

Dispute Resolution Hotline

October 13, 2014

GOVERNMENT ARBITRATOR? 'DEFAULT PROCEDURE' WILL CLIP HIS WINGS

The Supreme Court has:

- acknowledged that it is a common sight that government officers are appointed as arbitrators, because of their status and position; discharge of their other duties assumes more importance and their role as arbitrators takes a back seat - this kind of behavior showing a casual approach in arbitration is anathema to the very genesis of arbitration;
- directed that where the government assumes the authority and power to appoint the arbitral tribunal, it should be vigilant and responsible in choosing arbitrators who are in a position to conduct arbitral proceedings in an efficient manner;
- held that the principle of 'default procedure' will apply and courts are not powerless to remedy situations arising from inaction of arbitral tribunals (in government contracts) to protect the interest of all parties.

INTRODUCTION

The Supreme Court of India ("Court"), in *Union of India v. U.P. State Bridge Corp Ltd¹*, has once again held that the appointment of an arbitrator by the court, of its own choice, departing from the arbitration clause, is not unknown and has become an acceptable proposition of law. This can now be termed as a legal principle established by a series of judgments of the Court.

ISSUE

In contracts involving a state related entity and a private party, the arbitrators are usually officials of the entity. While this practice of appointing a government official as an arbitrator has been frowned upon, it has been upheld. There have been numerous instances where such arbitrators have been unable to devote adequate time towards conducting arbitration proceedings or are incapable of conducting proceedings due to transfers or retirements. In such situation, would the court be able to step in and appoint an arbitrator/arbitral tribunal, departing from the agreed procedure?

BACKGROUND

The parties had entered into an agreement, *inter alia*, for construction of a rail bridge across the river Ganga near Patna. The general conditions of contract contained arbitration as the dispute resolution mechanism. As is common in such contracts, or members of the tribunal were to be railway authorities. Disputes arose between the parties and an arbitral tribunal was constituted in 2007. This arbitration did not complete for over 4 years and in March 2011, when a request case was filed before the Delhi High Court due to vacancy in the tribunal, the High Court gave a last chance to the tribunal to complete the arbitral proceedings within a period of 3 months with a direction to hold regular sittings at Patna. It was also stated in the order that if arbitration proceedings were not completed within the fixed period, the respondent would be at liberty to approach the Court and the Court would be constrained to pass appropriate orders in accordance with the Arbitration and Conciliation Act, 1996 ("Act").

The arbitral tribunal did not complete the proceedings within the allotted time leading the respondent to approach the Delhi High Court in terms of liberty granted. The Delhi High Court took note of the various dates or hearing fixed by the tribunal in the 3 months granted by the High Court and came to the conclusion that the delay caused in the arbitral proceedings was intentional. It held that the members of the arbitral tribunal were continuing their dilatory tactics and were violating the specific directions of the High Court. The High Court termed this attitude of the tribunal as negligent with no sanctity for any law or for the orders of the High Court. The High Court allowed the request petition and set aside the mandate of the tribunal with the appointment of a sole arbitrator by the court. The appellant challenged this order before the Court contending that it was not open to the High Court to appoint a sole arbitrator as (i) it was not empowered to constitute the arbitral tribunal on its own; and (ii) it was contrary to the arbitration clause.

JUDGMENT

The Court perused the provisions of the agreement as well as the Act. The Court was of the view that, taking into account the conduct of the arbitral tribunal from its inception and also after a life was granted by the Delhi High Court, the order of the Delhi High Court terminating the mandate of the arbitral tribunal was flawless.

The only question that remained was whether the substitute tribunal should have been appointed in terms of the agreement between the parties i.e. according to the rules applicable to the appointment of the arbitrator being replaced. The Court acknowledged that ordinarily, that would have been the position. However, referring to its earlier

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decision in *North Eastern Railway v. Trippl Engineering Works*², the court held that this position had seen significant erosion.

- In *Ace Pipeline Contracts (P) Ltd v Bharat Petroleum Corporation Ltd*³ the Court held that while the contract between the parties must be adhered to, deviations in exceptional circumstances would be permissible;
- In *Datar Switchgears Ltd. v. Tata Finance Ltd*⁴, *Punj Lloyd Ltd. v. Petronet MHB Ltd*⁵ and *Union of India v. Bharat Battery Manufacturing Co. (P) Ltd*⁶ the Court held that the filing of a petition under Section 11(6) of the Act by an aggrieved party after the expiry of the stipulated period to appoint the arbitrator would mean that the right to appoint an arbitrator was forfeited by the other party; this would contain an implication that the Court would be free to deviate from the terms of the contract;
- The divergence in the approach to be taken by the court was resolved in *Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Co. Limited*⁷, where the Court held that Section 11(6) empowered a court "to take the necessary measure", of course read alongwith the requirement of Section 11(8);
- In *Deep Trading Co. v. Indian Oil Corporation*⁸ the position stated in *Punj Lloyd* and related cases regarding the forfeiture of rights of the party responsible for appointment of arbitrator was reiterated and the view espoused in *Patel Engineering* regarding compliance to the qualifications of the arbitrator pursuant to Section 11(8) was deemed to be non-mandatory in nature;
- In *Singh Builder Syndicate*⁹, the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that arbitration proceedings had not concluded for a very long time making a mockery of the process.

The Court, whilst reiterating the importance of speedy conclusion of arbitration proceedings, analyzed the pillars of arbitration, being:

- The First Pillar: Three General Principles – fair, speedy and inexpensive trial by an arbitral tribunal;
- The Second Pillar: The General Duty of the Tribunal;
- The Third Pillar: The General Duty of the Parties;
- The Fourth Pillar: Mandatory and Semi Mandatory Provisions;

The Court considered that where the government has assumed the role of appointment of the Tribunal to itself and appoints persons who are not able to devote time or become incapable of acting as arbitrators due to transfers etc., the principle of 'default procedure' will apply, and the court may step in to appoint an arbitrator by keeping aside the procedure which is agreed by the parties. It was clarified that this would depend on the facts of a particular case, but the court was not powerless in this regard.

The Court upheld the decision of the Delhi High Court.

ANALYSIS

The Court has clearly taken heed of the ground level scenario which is emanating from the government appointing its own officers as arbitrators. While the Court has earlier frowned on this practice, it was upheld. Having a government officer as an arbitrator has not been very successful. It has led to a conundrum requiring the Court to step in and have a default procedure ready should the facts of a particular case require it.

The Court acknowledged that fair, speedy and inexpensive trial by an arbitration tribunal and party autonomy were fundamental principles of arbitration. In case of appointment of substitute arbitrators, the provisions of the arbitration clause would have to be followed in light of the principle of party autonomy. However, in certain cases, the principle of party autonomy would give way allowing the court to appoint the arbitrator.

The Court is slowly but surely clipping the wings of the government appointed arbitrators and ensuring that any default situation that arises due to this misadventure is corrected. This is being done to ensure that the principles on which arbitration is founded remain unscathed.

– Sahil Kanuga & Vyapak Desai

You can direct your queries or comments to the authors

¹ Civil Appeal No. 8100% of 2014

² Civil Appeal No. 8100% of 2014

³ (2007) 5 SCC 304

⁴ (2000) 8 SCC 151

⁵ (2006) 2 SCC 638

⁶ (2007) 7 SCC 684

⁷ (2008) 10 SCC 240

⁸ (2013) 4 SCC 35

⁹ (2009) 4 SCC 523

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