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Judicial delays hit arbitration awards

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Poor institutional arbitration infrastructure and judicial interference have rendered arbitration a nightmare in India.

Despite the Arbitration and Conciliation Act, 1996 being in place, companies are increasingly taking the bilateral investment treaty (BIT) route.

The case filed by The Children's Fund of UK against Coal India recently is a case in point. And now, Sistema, Telenor and Vodafone are expected to follow suit.

A good example of how frustrating arbitration can be is seen in the manner in which Coal India decided to move the Calcutta High Court against an arbitration award issued in London in 1992. It made an appeal under Section 34 of the Act, which was originally meant to only take up issues where the arbitration award goes against a country's laws.

The case related to a 1989 contract entered into by White Industries, an Australian firm, with Coal India for supply of equipment and development of a coal mine in Uttar Pradesh. The contract ran into disputes, which were referred to arbitration in London. White won the award and Coal India was asked to pay it $4.08 million.

Coal India challenged the award.

White moved the Supreme Court for rejecting Coal India's plea, and the matter remains undecided to this day.

In 1999, White approached the Arbitration Tribunal against the Indian government, seeking shelter under the BIT. The award penalised the Indian government for not enforcing an award an Australian company had obtained against Coal India because, as an article in the August, 2012 issue of The Indian Aribtrator (TIA), pointed out, "of the delays on the part of the Indian Judiciary". The award accepted White's claim and directed the Indian government to pay around Rs50 crore to it.

Though White has not yet moved the court for enforcement of this award, the very pronouncement is damning.

What is galling is not the monetary amount, but the observations against the government and the court. The award pointed to delays in the judicial process, and how they were frustrating the pursuit of justice. It also thus pointed to serious shortcomings in governance itself.

“This is nothing but an attack on the judicial sovereignty of the nation,” the TIA article said.

Ajay Jugran, a senior law practitioner, appears to agree.

“All say that justice delayed is justice denied, but we overwhelmingly excel at the latter. The exceptions are usually a few judicial activism-driven cases or matters being chased by the media. However, neither corporate litigation fits the bill for judicial activism, nor does it usually attract any media frenzy. So, the catalysts of economic growth continue to suffer when engaged before the Indian courts.”

Thus, rightly, or wrongly, the end result is that arbitration, which was meant to reduce the time and cost arising from judicial delays, has got diluted. It has become long-drawn-out, upsetting foreign investors, and also compelling foreign companies to take shelter under BIT.

Finally, almost ten years after the original arbitration award (in 2002), the Supreme Court constituted a five-member Constitution Bench in December 2011 to examine this and around 60 other cases, all involving the manner in which arbitration awards had got stuck in Indian courts.

The review revolves around the manner in which Indian courts have interpreted Section 34 of the Arbitration Act.

“What India needs today to build confidence of foreign investors is to develop institutional arbitration process and reduce court interference,” said Vyapak Desai, head, international litigation & dispute resolution practice at law firm Nishith Desai Associates.

This is not to plead against the existence of Section 34.

“Challenging an arbitral award is required as there is a possibility of errors creeping in the award passed by the arbitrator. Section 34 is required, but concluding hearing of the same should be time-bound or within a lock-in period. Otherwise, the purpose of arbitration is frustrated. It should also chalk out clearly the grounds or guidelines for filing of petition under Section 34, which may require ‘public policy’ to be clearly defined,” said Shrikant Hathi, managing partner, Brus Chambers, specialising in shipping and projects.

What the apex court will decide remains to be seen. But what is sorely needed is to find out ways in which the arbitration, which was supposed to reduce the time and cost involved in the pursuit of the normal judicial process, is interfered only on merits and in the rarest of the rare cases. The legislative, the judiciary and the executive need to work on this very seriously.