Kluwer Arbitration Blog

Arbitration and Mediation: Shifting Paradigms in India

Sanjna Pramod · Thursday, August 4th, 2016

Increasingly overburdened Courts have constrained access to judicial remedies for civil disputes in India. To enable expeditious settlement of commercial disputes, the Government of India issued the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("**Act**"). It envisages the establishment of separate commercial Courts to hear arbitral disputes, amongst other commercial disputes of a certain value and within a certain time. However, Courts should not be the forums where resolution of disputes begin, rather where disputes end after alternative dispute resolution ("**ADR**") mechanisms have been exhausted.

Arbitration, a frequently chosen alternative to litigation has turned out to be an expensive cousin. Its efficacy as an ADR has been threatened in India owing to the excessive time involved, unpopularity of institutional arbitration, non-supportive legal and judicial framework and reluctance to adopt foreign procedural standards in domestic commercial disputes.

One must stray beyond the beaten track. Mediation may provide a suitable alternative since it is less expensive, flexible, allows greater participation of the parties and provides solutions beyond formal legal remedies.

However, a significant disadvantage is that settlements reached through mediation are not enforceable similar to arbitral awards under the New York Convention. Naturally, Indian parties want greater certainty that if they do reach a settlement, enforcement will be effective so as to not revert to the same prolonged civil suit which they were trying to escape.

To address these concerns, much has been said about the enforceability of settlement agreements if they were placed on the same footing as arbitration awards. The US Government proposed, in the 62nd session of the UNCITRAL Working Group II, a multi-lateral convention for the enforceability of international commercial settlement agreements reached through conciliation for the purpose of encouraging the use of conciliation in resolving commercial disputes (see document A/CN.9/822). Having received comments from various delegations, the UNCITRAL Working Group II, would in its 65th session, proceed to consider the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation (see document A/CN.9/WG.II/WP.197). The evolution of an international regime would have a considerable impact on the appetite for mediation in India.

The choice of adopting a multi-tier dispute resolution clause akin to the Arb-Med-Arb clause ("**AMA**"), as provided and administered by the Singapore International Arbitration Centre

("**SIAC**") and the Singapore International Mediation Centre ("**SIMC**") is an incentive for parties to opt for mediation.

Parties under the AMA may be referred to mediation under the SIMC, in an on-going arbitration with the SIAC, if they request it. Should the mediation be successful, parties may formalise the terms of settlement by requesting the same be recorded as an arbitral award by consent. Should it fail, parties have the opportunity to revert to the arbitration.

This format is most suited to the Indian context. The comments provided in the 63rd session of the UNCITRAL Working Group II, indicate that unlike other jurisdictions, India has granted settlement agreements the same status as arbitral awards under sections 73 and 74 of the Arbitration and Conciliation Act, 1996 (see document A/CN.9/WG.II/WP.191). Further, stringent timelines imposed by section 29A of the Arbitration and Conciliation (Amendment) Act, 2015, would now ensure expeditious arbitrations. With this objective, arbitrators may encourage parties, should they so desire, to consider mediation during arbitration via the AMA.

The incentives under the AMA are clarity, certainty of process, the possibility of a meaningful mediation with an effort towards settlement in light of impending arbitration proceedings and the overarching assurance of enforceability of the settlement.

To effectively adopt this process in India, certain procedural steps may be adopted: 1) arbitrators should be open to staying the arbitration to allow parties to mediate. Arbitrators through early discussions could assist parties to evaluate their respective positions and advise them towards settlement since parties are not aware of the weaknesses and strengths of the case until the stage of the hearing, 2) the mediation process may not be conducted by the same person who is acting as arbitrator. Admittedly, mediators being involved in hybrids and the alignment of arbitration and mediation closely, when the two dispute resolution methods are fundamentally different has sparked much criticism. However, the AMA under the SIAC-SIMC poses no risk of an arbitrator's impartiality being affected by overseeing a facilitative mediation since separate institutions conduct the arbitration and mediation. Further, parties under the AMA would not hesitate to discuss their positions openly since such mediator is not the arbitrator of the dispute and 3) in the interest of party autonomy and procedural fairness, the AMA should be a choice offered to parties and not a mandated procedure.

Despite these incentives, parties in India may have reservations about the concept of AMA and its impact on parallel arbitration and litigation proceedings. However, the Act, would complement the AMA by providing a speedy resolution in the event of any parallel proceedings or challenge to the consent award, by separate commercial Courts within a stipulated time frame.

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

This entry was posted on Thursday, August 4th, 2016 at 12:05 am and is filed under India, Mediation, Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.