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Terminating arbitrator's mandate - can parties proceed with truncated tribunal?

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It is common knowledge that arbitration provides greater flexibility and party autonomy compared with traditional litigation before the courts. Corollary to this, the agreed terms for the appointment of an arbitrator or arbitral tribunal must be strictly followed while making such appointments if a dispute arises between the parties to an agreement.

This article primarily reviews the possible courses of action under the Arbitration and Conciliation Act 1996 following the termination of an arbitrator's mandate, with specific reference to whether it is possible to proceed with a truncated tribunal in cases where the arbitrator failed to or was prevented from acting specifically at the penultimate stage of the arbitration (ie, on the conclusion of the parties' final arguments but prior to the final award being delivered by the arbitral tribunal). Such possibility of proceeding with a truncated tribunal will arise only if the original arbitral tribunal in question comprised three or more arbitrators.

Legal framework

Briefly, an arbitrator's mandate will be terminated if:

- the arbitrator becomes *de jure* or *de facto* unable to perform their functions or fails to act without delay for another reason and withdraws from their office; or
- the parties to the arbitration agree to terminate the arbitrator's mandate.

Unless otherwise agreed by the parties, the legislative intent behind the 1996 act is to preserve arbitral proceedings even if an arbitrator's mandate has been terminated. A harmonious reading of Sections 14 and 15 of the 1996 act prescribes that an arbitrator's mandate can be terminated:

- by the arbitrator (by recusing themselves from the arbitral tribunal);
- by the parties;
- by the arbitral tribunal;
- by a court order;
- on the death of the arbitrator; or
- because of the arbitrator's physical incapacity to proceed with the mandate.[(1)]

As such, Section 15(2) of the 1996 act allows for arbitrators to be substituted if their mandate has been terminated.[(2)]

The appointment or substitution of an arbitrator must be made in accordance with the rules and criteria that apply to the arbitrator being replaced, as agreed by the parties to the arbitration.

Based on the above, under existing general practice:

- a party to an arbitration which has been stalled on such account may prefer to apply to have its nominee arbitrator reviewed and subsequently appointed with the ascent of the other members of the arbitral tribunal; or
- the parties' two nominee arbitrators may appoint a substitute presiding arbitrator as per the terms of the agreement, as the case may be.

In such a scenario, the newly constituted arbitral tribunal can reopen the proceedings from any stage considered appropriate in the interest of speedy resolution of the dispute in order to pass an appropriate award.

Proceeding with truncated tribunal

An alternative proposition that arises for consideration at this stage is whether there is a need to appoint a substitute arbitrator at all where one arbitrator's mandate has been terminated but the original arbitral tribunal comprised three or more arbitrators. Assuming that the proceedings may have been stalled immediately before the passing of the final award, on balance once the entire proceedings have been concluded, it may be beneficial both economically and in the interest of time to proceed with the surviving two-member arbitral tribunal, subject to the agreement of both the truncated tribunal and the parties to the dispute.

In this context, as per Section 31(2) of the 1996 act, in arbitral proceedings with more than one arbitrator, the signatures of the majority of the tribunal will suffice for the award to constitute a valid award under the 1996 act, provided that the reason for any omitted signature is provided and recorded in the award passed by the truncated arbitral tribunal. Therefore, where the majority has signed the award, this will constitute, in both fact and law, an award from the tribunal as a whole. The omission of one of the arbitrators' signatures, or any failure on the part of an arbitrator to deliver their award, does not affect the legitimacy or validity of the majority's award.[3]

In fact, in the case of *Government of India, BSNL v Acome*,[4] the Delhi High Court observed that the 1996 act does not seek to restrict the reasons for omitting a signature to those found within the act itself – particularly in Section 14 thereof – given that Section 31(2) does not deal with the reasons for which the minority of arbitrators may fail to sign the award. In other words, it appears that the reasons for omitting the minority are not limited to the grounds stipulated in Section 14 of the 1996 act and the circumstances highlighted therein are not exhaustive.

Taking this one step further, in *Narayan Prasad Lohia v Nukunj Kumar Lohia,*[5] the Supreme Court observed that if the two arbitrators agree and give a common award, there is no frustration of the proceedings, as their common opinion would have prevailed even if the third arbitrator (presuming that there were one) had differed in their opinion. Similarly, in *CIMMCO Limited v Union of India*,[6] when one of the arbitrators withdrew from further participation in the proceedings for health reasons after oral arguments had been concluded and the parties had submitted their final written submissions, the majority of the tribunal passed the award without the third arbitrator's signature.

Comment

From the above, it appears that a majority award that provides the reasons for the omission of an arbitrator's signature will suffice and may be construed as a valid award, particularly when the reasons for such omission are provided for under the 1996 act (eg, the death of an arbitrator, which is specifically covered under Section 14).

Needless to say, the above proposition is subject to the following conditions having been met:

- The possibility of proceeding with a truncated tribunal arises only on the termination of an arbitrator's mandate at the penultimate stages of an arbitration. This is particularly true as proceedings can continue with a truncated tribunal only if this does not adversely affect the interest of justice.
- Further, if the truncated arbitral tribunal cannot agree to the contents of the award (ie, it is not a majority award), an application under Section 15(2) of the 1996 act seeking substitution of a nominee or presiding arbitrator must be made.

In the event of the appointment of a nominee arbitrator in accordance with Section 15(2) of the 1996 act, it must also be kept in mind that any hearings previously held before such an appointment should not be repeated, as the objective of speedy resolution would be best served by a substitute arbitrator continuing where the erstwhile arbitrator left off, which is in line with the legislative objective behind the 1996 act.(7)

Endnotes

(1) *Shyam Telecom Ltd v Arm Limited, 2004 (3) Arb LR 146 (Del).*

(2) Priknit Retails Limited v Aneja Agencies, 2013 SCCOnline Del 534.

(3) (Moti (Alisa Maggie) Noshir Irani v Sheroo Jal Vakil, 2009 (5) Bom CR 336; Government of India v M/s Acome, (2008) 4 Arb LR 418 (DB)).

(4) 2007 (2) Arb LR 90 (SB).

(5) 2002 (3) SCC 572.

(6) 2019 SCC Online Del 7655.

(7) Shailesh Dhairyawan v Mohan Balkrishna Lulla, 2015 (6) Arb LR 79.

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