Do Parties Need Recourse against Interim Awards?

Kluwer Arbitration Blog
September 6, 2018

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Please refer to this post as: Harsh Hari Haran, 'Do Parties Need Recourse against Interim Awards?', Kluwer Arbitration Blog, September 6 2018, http://arbitrationblog.kluwerarbitration.com/2018/09/06/parties-need-recourse-interim-awards/

Introduction

The 2018 International Arbitration Survey: The Evolution of International Arbitration undertaken by the Queen Mary University and White and Case LLP found flexibility to be the third most valuable characteristic of international arbitration.

The flexibility inherent in the arbitral process allows tribunals to conduct the proceedings (ideally) in an expeditious manner. One common method used by tribunals is to delineate the issues in dispute and, where appropriate, determine some issues at an early stage of the proceedings by way of a "*partial*" or "*interim*" award.

Challenges to jurisdiction, questions of liability and applicable law are just some of such issues. In fact, a 2012 survey undertaken by the Queen Mary University and White and Case LLP found that partial or interim awards are issued in one third of arbitrations.

Given the potentially significant impact that an interim award can have on the arbitration proceedings, most jurisdictions provide parties with immediate recourse against an interim award. However, the Supreme Court of India in *M/s Indian Farmers Fertilizer Co-operative Limited v M/s Bhadra Products* (Civil Appeal No. 824 of 2018) ("***Bhadra Products***") invites the Indian Parliament to disrupt this delicate balance.

The current state of play

The Indian Arbitration and Conciliation Act, 1996 ("the **Arbitration Act**") is, in many ways, unique. One area where the Arbitration Act departs from the Model Law (and many other jurisdictions) is with respect to the remedies available to a party where a tribunal rules, as a preliminary question, that it has jurisdiction.

Article 16(3) of the 1985 UNCITRAL Model Law on International Commercial Arbitration ("the **Model Law**") provides a party with immediate recourse where the tribunal rules as a preliminary question that it has jurisdiction. By contrast, Section 16(5) of the Arbitration Act states that where a tribunal rejects a challenge to its jurisdiction, it shall continue with the arbitral proceedings and make an arbitral award and, pursuant to Section 16(6), a party aggrieved by such an award may make an application for setting aside such an award. In other words, under the Arbitration Act, where the tribunal rules as a preliminary question that it has jurisdiction the aggrieved party has *no immediate* recourse and must await the final award on merits.

There is some weight to the argument that the position taken by the Arbitration Act is far from satisfactory as it compels parties to incur unnecessary time and costs in potentially useless arbitration proceedings. But parties could take comfort in the fact that they could apply to set aside an interim award on any other issue. However, that too may soon change given the Supreme Court's observations in *Bhadra Products*.

The Supreme Court's decision

In arbitration proceedings between the appellant (respondent in the arbitration) and the respondent (claimant in the arbitration), the tribunal issued a "*First Partial Award*" rejecting the appellant's objection that the respondent's claims were time barred. The appellant applied to have the "*First Partial Award*" set aside. The trial court dismissed the petition on the ground that the tribunal's decision did not constitute an interim award and therefore could not be set aside under Section 34 of the Arbitration Act. The appeal to the High Court was also dismissed which resulted in an appeal to the Supreme Court.

The respondent argued that the tribunal's decision on limitation was a ruling with respect to its jurisdiction and, in accordance with Section 16(6) of the Arbitration Act, can only be challenged together with a final award.

Rejecting the argument the Supreme Court held that the term "*jurisdiction*" in Section 16 of the Arbitration Act has been used in the narrow sense and, similar to Section 30 of the English Arbitration Act, 1996, refers to (i) the existence of a valid arbitration agreement; (ii) whether the tribunal has been properly constituted; and (iii) whether the matters have been submitted to arbitration in accordance with the arbitration agreement.

Accordingly, the Supreme Court found that a determination on limitation is not a determination on the tribunal's jurisdiction but a determination on the merits of the claim and therefore constituted an interim award which can be set aside under Section 34 of the Arbitration Act.

Fatal parting words?

By adopting a narrow definition of "*jurisdiction*", the Supreme Court mitigated the potentially harmful consequences of Section 16(6) of the Arbitration Act as only a limited category of decisions would constitute a tribunal's decision on its jurisdiction.

However, the Supreme Court's judgment concludes with an invitation to the Parliament to consider amending Section 34 of the Act, such that all interim awards can only be challenged together with the final award. If accepted, this would severely reduce the attractiveness of arbitration in India.

Take the hypothetical situation where, in an arbitration arising from a construction contract, a contractor claims damages for wrongful termination of the contract and payment for work done and the employer counter-claims for costs incurred in engaging a replacement contractor. An interim award holding that the contract was validly terminated, would greatly reduce the scope of the damages hearing.

The Supreme Court's invitation, if accepted, would require the contractor to first contest the entire arbitration and thereafter apply to have the interim award set aside together with the final award. If the contractor is successful in having the award set aside, it will then have to potentially re-commence arbitration in order for its claim for damages to be determined. This is clearly unsatisfactory and would greatly increase the time and costs incurred by the parties.

Where does the balance lie?

The Supreme Court's invitation was motivated by a concern for the unnecessary delay and additional expense incurred by parties in dealing with "*piecemeal challenges*". While it is true that parties' incur time and costs in dealing with challenges to interim awards, the solution is not to remove all recourse to interim awards. Instead, the author suggests that the balance is struck when both tribunals and court exercise their discretion in an appropriate manner.

An arbitral tribunal should only determine an issue by way of an interim award if it will have a significant impact on the merits hearing. Courts, when faced with a challenge to an interim award, should be circumspect in granting a stay of the arbitration proceedings pending the determination of the challenge. Indian Courts may find guidance on this issue in the decision of the Singapore High Court in ***BLY v BLZ & Another*** **[2017] 4 SLR 410**, where the Singapore High Court, determining an application for a stay of the arbitration pending a challenge against the tribunal's ruling on its jurisdiction, held:

- The "*default position*" is that the arbitration will continue pending curial review;
- The court's discretion to stay the arbitration must be exercised judicially and with reference to all the circumstances of the case; and
- In order to justify the exercise of its discretion, there must be "*special circumstances"* necessitating a stay of the arbitration proceedings, which can include the conduct of the other party in relation to the arbitral proceedings. However, costs incurred in potentially useless arbitration proceedings would not constitute special circumstances.