Bar and Bench

Fighting an Arbitration in times of Distress: An Indian Perspective

The article explores how a litigant in an international arbitration involving an Indian party can navigate through the uncertainties.

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Apr 22, 2020, 2:19 PM IST

The world has come to a standstill due to COVID-19. Imposition of lockdowns and self-isolation has rendered many litigants across the globe extremely worried on how to go about their pending arbitrations, leave alone initiating new arbitration proceedings. Nearly all the reputed arbitral institutions have published their guidelines and are offering full support in times of distress through alternative arrangements. Most countries have also published official directives and rulings are in place introducing innovative and relaxed schedules for litigants.

The article explores how a litigant in an international arbitration involving an Indian party can navigate through the uncertainties. While there are challenges, the article proposes a few solutions which once can explore. Interestingly in the Indian context, Justice Ak Sikri stated that "*a lockdown cannot result in locking courts altogether. The only method available for holding court hearings is through video conferencing*." This is equally applicable in the context of international arbitration.

There are various options one can look at depending on the nature of the arbitration clause, which forms the corner stone to any arbitral proceeding. In India, institutional arbitration has picked up only in recent past – thanks, to the several factors including legislative amendments to the Arbitration and Conciliation Act, 1996 **(Indian Arbitration Act)** in 2015 and 2019; setting up of new arbitral institutions such as Mumbai Centre for International Arbitration (MCIA), as well as an expansion in the reach of existing foreign arbitral institutions. However, till date, majority of the arbitration cases are still conducted under ad-hoc mechanism prescribed under the Indian Arbitration Act. Large disputes involving government entities would almost inevitably be conducted under an ad-hoc arbitration clause.

Documents Only Arbitration

Documents only arbitration is not a novel concept. If the arbitration agreement so prescribes, then the arbitration can be conducted by way of exchange of only pleadings and documents. However, only in extremely rare circumstances would a contract specify a "*documents only*" arbitration clause. In all fairness, at the time of entering into the agreement, it may not be possible to contemplate the nature of differences that may crop up between the parties. However, giving procedural flexibility being a hallmark of arbitration, parties may choose to agree to a document only arbitration by consent subsequent to the disputes having arisen.

Many arbitral institutions have a special procedure for facilitating documents only arbitration. For example, under Rule 5 of the SIAC Rules 2016, prior to the constitution of the Tribunal, a party may file an application before the Registrar for the arbitral proceedings to be conducted in accordance with the expedited procedure, provided: (a) the amount in dispute does not exceed SGD 6,000,000 representing the aggregate of the claim and counterclaim; (b) if the parties so agree; and (c) in cases of exceptional urgency. If the application for an expedited hearing is allowed, the dispute is usually

referred to a sole arbitrator, and the Tribunal in consultation with the parties may decide the dispute on the basis of documentary evidence. Such practices ensure efficiency as well as works as a convenient mode for less and mid-value arbitral disputes. Similar guidelines are mentioned under the ICC Rules, LCIA Rules and American Arbitration Association Rules, which is primarily applicable in case of expedited arbitration involving straightforward business transactions and depending on the quantum involved in the dispute.[1]

If the parties have not designated an arbitral institution in their contract, they can by consent agree on an arbitral institution by way of a submission agreement. The IBA40 Committee in its Compendium of Arbitration Practice released in 2017 had even recommended that if it is not clear at the outset, a placeholder can be kept in the schedule to revisit this issue with the parties prior to the submission of witness evidence.[2] However, in practice, it is difficult to agree on such a consent after a dispute has arisen.

Indian Context

The Act always contemplated a scenario where parties could opt for a *documents only* arbitration, where it was not mandatory to have oral hearings.[3] With the growing trend of emergency and expedited arbitrations, in the 2015 amendments to the Indian Arbitration Act, Section 29B was inserted, which introduced *fast track arbitration*.

Under the *fast track* provision, the parties can before the constitution of the arbitral tribunal, agree in writing to conduct the arbitration under a fast track procedure. This mechanism allows the parties to make a request for an oral hearing which will be permitted if the arbitral tribunal considers it necessary, otherwise the arbitral tribunal shall decide based on written pleadings, documents, and submissions filed by the parties without any oral hearing. The award in fast track procedure must be made within six months from the date the arbitral tribunal enters reference. Since the adoption of the expedited procedure is solely based on the consent of the parties as opposed to the institution rules, we have not seen many such arbitrations.

But given the current circumstances with a national lock-down continuing, for a large number of relatively simple disputes (i.e. not complex/data heavy), it is worth a try to convince the opponent to agree on the fast track mechanism provided under the Indian Arbitration Act. These are only indicative solutions which will allow parties to resolve their disputes quickly. One needs to be mindful this may not work for high-value complex disputes where evaluation of evidence is critical.

Assuming a *documents-only* arbitration does not work, what are the other options available to the parties

Existing Arbitrations:

Virtual hearings can be the New Normal during the COVID-19.

In current times, under most arbitral institutional rules, all the procedural hearings are usually convened by audio or video conferencing as a matter of practice. Hence, this is not an impediment in the conduct of such proceedings.

The witness cross-examination can be conducted by way of video conferencing and the Tribunal may be requested to pass appropriate directions in this regard. While it remains a subject of debate as to how effectively a video conferencing can be used to conduct cross examination of witnesses, it has worked in most cases, save and except a few complex cases involving bulky documents. There is some limited practical downside where body language and general demeanor of the witness cannot be ascertained. The video protocols are already put in place and guidelines drafted by CIArb for witness conferencing[4] as well as ICC Report on Information Technology in international arbitration.[5]

Final hearings can easily be conducted on video conferencing and usage of electronic bundles has already been a way of life. In the recent years, the parties have the benefit of filing a detailed opening, closing and even responsive closing submissions before the Tribunal. All existing arbitrations which have completed pleadings need not to come to halt and can continue in normal course. Only on certain limited issues, the Tribunal may direct the parties and convene an oral hearing and such hearings can easily be conducted by video conferencing. In person hearings are no longer the norm or even desirable. There could be skeleton submissions filed along with the oral submissions as well. The distress times can infact be used for conducting hearings in a pragmatic manner and ensuring more flexibility in the process. The market is booming for video conferencing and time is ripe for embracing technology.[6]

New Arbitrations:

In arbitrations that have not advanced or have just been initiated, there is scope for further expediting the procedure. The parties can request the Tribunal and bifurcate the procedure in terms of interpretation of the contract, liability, and damages hearing – all culminating into a final award. The present time can perhaps be utilized to advance submissions on interpretation of the contract, which would usually involve submissions on law and much less on fact. Alternatively, the Tribunal in consultation with the parties, or the parties can apply to the Tribunal and seek a ruling on certain preliminary issues, such as jurisdiction, arbitrability etc. Procedures that can be managed without a great amount of involvement of the clients could perhaps be efficiently managed by the Counsel, and arbitration can be structured in that manner.

Discovery and production of documents:

Due to the technological advancements, there are various software which can be utilized to produce documents. However, a party can always refuse a detailed discovery exercise citing that they are not in possession of the documents – as most of the offices are shut at this given point. This is especially true for arbitrations involving statutory bodies. The Tribunal can perhaps be invited to judge the genuineness of the refusal and take adverse inferences, wherever necessary. Arbitration has been known to be inherently flexible from a procedural perspective and this is the time to test the waters. One cannot lose sight of the fact that any award so obtained may be rendered vulnerable if a party alleges that they were unable to present their case before the arbitral tribunal.

Securing interim reliefs:

While there may be delays in the conduct of the arbitral proceedings, the parties can file applications and secure interim reliefs from the Tribunal or the Court. Indian Courts are functioning and taking up extremely urgent cases, and the Indian Supreme Court has recently validated the conduct of such hearings.[7] In given a case, where extreme urgency can be established, a litigant can secure interim protection under Section 9 of the Indian Arbitration Act during the pendency of their arbitration.

Conclusion

The fact of the matter remains; we are entering into a new tomorrow where it is not possible to gauge how long the current restrictions on work and travel will remain. One must evaluate these options carefully, as inability to present a case or in the absence of compliance with principles of natural justice and procedural irregularities are grounds for challenging arbitral award in an India seated Arbitral Award, and also towards resisting enforcement of a foreign award (seated outside India). Therefore, unless the consent of the parties is secured or if the dispute falls within the parameters set out by the arbitral institution for expedited arbitration, there may be challenges in enforcement of such awards. The need of the hour is a mental shift from all parties concerned- litigants, lawyers, arbitrators and institutions to embrace technology and change the way how arbitrations are conducted in India.

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[2] IBA Arb40 Committee Compendium on Arbitration Practice, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=6AEF0665-7CF6-422B-8A9F-866629BE9EE6 last visited on April 12, 2020

[3] Section 24 (1) Indian Arbitration Act, 1996

[4] CIARB Guidelines for witness conferencing in international arbitration, available at https://www.ciarb.org/media/4595/guideline-13-witness-conferencing-april-2019pdf.pdf, last accessed on 12 April 2020.

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