Kluwer Arbitration Blog

One for the Money – Renewing Institutional Arbitration in India

Abhinav Bhushan (ICC International Court of Arbitration) · Monday, March 31st, 2014

and Niyati Gandhi

A done to death topic in arbitration gatherings in emerging markets, particularly in India, is the debate about *ad hoc* versus institutional arbitration. The basic arguments in favour and against both have been discussed time and again. However, renewed support for institutional arbitration can be found in two recent judgments from the courts in India arising out of *ad hoc* arbitrations.

Recently, in the much hyped ruling in *Union of India v Panacea Biotec (Panacea)*, Justice Vipin Sanghi of the Delhi High Court passed an order terminating the mandate of an arbitral tribunal in accordance with the mutual consent of the parties. The parties had collectively moved the court to terminate the mandate of the arbitral tribunal on grounds of tardiness and excessive fees under section 14(1)(b) of the Arbitration and Conciliation Act, 1996 (the Act). The parties had further sought the assistance of the court in appointing a sole arbitrator to resolve the differences among them in an arbitration to be administered by the arbitration centre operated under the auspices of the Delhi High Court. The court not only allowed the application but also went one step further and held that "no further fee" would be payable to the existing arbitral tribunal and appointed a retired judge of the Supreme Court as the Sole Arbitrator.

What needs to be noted with respect to this particular arbitration is that the parties had paid an advance on fees of approximately US$76,000 but even after a couple of years, no substantive hearings had taken place. Following the inordinate delay and "exorbitant" expenses thus incurred, the parties successfully moved the court to allow them to have a *de novo* arbitration administered by a local institution. Although this order has been called "unprecedented", it has certainly been welcomed with open arms by all stakeholders. What is notable about this judgment is that the court allowed the parties to use their statutory rights under Section 14(1)(b) of the Act almost as weapons. We say so because by allowing the application, they also penalized the tardy and expensive arbitral tribunal by ordering the non-payment of certain dues reminding parties and arbitrators that the mechanism of arbitration was introduced into the system with the promise of inexpensive, cost-effective and speedy resolution of disputes.

Furthermore, this was not the first judgment of its kind. In 2011, in another *ad hoc* arbitration, *Ariba India v Ispat Industries (Ariba)*, the first judgment in this line of cases, the Delhi High Court addressed the issue of fees as well as the issue of delay. In this case, the tribunal appointed had examined only one witness over the course of four and a half years. The delay had been caused by a variety of guerrilla tactics employed by the respondent with the intention of avoiding compliance

with the schedule fixed by the tribunal. Although it may be argued that the tribunal may not have acted with adequate efficiency and effectiveness in dealing with a recalcitrant respondent, the tribunal chose to impose "exemplary costs towards its fees" as a penalty on the parties for hearings that were not held. The court took note of the petitioner's argument that the parties entered into an arbitration agreement *"in the hope that their disputes would be resolved expeditiously in a fair and reasonable manner with reasonable and limited expenditure and costs. If these objectives are not achieved, the whole purpose of agreeing to resolution of disputes by arbitration gets defeated and the proceedings become a mockery"* and terminated the mandate of the existing tribunal. In addition, the court appointed a sole arbitrator to resolve the dispute by way of a *de novo* arbitration, specifically moving away from the cumbersome procedure of appointment provided for in the arbitration clause by consent of the parties. The court, therefore seems to have treated the application as a novation of the arbitration agreement between the parties.

The position of law that can be reached by reading *Panacea* and *Ariba* together is that speed and cost effectiveness are paramount considerations and in exceptional cases, courts would even proceed to appoint new tribunals by superseding the procedure prescribed in the arbitration clause in the interest of these considerations. This demonstrates the emphasis of the court on the nature of arbitration as a speedy, cost effective mode of dispute resolution and not just party autonomy.

The interesting aspect of the decision in *Panacea* is the pro arbitration interpretation lent to section 14(1)(b) of the Act. Previously when aggrieved with issues such as delays, parties could ask the court to impose a time limit upon the tribunal, but could not terminate the mandate of the tribunal by mutual consent. In fact, similar applications based on mutual consent to terminate the mandate of the arbitral tribunal have been held as not maintainable when the impartiality and independence of one or more members of the tribunal has been questioned in *Progressive Career Academy v. FIIT Jee*. Accordingly, a situation where undue delay has been caused by possible bias of the arbitral tribunal is treated differently and the mandate of such a tribunal cannot be terminated by mutual consent but would require challenge proceedings.

Although the evolution of pro arbitration jurisprudence is commendable, the liberal use and interpretation of section 14(1)(b) has the potential to backfire if the parties make such application at later stages in the arbitral proceedings. This is because a *de novo* arbitration would create considerable overlap and thus would involve considerable time. The most failsafe approach, therefore, would be to use an arbitral institution which would monitor the progress of the proceedings carefully and assist in controlling both time and costs.

While the aforementioned judgments are about parties seeking to terminate the mandate of the arbitral tribunal, the following judgment refers to the order of the arbitral tribunal terminating its own mandate. In the matter of *Lalit Kumar Sanghvi* before the Supreme Court of India (SCI), the petitioner was aggrieved by an order issued by the arbitral tribunal terminating its mandate caused by the failure of the Claimant to participate in the arbitral process and the non-payment of fees. The relevant portion of the order states that

> "The matter is pending since June 2003 and though the meeting was called in between June 204 and 11 April 2007 the Claimant took no interest in the matter. Even the fees directed to be given is not paid. In these circumstances please note that the arbitration proceedings stand terminated. All interim orders passed by the Tribunal stand vacated."

The issue before the court was whether the right recourse available to the petitioner was the filing of a suit to resolve the dispute (previously put to arbitration) under the writ jurisdiction of the High Courts or challenging the order of the tribunal terminating its mandate. The SCI ruled that the only recourse available to the parties was to challenge the validity of the order of the tribunal terminating its mandate. Although this order can be viewed positively as a show of respect for the arbitral process, it is particularly interesting because such a position could possibly increase the amount of time that it would take to resolve the dispute, thus working against the intention of the courts to ensure the speedy resolution of disputes under arbitration. It is pertinent to note that such an issue, where the tribunal terminates its own mandate, as against particular members resigning, is less likely to arise if the arbitration is administered by an institution in which case members of an arbitral tribunal can tender their resignation which would be considered by the institution, but the tribunal would not be able to terminate its own mandate.

These decisions are significant especially coming from courts in India since litigants choose arbitration specifically to avoid the long drawn litigations before the courts. These decisions emphasizing the need for institutional arbitration, coupled with the proposal of the Ministry of Law and Justice in a 2010 consultation paper to make institutional arbitration mandatory for all disputes valued at over Rs 5 crore (about US$ 800,000) make a strong case for institutional arbitration in India. In a country where arbitration is such an important form of commercial dispute resolution due to the time taken in judicial proceedings, it is crucial that clients make an informed decision with regard to the type of arbitration while negotiating the arbitration clause. The structure and procedural predictability that is provided by institutional arbitration may have great advantages in the Indian context.

Abhinav Bhushan is a Deputy Counsel at the Secretariat of the ICC International Court of Arbitration (ICC) in Paris, France. Niyati Gandhi is a final year student at the National Law School of India University in Bangalore, India. All views expressed in this article are that of the authors alone and do not represent the views of their respective institutions.

This entry was posted on Monday, March 31st, 2014 at 8:00 am and is filed under Ad hoc arbitration, Arbitration Institutions and Rules, Arbitrators, arbitrators' conduct, India
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.