbitration, it can be seen that, the UNCITRAL Model Law which provides a pro-arbitration approach is adopted by the 1996 Arbitration Act which is trying to reduce excessive court intervention in arbitration. But in courts, we can see the reluctance to apply the provisions in an arbitration friendly way. This has resulted in the amendments in 2015 and 2019.

## *Judicial Intervention in Other Jurisdictions*

### *Reference to Arbitration*

Even though arbitration agreement is the basis of arbitration, it has to be legally enforced by national courts at times to be operative. The positive effect of an arbitration agreement is that the parties are obliged to participate in arbitration in pursuant to it and the negative effect is that parties do not resolve dispute in courts.<sup>2</sup> The negative effect is enforced judicially by stay of suit or anti-suit injunction. The court referring a matter to arbitration without proceeding in court is also an enforcement of the negative effect directly and that of positive effect indirectly. The reference of a dispute to arbitration will always involve a scrutiny of the arbitrator's jurisdiction and this can be seen in almost all the major countries' arbitration laws.

The New York Convention in its A.II(3) embodies an obligation to refer parties to arbitration at the request of one party unless the court finds that the agreement is null and void, inoperative or incapable of being performed. A.8 of the UNCITRAL Model Law is a similar provision. In England, S.9 of the Arbitration Act, 1996 allows a party to agreement to apply for arbitration not before or after taking a procedural step in court and matter will be stayed by court unless the agreement is null and void, inoperative or incapable of being performed.<sup>3</sup> This is supplemented by the Civil Procedure Rules which says that if there is a question as to existence of agreement or relation of the dispute to the agreement, the court may decide it or give directions to decide and may order stay of proceedings till then.<sup>4</sup> In Switzerland, A.7 of Chapter 12 of Private International Law Act (PILA) provides that the court would decline jurisdiction if parties have concluded an arbitration agreement on an arbitrable dispute except when defendant had not contested jurisdiction, court finds that agreement is null and void, inoperative or incapable of performed or tribunal cannot be constituted for which defendant in proceedings is responsible.<sup>5</sup> The German Code of Civil Procedure in its Book 10, contains the parallel provision which is similar to the Model Law. The provision states that respondents in a suit should object before hearing and the court would reject the action unless the agreement is null and void, inoperative or incapable of being performed and before the tribunal is constituted an application may be made to court to determine whether arbitration is admissible.<sup>6</sup>

At a glance the provisions in all the three jurisdictions appear to be similar and they are all parties to the New York Convention. The procedural means of implementing the obligation differs in the three countries. The English law provides for stay of proceedings, the Swiss law requires courts to decline jurisdiction and the German law requires the courts to reject the action before it as inadmissible. Though these procedural means of referring parties to arbitration differ, the consequence is one and the same. Regarding the time limit for objecting to court's jurisdiction the English Act states that the application for stay shall not be before or after taking any steps in proceedings. In Germany, the same has to be made before the starting of the hearings and in Swiss law no request is required,

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<sup>2</sup> Born G, 2009, *International Commercial Arbitration*, Kluwer Law International, p.1004

<sup>3</sup> Arbitration Act, 1996, 1996 C.23 as amended

<sup>4</sup> Civil Procedure Rules (CPR) 1998 (SI 1998/3132), as amended

<sup>5</sup> Translation by Dr. Robert P. Umbricht, (Switzerland) 2011 available at <http://www.umbricht.ch/pdf/swissPIL.pdf>

<sup>6</sup> Translation by German Institute of Arbitration (DIS) and German Federal Ministry of Justice published in *The New German Arbitration Law*, 1998, 14(1) *Arbitration International*, p.1.

but court shall decline jurisdiction unless defendant proceeded with the court proceedings. The New York Convention has no time limit, but in Model Law the time limit is before submitting the first statement in dispute.

As to pending arbitral proceedings parallel to court proceedings, the German and Swiss laws have adopted the UNCITRAL Model Law and allow arbitral proceedings to be initiated and continued when the issue is pending in court.<sup>7</sup> But the English Act is not addressing this issue like the New York Convention. There is a view that there has to be a stay of arbitral proceedings<sup>8</sup>, but this question was left open in *Grammar v. Lane and Webster*<sup>9</sup> when the requirements for a referral to arbitration is compared, both New York Convention and UNCITRAL Model Law do not specify the party to invoke the agreement. But obviously it has to be the defendant in the suit against whom proceedings had been initiated. The Swiss law refers to the arbitrability of the dispute.<sup>10</sup> The German court examined the arbitrability of the dispute before deciding whether to reject the action before it as inadmissible.<sup>11</sup> Under English law, arbitrability is regulated in Common Law. Thus in case of reference to arbitration when the three jurisdictions are compared, no major differences can be seen.

### *Arbitral Jurisdiction*

Arbitrators are not holding jurisdiction in the same way as are sovereign states and their institutions. But they are authorized by law to function like judges to adjudicate disputes and hence the term 'jurisdiction' is used to denote arbitrator's power to arbitrate. Similar to the Model Law in both English and Swiss Arbitration Acts, unlike Germany, the term 'arbitral jurisdiction' is used.

The term competence is used to denote the power of arbitral tribunal to decide on its own jurisdiction. Anyway the term competence and jurisdiction denote the power of arbitrator to determine a particular dispute between parties. After determining jurisdiction, arbitrator decides the admissibility wherein issues like conditions precedent, time issues, waiver of claim, absence of dispute etc. are considered. Both are different and important. Jurisdiction issue cannot be finally decided by arbitrator whereas admissibility decision by arbitrator is final. Thus in matters of arbitral jurisdiction there is shared jurisdiction between courts and arbitrator, but admissibility is something coming within the exclusive ambit of arbitrator. Still any arbitral award could be set aside by court. But the difference is difficult to be established<sup>12</sup> and courts may review decisions without distinguishing them.

The difference could be understood as that lack of jurisdiction means the dispute cannot be before the arbitrator and lack of admissibility means there is no valid dispute at all for consideration by any authority. While determining the nature of objection, it should be seen whether parties intended a particular issue to be decided conclusively by the arbitrator. Only challenges related to the nature of forum in which the issue was to be decided were challenges to arbitration clause itself.<sup>13</sup> While distinguishing jurisdiction and admissibility, it is to be seen whether the objection was aimed at the

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<sup>7</sup> Translation by Swiss Chamber' Arbitration Institution available at <http://www.swissarbitration.org/sa/en/rules.php>

<sup>8</sup>Merkin R,1991, *Arbitration Law* (Service Issue No. 55, 15<sup>th</sup> April 2010),London, Informa

<sup>9</sup> [2000] 2 All E R 245

<sup>10</sup>*Supra* n.5

<sup>11</sup>*Infra* n.43

<sup>12</sup>Paulsson J.,2005, "Jurisdiction and Admissibility", *Global Reflection on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, edited by Aksen G, p.603, Paris, ICC Publishing,

<sup>13</sup> Rau AS,2003, "Everything You Really Need to Know About 'Separability' in Seventeen Simple Propositions", *Am. Review of International Arbitration*, 14(1):1, p.70

tribunal or at the claim.<sup>14</sup> But sometimes the objection seems to appear that it is aimed at arbitral jurisdiction, like a party arguing non fulfilment of a condition precedent to arbitration. So here it requires a thorough examination of agreement and circumstances to find out whether it is an objection on jurisdiction or admissibility. Now as a solution, at the pre-award stage, it may be referred to arbitrator who shall make a detailed inquiry. In doing so, if he finds that parties intended to resolve the dispute in court, the question is jurisdictional. If he finds that parties never intended a dispute resolution or not until a pre-condition is fulfilled, the question is of admissibility.<sup>15</sup>

Arbitrability means matters which cannot be resolved by arbitration as per the national law, in spite of a valid arbitration agreement.<sup>16</sup> Sometimes it is used widely to include both jurisdictional and admissibility issues. In US the term arbitrable is used to denote the quality of a particular dispute to be determined by arbitration.<sup>17</sup> They have distinguished between issues relating to making of agreement with those not related to making of agreement. Issues related to making of agreement are of arbitral jurisdiction and are finally decided by courts. But those not related to making of agreement are decided finally by arbitrators.<sup>18</sup> There is confusion and difference of opinion as to what all objections are related to arbitrability.<sup>19</sup> So it can be said that certain procedural issues relating to admissibility are to be decided by arbitrators.

### *Competence-Competence*

The power of arbitrator to rule on his own jurisdiction is called as ‘competence-competence’ principle.<sup>20</sup> This embedded in A.16 of Model Law<sup>21</sup> can be seen in almost all national arbitration statutes, international conventions and rules. This principle permits arbitrators to independently determine their power to resolve a dispute without the authorisation of state courts. When this power in different jurisdictions is analysed there can be variations in it. An arbitral tribunal has this power, only if parties within the limits of applicable law, confer this power on the tribunal by operation of law.<sup>22</sup> The doctrine of separability on which the competence principle is based provided that the arbitration clause in an agreement is to be considered as an independent contract. Thus separability gives the arbitrator the power to decide on the nullity of the main contract. But for this there has to be a valid arbitration agreement. So the power to decide on the validity of arbitration agreement is based on the principle of competence.

The power of arbitrator is to decide on his jurisdiction vis-à-vis the power of courts to do so is always controversial. The controversy is regarding the timing and depth of court’s inquiry into matters of existence, validity and applicability of arbitration agreements.<sup>23</sup> The positive effect of the principle

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<sup>14</sup>Supra n.12, p.616

<sup>15</sup>Id at 617.

<sup>16</sup>Supra n.2 at 767

<sup>17</sup>Ibid.

<sup>18</sup> Rau AS, 2008, Arbitral Jurisdiction and the dimensions of “consent”, *Arbitration International*, 24(2):199, p..202

<sup>19</sup> See e.g. Bermann, 2009, Part I: *International Commercial Arbitration*, Chapter 3: *The Gateway Problem in International Commercial Arbitration*, pp.59-61; Shore

<sup>20</sup>Holtzmann et al, 1989, *The United Nations Commission on International Trade Law A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer, pp. 478, 508; Gaillard and Savage, 1999, *Fauchard, Gaillard, Goldman on International Commercial Arbitration*, Hague, Kluwer Law International, p.395 para. 650

<sup>21</sup>[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/P185\\_Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/P185_Model_arbitration_status.html)

<sup>22</sup>Chaturvedi and Agarwal, , 2011, “Jurisdiction to determine jurisdiction”, *Journal of Chartered Institutional Arbitrators*, 77 (2) : 201

<sup>23</sup>Supra n.2 at 856

enables the arbitrator to rule on his own jurisdiction and the negative effect enables the arbitrator to be the sole judges of their jurisdiction.<sup>24</sup> But an arbitrator's jurisdictional decision is provisional and subject to judicial review. To what extent the judicial review can be done by courts is again a problem. The principle allows arbitrators to arbitrate the dispute without considering jurisdictional challenges. Here the arbitrators decide and there is only a subsequent judicial review. Then rarely there can be exclusive authority to arbitrators where parties may waive their right to judicial review.

The courts should not review before the arbitrators have decided the issue and there should not be a parallel review on the same issue during the arbitral proceedings.<sup>25</sup> The courts should only do a prima facie examination of the existence and validity of the agreement. When the courts are not holding substantive inquiries into such matters, there will not be delay in arbitral proceedings. Later the courts hold a full review of the matter.<sup>26</sup> There are variations as to the effects of this principle in various jurisdictions. The negative effect of competence-competence is internationally accepted, but this gets defeated if the parties get the jurisdictional matter decided in courts.<sup>27</sup> One safeguard to protect the negative effect of the principle is its practical benefits by allowing parties to first argue before the arbitrator and then in courts. Another safeguard can be the prima facie standard of review adopted by courts at the pre-award stage for the review of the existence and validity of arbitration agreement.

The UNCITRAL Model Law and certain other jurisdictions like Sweden, though recognized arbitrator's power to rule on its own jurisdiction subject to judicial review, allows judicial intervention at any time even before arbitral decision.<sup>28</sup> In French law, the review of nullity or inapplicability of arbitration agreement amounts to only a prima facie standard of review<sup>29</sup> and it shall be done by the arbitrator only. But in Swiss law, it is not a limited review for courts. Under A.7 of Private International Law Act the court in a dispute on arbitration agreement should decline jurisdiction unless agreement is null and void, inoperative or incapable of being performed. Here the scope of review is wide as the court summarily examines to see whether agreement is null and void, inoperative or incapable of being performed.<sup>30</sup> In countries adopting the UNCITRAL Model Law, some take a full review of existence, validity and applicability of agreements, while some others only allow a prima facie review.<sup>31</sup> In *Shin Etsu Chemical Co Ltd v. AkshOptifibre Ltd*,<sup>32</sup> the Indian Supreme Court on a reference under S.45 of the Act held that the court could do only a prima facie review to see whether the agreement is null and void, inoperative or incapable of being performed. Thus the depth of inquiry varies in different jurisdictions when prima facie standard is used to review arbitral jurisdiction.

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<sup>24</sup> Gaillard E. Savage J , 1999, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Hague, Kluwer Law International, pp. 400-401

<sup>25</sup> Gaillard and Banifatemi , May 1 2008, "Negative effect of competence-competence: The rule of Priority in Favour of the Arbitrators" in *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice* edited by Gaillard and Pietro DD, London, Cameron, p. 258.

<sup>26</sup> *Supra* n.24 at 401

<sup>27</sup> *Supra* n.25 at 273

<sup>28</sup> *Supra* n. 2 at 900-904, 965, 877-80

<sup>29</sup> Decree No. 2011-48 of 13 January 2011, Article 1448. The decree contains the new text of the Book 4 of the Code of Civil Procedure, translated by Manuel Gaillard, Nanau Lelen-Knobil and Daniela Pellarini of Shearman and Sterling LLP available at <http://www.parisarbitration.com/brief-1.php?id=6>

<sup>30</sup> *Supra* n.25 at 262

<sup>31</sup> Bachandf , 2006, "Does Article 8 of Model Law call for full or prima facie review of the arbitral tribunal's jurisdiction?" *Arbitration International*, 22 (3):463

<sup>32</sup> 7 SCC SC(2005) at 234

### *Judicial Intervention in Pre-arbitration Stage in England*

The English law on arbitration had not completely adopted the UNCITRAL Model Law. Accordingly, fairness, impartiality and avoiding delay in arbitration process was a major premise of arbitration. Then there was party autonomy and lastly the principle of non-intervention by courts which is similar to A.5 of Model Law. Section 1(c) of the English Act says that in matters governed by Part I of the Act no court intervention should be made by court. By using the word 'should' they have not contemplated an absolute prohibition. So there could be minimal and limited court intervention within the law. The intervention is supposed to supplement the arbitral process. So sometimes court can decide preliminary issues even before arbitration, if needed for effective arbitration.

Under S.9(4) of the Arbitration Act, the court is empowered to stay its proceedings on an application by a party against whom legal action is sought in a matter relating to the agreement which is to be referred to arbitration. The court shall stay the proceedings unless the agreement is null and void, inoperative or incapable of being performed. Here, under the Act, courts can intervene but the issue is regarding the restraint in exercising such jurisdiction. Under common law and equity, jurisdiction of courts is not ousted by an arbitration agreement, but parties could hold parallel court proceedings along with arbitration.<sup>33</sup> This was modified by early arbitration laws providing for stay of court proceedings in cases of reference to arbitration. S.9 of the 1996 Act provides for a mandatory stay of court proceedings in cases of reference to arbitration. This power was held by the Court of Appeal in *Al-Naimi v. Islamic Press Services Inc.*<sup>34</sup> as one in the court's inherent jurisdiction. This inherent power to stay is exercised by courts because arbitrators are the best persons to decide questions of jurisdiction.<sup>35</sup>

Common Law had recognized the concept that an arbitral tribunal may rule on its own jurisdiction.<sup>36</sup> This could be later appealed in courts. But in matters involving the validity of agreement or the like, the arbitrator decided it as a substantive one and courts could do only a limited review.<sup>37</sup> S.30 of the 1996 Act stated the principle of competence-competence by which the arbitral tribunals could rule on their jurisdiction and it could be on matters relating to validity of agreements, constitution of tribunal, matters in arbitration etc. This exhaustive list had been expanded by court. So S.30 gives the arbitrator to decide on his jurisdiction unless parties have otherwise agreed. But if the parties are silent as to whether competence-competence is excluded, it will be a matter of construction to decide whether the tribunal can decide on its own jurisdiction.<sup>38</sup> The jurisdictional issue is decided as preliminary which can be reviewed in court under S.67 of the Act. If the award is made, then also it can be challenged on merits in courts. The courts would be deciding not whether the tribunal could decide the issue but whether it was correct in reaching the decision.

The principles in sections 9 and 30 create a tension between the jurisdiction of court to determine existence and scope of arbitration agreement and arbitrators' ability to determine their own jurisdiction. S.30 enables tribunal to preliminarily decide its own jurisdiction and if there is any doubt on tribunal's jurisdiction, English courts would not send the parties to arbitration. Under S.32 of the

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<sup>33</sup>Merkin and Flannery, 2008, *Arbitration Act 1996*, 4<sup>th</sup> edition London, Informa Publishing

<sup>34</sup> [2000] 1 Lloyd's Rep 522

<sup>35</sup>*Supra* n.33

<sup>36</sup>*Ibid.*

<sup>37</sup>*Ibid*

<sup>38</sup>*Ibid*



Act, the court, on application of parties, can determine a preliminary point of jurisdiction and even when this is pending arbitration may continue. Then under S.72, a person alleged to be a party, but refusing to appear can question the substantive jurisdiction of tribunal. Finally, an award may be challenged on jurisdiction under S.67 or appealed on a question of law under S.69 of the Act. So other than Section 9 these are other provisions enabling courts to interfere with the arbitration process. A study of proceedings under S.9 will not amount to judicial reference to arbitration, but the parties have the choice to opt for it or not.<sup>39</sup> Only when legal proceedings are brought by one party to agreement against another, the latter seeks a stay of proceedings.<sup>40</sup> S.9 applies when it is proved that there is an arbitration agreement and that the matter comes within it. If any of these is not proved, English courts might grant a stay of proceedings under its inherent jurisdiction. When the courts were certain of the existence of agreement, the rest would be referred to arbitrator for decision. English system was not giving priority to arbitrator or court but determined on the facts of each case. It is a middle ground solution where arbitration shall be prioritised depending on the circumstances of the case. The conditions for referring arbitral jurisdiction to arbitrators are very narrow and in most cases, courts determine jurisdictional issues before granting stay of its proceedings. Thus very rarely here courts refer matters as to existence of agreement, its scope, its binding nature etc. to arbitrators.

#### *The German Law Regarding Court Intervention in Pre-arbitration Process*

The tenth book of German Code of Civil Procedure (ZPO) governing arbitration proceedings incorporated the 1985 UNCITRAL Model Law on International Commercial Arbitration. Here it differs from England which is a common law country. The courts do not have inherent powers as in England. §1032(1) ZPO, an alternative of S.9 of Arbitration Act, 1996, gives the power to courts to reject an action as inadmissible on the grounds of existence, validity and applicability of arbitration agreements.

The current arbitration law was made in 1998 and it adopted the UNCITRAL Model Law except for some amendments considering the country's legal and institutional framework.<sup>41</sup> The main difference is that the scope of German Arbitration Law was applied to both national and non-commercial arbitration, while Model Law applied only to international commercial arbitration. The arbitration law is in the Tenth Book of the ZPO which is the German Code of Civil Procedure. Some other provisions in ZPO and few arbitration specific provisions in other statutes are applicable if not in conflict with the Tenth Book. There are no general principles guiding the German law as in England. But the German Arbitration Law has the following basic features: (1) Principle of territoriality, (2) prevailing role of party autonomy, (3) guarantee of due process and (4) effective proceedings and limitation of court interference.<sup>42</sup> §1026 ZPO limits the extent of court intervention. It is general principle of German law that the courts may intervene into private affairs only where the law authorizes them to do so.<sup>43</sup> §1026 ZPO is narrower than the English Act as it applies to all measures of

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<sup>39</sup>*Ibid*

<sup>40</sup>*Ibid*

<sup>41</sup>Binder, 2010, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3<sup>rd</sup> edition. London, Sweet and Maxwell, p.12.

<sup>42</sup>Bockstiegel and others, 2007, "Germany as a place for international arbitrations - General overview" in *Arbitration in Germany: The Model Law in Practice*, edited by Bockstiegel and others, Kluwer Law International, Alphen aan den Rijn, p.5 at pp.17-18.

<sup>43</sup> Gerhard Wagner, "S.1026-extent of court intervention" in *Arbitration in Germany: The Model Law in practice* edited by Bockstiegel, Kroll and others, p.81.

court. At the same time, court participation in arbitration should be guided by the principle of cost and time efficiency.<sup>44</sup> Also such court proceedings are always one time so that arbitration is unaffected. Here the question of arbitral jurisdiction should be finally decided by the court where the matter is brought and this is again justified in the interests of procedural economy.

The main effects of an arbitration agreement are procedural in nature. The agreement establishes arbitrator's jurisdiction and excludes courts from deciding disputes relating to it. So it is contractual and results in mutual obligations. So the validity of it will be determined by both substantive and procedural contract law.<sup>45</sup> Initially the German courts dismissed suits where there were arbitration agreements. Later courts made an extensive review on the formation, validity and scope of agreement as against a substantially reduced review in cases where one party relied on kompetenz-kompetenz clause which was a special clause in the agreement conferring competence to rule on competence.<sup>46</sup> So by inserting such a clause, there would be a second arbitration agreement and hence courts could only examine the validity and scope of this clause only. This was criticized and in 1998, §1032 ZPO empowered the court to reject a suit as a dispute in arbitration agreement is inadmissible. But here courts do not have inherent powers to do so as in England.<sup>47</sup> Thus the German law is different from English law. Although the law was to correspond to the Model Law, many changes were adopted in German law so that the courts could reject any action as inadmissible.

The power of an arbitral tribunal to rule on its own jurisdiction was expressly established in the reformed arbitration law. §1040 ZPO corresponds to S.16 of UNCITRAL Model Law and has both principles of competence-competence and separability. In arbitrations, arbitrators may rule on their jurisdiction even if it is not objected. The ruling of arbitrator on jurisdiction has to be separate and preliminary under § 1040 and there can be an immediate court review on the same giving a final ruling. But if the jurisdictional ruling is part of the award, it could be set aside under §1059 where the grounds are different and broader than that in § 1040.

§ 1032(i) ZPO, as amended, provides that the court must reject a suit as inadmissible, meaning that, at pre-award stage there will be a review of the existence, validity and scope of the agreement. The jurisdictional issue would be finally decided by the court under §1032(2) as the tribunal is not in existence and it is done in the interest of procedural economy. But after the arbitrator is appointed, jurisdictional issue is decided by him as per §1040. Between the power of court under §1032(1) and that of arbitrator under §1040, the legislation has intended that the power to finally decide arbitral jurisdiction is with the court.<sup>48</sup> The arbitrator is only provisionally determining jurisdictional issue whether a competence clause is there or not. German courts fully review the existence and validity of arbitration agreements and there the rule of negativity of competence-competence does not prevail.<sup>49</sup>

In an application under §1032(1), to reject a suit as inadmissible, it is seen whether the agreement is null and void, inoperative or incapable of being performed, whether the claim is within the scope of agreement and whether it is arbitrable. Whereas under §1032(2), in deciding the admissibility of arbitration, court examines whether there exists an effective arbitration agreement,

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<sup>44</sup>*Supra* n.42 at 21

<sup>45</sup>*Id* at 24

<sup>46</sup>Heirmann (1994), p.130 as cited in S.Synkova, 2013, *Courts' Inquiry into Arbitral Jurisdiction at Pre-Award stage*, Switzerland, Springer International Publishing, p. 196

<sup>47</sup>*Supra* n.42 at 49

<sup>48</sup>Voit (2007), Rn. 8 as cited in S.Synkova, 2013, *Courts' Inquiry into Arbitral Jurisdiction at Pre-Award stage*, Switzerland, Springer International Publishing, p. 208

<sup>49</sup>*Supra* n.42 at 22

whether it is capable of being performed and whether the matter comes within the agreement. In both cases when there is a doubt as to the validity or scope of agreement, courts do an in-depth review of the agreement. A full review in §1032(1) proceedings results in a final and binding decision and there is no priority for arbitration.

Thus German law opts for an early court decision on jurisdictional issues. The scrutiny by courts in §1032(1) is not at all limited when arbitration is happening as a parallel proceeding.<sup>50</sup> There can be decisions on the admissibility of arbitration and also review of preliminary rulings of arbitrators on jurisdiction. All court rulings are accepted as final and priority to arbitration is seen only in limited situations. The German law wants to establish lack of arbitral jurisdiction at the first stage itself and so it prefers court determination of the same. Sub sections (1) and (2) of §1032 ZPO allow the parties to approach courts in case of arbitral jurisdiction in two ways. English law has a different approach, where the courts decide the jurisdictional issues by choosing the best way to decide which is the best forum to resolve the dispute. But in German law, procedural economy seems to justify all these measures that are preferring courts to arbitration.

#### *Court Intervention and Pre-arbitration Process under the Swiss Law of Arbitration*

Chapter 12 of Swiss Private International Law Act (PILA) applies to international arbitrations. Here the issue of court inquiry into the existence and validity of arbitration agreement at pre-award stage is related to application of *lis pendens* in international arbitration. The PILA came into force in 1989 and Chapter 12 along with the Model Law. But Chapter 12, though adopted UNCITRAL has its own variations. For domestic arbitrations, the third part of Federal Code of Civil Procedure (SCCP) applies. In England and Germany there is a specific provision for limited court intervention in arbitration. This is not seen in Chapter 12 of PILA, but the courts as a principle, have exercised only a limited intervention with arbitration at the pre-award stage.

Arbitration agreement in Swiss law is sometimes viewed as procedural, private or a combination of both. A.7 PILA is the equivalent of S.9 of English Act and §1032(1) ZPO and it allows courts to decline jurisdiction when a dispute relating to an arbitration agreement comes before it. Even though Chapter 12 PILA has been interpreted to apply to international arbitrations, A.7 PILA can apply to both domestic and international arbitrations as a common rule. But courts have applied New York Convention in international ones. So for arbitrations with one party not in Switzerland, S.7 PILA applies, New York Convention for purely international ones and purely domestic arbitration the SCCP applies. Under S.7 PILA, court declines jurisdiction, unless it finds the agreement null and void, inoperative or incapable of being performed or jurisdiction is not objected or the tribunal is not formed. The first difference in S.7 is that courts here examine jurisdiction on their own motion at any stage.<sup>51</sup> If defendant proceeds without contesting court's jurisdiction, court can assume jurisdiction over the dispute.<sup>52</sup> The second difference is that A.7 provides additional exceptions to the obligation of courts to refer to arbitration. Even in cases of bad faith or abusive procedural behaviour of defendant, claimant can under A.7 claim before court instead of appointing arbitrator from the court.<sup>53</sup>

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<sup>50</sup>*Supra* n.48

<sup>51</sup>Mc Lachlan and Nygh PE, 1996, *Transnational tort litigation: jurisdictional principles*, Oxford, Oxford University Press, p.56

<sup>52</sup> Bert SV Artikel 7, 2007, in *Basler Kommentar-Internationales Privatrecht*, 2<sup>nd</sup> edition, edited by Honsell H et al, Helbing Lichtenhahn Verlag, Basel, note 6.

<sup>53</sup>*Id* at note 16

Under A.186 PILA, arbitral tribunals can decide on their own jurisdiction. Here the principle of separability and principle of competence-competence is considered differently. The ruling on jurisdictional issue is decided as a preliminary award. The plea of lack of jurisdiction must be raised before any defence and it will be decided irrespective of any parallel proceeding on the same matter.<sup>54</sup> This provision cannot be excluded by parties and the same excludes other reliefs from courts. An analogous provision is A.359 SCCP for domestic arbitration. The preliminary award on the issue whether it is based on a thorough review of the agreement or only a prima facie review is another debate. Actually this preliminary award can be reviewed by courts which is final unless parties expressly excluded it. So arbitrator gets the priority to decide on jurisdiction, though not absolute and the court in pre-award stage examines in a limited way. Next is whether *lis pendens* in S.9 PILA applies to arbitrators deciding on a matter which is pending abroad in a forum.

Under A.9 PILA when the same matter is pending abroad, the Swiss court would stay its proceedings, if it is felt that the foreign forum would decide it in reasonable time. Here *lis pendens* rule is followed and in spite of arbitration agreement the court decision on the matter is given binding effect. When conditions under A.9 PILA are found, even the arbitral tribunal must stay its proceedings. In *lis pendens*, rather than priority to decide, it is that the second gets stayed in favour of the first. As a result A.86 PILA was amended granting priority to arbitration when same matter is pending before any forum. Even though similar to Model Law provision, A.186 PILA is wider in scope in giving the arbitrator priority over courts.

The final decision on arbitral jurisdiction is with the courts in Switzerland as under A.190(2)(b) PILA an arbitral award can be set aside on jurisdictional grounds. But regarding the scope of review by courts both at the pre-award and post-award stage, it is controversial as a limited inquiry confirms the priority of arbitration in jurisdictional issues. Subsequent review by courts is possible only if jurisdictional objection was raised in arbitration. So it can be said that arbitration has priority to decide its jurisdiction but this is not an absolute one.

In foreign arbitrations seated abroad, if the New York Convention applied which permits courts to fully review and decide on the jurisdictional issue and if they are seated in Switzerland, S.7 PILA applies by which courts perform only a prima facie review of arbitration agreement.<sup>55</sup> In purely domestic arbitrations, A.61 SCCP applies under which court declines jurisdiction unless the agreement is evidently null and void, inoperative or incapable of being performed. In cases under PILA and SCCP, courts decide the jurisdictional issue finally at the post award stage. Under A.7 PILA, court declines jurisdiction if any defect in agreement is found in a summary examination and if no defect found, court assumes jurisdiction and this court decision is binding on the tribunal.

The difference with respect to seat of arbitration in A.7 PILA was proposed to be amended in 2008. Issues in A.7 PILA are regarding standard of review of agreements and the scope of summary review of arbitration agreements. In cases of arbitrations seated in Switzerland, courts conduct a preliminary review at pre-award stage and a full review at post-award stage. But in foreign seated arbitrations courts conduct a comprehensive review at pre-award stage and there is no such review after the award. Here full review is given to courts at pre-award stage fearing that the foreign seat is not favourable to arbitration.<sup>56</sup> But there can be review at post-award stage when the foreign award

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<sup>54</sup>Translation by Swiss Chambers' Arbitration Institution, available at <http://www.swissarbitration.org/sa/en.rules.php>.

<sup>55</sup>Segesser G and Schramm D 2010, in *Concise International Arbitration*, edited by Mistelis LA, Switzerland Kluwer Law International, p.942.

<sup>56</sup>Besson (2011) ASA Bull 29(3) at 597.

comes for recognition or enforcement. Summary review in A.7 PILA is a deviation from the general rule of comprehensive review and this is to protect the power of arbitrator to decide on jurisdiction. A.7 PILA gives priority to arbitrators to determine their jurisdiction. Under A.186 PILA arbitrators decide on jurisdiction even when same issue is before another forum. Thus at pre-award stage arbitrators decide on jurisdiction unless agreement is null and void etc. This review of the agreement done by the court is summary in nature and even though sometimes a full review is needed, the summary review is kept as a basis for the court's inquiry.

Unlike the English and German laws, A.186 PILA gives power only to arbitrator to decide on its own jurisdiction. There is no remedy of declaratory relief in this context. There the principal of competence-competence is followed in both negative and positive ways and a relief of anti-arbitration injunction is not granted. In matters of court appointment of arbitrators, court's review is only to the existence of agreement and nothing more. So always arbitral jurisdiction is decided by arbitrators under PILA and in some situations at pre-award stage courts are granted a very limited power to conduct a summary examination of the arbitration agreement. When the courts decline jurisdiction under A.7 PILA, it is a permanent decision of arbitral jurisdiction. One view is that a permanent decision requires full review of the agreement. But the acceptable version is that if the court makes a prima facie inquiry that becomes a final and binding decision. The proposed amendment to A.7 PILA was that the court makes only a prima facie inquiry of the arbitration agreement and then leave it to the arbitrator to decide on his jurisdiction. Similar to the summary examination, here also the issue is whether court has to only look into the existence of agreement or something more. If a defect in agreement is revealed in preliminary inquiry, a full review might be needed to decide on the court's jurisdiction.

The Swiss jurisdiction is one which prioritizes arbitrators to determine their jurisdiction which can be subsequently reviewed by courts. New York Convention governs foreign seated international arbitrations, PILA governs Swiss seated international arbitrations and SCCP governs domestic arbitrations. A.II(3) of New York Convention grants courts a full review of existence, validity and scope of agreements before declining jurisdiction whereas A.7 PILA only permits a prima facie review of the same leaving it to arbitrators. But if prima facie agreement does not exist, there will not be jurisdiction to arbitrators. Here the courts do only a summary examination and the decision is binding on arbitrators. Under the New York Convention, courts will make the jurisdictional decision. This is similar to the German law. In case of wrongful assumption of jurisdiction by arbitrators, Swiss law provides minimum safeguards than German law. A.7 PILA permits limited summary inquiry into agreements by courts, Swiss law does not give declaratory relief to arbitral jurisdiction and PILA allows exclusion of setting aside if parties are not connected to Switzerland. So we can see minimum safeguards in Swiss law compared to the excessive safeguards in German law.

### *Conclusion*

In all the countries it could be seen that the intention of parties to arbitrate is not destroyed by approaching courts for reliefs. The relation between litigation and arbitration enables the courts to assess arbitral jurisdiction when the parties raise it in courts. A party to an arbitration agreement should

be able to approach courts if the agreement is not legitimate. So it was seen how the parties to agreement consented to arbitrate and how that intention is protected by not deciding disputes in courts.

In English law, if arbitration agreement is proved courts under S.9 of 1996 Act would stay proceedings and leave jurisdictional matters to arbitrators. Courts rarely do this when there is an agreement and it is reasonable on the ground of case management. In majority situations, courts decide on the existence of agreement and whether the matter comes within it. Under S.32 and S.72 party can apply to court to decide arbitral jurisdiction both before and during proceedings. After the award jurisdiction can be challenged under S.67 of the Act. German law does not provide courts with inherent jurisdiction as in English law, to reject a suit as not admissible and the suit is rejected only if the agreement is not null and void, inoperative or incapable of being performed and the dispute is arbitrable. The ZPO ensures safeguards to see that parties have consented. In England and Germany, declaratory relief is granted, but not subject to conditions as in Germany. Here positive preliminary jurisdictional decisions and negative jurisdictional awards can be challenged in courts. In Swiss law, courts decline jurisdiction after a summary review of agreement and leave the issue to arbitrator. Here the courts' power is not considered inherent as in England. Here only minimum protection is given to ensure consent of parties. There is no declaratory relief, but rulings of arbitrators on jurisdiction can be challenged. Challenge of award can be excluded subject to conditions under A.190 PILA. A balanced approach is seen in England than the other two countries as to the intention of parties to arbitrate and the protection of that intention by not relying on courts.

The three countries differ in their approaches, when courts in proceedings prioritise arbitrators to decide their jurisdiction. Swiss courts granted priority to arbitrators to decide on jurisdiction, German courts determined jurisdiction and English courts decided issues on facts of each case. In Switzerland, in foreign seated arbitrations, the courts decided jurisdiction and there arbitrators were not prioritised. England was providing a middle solution in jurisdictional matters.

Regarding the balance between legitimacy of arbitration and efficacy of arbitration the compared laws are slightly different. In some laws court decisions are given importance whereas in some other arbitral decisions are more important as they are time saving. Internationally arbitration agreements should be enforced to the maximum extent. Courts and arbitrators are equally good in deciding jurisdictional issues, but to avoid multiple proceedings, high cost, time etc., the preference is given to one forum. In cases, *lis pendens*, *res judicata* etc, are used to solve them. Arbitration can be easily given away whereas litigation can be abused more. By opting courts, arbitration is avoided and it cannot persuade parties. So for efficacy of arbitration, arbitrators should decide their jurisdiction and this priority is the negative effect of competence-competence. If the arbitrator assumes wrong jurisdiction and the award is set aside, delay and high costs are the consequences of this negative effect. So absolute priority to arbitrators is not there. In Swiss law, courts conduct a *prima facie* review as to existence of agreement before leaving the jurisdictional issue to arbitrators. So limited exceptions to arbitral priority are the minimal court interventions.

With respect to seat of arbitration, arbitral priority is given to domestic seated arbitrations alone as seen in Swiss law. The reason is that domestic seated awards can be set aside but in foreign seated it is not possible. As to challenges to agreement, S.9 of English Act permits courts to stay its proceedings if proved that there is arbitration agreement and it covers the dispute involved. In German law, courts look into formation, validity and scope of agreement and here parties can waive the right

to approach courts. Whereas in Swiss law, only a summary examination as to existence of agreement is possible.

The general rule of prioritising arbitrator for deciding jurisdiction can be slightly changed if the challenge is purely on facts. But if both fact and law are there, arbitrator should only decide. After starting arbitration, court's power is reduced to minimum to interfere with arbitral process. Here the German law provides for right to claim declaratory relief from court as to tribunal's jurisdiction. Under S.9 of English Act, courts consider the order of proceedings to decide whether courts or tribunals have jurisdiction. Legitimacy of arbitration is also protected by providing an immediate court review of jurisdictional rulings by arbitrators.

There has been different standards of review depending on the seat of arbitration, nature of challenge, jurisdictional challenges before and after the award etc. In Swiss law, it is proposed to abolish the distinction on the different standards of review based on the seat of arbitration. A pending parallel proceedings in another jurisdiction is likely to have a conflicting decision with that of pending arbitral proceedings in the country. Here a summary review on jurisdiction may only determine jurisdiction and the priority to determine it but not other issues. A different standard of review can be adopted for issues on consent to arbitrate and other issues on arbitral jurisdiction. The former one may be done by a summary review, but for the latter a more flexible and comprehensive approach may be required as in the English law. But when such issues are connected, a fragmentation is not possible and so a decision between factual and legal issues might cause difficulty. There can be different standards in the stages before and during arbitral proceedings. Once arbitration is initiated, a jurisdictional issue brought before court may be disposed by a limited review in a short time. But a challenge before arbitration can be of bad faith to delay proceedings and has to be dealt with caution. The negative effect of competence-competence with the precaution of summary review can be supplemented with the claim for conditional declaratory reliefs as in English and German laws. So solving the problem of determining arbitral jurisdiction at the pre-award stage in all compared jurisdictions indicates the need for a uniform international consensus. This can be achieved by making the New York Convention and the like from being made uniform by adopting an UNICITRAL recommendation for the same.

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