EXTENT OF JUDICIAL INTERVENTION AND CONSTITUTIONAL COURTS

INTRODUCTION

(A) EXTENT OF JUDICIAL INTERVENTION: ARTICLE 5 OF MODEL LAW AND SECTION 5 OF ACA

Article 5 of the Model Law provides that "in matters governed by this Law, no court shall intervene except where so provided in this Law."

It "states a simple, but very important, principle. Its purpose is to oblige the draftsmen of the law to state the instances in which court control is envisioned, in order to increase certainty for parties and arbitrators and further the cause of uniformity".

Section 5 ACA provides that "notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

(B) JUDICIAL REVIEW CANNOT BE TAKEN AWAY

The *non-obstante* language of Section 8, ACA, however, does not affect the power of judicial review the High Court under Article 226 and 227 or of the Supreme Court under Article 32 of the Constitution of India. This jurisdiction cannot be limited or fettered by any Act of the Legislature. They form part of the basic structure of the Constitution.

The State's contract with a private party is also subject to judicial review (on self-imposed narrow or broad standards depending on the authority you are reading) on constitutional law and administrative law principles. A purely contractual dispute is usually outside the self-imposed limitations of the court's discretionary jurisdiction because the extraordinary remedy under these provisions is not intended to be used for declaration of private rights.

But, for example, if the State discriminates, or acts unfairly, or unreasonably, or arbitrarily the public law remedy can be invoked.

One foremost basis for challenging either the formation of a contract or a State action during the contract[1] is Article 14 of the Constitution of India "[T]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." "When an instrumentality of the State acts contrary to the public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution".[2]

(C) 2019 CASES: JUDICIAL REVIEW OF ARBITRATION AGREEMENT IN ICOMM AND APPLICABILITY OF ARTICLE 227 IN DEEP INDUSTRIES

1. ICOMM

Icomm Tele Limited v. *Punjab State Water Supply and Sewerage Board and others*, (2019) 4 SCC 401 is an example of the involvement of constitutional rights in arbitration (with a State instrumentality). Here, the question of the validity of the arbitration agreement arose outside of the ACA in a petition Article 226 of the Constitution of India before the High Court.

The matter involved a pre-deposit requirement before the non-state party could invoke arbitration. The refund of the pre-deposit, in case the State

[1] *See Shrilekha Vidyarthi (Kumari)* v. *State of U.P.*, (1991) 1 SCC 212 ("The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters").

[2] *ABL International Limited* v. *Export Credit Guarantee Corporation of India Limited*, (2004) 3 SCC 553.

party lost in arbitration, was to be not of the whole amount. The High Court rejected the petition.

A 2-judge bench of the Supreme Court (R.F. Nariman and Vineet Saran JJ) struck down the clause. They applied Article 14 and held that the clause was arbitrary.

A passage from *Central Inland Water Transport Corpn.* v. *Brojo Nath Ganguly*, (1986) 3 SCC 156, a leading authority on the principle of contract of adhesion, was cited. But the court rejected the argument that the clause amounted to a contract of adhesion and could be set aside on the grounds of unconscionability. It referred to paragraph 89 of *Central Inland* and said the principle does not apply where both parties are businessmen, and the contract is a commercial transaction.

This is what the court had said at paragraph 89 in *Central Inland*: -

> "This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. *This principle, however, will not apply where the bargaining*

> *power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infrastructural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances* (emphasis added)".

It will be useful to note here that unconscionability claims to an arbitration agreement has been recognized in many jurisdictions across the world, as noted by Mr. Born.[3] Such an argument goes to the substantive validity of an arbitration agreement[4], which "concerns its contractual validity in general," for instance, fraud, mistake, undue influence, lack of consideration, etcetera.

The question of substantive validity can arise in the ACA in several proceedings. For example, one of the grounds of setting aside an arbitral award is that the "arbitration agreement is not valid under the law to which the parties have subjected it …" [Section 34 (2) (a) (ii)].

Icomm might make it difficult for parties to apply unconscionability claims in a similar situation.

2. Deep Industries

Under Article 227, the High Courts have judicial and administrative powers of superintendence over all courts and tribunals throughout its territory.

Can or should a High Court exercise its jurisdiction under Article 227 in matters decided under the ACA? This was the question before a 3-judge

[3] Gary B. Born, *International Commercial Arbitration*, pg. 856-866, vol. 1, 2nd ed.

[4] Formal validity of an arbitration agreement on the other hand relates to the written form requirements (under Section 7 ACA).

bench presided by Nariman J in *Deep Industries Limited* v. *Oil and Natural Gas Corporation and another*, 2019 SCC OnLine SC 1602.

The arbitral tribunal made an interim order under Section 17 of the ACA (which provides for interim measures by the tribunal). An appeal was filed before the City Civil Court but rejected. Since no appeal lies from such an order under the ACA, a petition under Article 227 of the Constitution was filed challenging the City Court's order.

The court held that though High Courts can exercise jurisdiction under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the ACA, this must be with extreme circumspection, considering the statutory policy of the ACA so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.