CRY FOR INSTITUTIONAL ARBITRATION

By:

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"Institutional Arbitration" – Meaning of

Institutional arbitration may be defined as a process whereby arbitration is conducted and overseen by a well-established arbitral institution and the proceedings are conducted by experts appointed by it as per its rules and governed by fee structure fixed by it. The contesting parties take recourse to arbitral institution which helps to ensure independence and impartiality, besides ensuring efficiency and secrecy.

Constitution of arbitral tribunal

Before approaching the arbitral institution, it should be ensured that the arbitration agreement provides for resolution of disputes through a named arbitral institution. When disputes crystallize, either party may approach the arbitral institution for appointment of a sole arbitrator or a multi-member tribunal, depending upon the amount involved in the dispute. Generally speaking, if the amount of dispute is upto Rs. 50 lacs, a sole arbitrator is appointed, but if the amount involved exceeds Rs. 50 lacs then a three-member tribunal is constituted – one member nominated by each party and the presiding arbitrator nominated by the arbitral institution. It needs to be noted that neither party to the dispute can pick up its nominee arbitrator other than the one who is already on the panel of arbitrators of that institution.

Role of arbitral tribunal

An arbitral tribunal is the pivot in the dispute resolution mechanism. If the pivot develops a fault, it is bound to create a problem which would depend upon the magnitude of 'defect' it develops. A strong and well-built pivot would withstand all external forces without fear of failure. Same is the case with an arbitral tribunal. If the arbitral tribunal is knowledgeable, independent, impartial, honest and dedicated to the cause of arbitration, the results are bound to be highly satisfactory and immune from any questioning.

Determination of procedure

Arbitral proceedings have to be conducted in an acceptable and well-established manner. There is much of hue and cry to devise the procedure in *ad hoc* arbitration, but in case of arbitration conducted through the aegis of an arbitral institution, it poses no problem whatsoever. There are fixed set of rules which are applicable to all the arbitrations conducted by the arbitral institution. Such consistency and well-established norms are nowhere to be seen in *ad hoc* arbitrations.

Fixation of fees

It is most unfortunate that these days arbitration has become a profitable venture/business. Commercial considerations play a vital part. In *ad hoc* arbitrations, the arbitral tribunals fix their own fee without having any regard whatsoever to its genuineness or justification. Fee is generally fixed

according to the status of the arbitral tribunal. If the members of the arbitral tribunal are engineers, the fee may range from, say, Rs. 15,000/- to Rs. 25,000/- per day. The term 'per day' normally means a sitting of 3-4 hours duration. But if the arbitral tribunal comprises retired judges, then the fee ranges from Rs. 75,000/- to Rs. 1,00,000/- per day. Here the term 'per day' has different connotation and it varies from 2-3 hours duration. In case of institutional arbitrations there is no such discretion permissible. A fixed fee structure is laid by the arbitral institution, according to which the members of the arbitral tribunal are paid. There is no question of payment on 'per day' basis.

Charging of exorbitant fee by arbitrators erodes confidence in arbitration

It was noted by the Supreme Court in *Union of India* vs *Singh Builders Syndicate,* (2009)4 SCC 523, that fee charged by the arbitrators is highly excessive. It showed deep concern. It was expected that the arbitrators will heed to the advice of the Supreme Court in scaling down their fees but, of late, it is noticed that the fees has rather gone up. It seems that the only answer to the problem is by taking recourse to arbitration through arbitral institutions where the schedule of fees is quite reasonable and in any case it is no match to what is being charged in *ad hoc* arbitrations.

In the aforesaid case, the Supreme Court had been constrained to observe:

> "20. Another aspect referred to by the appellant, however requires serious consideration. When the arbitration is by a tribunal consisting

of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge(s).

"21. When a retired Judge is appointed as arbitrator in place of serving officers, the Government is forced to bear the high cost of arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as arbitrator(s). There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge(s) are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.

"22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, which is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party which readily agreed to pay the high fee.

"23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the arbitrators' fees is not fixed by the arbitrators themselves on case-to-case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the arbitration is held. Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned. Third is for the retired Judges offering to serve as arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an arbitrator whose fees are in their "range" having regard to the stakes involved."

The aforesaid observations were quoted in *Sanjeev Kumar Jain versus Raghubir Saran Charitable Trust*, (2012)1 SCC 455. In fact, the Supreme Court went much further when it observed as follows:

"41. There is a general feeling among consumers of arbitration (parties settling disputes by arbitration) that ad-hoc arbitrations in India – either international or domestic, are time consuming and disproportionately expensive. Frequent complaints are made about two sessions in a day being treated as two hearings for purpose of charging fee; or about a session of two hours being treated as full sessions for purposes of fee; or about nonproductive sittings being treated as fully chargeable hearings. It is pointed out that if there is an arbitral tribunal with three arbitrators and if the arbitrators are from different cities and the arbitrations are to be held and the Arbitrators are accommodated in five star hotels, the cost per hearing, (Arbitrator's fee, lawyer's fee, cost of travel, cost of accommodation etc.) may easily run into Rupees One Million to One and half Million per sitting. Where the stakes are very high, that kind of expenditure is not commented upon. But if the number of hearings become too many, the cost factor and efficiency/effectiveness factor is commented. That is why this Court in *Singh Builders Syndicate* observed that the arbitration will have to be saved from the arbitration cost.

"42. Though what is stated above about arbitrations in India, may appear rather harsh, or as an universalization of stray aberrations, we have ventured to refer to these aspects in the interest of ensuring that arbitration survives in India as an effective alternative forum for disputes resolution in India. Examples are not wanting where arbitrations are being shifted to neighbouring Singapore, Kuala Lumpur etc., on the ground that more professionalized or institutionalized arbitrations, which get concluded expeditiously at a lesser cost, are available there. The remedy for healthy development of arbitration in India is to disclose the fees structure *before* the appointment of Arbitrators so that any party who is unwilling to bear such expenses can express his unwillingness. Another remedy is Institutional Arbitration where the Arbitrator's fee is pre-fixed. The third is for each High Court to have a scale of Arbitrator's fee suitably calibrated with reference to the amount involved in the dispute. This will also avoid different designates prescribing different fee structures. By these methods, there may be a reasonable check on the fees and the cost of arbitration, thereby making arbitration, both national and international, attractive to the litigant public. *Reasonableness and certainty* about total costs are the key to the development of arbitration. Be that as it may."

Procedural Matters

In case of institutional arbitration everything is totally systemized,

whereas it is not so in case of *ad hoc* arbitrations. In the case of institutional arbitrations, if any vacancy arises, the same is filled up in a short time but in case of *ad hoc* arbitrations there is no way out except to knock at the door of the court to supply vacancy which is more so in case of arbitrations being conducted by sole arbitrators.

Many arbitral tribunals (sole or multi-member) comprise of persons who are usually favoured and are much in demand. Whenever an occasion arises for appointment of arbitrator, the name of such favoured arbitrators generally comes up for consideration. Others who may be more capable and competent are left out. Reason for such an approach on the part of the parties does not require any explanation. In this connection it would be apt to quote from *Russel on Arbitration* (20th Ed., p. 104), where it is stated:

> "Mr. _____ had, indeed, been the arbitrator appointed by them on several occasions and was described before me as [their] first choice arbitrator, language more usually heard in the context of Smithfield or Covent Garden market produce than of a well-known arbitrator, but the meaning is clear enough."

Time limit for making award

Unlike the repealed 1940 Act, there is no stipulation in the 1996 Act enjoining upon the arbitral tribunal to make an award within a particular period of time. The legislature had left it to the wisdom of the arbitrators to use their discretion. It was never in the contemplation of the legislature that the arbitrators would take years on end to publish the award after the conclusion of the hearing. In one of the reported cases from Delhi High

Court, the arbitral tribunal chose to make the more than 4 years after the conclusion of the arbitral proceedings. Surprisingly, no explanation whatsoever was offered by the arbitral tribunal as to why such an abnormal delay had taken place. In the passing, it is mentioned that the award was not set aside by the High Court on this ground, but the delay was certainly frowned upon. In fact, the award was set aside on other grounds, which had roots in the delay in making the award. This can happen only in *ad hoc* arbitrations.

In arbitrations conducted through an arbitral institution, such a situation cannot arise because, as per its rules, the arbitral tribunal is bound to make the award within a specified time. If for any justifiable reason, and/or extraordinary reason, the arbitral tribunal is not in a position to complete the task assigned to it, then extension is granted for a short time so as to achieve the target.

Screening of award

In *ad hoc* arbitrations, the award as published is sent to the court without caring as to the format and the formalities connected therewith. This results in raising of objections by the Registry of the court. The arbitral tribunal, after meeting with the objections, returns the same to the Registry of the court. This entails unavoidable delay of few months. However, there is a system laid down by arbitral institutions to scrutinize the award after it is received from the arbitral tribunal. By scrutiny of the award, it does not mean that the institution can comment upon the merits of the award. All that the

arbitral institution has to see is to check the requirements from the angle of the court. In this way, lot of time is saved since Registry of the court has no occasion to raise any objection.

Availability of infrastructural facilities

In *ad hoc* arbitrations, it is generally observed that there is no availability of infrastructure. The arbitral tribunal is dependent on outside support. Sometimes, it is available and at other times, it is not. This paralyses the smooth functioning of the arbitral proceedings. As against that, in case of arbitrations conducted through arbitral institutions, infrastructural facilities are not a problem at all. A regular secretariat, comprising of able and competent staff, is always available. In addition to the availability of trained staff, library facilities are also available for ready reference and consultation. This leads to professionalism in conducting arbitrations.

Venue of arbitration

It is a matter of common knowledge that in case of *ad hoc* arbitrations, arbitral hearings are generally held in high-end Clubs, 5-Star Hotels and other such-like expensive places. Needless to say that at the end of the day the parties have to foot a hefty bill, which *inter alia* includes amount incurred on snacks, soft drinks, tea, coffee, lunch etc. As against that, in case of institutional arbitration, venue does not pose any problem. It is one of the court rooms that is made available for conducting arbitral hearings on nominal charges only. Light refreshments are also included in the aforesaid charges.

Confidentiality

In case of arbitrations conducted by arbitral institutions, the secretarial and administrative staff is governed by the rules of the institution. Thus, it is easy to maintain confidentiality of not only the arbitral proceedings but also of the discussions which precede the making of the award, e.g. the inter-action between the members of the arbitral tribunal. There is complete secrecy and no undue information is leaked. But in *ad hoc* arbitrations, the position is just the reverse. Every information, which a party wishes to have, is leaked to it by the concerned staff for a consideration.

Ad hoc arbitrations least favoured by foreign investors

Over the last one decade, particularly, there had been a huge influx of foreign investment in India. During the subsistence of various contracts which are undertaken by the foreign parties, some disputes do arise. The foreign parties do not favour adjudication of disputes through *ad hoc* arbitrations but, at times, they are compelled to agree to the same. The sad experience which they have in such arbitrations is shared by them with the trading commodity in their country. Word goes fast and the prospective business houses look for investment in countries other than India. This certainly has a negative effect on the economic conditions of India.

Favoured venues of arbitration by foreign business houses

Some of the places currently favoured by the foreign business houses for conduct of arbitrations are Singapore, London, Paris and, lately, Kuala

Lumpur. At all these places, arbitral institutions handle the arbitral matters with utmost professionalism and efficiency. Both the parties come out happily, after the award at least on the count that with the early decision, a lot of their valuable time has been saved. It is a matter of fact that our arbitral institutions have not been able to attract foreign investors to India. As against that, as of now, there is a stipulation in the Chinese law that all arbitrations should be institutional arbitrations.

Time has come when our laws should be in tune with Chinese law. There is a need for completely abolishing *ad hoc* arbitrations. The arbitral institutions in India are fully equipped to handle any number of arbitration matters with utmost diligence. Once this is given impetus, there is no reason why the trading community, and more particularly foreign business houses, will not favour India as their next stop for purposes of investment.